

Towards Environmental Justice in Kenya

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Abstract

Natural resources are vital for human survival. They are sources of livelihood for most communities in Africa. However, access to, control and use of natural resources in most of Africa has been limited, denied or undermined by laws and policies carried over from the colonial period. Using some examples from the colonial era, the paper argues that current environmental injustices in Kenya have roots in colonial laws and policies. It also explores the provisions of the Constitution of Kenya 2010, and some of the sectoral laws enacted under it on environmental justice. The conceptual parameters of environmental justice adopted in this discussion are to assess whether the laws, policies and regulations under study distribute environmental burdens proportionately; whether they have adequate provisions for all to participate in environmental decision-making and whether they allow all to have access and enjoy a fair share of natural resources.

1.0 Introduction

The paper discusses the concept of environmental justice as a tool for effective management of natural resources in the Kenyan context. Natural resources are vital for human survival. They are sources of livelihood for most communities in Africa. However, access to, control and use of natural resources in most of Africa has been limited, denied or undermined by laws and policies carried over from the colonial period. Using some examples from the colonial era, the paper argues that current environmental injustices in Kenya have roots in colonial laws and policies. It also explores the provisions of the Constitution of Kenya 2010, and some sectoral laws enacted under it on environmental justice.

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The conceptual parameters of environmental justice adopted in the chapter are to assess whether the laws, policies and regulations under study distribute environmental burdens proportionately; whether they have adequate provisions for all to participate in environmental decision-making and whether they allow all to have access and enjoy a fair share of natural resources.

The discussion begins with an overview of the concept of environmental justice and its importance in natural resources management. It then highlights incidences of environmental injustices that have happened in Kenya and undertakes an analysis of the relevant legal frameworks, and offers proposals on what can be done to achieve environmental justice for the Kenyan people.

2.0 Environmental Justice

Broadly defined, environmental justice entails the right to have access to natural resources; not to suffer disproportionately from environmental policies, laws and regulations; and the right to environmental information, participation and involvement in decision-making.¹ In the United States of America (USA), it is defined as the fair treatment and meaningful involvement of all people regardless of race, color, national origin, or income with respect to the development, implementation, and enforcement of environmental laws, regulations, and policies.² Environmental justice serves two purposes. First, it ensures no groups of persons bear disproportionate environmental burdens and second, that all have an opportunity to participate democratically in decision-making processes.³ In the United Kingdom (UK), environmental justice refers to fairness in the distribution of environmental 'goods' or 'bads' and fairness in providing information and opportunities necessary for people to participate in decisions about their environment.⁴ Environmental justice also means a struggle to rein in

¹ R. Ako, 'Resource Exploitation and Environmental Justice: the Nigerian Experience,' in F.N. Botchway (ed), *Natural Resource Investment and Africa's Development*, (Cheltenham, UK: Edward Elgar Publishing, 2011), pp. 74-76.

² U.S. Environmental Justice Agency, 'What is Environmental Justice?'

Available at <http://www.epa.gov/environmentaljustice/> [Accessed on 08/12/2014].

³ R. Ako, 'Resource Exploitation and Environmental Justice: the Nigerian Experience,' in F.N. Botchway (ed), *Natural Resource Investment and Africa's Development*, *op. cit.*

⁴ *Ibid.*

and subject corporate and bureaucratic decision-making and relevant market processes to democratic scrutiny and accountability. Environmental justice in this context requires that the exploitation of resources should be done with due regard to environmental and social exigencies. These exigencies act as important constraints in natural resources exploitation.⁵

In Africa, environmental justice mostly entails the right to have access to, use and control natural resources by communities.⁶ This view is exemplified by the *Endorois case*,⁷ where the community was fighting against violations resulting from their displacement from their ancestral lands without proper prior consultations, adequate and effective compensation for the loss of their property, the disruption of the community's pastoral enterprise and violations of the right to practise their religion and culture, as well as the overall process of their development as a people. The African Commission on Human and Peoples' Rights (ACHPR) found Kenya to be in violation of the African Charter,⁸ and urged Kenya to, *inter alia*, recognise the rights of ownership of the Endorois; restitute their ancestral land; ensure the Endorois have unrestricted access to Lake Bogoria and surrounding sites for religious and cultural rites and for grazing their cattle. The Government of Kenya is however yet to implement the decision of the Commission in the Endorois case. This demonstrates the Government's laxity in actualizing environmental rights in Kenya.⁹

⁵ Obiora, L., 'Symbolic Episodes in the Quest for Environmental Justice'. *Human Rights Quarterly*, 21, 2, 1991. P. 477.

⁶ *Ibid.*

⁷ *Centre for Minority Rights Development (Kenya) and Minority Rights Group International on behalf of Endorois Welfare Council v Kenya*, No. 276 / 2003; See also generally, *Kemai & Others vs Attorney General & 3 Others* (2006) 1 KLR (E&L) 326, Civil Case 238 of 1999; *Ogiek People v. District Commissioner* Case No. 238/1999 (2000.03.23) (Indigenous Rights to Tinet Forest).

⁸ Arts. 1, 8, 14, 17, 21 and 22. the Kenyan government had violated their right to religious practice (Art. 8), right to property (Art. 14), right to freely take part in the cultural life of his/her community (Art. 17), right of all peoples to freely dispose of their wealth and natural resources (Art. 21), and right to development (Art. 22)

⁹ United Nations Human Rights Committee, 'Consideration of reports submitted by States parties under Art. 40 of the Covenant Concluding observations adopted by the Human Rights Committee at its 105th session, 9-27 July 2012. CCPR/C/KEN/CO/3, para. 24.

2.1 Components of Environmental Justice

The 1992 Rio Declaration succinctly captures the key components of environmental justice. It provides that environmental issues are best handled with participation of all concerned citizens, at the relevant level. At the national level, each individual should have appropriate access to information concerning the environment held by public authorities, including information on hazardous materials and activities in their communities, and the opportunity to participate in decision-making processes. Further, it obligates the States to facilitate and encourage public awareness and participation by making information widely available. In addition, states are to provide effective access to judicial and administrative proceedings, including redress and remedy.¹⁰

Essentially, the Declaration contains the critical legal mechanisms that are germane in promoting environmental justice. These are access to information, public participation and access to justice in environmental matters. The three components are interdependent and functionally interlinked. Access to environmental information is a prerequisite to public participation in decision-making and to monitoring governmental and private sector activities. Effective access to justice in environmental matters requires an informed public that can bring actions before informed institutions.¹¹

2.1.1 Access to Environmental Information

Access to information refers to the availability of environmental information (including that on hazardous materials and activities in communities) and mechanisms by which public authorities provide environmental information.¹² Communities cannot be meaningfully engaged on matters relating to the environment and the exploitation of natural resources without an understanding of what the ideals should be in a society where there is environmental justice. As such, the first step towards achieving environmental justice for the Kenyan people must be to afford them access to the relevant environmental information in forms that they would appreciate. This could be done in different ways

¹⁰ Principle 10, Report of the United Nations Conference on Environment and Development (Rio de Janeiro, 3-14 June 1992), A/CONF.151/26 (Vol. I).

¹¹ UNEP, *Training Manual on International Environmental Law*, (UNEP, 2006), pp.80-81.

¹² *Ibid.*

including through newspapers, television, posters, release of reports, barazas, amongst other processes provided in law where communities can get the relevant information in forms and language that they can understand and appreciate.

2.1.2 Public Participation

Public Participation means the availability of opportunities for individuals, groups and organizations to provide input in the making of decisions which have, or are likely to have, an impact on the environment including in the enactment of laws, the enforcement of national laws, policies, and guidelines and environmental impact assessment procedures.¹³ Public participation in environmental and natural resources governance should not be cosmetic but should be meaningful in order for the public to feel that their concerns are addressed and consequently for them to have trust and support the decisions of the government relating to the particular natural resources and environmental concerns. However, this cannot be achieved in a situation where the citizenry do not have an understanding of those problems, and where they have any knowledge be it traditional or any other, there must be a harmonization of the same with the scientific knowledge. This can be achieved through educating the public on the available scientific knowledge in a comparative manner so as to make them appreciate the similarities or differences arising therein.

2.1.3 Access to Justice

Access to justice is not an easy concept to define. It has been described as a situation where people in need of help, find effective solutions from justice systems that are accessible, affordable, comprehensible to ordinary people, and which dispense justice fairly, speedily and without discrimination, fear or favour and offer a greater role for alternative dispute resolution.¹⁴ It also refers to those judicial and administrative remedies and procedures available to a person (natural or juristic) who is aggrieved or likely to be aggrieved by an issue. Further, it could refer to a fair and equitable legal framework that protects human rights

¹³ *Ibid.*

¹⁴ Ladan, M.T., "Access to Justice as a Human Right under the Ecowas Community Law," available at

<http://www.google.com/url?sa=t&rct=j&q=&esrc=s&source=web&cd=16&cad=rja&uact=8&ved=0CFcQFjAFOAo&url=http%3A%2F%2Fwww.abu.edu.ng%2Fpublications%2F2009-07->
(Accessed on 19/04/2014).

and ensures delivery of justice.¹⁵ Access to justice also entails the opening up of formal systems and legal structures to the disadvantaged groups in society, removal of legal, financial and social barriers such as language, lack of knowledge of legal rights and intimidation by the law and legal institutions.¹⁶ Access to justice could also include the use of informal conflict management mechanisms such as Alternative Dispute Resolution mechanisms (ADR) and traditional dispute resolution mechanisms (TDRM), to bring justice closer to the people and make it more affordable.¹⁷

In *Dry Associates Limited v Capital Markets Authority & anor*¹⁸, access to justice was broadly described as including the enshrinement of rights in the law; awareness of and understanding of the law; access to information; equality in the protection of rights; access to justice systems particularly the formal adjudicatory processes; availability of physical legal infrastructure; affordability of legal services; provision of a conducive environment within the judicial system; expeditious disposal of cases and enforcement of judicial decisions without delay.¹⁹

Access to justice is a basic and inviolable right guaranteed in international human rights instruments and national constitutions.²⁰ As a justiciable right, it has two important dimensions: procedural access (fair hearing before an impartial tribunal) and substantive access (fair and just remedy for a violation of one's rights).²¹ The two dimensions are important in facilitating access to justice as observed by Krishna Iyer, J in *Municipal Council, Ratlam vs Shri Vardhichand &*

¹⁵ *Ibid.*

¹⁶ Global Alliance against Traffic in Women (GAATW), Available at <http://www.gaatw.org/atj/> (Accessed on 09/03/ 2014).

¹⁷ See Muigua, K. and Kariuki F., 'ADR, Access to Justice and Development in Kenya'. Paper Presented at Strathmore Annual Law Conference 2014 held on 3rd & 4th July, 2014 at Strathmore University Law School, Nairobi.

¹⁸ *Dry Associates Limited V Capital Markets Authority & Another Interested Party Crown Berger (K) Ltd* [2012] eKLR [Petition No. 328 of 2011].

¹⁹ *Dry Associates Limited V Capital Markets Authority & Another Interested Party Crown Berger (K) Ltd* [2012] eKLR [Petition No. 328 of 2011] para. 110.

²⁰ Art. 48 of the Constitution of Kenya 2010, guarantees the right of access to justice for all; See also Art. 159(2) thereof.

²¹ *Ibid.*

Others²² that 'it is procedural rules which infuse life into substantive rights, which activate them effective (Emphasis added).' Alternatively, procedural rights without any substantive content are meaningless if entirely cut from material considerations.²³ As such, access to justice is an instrumental right that gives the structural framework necessary for the realisation of all substantive fundamental human rights.²⁴ However, both conceptions of access to justice must be accorded equal importance in legal frameworks, if communities are to have any meaningful access to justice. The Bill of Rights is thus not enough by itself to guarantee access to justice for all persons. There has to be corresponding legal and non-legal frameworks for the enforcement of rights.

