

Journal of Conflict Management & Sustainable Development



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Editor's Note

Welcome to the first Issue of the second Volume of the *Journal of Conflict Management and Sustainable Development* (Journal of CMSD, Vol.2, Iss. No.1).

The Journal of CMSD is meant to highlight and canvass current and emerging debates on the themes of conflict management and sustainable development.

While sustainable development agenda has become the yardstick of development sustainability globally, there are factors and intervening issues that ought to be addressed to ensure that the same becomes a reality for countries around the world.

This is especially important in light of the *Sustainable Development Goals (SDGs) of the 2030 Agenda for Sustainable Development* — adopted by world leaders in September 2015 at the United Nations Summit, which envisions a continuing debate on the goals.

The current Issue of the Journal carries articles revolving around the themes of, inter alia, Conflict Management; Environmental Conflicts; Gender and Non Discrimination; Social Justice and Human Rights; the Environment and Sustainable Development in general, amongst others, which are all key to the global efforts geared towards realisation of sustainable development goals.

The current Issue also recognises the need for an integrated approach to the realisation of socio-economic rights of all people as a step towards realisation of the sustainable development agenda.

Thus, some of the articles explore topics based on this theme in a bid to promote a holistic approach to sustainable development.

The Editor hopes that the articles contained in the current Issue will evoke some responses on the matters raised and some further suggestions on the

way forward, since sustainable development envisages a collective responsibility and efforts from all.

Dr. Kariuki Muigua, Ph.D.; FCIArb; Chartered Arbitrator; Accredited Mediator.

Managing Editor. May, 2018

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“Promoting Sustainable Development Through Conflict Management in The Healthcare System in Kenya”

By: Dr. Wachuka Njoroge,* Dr. Steve Gachie,† Alvin Gachie,‡ Wambaire Cikũ§

Abstract

This paper analyses the issue of conflict prevention and management in the healthcare system through expansion of social health insurance, arguing that through taking up such efforts, the government and all stakeholders involved would contribute effectively to promoting sustainable development through ensuring adequate standards of health for all. Proposals to manage conflict through reforming Kenya’s healthcare system include establishment of a national health services commission, improved access to primary health care, expansion of social health insurance, and strengthening regulatory boards and unions. This paper argues that one course of action to improve the healthcare system and reduce inequalities and competing interests, is through expanding the health insurance system. One proposal is to step up efforts to increase enrolment of members of the public to the National Hospital Insurance Fund, and also an improvement of the benefits offered by the National Hospital Insurance Fund, to overall contribute to Sustainable

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The authors are grateful to Terri Wanjiku for her work towards transcription of discussions on the subject, which formed the heart of this paper.

Development Goal 3 to ensure healthy lives and promote well-being for all at all ages.

List of Abbreviations and Acronyms

NHIF	National Hospital Insurance Fund
SDGs	Sustainable Development Goals

1.0 Introduction

the strikes came alongside In 2016 and 2017, over 5,000 doctors and more than 27,000 nurses in Kenya went on strike in separate disputes with the government, paralysing activities at around 2,500 public health facilities.¹ Apart from highlighting the working conditions for healthcare professionals, the strikes also showed that majority of Kenyans cannot afford private healthcare, as at least 12 people died and health conditions worsened for those who would normally access the then affected public health facilities.² News of reports of governance challenges within the government.³ Also

¹ Humphrey Malalo, 'Kenyan Government Doctors Go on Strike, Demand Honoring of 2013 Pay Deal' *Reuters* (Nairobi, Kenya, 5 December 2016) <<https://www.reuters.com/article/us-kenya-strike/police-fire-tear-gas-to-disperse-striking-kenyan-doctors-idUSKBN13U18F>>; BBC, 'Kenya Doctors End Strike After Signing Government Deal' *BBC News* (Nairobi, Kenya, 14 March 2017) <<http://www.bbc.com/news/world-africa-39271850>> accessed 23 January 2018; Al Jazeera, 'Kenya Doctors End Strike After Deal with Government' *Al Jazeera* (Nairobi, Kenya, 15 March 2017) <<http://www.aljazeera.com/news/2017/03/kenya-doctors-strike-deal-government-170314084246054.html>> accessed 23 January 2018; The Lancet, 'Kenya's Nurses Strike Takes Its Toll on Health-Care System' (2017) 389 *The Lancet* 2350.

