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Recognising the Rights of Nature for Environmental Justice in Kenya

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Abstract

Environmental justice in Kenya has since time immemorial been marred by various challenges. [1] *While the enactment of the Environmental Management and Coordination Act and the Constitution of Kenya 2010 provided a stronger legal basis for environmental litigation and conservation, there still are procedural challenges that continue to hinder the attainment of environmental justice.*[2] *This paper therefore, seeks to show how the recognition of the Rights of Nature as a legal doctrine can be adopted in Kenya. The same shall be achieved through an analysis of the various jurisdictions that have adopted this school of thought while also keenly looking at legal jurisprudence that speaks to the Rights of Nature. Thus, this paper shall demonstrate that the attainment of environmental justice for the present and future generations should take into consideration that nature has inherent rights, that is; the right to exist, regenerate and defend itself not only for the benefit of the people but for the benefit of nature itself.*

1. Introduction

Sometime in August 2018, officials of Ufanisi Center in Korogocho area in Nairobi County, an environmental community-based organisation, filed a suit against the National Environment Management Authority (NEMA) on account of air and water

[1] Kariuki Muigua & Francis Kariuki, *Towards Environmental Justice in Kenya*, KMCO, January, 2015, *Towards-Environmental-Justice-in-Kenya-January-2015.pdf (kmco.co.ke)* accessed 28th March 2023

[2] Brian Sang, *Tending Towards Greater Eco-Protection in Kenya: Public Interest Environmental Litigation and Its Prospects Within the New Constitutional Order*, Journal of African Law, 2013, Vol. 57, No. 1 (2013); 29-56

pollution in regions near the Nairobi and Athi River.[3] They later amended the petition to include the County Governments of Nairobi, Machakos, Kiambu, Kilifi, Makueni and Tana River as Interested Parties to the suit. The suit claimed that the Respondent and Interested parties failed to prevent or stop the pollution of the Athi and Nairobi rivers and the air and water pollution by the Dandora Dumpsite. They claimed that the resultant poor air and water quality had adverse effects on the right to life, health, water, food and adequate standards of living as enshrined in the Constitution.

Whilst rendering the judgement and finding the Respondent and Interested parties liable, Justice K Bor, proposed a way to deal with the said pollution by borrowing from other jurisdictions that have come up with creative ways to deal with pollution of their rivers. According to Justice K Bor one such innovation, adopted for the conservation of rivers and lakes is the granting of legal personalities to such bodies. This innovation constitutes an important element of the Rights of Nature Approach. To this end, this paper makes a case for the application of the rights nature approach towards the attainment of environmental justice in Kenya. It makes a start in looking at the rights of nature discourse by defining it and looking at key its proponents. Thereafter, the paper looks at the rights of nature in practise and environmental litigation under the rights of nature approach. The paper will demonstrate that Kenya ought to adopt the rights of nature approach in the attainment of environmental justice through conservation and litigation.

[3] Isaiah Luyara Odando & another v National Management Environmental Authority & 2 others; County Government of Nairobi & 5 others (Interested Parties) [2021] eKLR

2. The Rights of nature discourse

Laws prescribing rights of nature are constructed to grant nature a legal personality and conceptualize nature at the ecosystem level while recognizing that human beings are part of these ecosystems.[4] Therefore, the Rights of Nature are described as a means for people to uphold their use of natural resources while still preserving biodiversity.[5] This doctrine denotes a shift from an anthropocentric approach to an ecocentric one in attaining environmental justice where the rights of nature will speak to the conservation of the environment as matter of right rather than from the benefits accrued by human beings.[6]

The doctrine of Rights of Nature originates from an article by Christopher Stone titled ''Should Tress Have a Standing?''[7] which sought to contribute towards an ongoing case in a US federal court, *Sierra Club v Morton*. The plaintiff in *Sierra Club v Morton* sought to challenge the decision concerning the development of a ski resort within the Sierra Nevada Mountains of California.[8] While this suit was rejected by a majority of the court, a dissenting opinion by Justice