2.1.4 Environmental Justice as either Distributive or Procedural Justice

Just like access to justice, environmental justice is associated with two elements of justice namely: distributive and procedural justice in relation to the environment. Distributive environmental justice recognizes that the human right to a dignified life is fundamental, and everyone has a right to a healthy and safe environment. On the other hand, procedural environmental justice requires that in order to uphold distributive justice, citizens need to be informed about and involved in decision making, and enabled to identify and stop acts that breach environmental laws and cause environmental injustices. Procedural justice is concerned with how and by whom decisions are made, and encompasses participation and legitimacy as common concepts. The institutional framework addressing environmental issues should be easily accessible to all including the marginalized groups.²⁵

Demands for the recognition of cultural identity and for full participatory democratic rights are integral demands for justice as well, and they cannot be

²²1980 AIR 1622, 1981 SCR (1) 97. Available at <http://indiankanoon.org/doc/440471/> [Accessed on 06/12/2014].

²³ Cullet, P., 'Definition of an Environmental Right in a Human Rights Context,' 13 *Netherlands Quarterly of Human Rights* (1995), p. 25 at p. 37.

²⁴ *Ibid.*

²⁵ Friends of the Earth Scotland, 'Environmental Justice', available at <http://www.foescotland.org.uk/environmentalrights> [Accessed on 08/12/2014]; See also Agyeman, J., and Evans, B., 'Just sustainability': the emerging discourse of environmental justice in Britain? *The Geographical Journal*, Vol. 170, No. 2, June 2004, pp. 155–164 at p. 156.

separated from distributional issues.²⁶ One of the crucial components of environmental justice is that it seeks to tackle social injustices and environmental problems through an integrated framework of policies. An equitable distribution of the environmental costs and benefits of economic development, both globally and nationally, is required, based on the premise that everyone should have the right and be able to live in a healthy environment with access to enough environmental resources for a healthy life. It also recognizes that it is predominantly the poorest and least powerful people who are missing the above-stated conditions.²⁷

Secondly, environmental justice examines issues of procedural equity and access to the processes of justice. The procedures and processes needed to tackle negative environmental impacts should therefore be accessible on an equal basis to different social groups since many environmental injustices may be caused or exacerbated by procedural injustices in the processes of policy design, land-use planning, science and law. Therefore, the necessary policy, legal and institutional framework in place is crucial in ensuring environmental justice at the global, regional and national levels.²⁸

Thirdly, environmental justice is inextricably related to sustainable development and social justice. It has been argued that it is possible to have a situation of perfect equality but which is destructive of the environment, and also a situation of perfect environmental sustainability which is inequitable.²⁹ Sustainable development has been described as primarily a social justice project focusing on equitable development to meet human needs while still recognizing that the preservation of natural resources is necessary to fulfill these needs.³⁰

²⁶ Schlosberg, D., 'Reconceiving Environmental Justice: Global Movements and Political Theories,' *Environmental Politics*, Vol.13, No.3, Autumn 2004, pp.517 – 540 at p. 537.

²⁷ Todd, H., & Zografos, C., 'Justice for the Environment: Developing a Set of Indicators of Environmental Justice for Scotland,' *Environmental Values*, Vol.14, No.4 (November 2005), pp. 483-501 at p. 484.

²⁸ *Ibid*, p. 484.

²⁹ *Ibid*, p. 484.

³⁰ Thatcher, A., 'Theoretical definitions and models of sustainable development that apply to human factors and ergonomics,' in Broberg, N. O., et al, (eds), *Human Factors In Organizational Design And Management – Xi, Nordic Ergonomics Society Annual Conference – 46*, 2014, pp. 747-752 at p. 747.

Notably, the main outcomes of the Rio+20 Conference was the agreement by member States to launch a process to develop a set of Sustainable Development Goals, which will build upon the Millennium Development Goals and converge with the post 2015 development agenda.³¹ The developed Sustainable Development Goals (SDGs), also known as *the 2030 Agenda for Sustainable Development*,³² includes a set of 17 Sustainable Development Goals (SDGs) which focus on inequalities, economic growth, decent jobs, cities and human settlements, industrialization, energy, climate change, sustainable consumption and production, peace, justice and institutions.³³

The *Sustainable Development Goals, Agenda 2030* (SDGs) define sustainable development broadly to cover issues such as poverty, inequality, gender equality, health, education, governance, climate change and environmental protection.³⁴ The global debate on sustainable development is mainly based on three core elements of sustainability which include:³⁵ Economic: An economically sustainable system must be able to produce goods and services on a continuing basis, to maintain manageable levels of government and external debt, and to avoid extreme sectoral imbalances which damage agricultural or industrial production; Environmental: An environmentally sustainable system must maintain a stable resource base, avoiding over-exploitation of renewable resource systems or environmental sink functions, and depleting non-renewable resources only to the extent that investment is made in adequate substitutes. This includes maintenance of biodiversity, atmospheric stability, and other ecosystem functions not ordinarily classed as economic resources; and Social: A socially sustainable system must achieve distributional equity, adequate provision of

³¹ United Nations Department of Economic and Social Affairs, "Sustainable development goals," available at <https://sustainabledevelopment.un.org/topics/sustainabledevelopmentgoals> [Accessed on 25/08/2017].

³² United Nations, *Transforming our world: the 2030 Agenda for Sustainable Development*, Resolution adopted by the General Assembly on 25 September 2015, [without reference to a Main Committee (A/70/L.1)], Seventieth session, Agenda items 15 and 116, 21 October 2015.

³³ United Nations General Assembly, "The road to dignity by 2030: ending poverty, transforming all lives and protecting the planet," *Synthesis report of the Secretary-General on the post-2015 Sustainable development agenda*. A/69/700. para.45.

³⁴ See United Nations, *Transforming our world: the 2030 Agenda for Sustainable Development*, A/RES/70/1, Resolution adopted by the General Assembly on 25 September 2015.

³⁵ Harris, J.M., "Basic Principles of Sustainable Development," Global Development and Environment Institute, Working Paper 00-04, June 2000, op cit., pp.5-6.

social services including health and education, gender equity, and political accountability and participation.³⁶

As a result, the concept of sustainable development is seen as an attempt to combine growing concerns about a range of environmental issues, socio-economic issues to do with poverty and inequality and concerns about a healthy future for humanity. It strongly links environmental and socio-economic issues.³⁷ Environmental justice may be considered as an alternative discourse to sustainable development. This is because environmental justice emphasizes commitment to the struggle of communities who suffer the most environmental damage by giving them a voice to access decision-making, which links with social justice, to ensure sustainable and equitable development.

Environmental justice can therefore address our concerns as to the use of our environmental resources and how to ensure equitable participation in environmental decision-making. This has been framed in academic terms as distributive justice and procedural justice, a distinction which is useful in the environmental justice discourse.³⁸

3.0 Background to Environmental Injustice in Kenya

The history of natural resources in Kenya depicts a struggle for environmental justice. A classic example is the Mau Mau revolt in the 1920s-1950s. One of the main reasons for the revolt was to claim back land and land-based resources which had been divested from local communities and vested in Her Majesty. The colonialists were able to use law to exercise control over all the natural resources in the colony. In 1899, using the *Foreign Jurisdiction Act*,³⁹ the British were able to declare the land in the protectorate as waste and unoccupied since a settled form of government did not exist and the land had not been appropriated by the local

³⁶ Ibid, p.6.

³⁷ Hopwood, B., *et al*, "Sustainable development: mapping different approaches," *Sustainable Development*, Vol. 13, Issue 1, February 2005, pp.38–52, p.39.

³⁸ Paavola, J. and Adger, W.N., "Justice and Adaptation to Climate Change", *Tyndall Centre Working Paper 23*, 2002.

³⁹ *Foreign Jurisdiction Act*, 1890. (53 & 54 Vie. c, 37.) s. 2 & 3.

sovereign or individual.⁴⁰ Several laws were therefore introduced in Kenya whose effect was to wrest control over natural resources from local communities. For example, under the *Crown Lands Ordinance of 1915*, all public land in the colony was vested in Her Majesty, leaving Africans as tenants at the will of the crown.⁴¹ Under the Ordinance, all land within the protectorate was declared crown land whether or not it was occupied by the natives or reserved for native occupation.

The effect of the law was to appropriate all land and land based resources from Africans and to vest them in the colonial masters.⁴² In addition, the law gave the colonial authorities powers to appropriate land held by indigenous people and allocate it to the settlers. This position was affirmed in a 1915 opinion delivered by the then Chief Justice to the effect that whatever rights the indigenous inhabitants may have had to the land had been extinguished by the Ordinance leaving them as mere tenants at the will of the crown.⁴³ The colonial authorities were therefore able to grant land rights to settlers in the highlands, while Africans were being driven and restricted to the native reserves. In the natives reserves there was overcrowding, soil erosion, and poor sanitation, amongst many other problems.⁴⁴

⁴⁰ Njonjo Commission Report, p.23. Towett J. Kimaiyo has recorded that on 15th June, 1895, Kenya was declared a British Protectorate and the legal effect of this declaration was to confer on the British crown Political Jurisdiction over the area, whilst it remained a foreign jurisdiction. The declaration of Protectorate did not confer any rights over land in the territory. Any rights over the land would have to be on the basis of conquest, agreement, treaty or sale with the indigenous people. In 1897, the Indian Land Act was extended to the territory, thus enabling the appropriation of lands in the main land beyond Mombasa for public use. This appropriation was however limited to land within one mile of either side of the railway line. To overcome the problem of title to land in the territory, in 1899 the law officers of the crown advised that the Foreign Jurisdiction Act, 1890 empowered the crown to control and dispose waste and unoccupied land in the protectorates with no settled forms of government and where land had been appropriated to the local sovereign individuals. In 1901 the East African (Lands) ordinance-in- council was enacted conferring on the commissioner of the Protectorate (later named Governor) power to dispose of all public lands on such terms and conditions as he might think fit. [Towett J. Kimaiyo, 'Chapter 6: Kenya Land Policy since 1900,' *Ogiek Land Cases and Historical Injustices*, 1902-2004, Vol. 1, 2004.]

⁴¹ HWO Okoth-Ogendo, *Tenants of the Crown: Evolution of Agrarian Law & Institutions in Kenya*, (ACTS Press, Nairobi, 1991), p.54.

⁴² *Ibid.*

⁴³ See generally the case of *Isaka Wainaina and Anor vs. Murito wa Indagara and others* (1922-23) 9(2) KLR, 102.

⁴⁴ See HWO Okoth-Ogendo, *Tenants of the Crown: Evolution of Agrarian Law & Institutions in Kenya*, (ACTS Press, Nairobi, 1991).

At the coastal region the *Land Titles Act*⁴⁵ was enacted to remove doubts that had arisen in regard to titles to land there and to establish a Land Registration Court. The processes of land adjudication and registration under the Act deprived indigenous Coastal Communities of their land. This led to problems of landlessness among the indigenous Coastal people and absentee landowners.⁴⁶ Some of the current land problems at the coast region have been traced back to the now repealed *Land Titles Act*⁴⁷.

The capitalist traders in British territory of Kenya agreed to employ their resources, through private Chartered Companies,⁴⁸ so long as they were guaranteed a monopoly of trade and allowed to exercise exclusive rights over taxation, minerals and land.⁴⁹ To protect these traders and safeguard their future claims, European Governments declared the territories they were occupying protectorates. Since the legality of protectorates was contested, they developed a system of Treaties or Agreements which were accepted as valid titles to the acquisition of African territories and the Africans were alleged to have "voluntarily ceded their sovereign rights." Such treaties were duly attested by a cross which purported to carry the assent of a King or Chief. The so-called assent was obtained by vague promises which were often unrecorded and all they were looking for were grounds to justify the acquisition of African lands.⁵⁰

The two Maasai agreements of 1904 and 1911 illustrate the effect of the treaties and agreements on the rights of the local people to their natural resources. In 1904, the then Commissioner of the Protectorate entered into an agreement with the Chief and certain representatives of the Maasai tribe by which, *inter alia*, it

⁴⁵ Cap 282, Laws of Kenya.