² Al Jazeera (n 5); Audrey Wabwire and Abdullahi Abdi, 'Kenya's Government Should Resolve Doctors' Strike' (*Human Rights Watch*, 5 February 2017) <<https://www.hrw.org/news/2017/02/05/kenyas-government-should-resolve-doctors-strike>> accessed 23 January 2018; *The Lancet* (n 5).

³ Al Jazeera (n 5); Maureen Kakah and Eunice Kilonzo, 'Kenya Doctor's Union Officials Get One-Month Jail Term Over Strike' *The East African* (Nairobi, Kenya, 12 January 2017)

reported was the need for improvement of the conditions in public health facilities, confirming claims that the public healthcare system in Kenya is overburdened and underfunded.⁴

Since the promulgation of the Constitution of Kenya of 2010 there have been various strike actions apart from the 2016/2017 healthcare professionals' strikes.⁵ The 100-day strike in 2016/2017 ended with a deal between the healthcare professionals and the government.⁶ However, the underlying issues that plague the health sector in Kenya and other developing countries across the world, including the nexus between poverty, health and development, remain. The healthcare professionals maintained that the strike was not just about money, but rather was motivated by a principled stance to demand for high quality healthcare for the citizens as guaranteed by the Constitution of Kenya 2010.⁷ The strikes have shown how conflict of

<<http://www.theeastafrican.co.ke/news/Kenya-Doctors-union-officials-get-one-month-suspended-sentence/2558-3515304-kcrdniz/index.html>> accessed 23 January 2018.

⁴ BBC (n 5); Jacob Kushner, 'Kenya's Health System on the Verge of Collapse as Doctors' Strike Grinds on' *The Guardian* (Nairobi, Kenya, 13 February 2017) <<http://www.theguardian.com/world/2017/feb/13/kenyas-health-system-verge-of-collapse-doctors-strike-pay-staffing-union-leaders-jail>> accessed 23 January 2018.

⁵ *Okiya Omtatah Okiiti v Attorney General & 5 others* [2015] Employment and Labour Relations Court of Kenya at Nairobi Petition No. 70 of 2014, eKLR.

⁶ Katharine Houreld, 'Kenya Doctors End Three-Month Strike After Deal with Government' *Reuters* (Nairobi, Kenya, 14 March 2017)

<<https://www.reuters.com/article/us-kenya-strikes/kenya-doctors-end-three-month-strike-idUSKBN16LIZ5>>; Christabel Ligami, 'Kenyan Doctor's Pay to Rival South Africa and Namibia's' *The East African*

<<http://www.theeastafrican.co.ke/news/Kenyan-doctor-s-new-pay-rival-South-Africa-Namibia-/2558-3859730-148lqr8z/index.html>> accessed 23 January 2018.

⁷ Bernard Olayo, 'Doctors' Strike Is Perfect Chance to Redesign Kenya's Healthcare System' *Business Daily* (Nairobi, Kenya, 12 March 2017)

<<https://www.businessdailyafrica.com/analysis/redesign-Kenya-healthcare-system/539548-3846760-twimky/index.html>> accessed 23 January 2018; Eyder Peralta, 'The Doctors Aren't in At Kenya's Public Hospitals' (*NPR.org*, 5 January 2017) <<https://www.npr.org/sections/goatsandsoda/2017/01/05/508369378/the-doctors-arent-in-at-kenyas-public-hospitals>> accessed 23 January 2018.

interests if left unaddressed, coupled with inadequate dialogue between the holders of such interests, can lead to a live dispute with considerable costs to the parties, and most importantly to the members of the public.⁸

Proposals to manage this conflict through reforming Kenya's healthcare system include establishment of a national health services commission, improved access to primary health care, expansion of social health insurance, and strengthening regulatory boards and unions.⁹ This paper analyses the issue of conflict prevention and management in the healthcare system through expansion of social health insurance, arguing that through taking up such efforts, the government and all stakeholders involved would contribute effectively to promoting sustainable development through ensuring adequate standards of health for all.