[4] Craig M. Kauffman, Pamela L Martin, *Constructing Rights of Nature Norms in the US, Ecuador & New Zealand*, Global Environmental Politics (2018) 18 (4):43-62

[5] Jan Darpo, *Can Nature Get It Right?; A Study on the Rights of Nature in the European Context*, *https://www.europarl.europa.eu/RegData/etudes/STUD/2021/689328/IPOL_STU(2021)689328_EN.pdf* accessed 28th March, 2023

[6] Kariuki Muigua, *Entrenching Ecocentric Approach to Environmental Management in Kenya*, published August 19, *2022 Entrenching Ecocentric Approach to Environmental Management in Kenya | University of Nairobi (uonbi.ac.ke)* accessed 28th March, 2023

[7] Stone Christopher D, '*Should Trees Have a Legal Standing? -Towards Legal Rights for Natural Objects.*' Southern California Law Review 45 (1972): 450-501

[8] Sierra Club v Morton 405 US. 727 (1972)

William O Douglas referred to the idea proposing that environmental objects be granted legal personhood to be able to defend themselves in court through representation by the public.

The proponents of this doctrine argue that modern environmental law continues to propagate the destruction of the planet through legislations that regard nature and natural resources as property and objects.[9] Further, such regulations and legislations are only aimed towards mitigating negative environmental impacts for the purposes of economic growth. The recognition of the Rights of Nature is important in making legal systems proactive in tackling emerging crises by granting Nature primacy over economic interests.[10]

Further, it has been argued that the rights of nature approach grants people the locus standi to bring cases to courts on behalf of nature where the merits of the case would be heard.[11] The advancement of this school of thought thus asserts that humanity's survival is dependent on healthy ecosystems and as such, the protection of nature's rights advances human rights and their well-being.

3. From theory to practise

Internationally, movements promoting the Rights of Nature began forming as early as in the 1980s which subsequently led to the formation of institutions and centers for earth jurisprudence in countries such as New Zealand and the United States of America. In 2009, the UN General Assembly created the UN Harmony with Nature Program which serves to facilitate the development of the Rights of Nature within the UN system. Rights of Nature are expressed in various reports and resolutions of the UN General

[9] Ibid note 5 at pg. 14
[10] Ibid
[11] Ibid note 5 at pg.15

Assembly [12] with the clearest expression being the Universal Declaration on the Rights of Mother Earth (UDRME) which addresses the obligations of Human Beings to Mother Earth. At the heart of global rights of nature norms is that all components of nature including humans have inherent rights.

Drawing examples from countries that recognize Rights of Nature such as Ecuador and New Zealand, these rights may vary in the specific ways in which they are granted. Ecuador's constitution for example, conceptualizes nature's value holistically. Chapter 7 of the Ecuadorian Constitution grants nature the rights to exist, to maintain its integrity as an ecosystem and to regenerate its life cycles, structure, functions and evolutionary processes.[13] On the other hand, laws prescribing the rights of nature in New Zealand are only granted to particular ecosystems (the Whanganui River and the Forest) and such laws explicitly define the boundaries of these ecosystems and restrict legal personality to them.[14] In both Countries however, these laws tend to recognize ecosystems as living spiritual beings.

In Colombia, the Supreme Court issued a decision in April 2018 in which it recognized the Amazon River ecosystem as having rights deserving protection in a case filed by a group of young people against the President, ministries, agencies and local governments.[15] The group claimed that the government had violated their rights to life, health and enjoyment of a healthy environment by failing to control deforestation in the Amazon region which contributed to