⁴⁶ National Land Policy, 2009. p.43.

⁴⁷ *Land Titles Act* 1908, LTA (Cap 282).

⁴⁸ A good example is the ten mile coastal strip which was owned by the Sultan of Zanzibar. This land had been leased to the Imperial British East African Company in 1888 by virtue of which all land in the Sultan's territory was ceded to the company except the private lands. Government of Kenya, *Report of the Commission of Inquiry into Land Law Systems in Kenya on Principles of a National Land Policy Framework, Constitutional Position of Land and New Institutional Framework for Land Administration* (Government Printer Nairobi, 2002) p.21.

⁴⁹ Kiwanuka, S., 'From Colonialism to Independence: A Reappraisal of Colonial Policies & African Reactions.' 1870-1960. KLB. P. 19.

⁵⁰ *Ibid*; See generally, Watkins, O. F., 'The Report of the Kenya Land Commission, September, 1933', *Journal of the Royal African Society*, Vol. 33, No. 132 (Jul., 1934), pp. 207-216.

was arranged that certain sections of the tribe should move to a reserve at Laikipia. This removal took place and the tribe was consequently divided in two.⁵¹ In 1911, the then Governor of the Protectorate entered into another agreement with the Chief, his regents, and certain representatives of that portion of the tribe living at Laikipia, by which it was arranged that the sections of the tribe which under the former agreement had moved to Laikipia should move south into one reserve with the remainder of the tribe.⁵² Using the two Agreements, the British were able to forcibly move certain sections of the Maasai out of their favourite grazing grounds in the central Rift Valley (Naivasha-Nakuru) into two reserves in order to make way for white settlement.⁵³ Since then, attempts by the community to regain the land have not been successful. The Colonialists chose not to recognise customary property ownership regarding it as an invalid way of claiming any ownership or control over property or environment.⁵⁴

The Maasai representatives have argued that land loss occasioned by the two agreements, is the single most important factor responsible for the ongoing cultural, economic, and social destitution of the Maasai people and has indeed, been responsible for the erosion of their sovereignty as a people.⁵⁵ They feel that they have been neglected by successive Governments of Kenya in redressing these historical injustices on land and related natural resources.⁵⁶

⁵¹ 'Judgment of the High Court of the East Africa Protectorate in the Case Brought by the Maasai Tribe Against the Attorney-General of the Protectorate and Others' *The American Journal of International Law*, Vol. 8, No. 2 (Apr., 1914), pp. 380-389 at p. 381.

⁵² *Ibid.*

⁵³ Hughes, L., *Moving the Maasai: A Colonial Misadventure*, (Palgrave Macmillan, 2006), p. 8; Olson, P.A., 'The Struggle for the Land: Indigenous Insight and Industrial Empire in the Semiarid World', U of Nebraska Press, 1990. Available at <https://books.google.co.ke/books?id=OqwF27HZms8C&printsec=frontcover#v=onepage&q&f=false> [Accessed on 26/12/2014]. p. 235.

⁵⁴ The provisions of the Land Titles Act demanded that for any local to claim land at the coast, they ought to possess papers showing ownership.

⁵⁵ Meitamei, O.D., 'Maasai Autonomy and Sovereignty in Kenya and Tanzania', *Mining Indigenous Lands*, 25.1 (Spring 2001). Available at <http://www.culturalsurvival.org/ourpublications/csq/Art./maasai-autonomy-and-sovereignty-kenya-and-tanzania> [Accessed on 26/12/2014].

⁵⁶ See generally, Kantai, P, 'In the Grip of the Vampire State: Maasai Land Struggles in Kenyan Politics,' *Journal of Eastern African Studies*, Vol. 1, No. 1, pp.107-122, March 2007.

The loss of control rights over natural resources also affected other resources including forests and water. For instance, in 1891 a law was enacted to protect the mangrove forests at Vanga in Coast region. Shortly thereafter in 1897, the *Ukamba Woods and Forests Regulations* established a strip marking two miles each side of Uganda railway and the same was placed under the management and control of the Divisional Forest Officer (DFO) and the railway administration. This changed forest management by communities which was done through customary practices with the accruing benefits extending to all community members in a fair manner. In 1900, the 1891 and 1897 Regulations were extended to cover all the forests in the coastal region and all those along the railway line. To facilitate this state-centric approach to forests management, a post of conservator of forests was established in 1902 as the officer who would oversee the management of all the regulated forests from the national level. Within the same year, the East African Forests Regulations provided for the gazettment or degazettment of forests and control of forests exploitation through a system of licences and fines. The culmination of this was in 1932 when a declaration was issued over the remaining expansive forests in order to bring them under control of the government including the high potential areas.⁵⁷

The main focus of forests management in reserved forests was production and protection and included collection of revenues, supervisory permits and licences, protection against illegal entry and use, reforestation and afforestation, research and extension.⁵⁸ Further, outside reserved forests, the focus by the government authorities was regulation and control of forest resources utilisation through legislation without considering the interests of the local communities or the existing traditional management systems.⁵⁹

Thus, the colonial government effectively transferred the management of forests from the local communities to the government through exclusionist and

⁵⁷Mogaka, H., 'Economic Aspects of Community Involvement in Sustainable Forest Management in Eastern and Southern Africa.' *Issue 8 of Forest and social perspectives in conservation*. IUCN, 2001. p.74.

⁵⁸ Kigenyi, et al. 'Practice Before Policy: An Analysis of Policy and Institutional Changes Enabling Community Involvement in Forest Management in Eastern and Southern Africa.' *Issue 10 of Forest and social perspectives in conservation*. IUCN, 2002. P. 9.

⁵⁹ *Ibid.*

protectionist legal frameworks, a move that was inherited by the independent governments of Kenya.⁶⁰ It was only in the 1990s that there emerged a paradigm shift towards community based forests management although this was done with minimal commitment from the stakeholders.⁶¹ Arguably, this has been with little success due to the bureaucracy involved in requiring communities to apply for complicated licences and permits in order to participate in the same. Similarly, in relation to water resources, legal frameworks were enacted chief among which is the Water Ordinance of 1929, vesting water resources on the authorities. This denied local communities the universal water rights that they had enjoyed in the pre-colonial period. It is noteworthy that the problem of environmental injustice in Kenya has in fact continued into independent Kenya and often with ugly results, as has been documented in various Government reports.⁶²

Environmental injustice continues to manifest itself in modern times. The recent conflicts such as those in Lamu County and in some of the pastoral counties are largely attributable to environmental injustices inflicted over the years.⁶³ In some,

⁶⁰ For instance, in 1985 the Government of the day effected a total ban on the shamba system, which was participatory in nature in that it allowed communities to settle in forests and engage in farming as they took care of the forests. Following the ban, the communities were resettled outside the gazette forest areas. This form of eviction has also been witnessed in such recent cases as the Endorois and the Ogiek cases.

⁶¹ Emerton, L., 'Mount Kenya: The Economics of Community Conservation'. *Evaluating Eden Series*, Discussion Paper No.4. p. 6.

⁶² See the *Report of the Judicial Commission Appointed to Inquire into Tribal Clashes in Kenya*, July 31, 1999 (Akiwumi Report). The report found that some of the main causes of post-independence tribal clashes have been ambitions by some communities of recovering what they think they lost when the Europeans forcibly acquired their ancestral land; See also the *Kriegler and Waki Reports on 2007 Elections*, 2009. Government Printer, Nairobi. The *Kriegler and Waki Reports* stated that the causes of the post-election clashes in the Rift Valley region covered by included conflict over land, cattle rustling, political differences and ecological reasons among others. [p. 59].

⁶³ See generally, Rohwerder, B., *Conflict Analysis of Kenya*, (Birmingham, UK: GSDRC, University of Birmingham, 2015).

Available at <http://www.gsdrc.org/wp-content/uploads/2015/12/KenyaConflictAnalysis.pdf> [Accessed on 1/09/2017]; See also Nyanjom, O., "Remarginalising Kenyan Pastoralists: The Hidden Curse of National Growth and Development," *African Study Monographs*, Suppl. 50: October 2014, pp. 43–72; National Environment Management Authority, 'Environmental Sensitivity: Atlas of Lamu County,' 2015. Available at http://www.ku.ac.ke/schools/environmental/images/stories/docs/Lamu_Sensitivity_Atlas.pdf [Accessed on 1/09/2017]

there are feelings that land and other land-based resources were taken away from local communities, creating a feeling of disinheritance. In other areas, there are conflicts over access to resources such as forests among forest communities for livelihood, while in others conflicts emerge due to competition over scarce natural resources and competing land uses.

4.0. Legal Framework for Environmental Justice in Kenya

4.1 Constitution of Kenya 2010

The history of environmental justice is important in the Kenyan context as it shows how laws and policies can impose environmental burdens disproportionately on people; marginalize and exclude communities from natural resources; and hinder communities from enjoying a fair share of their natural resources. The current Constitution seeks to correct this situation by promoting and requiring environmental justice.

The Constitution provides a foundation for environmental justice by emphasizing the need for public participation in matters of governance including the governance of environmental matters and natural resources in Kenya. The Constitution provides for the national values and principles of governance which include, *inter alia*, democracy and participation of the people; human dignity, equity, social justice, inclusiveness, equality, human rights, non-discrimination and protection of the marginalised; good governance, integrity, transparency and accountability; and sustainable development.⁶⁴

*In The Matter of the National Land Commission [2015] eKLR,*⁶⁵ the Supreme Court of Kenya extensively addressed itself to the role and place of public participation in the administration and management of land in Kenya. Mutunga, CJ (as he then was) was of the opinion that:

“Public participation was a major pillar, and bedrock of democracy and good governance. It was the basis for changing the content of the State, envisioned by the Constitution, so that the citizens had a major voice and impact on the

⁶⁴ Art. 10(1).

⁶⁵ Advisory Opinion Reference No. 2 of 2014, December 2, 2015.

equitable distribution of political power and resources. With devolution being implemented under the Constitution, the participation of the people in governance would make the State, its organs and institutions accountable, thus making the country more progressive and stable. The role of the Courts, whose judicial authority was derived from the people of Kenya, was the indestructible fidelity to the value and principle of public participation. The realization of the pillars of good governance would become weak and subject to the manipulation by the forces of status quo if the participation of the people was excluded” (emphasis added).⁶⁶ Further, he stated that: “public participation was the community based process, where people organise themselves and their goals at the grassroots level and work together through governmental and non-governmental community organisations to influence decision making processes in policy, legislation, service delivery, oversight and development matters. It was a two way interactive process where the duty bearer communicates information in a transparent and timely manner, engages the public in decision making and is responsive and accountable to their needs. The definition could be applied to the management and administration of land in Kenya. In order to achieve efficient land administration and management, the national and county governments; the arms of government; and the commissions and independent offices, must conduct meaningful consultation, communication, and engagement with the people” (emphasis added).⁶⁷

The Chief Justice further stated that the principle of the participation of the people did not stand in isolation; it was to be realised in conjunction with other constitutional rights, especially the right of access to information (article 35); equality (article 27); and the principle of democracy (article 10(2)(a)). The right to equality related to matters concerning land, where State agencies were encouraged also to engage with communities, pastoralists, peasants and any other members of the public. Thus, public bodies should engage with specific stakeholders, while also considering the views of other members of the public. Democracy was another national principle that was enhanced by the participation of the people.⁶⁸

⁶⁶ Advisory Opinion Reference No. 2 of 2014, para. 45.

⁶⁷ Ibid, para. 47.

⁶⁸ Ibid, para. 49.; See also Muigua, K., et al, *Natural Resources and Environmental Justice in Kenya*, (Glenwood Publishers Limited, August, 2015), pp. 23-29.