Healthcare systems consist of three essential aspects: health facilities, healthcare professionals and the service delivery mechanisms, finance and insurance mechanisms to fund the service delivery, and the healthcare itself provided to patients.¹⁰ Conflict may arise in the healthcare system at a vertical level or in a horizontal level. In the vertical plane, for example, in private healthcare systems, there may be conflicting interests between the hospital management and their rules of operation, and the healthcare providers in the lower steps of the managerial chain. At the horizontal level, there may be conflict between public and private health facilities and their interests towards promoting community health. This description of situations of conflict in the healthcare system is not exhaustive. Conflict between healthcare professionals and the regulatory boards and unions, as well as conflict between the healthcare professionals and regulatory boards and unions on

⁸ Brigid Chemweno and Paul Ogemba, 'Apology to Kenyans as Doctors' Strike Ends with Return-to-Work Formula' *The Standard* (Nairobi, Kenya, 15 March 2017 <<https://www.standardmedia.co.ke/article/2001232717/apology-to-kenyans-as-doctors-strike-ends-with-return-to-work-formula>> accessed 23 January 2018.

⁹ Bernard Olayo (n 11).

¹⁰ Narumi Eguchi, 'The Trend of Public Perception of Healthcare in Japan - From the 4th Perception Survey of Japanese Healthcare' (2013) 56 *Japan Medical Association Journal* 267.

the one side, and the government on the other side, also arises and has potential to destabilise the national healthcare system.

In a private healthcare system, a hospital is considered a business, where the first consideration is the profit generated from the business activities. For example, laboratory services carried out by the in-hospital laboratory are charged for with the overarching aim of gaining from the transaction for profit. However, staff working in the lab, or doctors carrying out their services may consider optimal service delivery and promotion of satisfactory standards of public health as their foremost interest. A study on the quality of medical laboratory service provision in Kenya found that the main motive of laboratory service providers in public facilities had in order to provide service was reliability of results, while the private laboratory owners rated profitmaking as their most important motivating factor.¹¹ The same study found that faith-based laboratory services providers were most motivated by improving the health status of the community.¹²

Public hospitals have a mandate to provide services of adequate quality at a fee and location that promotes access to health to the general public. Faith-based health facilities may have another mandate of influencing the religious views of patients. In private health facilities, conflict may arise between the interests of serving the public and making profits. Private health facilities, with a primary aim of generating profit from the enterprise, indeed also have a mandate to provide healthcare, but through the fees charged and freedom to select a location to place the facility, may at times disregard the ethos of the public healthcare system of improving access to healthcare. It must be stressed that this does not intend to demean the contribution of private health systems in improving public health in a country, but rather explores ways in which community health may be ensured to further advance the goal of eliminating inaccessibility to public health systems.

¹¹ Wachuka Njoroge, 'Assessment of the Quality of Medical Laboratory Service Provision in Kenya' (PhD Thesis, Kenyatta University 2014) 76.

¹² Wachuka Njoroge (n 15).

2.0 International and National Provision for Promotion of Health for Sustainable Development

Sustainable development refers to the idea of achieving development for the current generation without compromising the development of future generations.¹³ Governments across the world including Kenya through Vision 2030, have adopted this approach of striving for sustainable development.¹⁴ The global goals for sustainable development, referred to as the Sustainable Development Goals (SDGs), are seventeen interconnected goals, where the achievement of one has an impact on all others.¹⁵ While all the goals contribute to promoting public health, SDG 3 on Good Health and Wellbeing plays a central role in this issue of conflict management in healthcare systems.¹⁶

The meaning of sustainable development has over the years expanded from the connotations of environmental issues attached to the word 'sustainable', and the economic and political issues linked with the word 'development'.¹⁷ The 1992 United Nations Conference on Environment and Development resulted in the Rio Declaration on Environment and Development and Agenda 21, a global programme of action on sustainable development which, among other issues, acknowledged that all countries "must address the

¹³ World Commission on Environment and Development, 'Report of the World Commission on Environment and Development: Our Common Future (Brundtland Report)' (World Commission on Environment and Development 1987).