[12] UN General Assembly, Harmony with Nature: resolution A/RES/70/208 2015
[13] Constitution of the Republic of Ecuador 2008, as amended to 2021
[14] Ibid note 4 at pg. 49
[15] Future Generations v Ministry of Environment & Others; Radicacion no. 11001-22-03-000-2018-00319-01; STC 4360-2018

environmental degradation and climate change.[16] The Colombian court declared that it would recognize the Colombian Amazon as an entity with rights and entitled to protection, conservation, maintenance and restoration, for the sake of protecting the vital ecosystem for the future of the planet.[17] This 2018 decision followed an earlier one made in 2016 that granted legal rights to the Rio Atrato against the background of the devastating environmental and social impacts caused by illegal mining in the Atrato region and the failure of the State to address them, the Colombian Constitutional Court ruled in favour of the claimant communities in 2016.[18]

Conclusively, when the rights of nature approach is adopted in the conservation of the environment, the net effect is the development of concrete environmental policies and actions specific to that particular river or lake and so forth based on its inherent rights.

4. Environmental litigation and the rights of nature discourse

Environmental litigation provides a mechanism for both private and public interest claimants to enforce environmental law, determine environmental disputes, obtain compensation for environmental damage and in the end, conserve and protect the environment.[19]

[16] Ibid
[17] Ibid
[18] Philipp Weshe, *Rights of Nature in Practice: A Case Study on the Impacts of the Colombian Atrato River Decision,* Journal of Environmental Law, Volume 33, Issue 3, November 2021, Pages 531–555, *https://doi.org/10.1093/jel/eqab021* accessed 28th March 2023
[19] Oscar Amugo Angote, *Environmental Litigation in Kenya: A Call for Reforms*, Journal of cmsd Volume 3(1) 2019 *Justice-Oscar-Amugo-Angote-Environment-Litigation-and-A-Call-for-Reforms-10th-june-2019.pdf (journalofcmsd.net)* accessed 28th March 2023

Despite this, environmental litigation in Kenya has been frustrated since time immemorial.[20]

In the previous constitutional dispensation, environmental litigation was largely unsuccessful for various reasons. One such reason, was the question of *locus standi.* At the heart of many environmental actions was the question: who has the standing? Who can appear for the environment?

Like most African states with legal orders of British provenance, Kenya adheres to the tenets and traditions of common law.[21] As such, most Kenyan procedural rules including *locus standi* are based on common law. The common law position on *locus standi* requires that applicants who seek an actionable remedy must show or have an interest or must show that they have suffered or are likely to suffer as a result of the impugned conduct.[22] This is well set out in the case of *Gouriet v Union of Postal Office Workers* where the Court held that the jurisdiction of a civil court to grant remedies in private law is confined to the grant of remedies to litigants whose rights in private law have been infringed or are threatened with infringement.[23]

When this restrictive approach to locus standi was applied by Kenyan courts in environmental actions, litigants were required to indicate their interest in the case and prove the injury that they had suffered or were likely to suffer. This frustrated many environmental actions instituted by public-spirited individuals or non-state entities as such persons were often held not to meet the requisite threshold of

[20] Ibid
[21] Ibid note 2
[22] Ibid
[23] Gouriet v Union of Post Office Workers and others [1977] 3 All ER 70; [1978] AC 435.

proximate harm and/or loss from the impugned conduct.[24] This is because most environmental matters are by their very nature public and therefore it was difficult for a person to prove that he had suffered injury due to environmental degradation.[25] The upshot of all these was environmental litigation was hindered even in the presence of environmental degradation and apparent environmental violations.

This is well brought out in the case of *Wangari Maathai v Kenya Times Media Trust*.[26] In this case, the Plaintiff (Wangari Maathai) sought an injunction restraining Kenya Times Media Trust from embarking further on the construction of the proposed Kenya Times complex at Uhuru Park until determination of the suit or further orders of the court. Kenya Times Media trust raised a preliminary objection and sought to strike out the plaint on grounds that the plaint disclosed no cause of action against the Defendant and that the plaintiff had no locus standi to file the suit or the application. The Court struck out the plaint for the reasons raised by the Defence in its preliminary objection. The Court held that the Plaintiff had not shown that the Defendant Company was in breach of any rights, public or private in relation to the plaintiff nor that the Company caused damage to her nor that she anticipates any damage or injury. The Court further held only the Attorney General could sue on behalf of the public.