In the case of *Friends of Lake Turkana Trust v Attorney General & 2 others*⁶⁹ the Court stated, *inter alia*, that the right to life, dignity and economic and social rights are all connected and indivisible, and it cannot be said that—one set of rights is more important than another. All these rights of necessity need to be observed for person to attain a reasonable livelihood.⁷⁰

The need for environmental justice was also affirmed in the case of *Joseph Leboo & 2 others v Director Kenya Forest Services & another*⁷¹ the Court stated as follows:

*“...in my view, any person is free to raise an issue that touches on the conservation and management of the environment, and it is not necessary for such person to demonstrate, that the issues being raised, concern him personally, or indeed, demonstrate that he stands to suffer individually. Any interference with the environment affects every person in his individual capacity, but even if there cannot be demonstration of personal injury, such person is not precluded from raising a matter touching on the management and conservation of the environment....Any person, without the need of demonstrating personal injury, has the freedom and capacity to institute an action aimed at protecting the environment. The plaintiffs have filed this suit as representatives of the local community and also in their own capacity. The community, of course, has an interest in the preservation and sustainable use of forests. Their very livelihoods depend on the proper management of the forests. Even if they had not demonstrated such interest that would not have been important, as any person who alleges a violation of any law touching on the environment is free to commence litigation to ensure the protection of such environment....”*⁷²
(emphasis added)

The one common component that runs through all these principles and values is their anthropocentric nature. They all recognise the important role of all human beings in matters of governance including governance of natural resources. They call for meaningful involvement of all persons in governance matters. Meaningful involvement has been defined to mean that: potentially affected community

⁶⁹ [2014] eKLR, ELC Suit No. 825 OF 2012.

⁷⁰ Advisory Opinion Reference No. 2 of 2014, p.11.

⁷¹ [2013] eKLR, Environment and Land No. 273 of 2013.

⁷² Ibid, Paras 25 & 28.

residents have an appropriate opportunity to participate in decisions about a proposed activity that will affect their environment and/or health; the public contribution can influence the regulatory agency's decision; the concerns of all participants involved will be considered in the decision making process; and the decision makers seek out and facilitate the involvement of those potentially affected.⁷³

The Constitution guarantees the right of every person 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 70.⁷⁴ The guarantee does away with the requirement for showing standing in environmental matters.⁷⁵

To realise environmental rights, the constitution guarantees the right to access to information⁷⁶ and access to justice.⁷⁷ Environmental justice as an offshoot of the right of access to justice also needs to be enhanced to facilitate people's enjoyment of the right to a clean and healthy environment as envisaged in the laws of Kenya. If people and communities in general are to have any meaningful access to justice, then both substantive and procedural rights must be accorded equal importance in the access to justice frameworks. The Bill of Rights is thus not enough to guarantee access to justice for all persons but there must be a corresponding effective legal framework for the enforcement of this Bill of Rights. It is within this framework that the right to environmental justice for all persons in Kenya would be realised.

For example, in land matters the Constitution outlines the principles of landholding and management in Kenya to wit; sustainability, efficiency, equity

⁷³ The National Environmental Justice Advisory Council, Indigenous Peoples Subcommittee, 'Meaningful Involvement and Fair Treatment by Tribal Environmental Regulatory Programs', November 2004, p. 5. Available at

<http://www.epa.gov/environmentaljustice/resources/publications/nejac/ips-final-report.pdf>

⁷⁴ Art. 42.

⁷⁵ See the case of Prof. Wangari Maathai.

⁷⁶ Art. 35

⁷⁷ Art. 48.

and productivity. These principles are to be realised by ensuring equitable access to land; security of land rights; transparent and cost effective administration of land; elimination of gender discrimination in law, customs and practices related to land and property in land; and encouragement of communities to settle land disputes through recognised local community initiatives consistent with this Constitution.⁷⁸

If well implemented the principles would be a positive step towards realising environmental justice for all in land matters in Kenya.⁷⁹ The poor and women would have access to land for housing and farming to feed their families. The Constitution also requires the enactment of other laws on land namely: *Land Act*,⁸⁰ *Land Registration Act*⁸¹ and *National Land Commission Act*.⁸² These laws adopted the constitutional principles on land as the guiding principles in their implementation including dealing with historical land injustices.

4.2 Environmental Management and Coordination Act 1999

With regard to sustainable development, the Act⁸³ provides that in exercising the jurisdiction conferred upon it under subsection (3),⁸⁴ the High Court shall be guided by the following principles of sustainable development, *inter alia*; the principle of public participation in the development of policies, plans and processes for the management of the environment; and the cultural and social principle traditionally applied by any community in Kenya for the management of the environment or natural resources in so far as the same are relevant and are not repugnant to justice and morality or inconsistent with any written law.⁸⁵

⁷⁸ Art. 60(1).

⁷⁹ See also *Environmental Management and Co-ordination (Amendment) Act*, Act No. 5 of 2015 which was enacted to revise the Environmental Management and Coordination Act, (EMCA) No. 8 of 1999 in line with the current constitutional provisions on environmental management.

⁸⁰ No. 6 of 2012.

⁸¹ No. 3 of 2012.

⁸² National Land Commission Act, 2012 (No. 5 of 2012).

⁸³ Environmental Management and Coordination Act, (EMCA) No. 8 of 1999, Laws of Kenya.

⁸⁴ Powers to enforce the right of every person in Kenya to a clean and healthy environment the duty to safeguard and enhance the environment.

⁸⁵ Environmental Management and Coordination Act 1999, S. 3(5).

It is noteworthy that EMCA, in a bid to facilitate public participation in environmental governance matters, dispenses with the requirement of proving *locus standi* in environmental litigation. The Act also states that a person alleging violation of a right to clean and healthy environment 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 –is not frivolous or vexatious; or is not an abuse of the court process.⁸⁶

The *Environmental Management and Co-ordination (Amendment) Act*, 2015⁸⁷ was enacted to streamline EMCA in accordance with the current Constitution of Kenya and especially making provision for the devolved system of governance with respect to the various environmental bodies in the country.

4.3 The Environment and Land Court Act

The Environment and Land Court Act⁸⁸ establishes an Environment and Land Court (ELC) to hear matters touching on environment and land. The important role to be played by courts in achieving environmental justice was affirmed in the case of *Peter K. Waweru v Republic*,⁸⁹ where the Court, although not the ELC, stated, *inter alia*, that “...environmental crimes under the Water Act, Public Health Act and EMCA cover the entire range of liability including strict liability and absolute liability and ought to be severely punished because the challenge of the restoration of the environment has to be tackled from all sides and by every man and woman....In the name of environmental justice water was given to us by the Creator and in whatever form it should never ever be the privilege of a few – the same applies to the right to a clean environment.”⁹⁰

⁸⁶ S. 3(4), EMCA; Art. 70 (1) of the Constitution also states that if a person alleges that a right to a clean and healthy environment recognised and protected under Art. 42 has been, is being or is likely to be, denied, violated, infringed or threatened, the person may apply to a court for redress in addition to any other legal remedies that are available in respect to the same matter. Clause (3) thereof is to the effect that for the purposes of this Art., an applicant does not have to demonstrate that any person has incurred loss or suffered injury.

⁸⁷ *Environmental Management and Co-ordination (Amendment) Act*, Act No. 5 of 2015, Laws of Kenya.

⁸⁸ *Environment and Land Court Act*, No. 19 of 2011, Laws of Kenya. Government printer, Nairobi.

⁸⁹ [2006] eKLR.

⁹⁰ [2006] eKLR, Misc. Civ. Applic. No. 118 of 2004, p.14.

Article 22(2) of the Constitution of Kenya allows Courts to take action to protect the environment without necessarily looking for immediate proof of likely violation of the right to clean and healthy environment. In *Said Tahir & 2 others v County Government of Mombasa & 5 others*,⁹¹ the Court observed that although the right to a clean and healthy environment is a right under the Bill of Rights (Chapter 4 of the Constitution), the determination of which is conferred upon the High Court under Article 23(1) of the Constitution, there is a duality of jurisdiction between the High Court and the Environment and Land Court by virtue of Article 162 (2) of the Constitution, and by virtue of the jurisdiction conferred upon the latter court by section 13(7) of the *Environment and Land Act*⁹². However, in *Timothy Otuya Afubwa & another v County Government of Trans-Nzoia & 3 others*, the Court stated that the Constitution designates the High Court as the only court to address questions on violation of the Bill of Rights. The only right under the Bill of Rights which the Environment and Land Court can hear is the right to clean and healthy environment and thus it has jurisdiction to entertain matters relating to violation of this right.⁹³

The establishment of the court is part of the recognition of the need to enhance access to justice in environmental matters. Previously, environmental and land court matters used to be heard in the ordinary courts and could take years before justice is realised for the parties.

4.4 Water Policy 2012 and Water Act 2016

In the past, the water sector in the country has been bedeviled by many problems, some of which can be traced back to the colonial times. For instance, the colonial masters made policies that favoured the use of all the water resources in the colony by the settlers at the expense of the locals. The local people lost control over water resources in the country as the colonial laws such as the 1929 *Water Ordinance* divested ownership of all water bodies in the colony from local communities. The main use of water from the water bodies was farming by settlers. The settlers' main preoccupation was water exploitation without

⁹¹ [2015] eKLR, Petition No. 6 of 2015.

⁹² No 19 of 2011, Laws of Kenya.

⁹³ *Timothy Otuya Afubwa & another v County Government of Trans-Nzoia & 3 others* [2015] eKLR, para.8.

conservation of catchment areas. This led to such problems as soil erosion, siltation and disease outbreaks amongst the Africans who had been restricted to certain reserve areas. Indeed, the state-centric approach to water management in Kenya has been a problem that was also repeated in the now repealed *Water Act 2002*⁹⁴ which vested the control of water resources in the state and the Minister responsible for water resources. Although past policies have contemplated participatory approach to water management in the country, the same has not achieved much positive results.

To correct this, the current Constitution provides for principles of natural resources management which include public participation and also devolution, which seek to empower the locals and give them a voice in the management. The water sector does not have a current and clear sector-specific policy and legal framework to operationalize devolution as envisaged by the current Constitution of Kenya.⁹⁵ As such, the *Water Policy 2012* seeks to address this alongside other challenges that were identified as *inter alia*: Climate Change, Disaster Management and Environmental Degradation; Water availability and water service provision; absence of reliable information in the rural Water Supply and Sanitation (WSS) sub-sector; mixed and inconsistent performance of sector institutions mainly due to insufficient governance and autonomy of institutions; lack of good governance practices in some sector institutions; insufficient effluent treatment threatening the country's public health and economic growth; incomplete devolution of functions to the basin level in Water Resources Management (WRM) and conflict of interest in regulation and implementation.⁹⁶

Article 43 of the Constitution of Kenya guarantees the right to an adequate standard of living for all and this encompasses right to adequate food, clothing, shelter, clean and safe water, education, health and social security.

⁹⁴ Act No. 8 of 2002.

⁹⁵ Heymans, C., et al. *Devolution in Kenya: opportunities and challenges for the water sector - supporting poor-inclusive WSS sector reform*. Water and sanitation program, policy note, World Bank Group, 2013. Available at <http://documents.worldbank.org/curated/en/2013/09/19122948/devolution-kenya-opportunities-challenges-water-sector-supporting-poor-inclusive-wss-sector-reform>

⁹⁶ National Water Policy, 2012.

The Water Act 2016⁹⁷ was enacted to provide for the regulation, management and development of water resources, water and sewerage services; and for other connected purposes. The Cabinet Secretary, the Water Resources Authority, the Regulatory Board, county governments and any person administering or applying this Act shall be guided by the principles and values set out in Articles 10⁹⁸, 43⁹⁹, 60¹⁰⁰ and 232¹⁰¹ of the Constitution.¹⁰² Thus, while every water resource is vested in and held by the national government in trust for the people of Kenya even under this Act¹⁰³, its management should be aimed at ensuring that communities enjoy their right to water among other economic and social rights that are related to the provision of water services. Section 63 thereof also provides that every person in Kenya has the right to clean and safe water in adequate quantities and to reasonable standards of sanitation as stipulated in Article 43 of the Constitution.