¹⁴ Republic of Kenya, 'Kenya Vision 2030' <https://www.afidep.org/?wpfb_dl=70> accessed 21 November 2015.

¹⁵ United Nations Sustainable Development Summit, 'Sustainable Development Goals'.

¹⁶ 'Sustainable Development Goal 3: Ensure Healthy Lives and Promote Well-Being for All at All Ages' (*Sustainable Development Knowledge Platform*) 3 <<https://sustainabledevelopment.un.org/sdg3>> accessed 25 January 2018.

¹⁷ Yasmin von Schirnding and Catherine Mulholland, 'Health in the Context of Sustainable Development' (World Health Organization 2002) Background Document 7

<http://www.who.int/mediacentre/events/HSD_Plaq_02.6_defl.pdf> accessed 22 January 2018.

primary health needs of the world's population, since they are integral to the achievement of the goals of sustainable development and primary environmental care".¹⁸ Chapter 6 of Agenda 21 recognised the importance of intersectoral efforts, and called for increased coordination between "citizens, the health sector, the health-related sectors and relevant non-health sectors (business, social, educational and religious institutions) in solutions to health problems."¹⁹ This supports the argument for improved coordination between members of the public, the government and the private sector, to collectively contribute to achieving adequate standards of health.

From 1992 to date (2018), the world has witnessed various successes in the health sector including increases in the average life expectancy, declines in infant and child mortality rates, and decreases in the proportion of underweight and stunted children.²⁰ However, these statistics are underrepresented in many countries in Sub-Saharan Africa, where, for example, one-third of deaths among children under 5 years occurred after the first month of life.²¹ There remain inequalities both between and within countries in the achievement of universal public health. In Kenya, efforts such as the Beyond Zero campaign pioneered by the First Lady of Kenya, Margaret Kenyatta, have improved maternal health and reduced the number of deaths of children through facilitating a 50% reduction in new child infections of HIV.²²

¹⁸ 'Agenda 21 - Chapter 6 - Protecting and Promoting Human Health'
<<http://www.un-documents.net/a21-06.htm>> accessed 22 January 2018.

¹⁹ Ibid.

²⁰ Yasmin von Schirnding and Catherine Mulholland (n 21) 13.

²¹ World Health Organization (WHO), 'World Health Statistics 2017: Monitoring the Health for the SDGs, Sustainable Development Goals' (World Health Organization 2017) 30

<<http://apps.who.int/iris/bitstream/10665/255336/1/9789241565486-eng.pdf?ua=1>>
accessed 25 January 2018.

²² Government of the Republic of Kenya, 'Impressive Scorecard for Beyond Zero as First Lady Unveils New Roadmap to Eliminate Mother-to-Child HIV Transmission' (*The Presidency*, 13 June 2017) <<http://www.president.go.ke/2017/06/13/impressive->

Approximately 50% of the people in Sub-Saharan Africa do not have access to adequate healthcare systems, and the health infrastructure in many African countries is inadequate, despite provisions in the law and recognition of the right to health.²³ The Constitution of Kenya of 2010 states that “every person has the right to the highest attainable standard of health, which includes the right to health care services, including reproductive health care”, and “to social security”.²⁴ With specific reference to children, Article 53 provides that every child has the right to healthcare.²⁵ In addition, Article 56 mandates the State to put in place affirmative action programmes designed to ensure that minorities and marginalised groups have reasonable access to health services.²⁶ Some of these efforts include a duty for the national government to establish and use an Equalisation Fund to provide basic services including health facilities “to marginalised areas to the extent necessary to bring the quality of those services in those areas to the level generally enjoyed by the rest of the nation, so far as possible”.²⁷

The provision of healthcare services is primarily the responsibility of the modern government, despite the fact that the first health facilities were faith-based.²⁸ In Kenya, governance challenges have plagued the provision of health services to members of the public at both the national level and the county level, acknowledging the distribution of functions between the national government and the county governments under the Constitution of Kenya of

scorecard-for-beyond-zero-as-first-lady-unveils-new-roadmap-to-eliminate-mother-to-child-hiv-transmission/> accessed 25 January 2018.