The implication and application of this strict rule in subsequent cases had a negative impact on the number of environmental cases filed in the courts, thus denying the courts the opportunity to settle environmental disputes and protect the environment.

[24] Ibid
[25] Ibid note 2
[26] Maathai v Kenya Times Media Trust Ltd [1989] eKLR

However, with the enactment of the Environmental Management and Coordination Act in 1999, litigants were provided with a clear basis for public interest litigation. Section 3 (1) of the Act guarantees every person in Kenya the right to a clean and healthy environment, and a corresponding duty to protect the environment.[27] The same section, under sub-section 3 provides a basis for any person to actively seek judicial redress in respect of (likely) violations of environmental rights or dereliction of environmental duties as set out in subsection 1 of the Act.[28] Section 3(4) of the EMCA surmounts the common law locus standi requirement by guaranteeing that any person proceeding under subsection (3) shall have the capacity to bring an action notwithstanding that such a person cannot show that the defendant's act or omission has caused or is likely to cause him any personal loss or injury provided that such action.[29]

The promulgation of the 2010 Constitution further developed and enhanced environmental litigation and ultimately environmental conservation and protection. Article 42 provides that every person has the right to a clean and healthy environment, which includes the right to have the environment protected for the benefit of present and future generations through legislative and other measures, particularly those contemplated in Article 69; and to have obligations relating to the environment fulfilled under Article 70. [30] The Constitution introduced provisions which also surmount the restrictive common law interpretation of locus standi. Article 22 (1) guarantees every person the right to institute court proceedings in respect of threatened breaches of fundamental guarantees in the Bill

[27] Environmental Management and Coordination Act, 1999, Section 3(1)
[28] Environmental Management and Coordination Act, 1999, Section 3(3)
[29] Environmental Management and Coordination Act, 1999, Section 3(4)
[30] Constitution of Kenya, 2010, Article 42

of Rights and facilitates the institution of judicial proceedings by persons other than those acting in their own interests.[31]

While the enactment of the Constitution and Environmental Management and Coordination have provided a clear legal basis for the public interest litigation in environmental matters, environmental litigation still faces procedural and substantive obstacles. The basis of instituting environmental claims under the Constitution and the Environmental Management and Coordination Act remains largely to be if the people's rights to the environment are threatened. This then usually translates to granting of reliefs to affected persons rather than the environment itself.

To improve environmental litigation, and ultimately environmental conservation, the rights of nature approach should be employed. This would mean that the environment becomes a right holder with legal standing in court. The environment will therefore be able to institute proceedings on its own behalf simply because nature has inherent rights that deserve to be protected. Additionally, the environment becomes the direct beneficiary of legal redress. As rightly stated by William O Douglas in *Sierra Club v. Morton*, "environmental objects" should be able "to sue for their own preservation", rivers, valleys, trees, beaches—all of these natural objects should be treated like other inanimate objects to which courts have given legal personhood, like ships or corporations.[32] These rights of nature can be enforced by a guardianship body who could initiate legal action

[31] Constitution of Kenya, 2010, Article 22
[32] Scott W. Stern, *Standing for Everyone: Sierra Club v. Morton, Supreme Court Deliberations, and a Solution to the Problem of Environmental Standing*, Fordham Environmental Law Review, Volume30, Number 2 2018 Article 2

and collect relief on behalf of the natural entity, which could then be directed into a fund to preserve and restore its condition.[33]

5. Conclusion

The spirit of the Constitution of Kenya 2010 reflected both in the preamble and subsequent provisions, speaks towards sustaining the environment for the benefit of future generations. In so doing, there needs to be a shift in our approach as a country on environmental conservation and litigation. As demonstrated above, by employing the rights of nature approach we can be able to attain environmental justice as a country because the basis of our environmental conservation and litigation would be that just like human beings, nature has inherent rights; that is, the rights to exist, regenerate and defend itself not only for the benefit of the people but for nature itself.