For effective water resources management, environmental justice concepts such as public participation, information sharing, community based natural resource management, amongst others should feature prominently if the sector is to reflect the spirit of the current Constitution. This can be achieved through the Policy guiding principles which include *inter alia*: Right to water with a pro-poor orientation; Integrated Water Resource Management (IWRM) approach; Sector Wide Approach (SWAp) for enhanced development; devolution of functions to the lowest appropriate level; gender provisions in the management of Water Sector Institutions (WSIs) and safeguarding of water; socially responsive commercialization for service delivery; good governance practices on all levels; participatory approach; public Private Partnership (PPP); and “User pays and polluter pays” principles. If fully implemented through the relevant sectoral

⁹⁷ Water Act, No. 43 of 2016, Laws of Kenya, Repealed by the Water Act, No. 43 of 2016..

⁹⁸ Constitution of Kenya 2010, National Values and Principles of Governance.

⁹⁹ Constitution of Kenya 2010, Economic and Social Rights.

¹⁰⁰ Constitution of Kenya, Principles of Land Policy.

¹⁰¹ Constitution of Kenya, Values and Principles of Public Service

¹⁰² Water Act, No. 43 of 2016, sec. 4.

¹⁰³ *Ibid*, sec. 5.

regulations, these principles can go a long way in actualizing environmental justice in the water sector.¹⁰⁴

4.5 National Land Policy, 2009

The Policy¹⁰⁵ identifies the problems facing the land sector in Kenya as including: severe land pressure and fragmentation of land holdings into uneconomic units; deterioration in land quality due to poor land use practices; unproductive and speculative land hoarding; under-utilization and abandonment of agricultural land; severe tenure insecurity due to overlapping rights; disinheritance of women and vulnerable members of society, and biased decisions by land management and dispute resolution institutions; landlessness and the squatter phenomenon; uncontrolled development, urban squalor and environmental pollution; wanton destruction of forests, catchment areas and areas of unique biodiversity; desertification in the arid and semi-arid lands; and growth of extra-legal land administration processes.¹⁰⁶

In order to tackle these challenges, it proposed that the process of acquisition, use and disposal of land rights should be guided by: equal recognition and enforcement of land rights arising under all tenure systems; non-discrimination in ownership of, and access to land under all tenure systems; protection and promotion of the multiple values of land; and development of fiscal incentives to encourage the efficient utilization of land.¹⁰⁷ These values and principles have also been reflected in the Constitutional provisions dealing with land and have also been recognised albeit in broader terms in the various land laws enacted in line with the Constitution.

¹⁰⁴ *Ibid*, para. 1.5; For further comment on the place of Water Act 2016 in achieving efficiency in water governance in Kenya, see Muigua, K., “Streamlining Water Governance in Kenya for Sustainable Development,” available at <http://www.kmco.co.ke/attachments/article/184/Streamlining%20Water%20Governance%20in%20Kenya-%2017TH%20FEBRUARY%202017.pdf>

¹⁰⁵ *Sessional Paper No. 3 of 2009 on National Land Policy*, August, 2009.

¹⁰⁶ *Ibid*, Para. 2.3.

¹⁰⁷ *Ibid*, para. 3.3.2.

5.0 Gender Discrimination and Environmental Justice

Kenya's quest for environmental justice for all persons cannot be fully realised without tackling the problem of gender discrimination in relation to access to natural resources in Kenya. Gender discrimination in law and policy particularly in access to natural resources and property ownership is an instance of environmental injustice.¹⁰⁸ In the past, women have been discriminated against especially when it comes to access to land and associated resources. Indeed, it has been observed that much of Kenya's history was in fact marked by growing inequality and division, where women and sexual and gender minorities were oppressed by traditional social and religious attitudes to gender which translated into discriminatory laws and discrimination by both the state and private actors, denied them equal participation in civil, political, economic, social and cultural life.¹⁰⁹ It is documented that only 3% of women have title deeds in Kenya.¹¹⁰ This has led to instances where women have not only been discriminated against in practice but also in law.

It is against this background that the current Constitution of Kenya has incorporated elaborate provisions to correct the situation. It provides that every person is equal before the law and has the right to equal protection and equal benefit of the law.¹¹¹ Women and men have the right to equal treatment, including the right to equal opportunities in political, economic, cultural and social spheres.¹¹²

¹⁰⁸ It is noteworthy that this is not a Kenyan problem only but has also persisted in other jurisdictions around the world. See generally, UN Human Rights Committee (HRC), *Consideration of reports submitted by States parties under Art. 40 of the Covenant: International Covenant on Civil and Political Rights: 4th periodic report: United States of America*, 22 May 2012, CCPR/C/USA/4 [accessed 27 December 2014].

¹⁰⁹ The Equal Rights Trust (ERT), "In the Spirit of Harambee: Addressing Discrimination and Inequality in Kenya," *ERT Country Report Series*: 1, London, February 2012. p. 1. Available at http://www.equalrightstrust.org/ertdocumentbank/In_the_Spirit_of_Harambee.pdf [Accessed on 20/12/2014].

¹¹⁰ UNDP-Kenya, *Millennium Development Goals in Kenya-Ten Years of Implementation and Beyond: The Last Stretch Towards 2015*, UNDP-Kenya, Nairobi, 2010, p.33.

¹¹¹ Art. 27(2) Equality includes the full and equal enjoyment of all rights and fundamental freedoms.

¹¹² Art. 27(3).

The constitution also prohibits the State or any person from discriminating directly or indirectly against any person on any ground, including race, sex, pregnancy, marital status, health status, ethnic or social origin, colour, age, disability, religion, conscience, belief, culture, dress, language or birth.¹¹³ These provisions are important in ensuring that all persons including women have access to, control and use of natural resources. If women are denied opportunities to access, use and manage natural resources they can also exploit the provisions allowing any person whose right to a clean and healthy environment is being or is likely to be, denied, violated, infringed or threatened, to apply to a court for redress in addition to any other legal remedies that are available in respect to the same matter.¹¹⁴

Among the principles of land policy as envisaged under Article 60(1) are *inter alia*: equitable access to land; security of land rights; and elimination of gender discrimination in law, customs and practices related to land and property in land. These principles envisage the removal of gender discrimination in access, use, management and ownership of property as this is one of the best ways of achieving environmental justice for all including women.

Women bear a disproportionate burden in environmental matters and are affected more by climate change, pollution and depletion of natural resources. Since they are particularly vulnerable to the earth's sustainability, their involvement in environmental problems is crucial.¹¹⁵ The Constitution of Kenya has provisions that not only encourage but also make it an obligation on the State to ensure that there is meaningful participation by women especially in matters of governance since they form part of the previously marginalised groups in society. It obligates the State to put in place affirmative action programmes designed to ensure that minorities and marginalised groups, ¹¹⁶ *inter alia*—

¹¹³ Art. 27(4) (5).

¹¹⁴ Art. 71, Constitution of Kenya.

¹¹⁵ United Nations Development Programme, 'Women's Empowerment to Environmental Justice'. Available at <http://www.ks.undp.org/content/kosovo/en/home/presscenter/Art.s/2013/05/30/women-s-empowerment-to-environmental-justice-dg-environment-women-empowerment-/> [Accessed on 19/12/2014].

¹¹⁶ See Art. 260 on interpretation which provides that "affirmative action" includes any measure designed to overcome or ameliorate an inequity or the systemic denial or infringement of a right or

participate and are represented in governance and other spheres of life; are provided special opportunities in educational and economic fields; develop their cultural values, languages and practices; and have reasonable access to water, health services and infrastructure.¹¹⁷ These provisions can facilitate the creation of a society where women not only participate in decision making in matters touching on the environment but are also given an opportunity to own and enjoy the natural resources related to the environment.

6.0 Environmental Justice and Livelihood

Access to justice regarding natural resources is a pre-requisite for improving people's livelihoods. In addition, environmental justice is inextricably linked to people's livelihood thus necessitating greater protection in law and policy. To this extent, environmental justice also dictates that victims of environmental injustice have a right to receive full compensation and reparations for damage as well as quality health care.¹¹⁸

The close relationship between environmental justice and livelihood sustenance was demonstrated in the case of *Kemai & Others vs Attorney General & 3 Others*,¹¹⁹ where members of the Ogiek ethnic community, sought a declaration that their eviction from Tinet Forest by the government contravened their right to life, the protection of the law and the right not to be discriminated against. This was based on the claim that they had been living in Tinet Forest since time immemorial, where they derived their livelihood by gathering food, hunting and farming. Their argument was that they would be left landless if evicted from the forest. They also claimed that their culture was concerned with the preservation of

fundamental freedom; and "marginalised group" means a group of people who, because of laws or practices before, on, or after the effective date, were or are disadvantaged by discrimination on one or more of the grounds in Art. 27(4). Arguably, this definition would include women, based on discrimination on ground of sex.

¹¹⁷ Art. 56, Constitution of Kenya.

¹¹⁸ Agyeman, J., and Evans, T., 'Toward Just Sustainability in Urban Communities: Building Equity Rights With Sustainable Solutions' *Annals of the American Academy of Political and Social Science*, Vol. 590, Rethinking Sustainable Development (Nov., 2003), pp. 35-53 at p. 50.

¹¹⁹ *Kemai & Others vs Attorney General & 3 Others* (2006) 1 KLR (E&L) 326, Civil Case 238 of 1999; *Ogiek People v. District Commissioner* Case No. 238/1999 (2000.03.23) (Indigenous Rights to Tinet Forest)

nature so as to sustain their livelihood and that they had never been a threat to the natural environment. The Court, in declining to issue favourable orders, held that the real threat to the right to life and to livelihood is not the government eviction orders in themselves but the negative environmental effect of ecological mismanagement, neglect and the raping of the natural resources. Hence, the importance of the issue of preserving the rain water catchment area. It is noteworthy that the Ogiek community case also moved on to the ACHPR for determination and has since been finalized, with the judgment delivered in favour of the Ogiek community.¹²⁰

While managing resources sustainably, states must have an environmental policy that takes account of those who depend on the resources for their livelihoods. Otherwise, it could have an adverse impact both on poverty and on chances for long-term success in resource and environmental conservation.¹²¹ Legal and policy constraints that deny the poor access to water for livelihood such as growing food crops for their families including small-scale agriculture to grow food crops for their families should be removed.

The Kenyan economy is largely based on agriculture which relies mostly on the exploitation of natural resources.¹²² Essentially, environmental justice gives people greater opportunities for protecting their fundamental human rights. Some of the basic rights guaranteed in the Constitution of Kenya 2010 include the economic and social rights of every person. These rights include the right – to the

¹²⁰ African Commission on Human and People's Rights v Republic of Kenya, Appl. No. 006/2012 (Delivered on Friday 26 May 2017).

¹²¹ United Nations Conference on Environment & Development Rio de Janeiro, Brazil, 3 to 14 June 1992, Agenda 21; See also chapter 3, para. 2.

¹²² Office of the Prime Minister Ministry of state for Planning, National Development and Vision 2030, *Sessional paper No. 10 of 2012 On Kenya Vision 2030*, Government Printer, Nairobi. P. 44; Government of Kenya, *Integrated Water Resources Management and Water Efficiency Plan for Kenya*, August, 2009. Government Printer, Nairobi; See also the Fisheries Management and Development Act, (No. 35 of 2016) which was enacted to provide for the conservation, management and development of fisheries and other aquatic resources to enhance the livelihood of communities dependent on fishing and to establish the Kenya Fisheries Services; and for connected purposes. The objective of this Act is to protect, manage, use and develop the aquatic resources in a manner which is consistent with ecologically sustainable development, to uplift the living standards of the fishing communities and to introduce fishing to traditionally non-fishing communities and to enhance food security (Sec. 5(1)).

highest attainable standard of health, which includes the right to health care services, including reproductive healthcare; to accessible and adequate housing, and to reasonable standards of sanitation; to be free from hunger, and to have adequate food of acceptable quality; to clean and safe water in adequate quantities; to social security; and to education.¹²³ These rights touch on the livelihoods of persons and they cannot therefore be ignored.