²³ Erin McCandless and Tony Karbo (eds), *Peace, Conflict, and Development in Africa: A Reader* (University for Peace 2011) 108 – 109

<http://www.upeace.org/pdf%5CREADER_webpages.pdf> accessed 23 January 2018.

²⁴ Constitution of Kenya 2010, art 43(1)(a), 43(1)(e).

²⁵ Ibid, Art 53(1)(C).

²⁶ Ibid, Art 56(E).

²⁷ Ibid, Art 204(2).

²⁸ Steve Gachie, ‘Environmental Communication: A Case Study of Wayfinding in a Hospital Environment in Kenya’ (PhD Thesis, University of Nairobi 2015) 50–66.

2010.²⁹ National referral health facilities and health policy are under the mandate of the national government while county health services including county health facilities and promotion of primary health care are functions of the county governments.³⁰ Despite the political issues involved with the devolution of healthcare services to the county level while retaining some functions at the national level, the underlying issues some of which contributed to the 2016/2017 healthcare professionals' strikes must be addressed through effective conflict prevention and management, and to contribute to sustainable development.³¹

3.0 Need for Increased Coordination Between Public and Private Entities in The Healthcare System in Kenya

During the 2016/2017 healthcare professionals' strikes, Kenyatta National Hospital, the largest public health facility in Kenya, was serviced by military doctors who at the time could only handle the worst cases of emergencies, leaving patients with serious conditions who did not have health insurance, in dire conditions.³² At the time, private health facilities did not, and neither are they required to, offer emergency services at no cost or at reduced cost to members of the public. This conflict between the core interests of public and private health facilities arises because healthcare services, generally considered a responsibility of the government in its service to the public, are provided by private health facilities. Some services offered by private health

²⁹ *International Legal Consultancy Group & Another v Ministry of Health & 9 Others* [2016] High Court of Kenya at Nairobi Petition No. 99 of 2015, eKLR.

³⁰ Constitution of Kenya (n 28), Fourth Schedule, art 185(2), 186(1) and 187(2); *Republic v Transition Authority & Another Ex parte Kenya Medical Practitioners, Pharmacists & Dentists Union (KMPDU) & 2 others* [2013] High Court of Kenya at Nairobi JR No. 317 of 2013, eKLR.

³¹ East Africa Centre for Law and Justice, 'The Genesis of the Doctors' Strike' (East Africa Centre for Law and Justice, 1 March 2017) <<http://eacj.org/general/23-general-feature-articles/225-the-genesis-of-the-doctors-strike.html>> accessed 23 January 2018.

³² Jacob Kushner (n 8).

facilities, while they could be offered at a lower cost, would be difficult to discount considering that the idea of private health facilities is founded on the nexus between profit-making and public service delivery. Conflict may exist, therefore, between public interest and private interest.

What may be said about how to resolve this conflict? Imagine you have a car accident outside a well-known private hospital. Doctors have taken the Hippocratic Oath and would ideally be called upon according to this and as far as is reasonably possible, to take immediate steps to ensure that your life is saved, for example, through first aid, and then transfer you to a place where you can be taken care of.³³ This, in the ideal world, would happen whether or not you have paid the admission fees to the health centre. In certain cases where the patient has had an accident and has not made payment to the health centre, access has been denied to treatment that could have been life-saving. Conflict between these two interests may result in doctors, who have taken the Hippocratic Oath, opting to offer services in a situation of emergency, for no fee. This would be at odds with the hospital policy for emergency situations, where certain fees may be required to be catered for even in emergency situations. However, as the Constitutional Court of South Africa in *Soobramoney v Minister of Health (Kwazulu-Natal)* stated, there is a:

*“...dichotomy in which a changing society finds itself and in particular the problems attendant upon trying to distribute scarce resources on the one hand and satisfying the designs of the Constitution with regard to the provision of health services on the other. It puts us in the very painful situation in which medical practitioners must find themselves daily when the question arises: “Should a doctor ever allow a patient to die when that patient has a treatable condition?”*³⁴

³³ Kenya Association of Physicians, ‘Hippocratic Oath’ (Kenya Association of Physicians, 2010)

<http://kapkenya.org/index.php?option=com_content&view=article&id=72:hippocratic-oath&catid=38:site-content> accessed 25 January 2018.