[33] Ibid note 19

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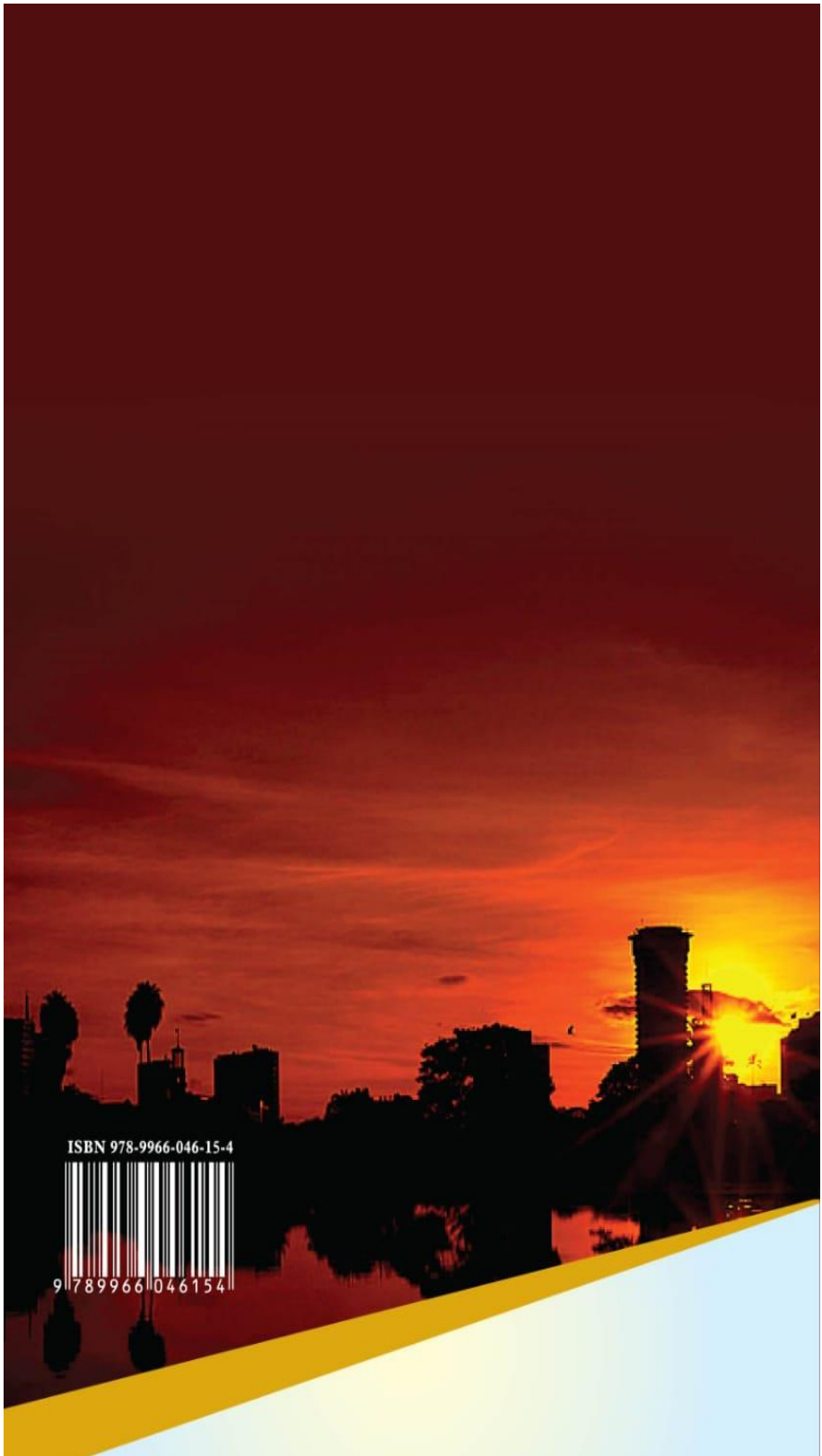
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