7.0 Environmental Justice and Conflict Management

It is worth mentioning that natural resources are perceived as an integral part of society the world all over, as sources of income, industry, and identity. Owing to this central role of natural resources to the general wellbeing of communities, conflicts related to the exploitation of natural resources are inevitable. Natural resource based conflicts have been defined as disagreements or disputes that arise with regard to the use, access and management of natural resources.¹²⁴ They have also been defined as situations where the allocation, management, or use of natural resources results in: violence; human rights abuses; or denial of access to natural resources to an extent that significantly diminishes human welfare.¹²⁵

¹²³ Art. 43; ; See also the National Food and Nutrition Security Policy, 2011 whose objective is to increase the quantity and quality of food available and accessible, in order to ensure that all Kenyans have an adequate, diverse and healthy diet. This will be achieved by working towards sustainable production increases for food that is diversified, affordable and helps meet basic nutrition requirements. This policy places an obligation on Government to promote sustainable food production systems with particular attention to increasing soil fertility, agro-biodiversity, organic methods and proper range and livestock management practices; Under the Agriculture and Food Authority (AFA) 2016-2021 Strategic Plan, one of the main goals under the Strategic Plan is to promote increased agricultural production for food and nutrition security; There is also a pending Food Security Bill, 2014 which seeks to give effect to Article 43(1)(c) of the Constitution on the freedom from hunger and the right to adequate food of acceptable quality; Article 53(1)(c) of the Constitution on the right of every child to basic nutrition and Article 21 of the Constitution on the implementation of rights and fundamental freedoms under the Constitution; and for connected purposes.

¹²⁴ Food and Agricultural Organisation, 'Conflict and Natural Resource Management', page 1. Available at <http://www.fao.org/forestry/21572-0d9d4b43a56ac49880557f4ebaa3534e3.pdf> [Accessed on 09/12/2014].

¹²⁵ United States Agency for International Development (USAID), 'Conflict Over Natural Resources At The Community Level in Nepal Including Its Relation to Armed Conflict', May 2006, page 1. Available at pdf.usaid.gov/pdf_docs/PNADF990.pdf [Accessed on 09/12/2014].

Environmental justice is related to conflict management. This is because in the environmental context procedural rights are the vehicle through which substantive rights are articulated by the courts and the other conflict management processes. The procedures and processes needed to tackle negative environmental impacts should therefore be accessible on an equal basis to different social groups since many environmental injustices may be caused or exacerbated by procedural injustices in the processes of policy design, land-use planning, science and law. Therefore, the necessary policy, legal and institutional framework in place is crucial in ensuring environmental justice at the global, regional and national levels.

Access to courts is an important pillar in promoting environmental justice in Kenya. Courts have however been faced by a number of challenges that hinder people particularly local communities from vindicating their environmental rights. Although the Constitution of Kenya guarantees the right of every person to institute proceedings claiming that a right or fundamental freedom in the Bill of Rights has been denied, violated or infringed, or is threatened with no need to prove locus standi to institute the suit, there still lies other challenges hindering access to courts such as the geographical location, complexity of rules and procedure and the use of legalese.¹²⁶

Environmental justice can be enhanced if the conflict management mechanisms allow parties to enjoy autonomy over the process and outcome; they can be expeditious, cost-effective, flexible and employ non-complex procedures. Compared to courts, ADR processes are affordable, flexible, less complex, foster relationships and give communities greater opportunities to participate in the management of natural resources.¹²⁷ ADR and TDRM processes provide additional avenues for people in accessing environmental justice. Alternative

¹²⁶ *Strengthening Judicial Reform in Kenya: Public Perceptions and Proposals on the Judiciary in the new Constitution*, ICJ Kenya, Vol. III, May, 2002; See also Kariuki Muigua, *Avoiding Litigation through the Employment of Alternative Dispute Resolution*, pp. 6-7, a Paper presented by the author at the In-House Legal Counsel, Marcus Evans Conference at the Tribe Village Market Hotel, Kenya on 8th & 9th March, 2012.

Available at <http://www.chuitech.com/kmco/attachments/Art./101/Avoiding.pdf>

¹²⁷ See generally Muigua K. "ADR: The Road to Justice in Kenya." Chartered Institute of Arbitrators (Kenya Branch). 2014; Volume 2 Number 1 (2014):28-94.

Dispute Resolution mechanisms such as negotiation, conciliation and mediation have the potential to enhance environmental justice for the Kenyan people since they allow parties to enjoy autonomy over the process and outcome; they are expeditious, cost-effective, flexible and employ non-complex procedures. To enhance environmental justice there is need to move beyond the law by adopting approaches that give communities greater avenues for protecting their rights and benefiting from the use of natural resources.

8.0 Enhancing Access to Environmental Justice in Kenya

Any steps towards realising environmental justice for the Kenyan people should arguably ensure that the local people's perception of what entails environmental justice is effectively incorporated in any government measures aimed at achieving the same. With this incorporation, it would be possible for the communities to support the government efforts in relation to achieving environmental justice for the Kenyan people. This can be achieved through ensuring that the elements discussed below are effectively incorporated in the laws on environmental governance.

8.1 Environmental Justice and Access to Information

As already pointed out, in order to contribute to the protection of the right of every person of present and future generations to live in an environment adequate to his or her health and well-being, there is need to guarantee the rights of access to information, public participation in decision-making, and access to justice in environmental matters.¹²⁸ The Constitution guarantees the right of access to information held by the State, any other person and required for the exercise or protection of any right or fundamental freedom.¹²⁹ It also obligates the State to publish and publicise any important information affecting the nation.¹³⁰

¹²⁸ Article 1 of the 1998 Aarhus Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters, UN Doc. ECE/CEP/43. Adopted at the 4th UNECE Ministerial Conference, Aarhus, 25 June, 1998. UN Doc. ECE/CEP/43.

¹²⁹ Art. 35(1); See also *Access to Information Act, No. 31 of 2016* which deals with disclosure of information including information on dangers of public health, safety and the environment. The Act was enacted to give effect to Article 35 of the Constitution; to confer on the Commission on Administrative Justice the oversight and enforcement functions and powers and for connected purposes.

¹³⁰ Art. 35(2).

Guaranteeing access to the relevant information is imperative in facilitating access to environmental justice and enabling the communities to give prior, informed consent where required in relation to exploitation of natural resources. With regard to informed consent, 'informed' has been defined to mean that all information relating to the activity is provided to indigenous peoples and that the information is objective, accurate and presented in a manner or form that is understandable to indigenous peoples.¹³¹ Relevant information includes: the nature, size, pace, duration, reversibility and scope of any proposed project; the reason(s) or purpose of the project; the location of areas that will be affected; a preliminary assessment of the possible economic, social, cultural and environmental impacts, including potential risks and benefits; personnel likely to be involved in the implementation of the project; and procedures that the project may entail.¹³² This informed consent cannot therefore be given without first ensuring that the concerned communities have access to relevant information. In *Friends of Lake Turkana Trust v Attorney General & 2 others*¹³³ the court was of the view that access to environmental information was a prerequisite to effective public participation in decision making and monitoring governmental and public sector activities on the environment.

The Court, in *Friends of Lake Turkana Trust* case, also observed that article 69(1) (d) of the Constitution of Kenya 2010 placed an obligation on the state to encourage public participation in the management, protection and conservation of the environment. Public participation would only be possible where the public had access to information and was facilitated in terms of their reception of different views. Such community based forums and Barazas can effectively facilitate this. For example, Rule 5 of the Second Schedule to the *Forest Conservation and Management Act, 2016*¹³⁴ states that where rules made under the Act so require, the responsible authority shall cause a public meeting to be held in relation to a proposal before the responsible authority makes its decision on the proposal.

¹³¹ FAO, 'Respecting free, prior and informed consent: 'Practical guidance for governments, companies, NGOs, indigenous peoples and local communities in relation to land acquisition. *Governance of Tenure Technical Guide* No. 3, Rome 2014. p.5.

¹³² *Ibid.*

¹³³ ELC Suit No 825 of 2012.

¹³⁴ *Forest Conservation and Management Act*, No. 34 of 2016, Laws of Kenya.

Such public meetings should, as a matter of practice, be conducted in a manner that would ensure full and meaningful participation of all the concerned communities. Well conducted, these are viable forums through which access to environmental information can be realized and consequently enhance access to environmental justice.

8.2 Environmental Justice and Public Participation

Meaningful involvement of people in environmental matters requires effective access to decision makers for all, and the ability in all communities to make informed decisions and take positive actions to produce environmental justice for themselves.¹³⁵ The *Vienna Declaration and Programme of Action*¹³⁶ states that all peoples have the right of self-determination.¹³⁷ By virtue of that right, they freely determine their political status, and freely pursue their economic, social and cultural development. This calls for free prior and informed consent from the affected communities in relation to exploitation of natural resources in their areas.

Free, prior and informed consent is a collective right of indigenous peoples to make decisions through their own freely chosen representatives and customary or other institutions and to give or withhold their consent prior to the approval by government, industry or other outside party of any project that may affect the lands, territories and resources that they customarily own, occupy or otherwise use.¹³⁸ It is thus not a stand-alone right but an expression of a wider set of human rights protections that secure indigenous peoples' rights to control their lives, livelihoods, lands and other rights and freedoms and which needs to be respected alongside other rights, including rights relating to self-governance, participation, representation, culture, identity, property and, crucially, lands and

¹³⁵ US Office of Legacy Management, 'Environmental Justice' *What Is Environmental Justice?* available at <http://energy.gov/lm/services/environmental-justice/what-environmental-justice> [Accessed on 08/12/2014].

¹³⁶ UN General Assembly, *Vienna Declaration and Programme of Action*, 12 July 1993, A/CONF.157/23.

¹³⁷ Proclamation 1.2.

¹³⁸ FAO, 'Respecting free, prior and informed consent: 'Practical guidance for governments, companies, NGOs, indigenous peoples and local communities in relation to land acquisition, op. cit. p.4.

territories.¹³⁹The Guidelines call for consultation and participation which entails engaging with and seeking the support of those who, having legitimate tenure rights, could be affected by decisions, prior to decisions being taken, and responding to their contributions; taking into consideration existing power imbalances between different parties and ensuring active, free, effective, meaningful and informed participation of individuals and groups in associated decision-making processes.¹⁴⁰

The Constitution of Kenya provides that the objects of devolved government are *inter alia*-to promote democratic and accountable exercise of power; to foster national unity by recognising diversity; to give powers of self-governance to the people and enhance the participation of the people in the exercise of the powers of the State and in making decisions affecting them; to recognise the right of communities to manage their own affairs and to further their development; to protect and promote the interests and rights of minorities and marginalised communities; to promote social and economic development and the provision of proximate, easily accessible services throughout Kenya; to ensure equitable sharing of national and local resources throughout Kenya; and to facilitate the decentralisation of State organs, their functions and services, from the capital of Kenya.¹⁴¹

The Constitution provides for the participation of the persons with disabilities,¹⁴² youth¹⁴³ minorities and marginalized groups¹⁴⁴, and older members of society¹⁴⁵, in governance and all other spheres of life. The foregoing provisions are important especially in relation to the provisions of the *County Governments*

¹³⁹ *Ibid*; See generally, *In The Matter of the National Land Commission [2015] eKLR*, Advisory Opinion Reference No. 2 of 2014, December 2, 2015, paras 45-49; See also Muigua, K., et al, *Natural Resources and Environmental Justice in Kenya*, (Glenwood Publishers Limited, August, 2015), pp. 23-29.

¹⁴⁰ FAO, 'Respecting free, prior and informed consent: 'Practical guidance for governments, companies, NGOs, indigenous peoples and local communities in relation to land acquisition, op. cit. p.4; See also Community Land Act, No. 27 of 2016 which requires active involvement of affected communities in negotiations involving exploitation of resources lying within such lands.

¹⁴¹ Art. 174, Constitution of Kenya 2010.

¹⁴² Art. 54.

¹⁴³ Art. 55

¹⁴⁴ Art. 56

¹⁴⁵ Art. 57.