³⁴ *Soobramoney v Minister of Health (Kwazulu-Natal)* [1997] Constitutional Court of South Africa CCT32/97 [1997] ZACC 17; 1998 (1) SA 765 (CC); 1997 (12) BCLR 1696.

Resource limitations remain a challenge across the world and more so in Sub-Saharan Africa, for members of the public to access healthcare, and the impacts of poverty on health are acknowledged.³⁵ It is evident how global this issue is when discussions around the United States of America's Patient Protection and Affordable Care Act of 2010 are taken in focus, showing that reform of a healthcare system is not without challenge, but instead is a process through which all stakeholders should coordinate efforts to work towards an ideal situation where all citizens have access to affordable healthcare delivery for instance through wide health insurance coverage.³⁶ In *Luco Njagi & 21 others v Ministry of Health & 2 others*,³⁷ the High Court of Kenya at Nairobi found that while the ideal situation would be that members of the public could access private health facilities on account of inadequate conditions at public health facilities, the Court could not order the government to allow the petitioner patients in need of dialysis to access the private health facilities. The Court held the view that because the right to health should be achieved progressively, government policy of how to achieve this right should be formulated in consideration of available resources. The Court followed the decision by the Constitutional Court of South Africa in *Soobramoney v Minister of Health (Kwazulu-Natal)*,³⁸ where a 41-year-old unemployed man suffering from diabetes, heart disease and kidney failure, could not access dialysis from a public health facility as a result of insufficient equipment which was in poor condition. Similar to the Constitution of South

³⁵ Yasmin von Schirnding and Catherine Mulholland (n 21) 23 – 25; Republic of Kenya, 'Kenya Health Policy 2014 - 2030' (Ministry of Health 2014) 7 <https://www.afidep.org/?wpfb_dl=80> accessed 25 January 2018.

³⁶ Stephen Shortell, Lawrence Casalino and Elliott Fisher, 'Implementing Accountable Care Organizations' (University of California at Berkeley 2010) Policy Brief <https://www.law.berkeley.edu/files/chefs/Implementing_ACOs_May_2010.pdf> accessed 23 January 2018.

³⁷ *Luco Njagi & 21 others v Ministry of Health & 2 Others* [2015] High Court of Kenya at Nairobi Petition No. 218 of 2013, consolidated with Petition No. 451 of 2013, eKLR.

³⁸ *Soobramoney v Minister of Health (Kwazulu-Natal)* (n 38).

Africa, the Constitution of Kenya of 2010 also provides that no one shall be denied emergency medical treatment.³⁹

Different situations in the two jurisdictions and different levels of realisation of the right to the highest attainable standard of health do not provide a varying result from the courts: that the right to access healthcare services must be achieved progressively, and that the courts cannot mandate the State to immediately open the flood-gates for members of the public to access services from private health facilities. These cases also show that the issue is alive not only in Kenya but in other countries in the Global South, on how to address issues of affordability of healthcare services and allow full realisation of the right to health and promote sustainable development.

Issues of how to allocate resources to health facilities are alive not only in the Global South, but all over the world. In the United Kingdom, the Court of Appeal of England and Wales decided the case of *R v Cambridge Health Authority*,⁴⁰ where a 10-year-old girl with leukaemia was denied public funding for treatment administered privately as a result of unavailability of beds in a public hospital willing to carry out the treatment. The Court while recognising that it was a sad affair, found that the Cambridge Health Authority was within its powers to determine how to allocate funds and it was therefore within the law to reject the girl's father's request for funding.

An examination of the history of development of the modern hospital may shed light on the distinction between the hospital as a public facility and the hospital as a private facility.⁴¹ The modern hospital as developed in the Global North, evolved from guesthouses run by charitable members of the society on a communal basis – including establishments run by the early Christians – to what now represent 'centres of scientific excellence'.⁴² While the Global

³⁹ Constitution of the Republic of South Africa 1996, art 27(3); Constitution of Kenya (n 28), art 43(2).

⁴⁰ *R v Cambridge Health Authority, ex parte B* [1995] Court of Appeal of England and Wales 2 All ER 129.

⁴¹ Steve Gachie (n 32) 50–66.

⁴² Guenter Risse, *Mending Bodies, Saving Souls: A History of Hospitals* (Oxford University Press 1999).

South has a large proportion of the world's population, there are insufficient hospitals, inadequate technology, and fewer than required trained healthcare professionals to care for all. Even in Kenya, while both private and public hospitals contribute to the same common goal of improving the health of citizens, patients with more means often have the advantage in various situations of having better technology and skill in a private hospital than in a public hospital. However, this is not always the case, and some public hospitals in Kenya such as some level 5 and level 6 public health facilities, have world-class facilities and top-notch health professionals, giving patients adequate attention and care.

What do we do, then, to address this conflict? Do we then punish private hospitals because they are not serving people who walk in for free? This would be an untenable situation because of the immense contribution of these private enterprises to addressing a gap in healthcare systems across the world. Or do we increase the number of public hospitals? This may prove to be a challenge in many countries where there is insufficient capacity to build, equip, and maintain public health facilities. Do we increase the funding for public hospitals? While certain policy and legal steps may be taken to increase the healthcare budget from national and sub-national governments to better equip and maintain public health facilities, some governments may not have sufficient resources in their treasuries to increase such funding. However, one solution may lie in promotion of public-private initiatives to further incentivise private health facilities to satisfactorily offer healthcare services at an affordable rate, to promote access to healthcare.

One such way is through expanding health insurance services in Kenya, and up-scaling registration efforts to health insurance schemes.⁴³ A study carried out in Japan showed that 80% of the members of the public held the perception that there should be equality in healthcare provision, where healthcare received should be the same regardless of income.⁴⁴ Adopting such findings to the situation in Kenya, ideally members of the public should have

⁴³ Bernard Olayo (n 11).

⁴⁴ Narumi Eguchi (n 14) 272.

access to adequate standards of health regardless of their socio-economic status. In Kenya, the National Hospital Insurance Fund (NHIF) is offered to and accessible by all. There is a nationwide interest in ensuring members of the public are enrolled on the NHIF scheme. However, enrolment in the NHIF scheme remains low. This suggests low levels of awareness about the system and its benefits for all Kenyans, especially the poor and marginalised. To address this, increased advocacy for the NHIF scheme may increase the levels of awareness and encourage enrolment. This would boost access to healthcare and contribute to achieving good health for all.

Governments, public health institutions and public health facilities on one hand should coordinate efforts with private health facilities and other private institutions on the other hand, to offer better healthcare services in Sub-Saharan Africa.⁴⁵ Through such public-private initiatives, it may be possible for citizens to access private hospitals using public funds. This may pose a challenge to private facilities, if the process of receiving the funds from public institutions is not straight-forward, or there are delays such as those that mar the public healthcare system in Kenya. The challenges may discourage private health facilities from participating in such a scheme. There would be in such a scenario a conflict of interests and the potential for the facilities to work at cross purposes if there is inadequate coordination in the healthcare system. To address this before the conflict emerges, there would be need for conflict prevention. This would benefit society because it would result in avoidance of the costs that could emerge if the conflict of interests would persist and break out into a dispute.

Disputes in the health sector, in particular those that are related to employment and labour relations, are resolved under the terms of a collective bargaining agreement which provides for a dispute resolution mechanism, and where the employer delays in providing for a collective bargaining agreement, through conciliation, and as an ultimate step by the courts.⁴⁶ Conflict prevention in the healthcare system may be put in place through analysing

⁴⁵ 'Agenda 21 - Chapter 6 - Protecting and Promoting Human Health' (n 22) 6.

⁴⁶ *Okiya Omtatah Okioti v Attorney General & 5 others* (n 9).

potential scenarios, evaluating the different interests, projecting various scenarios, and weighing the costs of each. This would allow stakeholders to address the issue in advance of its escalation and result in preservation of the status quo or improvement of the situation.