Act¹⁴⁶ which are to the effect that citizen participation in county governments shall be based upon the principles of *inter alia* – Timely access to information, data, documents, and other information relevant or related to policy formulation and implementation; Reasonable access to the process of formulating and implementing policies, laws, and regulations; protection and promotion of the interest and rights of minorities, marginalized groups and communities; legal standing to interested or affected persons, organizations, and where pertinent, communities, to appeal from or, review decisions, or redress grievances, with particular emphasis on persons and traditionally marginalized communities, including women, the youth, and disadvantaged communities; reasonable balance in the roles and obligations of county governments and non-state actors in decision-making processes; promotion of public-private partnerships; and recognition and promotion of the reciprocal roles of non-state actors' participation and governmental facilitation and oversight.¹⁴⁷

These provisions have an implication on natural resources management. It means that the devolved governments must not purport to make unilateral decisions especially with regard to the management of natural resources. They must recognise the centrality of people in whole debate of natural resources management, since these resources have an impact on the economic, social, cultural and even spiritual lives of the diverse communities in Kenya. As such, they must ensure their active participation in coming up with legislative and policy measures to govern their management and utilisation for the benefit of all. They must also be alive to the fact that any negative impact on the environment directly affects these communities.

The Constitution of Kenya requires Parliament to conduct its business in an open manner, and its sittings and those of its committees to be open to the public; and to facilitate public participation and involvement in the legislative and other business of Parliament and its committees.¹⁴⁸ The proposed law, *the Natural Resources (Benefit Sharing) Bill*, 2014, also seeks to have established by each affected local community a Local Benefit Sharing Forum comprising of five

¹⁴⁶ No. 17 of 2012, Laws of Kenya.

¹⁴⁷ *Ibid*, S. 87.

¹⁴⁸ Art. 118(1) (a).

persons elected by the residents of the local community.¹⁴⁹ Every affected local community is also to enter into a local community benefit sharing agreement with the respective county benefit sharing committee.¹⁵⁰ Such local community benefit sharing agreement is to include non-monetary benefits that may accrue to the local community and the contribution of the affected organization in realizing the same.¹⁵¹

It is therefore imperative that such communities be involved in the whole process to enable them air their views on the same and where such negative effects are inevitable due to the nature of the exploitation of the natural resources, their appreciation of such impact is the ultimate key to winning social acceptance of these projects.¹⁵² Indeed, it has been observed that participation will bring the most benefit when the process is seen as fair, and processes are seen as more fair if those who are affected have an opportunity to participate in a meaningful way and their opinions are taken seriously.¹⁵³ Indicators of procedural justice have been identified as: presence of local environmental groups, public participation or consultation on local developments and initiatives, Access to information, and responsiveness by public bodies.¹⁵⁴

Indeed, it has been argued that those affected by environmental problems must be included in the process of remedying those problems; that all citizens have a duty to engage in activism on behalf of Environmental Justice; and that in a democracy it is the people, not the government, that are ultimately responsible

¹⁴⁹ S. 31(1).

¹⁵⁰ S. 32(1).

¹⁵¹ S. 32(2).

¹⁵² S. 115 of the *County Governments Act* 2012 provides that Public participation in the county planning processes shall be mandatory and be facilitated through— mechanisms provided for in Part VIII of this Act; and provision to the public of clear and unambiguous information on any matter under consideration in the planning process, including—clear strategic environmental assessments; clear environmental impact assessment reports; expected development outcomes; and development options and their cost implications.

¹⁵³ Amerasinghe, M., et. al., 2008. 'Enabling Environmental Justice: Assessment of Participatory Tools. Cambridge, MA: Massachusetts Institute of Technology. p.3.

Available at <http://web.mit.edu/jcarmin/www/carmin/EnablingEJ.pdf> [Accessed on 08/12/2014].

¹⁵⁴ Todd, H., & Zografos, C., Justice for the Environment: Developing a Set of Indicators of Environmental Justice for Scotland, op. cit. p. 495.

for fair use of the environment.¹⁵⁵ Active and meaningful public participation, therefore, through such means as suggested in the indicators of procedural justice are important in enhancing access to environmental justice for all. For instance, it is imperative for the general public to not only abide by but also promote the realisation of the recent ban of use of polythene papers in Kenya, which took effect on 28th August 2017, since the government efforts to effect this ban is meant to promote the right to clean and healthy environment for all.

8.3 Benefit Sharing Arrangements

Benefit-sharing is a way of integrating the economic, social and environmental considerations in the management of natural resources.¹⁵⁶ In order to protect community and individual interests over land based resources and facilitate benefit sharing, the *National Land Policy*, 2009 recommended that the Government should: establish legal frameworks to recognise community and private rights over renewable and non-renewable land-based natural resources and incorporate procedures for access to and sustainable use of these resources by communities and private entities; devise and implement participatory mechanisms for compensation for- loss of land and damage occasioned by wild animals; put in place legislative and administrative mechanisms for determining and sharing of benefits emanating from land based natural resources by communities and individuals where applicable; make benefit-sharing mandatory where land based resources of communities and individuals are managed by national authorities for posterity; and ensure the management and utilization of land-based natural resources involves all stakeholders.¹⁵⁷

Perhaps as a response to the proposals by the *National Land Policy*, 2009, there is a proposed law, *Natural Resources (Benefit Sharing) Bill*, 2014, which seeks to establish a system of benefit sharing in resource exploitation between resource exploiters, the national government, county governments and local communities; to establish the Natural Resources Benefits Sharing Authority; and for connected purposes. The Bill, if passed into a law, is to apply with respect to the exploitation

¹⁵⁵ Frechette, K.S., 'Environmental Justice: Creating Equality, Reclaiming Democracy', OUP USA (2005). Available at <http://philpapers.org/rec/SHREJC> [Accessed on 10/12/2014].

¹⁵⁶ Government of Kenya, *Sessional Paper No. 3 of 2009 on National Land Policy*, Government Printer, Nairobi, p. 23.

¹⁵⁷ *Ibid*, p. 23.

of petroleum; natural gas; minerals; forest resources, water resources; wildlife resources; and fishery resources.¹⁵⁸ Notably, this Bill provides for guiding principles of benefit sharing which include: transparency and inclusivity; revenue maximization and adequacy; efficiency and equity; accountability and participation of the people; and rule of law and respect for human rights of the people.¹⁵⁹

The proposed law also proposes the establishment of the Benefit Sharing Authority,¹⁶⁰ with the mandate to, *inter alia*: coordinate the preparation of benefit sharing agreements between local communities and affected organizations; review, and where appropriate, determine the royalties payable by an affected organization engaged in natural resource exploitation; identify counties that require to enter into a benefit sharing agreement for the commercial exploitation of natural resources within the counties; oversee the administration of funds set aside for community projects identified or determined under any benefit sharing agreement; monitor the implementation of any benefit sharing agreement entered into between a county and an affected organization; conduct research regarding the exploitation and development of natural resource and benefit sharing in Kenya; make recommendations to the national government and county governments on the better exploitation of natural resources in Kenya; determine appeals arising out of conflicts regarding the preparation and implementation of county benefit sharing agreements; and advise the national government on policy and the enactment of legislation relating to benefit sharing in resource exploitation.¹⁶¹

The Bill also seeks to establish in each county that has a natural resource, a County Benefit Sharing Committee.¹⁶² Benefit sharing could effectively be used to

¹⁵⁸ S. 3.

¹⁵⁹ S. 4.

¹⁶⁰ S. 5.

¹⁶¹ S. 6(1).

¹⁶² S. 28. The functions of the said Committees will include *inter alia*: negotiate with an affected organization on behalf of the County Government prior to entering into a county benefit sharing agreement; monitor the implementation of projects required to be undertaken in the county pursuant to a benefit sharing agreement; determine the amount of money to be allocated to each local community from sums devolved under this Act; convene public forums to facilitate public participation with regard to proposed county benefit sharing agreements prior to execution by the

promote environmental justice among communities and enhance the relationship between the government and communities as well as among communities which in turn enhances peace in the country.

The *Natural Resources (Classes of Transactions Subject to Ratification) Act, 2016*¹⁶³ is meant to give effect to Article 71 of the Constitution of Kenya, 2010 and for connected purposes.¹⁶⁴ It requires certain transactions to be ratified by Parliament if they involve, inter alia, the grant of a right or concession by or on behalf of any person, including the national government, to another person for the exploitation of any natural resource of Kenya.¹⁶⁵ Some of the relevant considerations in deciding whether or not to ratify an agreement are as follows – the applicable Government policy; recommendations of the relevant regulatory agency; comments received from the county government within whose area of jurisdiction the natural resource that is the subject of the transaction is located; adequacy of stakeholder consultation; the extent to which the agreement has struck a fair balance between the interests of the beneficiary and the benefits to the country arising from the agreement; the benefits which the local community is likely to enjoy from the transaction; and whether, in granting the concession or right the applicable law has been complied with.¹⁶⁶

The need for equitable benefit sharing has also been captured in the *Community Land Act 2016*¹⁶⁷ which provides that subject to any other law, natural resources found in community land shall be used and managed- sustainably and productively; for the benefit of the whole community including future generations; with transparency and accountability; and on the basis of equitable

county government; convene public forums for the purpose of facilitating public participation with regard to community projects proposed to be undertaken using monies that accrue to a county government pursuant to this Act; and make recommendations to the county government on projects to be funded using monies which accrue to the county government pursuant to this Act.(s. 29).

¹⁶³ Natural Resources (Classes of Transactions Subject to Ratification) Act, No. 41 of 2016, Laws of Kenya.

¹⁶⁴ See also S. 124A, *Environment (Management and Coordination) Act*, No.8 of 1999, Laws of Kenya.

¹⁶⁵ Article 71(1) (a), Constitution of Kenya.

¹⁶⁶ Sec. 9, Natural Resources (Classes of Transactions Subject to Ratification) Act.

¹⁶⁷ No. 27 of 2016, Laws of Kenya.

sharing of accruing benefits.¹⁶⁸ Further, subject to any other relevant written law, an agreement relating to investment in community land should be made after a free, open consultative process and should contain provisions on the following aspects- an environmental, social, cultural and economic impact assessment; stakeholder consultations and involvement of the community; continuous monitoring and evaluation of the impact of the investment to the community; payment of compensation and royalties; requirement to re-habilitate the land upon completion or abandonment of the project; measures to be put in place to mitigate any negative effects of the investment; capacity building of the community and transfer technology to the community; and any other matters necessary for determining how local communities will benefit from investments in their land.¹⁶⁹ Such an agreement relating to investment in community land should only be made between the investor and the community, and the same must be approved by two thirds of adult members at a community assembly meeting called to consider the offer and at which a quorum of two thirds of the adult members of that community is represented.¹⁷⁰

8.4 Demonstrations and Lobbying

The Constitution guarantees every person's right, peaceably and unarmed, to assemble, to demonstrate, to picket, and to present petitions to public authorities.¹⁷¹ These are important tools that local communities can use to agitate for environmental rights. For example, communities can, by staging demonstrations and protests, stop corporations that are causing environmental pollution.

Environmental lobbying is either direct or indirect. Direct lobbying takes place when lobbyists meet with politicians and provide them with information that is relevant to the legislation on the floor of the House. The main goal is influencing the politician to vote in a certain way on legislation that is consistent with the interests of the group. Indirect lobbying arises where grass root lobbyists recruit community members to promote the interests of their group by holding

¹⁶⁸ Sec. 35, Community Land Act 2016.

¹⁶⁹ Sec. 36(1), Community Land Act 2016.

¹⁷⁰ Sec. 36(2) (3), Community Land Act 2016.

¹⁷¹ Art. 37.

demonstrations or writing or calling politicians with the main objective of rallying the community around a certain issue and to empower them to do something about it.¹⁷² A good example of this is the Maasai land claims initiative whose overall goal is to redress historical injustices and wrongs arising from the appropriation of Maasai ancestral land by the British colonial government following the Maasai Agreements of 1904 and 1911 and the failure by successive Governments of independent Kenya to address the said injustices and wrongs.¹⁷³

In many instances, lobbyists' Non-Governmental Organisations (NGOs) usually facilitate the lobbying and activism and communities can join in.¹⁷⁴ With strong governmental and community support, the NGOs involved can play a vital role in offering environmental education especially where government bodies cannot reach thus filling in the education lacuna that may exist. Effectively carried out demonstrations and lobbying can be a powerful tool in addressing such concerns as climate change, benefits sharing, participation in decision making, addressing the issue of environmental hazards all of which have a direct impact on communities and their lives.

8.5 Judicial Activism

There is no clear definition of some of the rights guaranteed in the Constitution of Kenya regarding the environment and thus it is up to the courts to give guidance in certain matters. There is therefore, a need for judicial activism so that jurisprudence in this area can be improved. For instance, there is no explanation of what, for example, amounts to a 'clean and healthy environment.' As noted by one author,¹⁷⁵ it took the court's active role to delineate this right in *Uganda*

¹⁷² Rolli, E., 'Environmental Lobbyist', available at <http://www.sage.wisc.edu/careers/profiles/pdf/Environmental%20Lobbyist.pdf> [Accessed on 22/12/2014]. p. 1.

¹⁷³ Koissaba, B.O., 'Maa Civil Society Forum: Issues Arising From Anglo - Maasai Treaties Of 1904 And 1911'. p.4.

¹⁷⁴ See generally, Ndahinda, F.M., 'Indigenoussness in Africa: A Contested Legal Framework for Empowerment of 'Marginalized' Communities'. Springer Science & Business Media, Apr 27, 2011. Available at https://books.google.co.ke/books?id=ayiB1Ngvd4C&dq=two+Maasai+agreements+of+1904+and+1911&source=gbs_navlinks_s [Accessed on 26/12/2014].

¹⁷⁵ Twinomugisha, B.K., 'Some Reflections on Judicial Protection of the Right to a Clean and Healthy Environment in Uganda', *3/3 Law, Environment and Development Journal* (2007), p. 244 at pg. 249.

Electricity Transmission Co Ltd v De Samaline Incorporation Ltd,¹⁷⁶ where the court expanded the meaning of a clean and healthy environment as follows;

'I must begin by stating that the right to a clean and healthy environment must not only be regarded as a purely medical matter. It should be regarded as a holistic social-cultural phenomenon because it is concerned with physical and mental well-being of human beings... a clean and healthy environment is measured in both ethical and medical context. It is about linkages in human well-being. These may include social injustice, poverty, diminishing self-esteem, and poor access to health services. That right is not restricted to a clinical model...' (Emphasis added)

Notably, the *Environment and Land Court Act* gives the court *suo moto* jurisdiction.¹⁷⁷ It is arguable that the section allows judges to engage in judicial

¹⁷⁶ Misc. Cause No. 181 of 2004 (High Court of Uganda).

¹⁷⁷ S.20; See also *Waweru v Republic*, Nairobi High Court, Miscellaneous Civil Application No. 118 of 2004 KLR (E&L) 677 which called for involvement of everyone, including courts, in protection and restoration of the environment and its resources. This has been the trend around the world. For instance, in the Philippine case of *Minors Oposa v. Secretary of the Department of Environmental and Natural Resources*, 33 ILM 173 (1994), the Supreme Court of the Philippines found the following: The right to a clean environment, to exist from the land, and to provide for future generations are fundamental; There is an intergenerational responsibility to maintain a clean environment, meaning each generation has a responsibility to the next to preserve that environment, and children may sue to enforce that right on behalf of both their generation and future generations; The Philippine Constitution requires that the government "protect and promote the health of the people and instill health consciousness among them." (see Section 15, Article II).

A group of children, including those of renowned environmental activist Antonio Oposa, brought this lawsuit in conjunction with the Philippine Ecological Network, Inc. (a non-profit organisation) to stop the destruction of the fast disappearing rain forests in their country. The plaintiff children based their claims in the 1987 Constitution of the Philippines, which recognises the right of people to a "balanced and healthful ecology" and the right to "self-preservation and self-perpetuation" (see Section 16, Article II). (Child Rights International Network, "Minors Oposa v. Secretary of the Department of Environmental and Natural Resources," available at <https://www.crin.org/en/library/legal-database/minors-oposa-v-secretary-department-environmental-and-natural-resources/> [Accessed on 25/08/2017]

activism to safeguard environmental rights by ensuring sustainable development using the devices envisaged in Article 159 of the Constitution to ease access to justice. Courts may therefore act without necessarily waiting for filing of any cases on public interest litigation so as to promote environmental justice.

8.6 Role of Academia

The institutions of learning around the country can play an important role in promoting environmental justice. They can be useful channels through which relevant information on environmental matters and natural resources can reach the communities in means that such communities can appreciate. Such information would not only be useful in assisting the communities know how best the resources at their disposal can be utilised for betterment of their livelihoods but would also be useful in enabling the communities to understand the existing legal and institutional frameworks on natural resources management and thus be able to meaningfully engage the authorities during public participation opportunities. Coming up with study programmes that focus on the specific resources in the country and collaborating with funding organisations would be useful in ensuring that a reasonable number of members of the public in general and specific communities in particular are well versed with the exploitation and management of the various natural resources, thus enabling them help the larger community in appreciating the implications of natural resources management.

8.7 Advocacy

The role of civil society, Non-Governmental Organisations (NGOs) and other faith-based organisations has been prominent in agitating for effective and efficient natural resources management. It has been noted that Environmental justice activists call for policy-making procedures that encourage active community participation, institutionalise public participation, recognise community knowledge, and utilise cross-cultural formats and exchanges to enable the participation of as much diversity as exists in a community.¹⁷⁸

¹⁷⁸ Schlosberg, D., 'Reconceiving Environmental Justice: Global Movements and Political Theories', op. cit. at p. 522.

8.8 Public Interest Litigation

Public interest litigation is one viable way of enhancing environmental justice in Kenya. When people are given opportunities to move to judicial and other non-judicial forums, natural resource managers are most likely to manage resources more productively, efficiently, sustainably and effectively. The Constitution provides for the enforcement of environmental rights and states that if a person alleges that a right to a clean and healthy environment recognised and protected under Article 42 has been, is being or is likely to be, denied, violated, infringed or threatened, the person may apply to a court for redress in addition to any other legal remedies that are available in respect to the same matter.¹⁷⁹ Further constitutional provisions that are useful in the promotion of the right under Article 70 are to be found under Articles 22¹⁸⁰, 23¹⁸¹ and 48¹⁸² thereof. These are important provisions that are aimed at promoting environmental justice for every person through use of public interest litigation.

For instance, in December 2010 the Africa Network for Animal Welfare (ANAW), a Kenya non-profit organization, filed a case in the East Africa Court of Justice (EACJ) challenging the Tanzanian government's decision to build a commercial highway across the Serengeti National Park. On June 20, 2014, the court ruled that the government of Tanzania could not build a paved (bitumen) road across the northern section of the Serengeti, as it had planned. It issued a permanent injunction restraining the Tanzanian government from operationalising its initial proposal or proposed action of constructing or maintaining a road of bitumen standard across the Serengeti National Park subject to its right to undertake such other programmes or initiate policies in the future which would not have a negative impact on the environment and ecosystem in the Serengeti National

¹⁷⁹ Art. 70(1).

¹⁸⁰ Art. 22(1) guarantees every person's right to institute court proceedings claiming that a right or fundamental freedom in the Bill of Rights has been denied, violated or infringed, or is threatened. Such persons need not prove locus standi to institute the suit (Art. 22(2)).

¹⁸¹ Art. 23 confers the High Court with jurisdiction, in accordance with Art. 165, to hear and determine applications for redress of a denial, violation or infringement of, or threat to, a right or fundamental freedom in the Bill of Rights.

¹⁸² Art. 48 obligates the State to ensure access to justice for all persons and, if any fee is required, it be reasonable and not impede access to justice.

Park.¹⁸³ Such decisions show the crucial role that courts can play in promoting environmental justice through stopping any government development plans that might negatively affect the environment or the livelihoods of communities.

In the case of *Lereya & 800 others v AG & 2 others*,¹⁸⁴ the plaintiff and others being the affected residents of Marigat Division of Baringo District sued the AG, Minister for Environment and Natural Resources and the National Environment Management Authority seeking the eradication of a weed plant on their land. They averred that the Food Agricultural Organization (FAO) introduced the weed, *Propis Juliflora* in Ng'ambo location in Marigat Division to curb desertification. The weed, which is invasive in nature allegedly, went out of control and caused harm to humans, livestock and the environment. The suit was objected to on grounds, *inter alia*, that the suit which was brought more than 20 years after the introduction of the plant was time barred and secondly that the plaintiffs had no specific interest in the subject matter and therefore lacked locus standi in the matter. The Court held that the preliminary objection on the ground of time limitation was not tenable because the weed was invasive in nature and its effects in the environment were long-term or continuing. Secondly, on the basis of section 3(3) and (4) of EMCA the preliminary objection on the ground of lack of locus standi had no merit.¹⁸⁵ However, this case was dismissed because the government had not been notified of the proceedings as required under the law.

The foregoing case is a good example of a scenario where the concerted efforts by the affected community to petition the court to enforce the right to clean and healthy environment were thwarted by procedural technicalities. Such technicalities should be addressed so as to ensure that the locals are able to access justice. As already indicated, procedural justice is not limited to environmental justice, but cuts across the whole spectrum of justice.¹⁸⁶ The basis of redress is the

¹⁸³ *African Network for Animal Welfare (ANAW) v The Attorney General of the United Republic of Tanzania*, Reference No. 9 of 2010.

¹⁸⁴ Nairobi HCCC No.115 of 2006 KLR(E&L) P. 761

¹⁸⁵ Previously, such rights as to petition court were unheard of and environmental rights cases were thrown out of the courts on technical grounds. Such infamous cases include, *inter alia*, *Wangari Maathai –v- Kenya Times Media Trust*(1989) 1KLR (E&L) which was dismissed for lack of standing.

¹⁸⁶ Todd, H., & Zografos, C., *Justice for the Environment: Developing a Set of Indicators of Environmental Justice for Scotland*, op. cit. p. 497.

obligation on the State to ensure access to justice for all persons at reasonable fees so as not to impede access to justice.¹⁸⁷ Further, the Constitution states that in exercising judicial authority, the courts and tribunals are to ensure *inter alia*, that justice is done to all irrespective of status; justice is not delayed; and that justice is administered without undue regard to procedural technicalities.¹⁸⁸

In the past, public interest litigation has successfully been used to safeguard environmental rights. For instance, in *Hassan & 4 others v KWS*,¹⁸⁹ the applicants sought orders to restrain the respondent from removing and or dislocating a rare and endangered animal called Hirola from its natural habitat in Arawale to the Tsavo National Park on the grounds that it was a gift to the people of the area and should be left there. The respondent contended that the application was seeking to curtail the respondent from carrying out its express statutory mandate.

The court in granting the temporary injunction held, *inter alia*, that although Section 3A (d), (e) and (f) of the *Wildlife (Conservation & Management) Act* empowered the Respondent to conserve wild animals in their habitat, the respondent would be acting outside its powers if it were to move the animals away from their natural habitat without the express consent of those entitled to the fruits of the land which includes flora and fauna.

9.0 Conclusion

Environmental rights can best be realised through the advocacy of rights to access to information, to consultation in the decision-making process and to access to courts, revamped in an environmental setting. Environmental justice in Kenya is an ideal that can be achieved. Already there are laws, policies and institutions that can be used as platforms for enhancing access to justice. However, due to the many and divergent interests (including local communities, investors and national and county governments) and high stakes involved in natural resources governance, the road to environmental justice may not be easy. It will require the

¹⁸⁷ Art. 48.

¹⁸⁸ Art. 159 (2).

¹⁸⁹ Nairobi HCCC No2959 of 1996 KLR (E&L) p. 214,

concerted efforts of all parties concerned to make environmental justice in Kenya a reality.

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