In the insurance industry, there are insurance agents who sell insurance products to members of the public, and as compensation receive a commission from the revenue collected by the insurance company. One proposal is for governments to use a similar strategy for public health insurance: to have public health insurance agents to promote the insurance products to members of the public. Through public awareness initiatives carried out by these government agents, the enrolment in the public health insurance schemes like NHIF may be increased. Compensation for the agents may be in the form of positive performance appraisals or even commissions offered by the private health facilities involved in the public-private collaboration. With specific targets for each agent, the insurance scheme could achieve its collective target, in a similar way in which the government collects taxes through various schemes and strives to achieve the tax targets for a particular year through the individual efforts of government officers.

A possible entry point for advocacy for NHIF is through partnering with schools to enrol students in third and fourth form. In some countries such as the United States of America, awareness raising for voting and the military, is done in high schools, resulting in high school graduates with a voter's card and a decision on whether or not to sign up to serve the country in the defence forces. At the average age of eighteen years, these new NHIF recruits could serve to promote cultural change, so that their peers and those younger than them after a systematic implementation of the initiative would know that when they turn eighteen, they will have the opportunity to sign up for NHIF. NHIF could enrol the students and then at a later date distribute the health insurance card to the students.

In public high schools especially, where a large proportion of high school students attend, the wide pool of potential NHIF recruits would be a promising target to engage with individuals to access public services including public health care. Highlighting the benefits of signing up for health insurance

at a young age could contribute to positioning NHIF as a potential channel for the income that the individual receives from the turn of adulthood, and therefore secure a healthy future for the student for years to come. The added benefit would be that the young individual having experienced these benefits after participating in the scheme could then influence their parents and other members of society to also enrol.

In Kenya, as in other developing countries, public health facilities face challenges including inadequate finance and human resources, which together limit the service offering to the public. Private health facilities may opt to collaborate with the government if there is a measurable benefit to cover the cost of offering services to the public. This would contribute to efforts by various stakeholders at the national and international level to contribute to improving the health of human beings, and in so doing, promoting sustainable development.

4.0 Conclusion

This paper has analysed the issue of conflict prevention and management in the healthcare system through expansion of social health insurance, arguing that through taking up such efforts, the government and all stakeholders involved would contribute effectively to promoting sustainable development through ensuring adequate standards of health for all. The healthcare system in Kenya, as in many other countries in Sub-Saharan Africa, is plagued with different forms of conflict: at a vertical level between healthcare professionals in lower cadres and those in management, and at a horizontal level as exemplified by the conflicting interests of credibility of results and profitmaking by public health facilities on the one hand and private health facilities on the other hand. Proposals to manage conflict through reforming Kenya's healthcare system include establishment of a national health services commission, improved access to primary health care, expansion of social health insurance, and strengthening regulatory boards and unions. This paper argues that one course of action to improve the healthcare system and reduce inequalities and competing interests, is through expanding the health insurance system. One proposal is to step up efforts to increase enrolment

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of members of the public to NHIF, and also an improvement of the benefits offered by NHIF, to overall contribute to SDG 3 to ensure healthy lives and promote well-being for all at all ages.

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Alternative Dispute Resolution in Environmental Disputes: A Case of the Specialized Environment and Land Court in Kenya

By: **Renson Mulele Ingonga***

Abstract

One of the novel features of the 2010 Constitution of Kenya (CoK) in environmental governance is the establishment of a specialized court to hear and determine environmental and land matters under Article 162(2) (b). The Environment and Land Court (ELC) was established under Section 4 of the ELC Act and was operationalized in 2012 when judges of the ELC were appointed. In discharging its functions, Section 20 of the ELC Act provides that nothing prevents the ELC on its own motion and in agreement with the parties or at the request of the parties, to adopt and implement alternative dispute resolution (ADR) mechanisms and traditional dispute resolution (TDR) mechanisms in accordance with the CoK. Article 159 (2) (c) of the CoK requires that in exercising judicial authority, courts and tribunals should be guided by the principle of promotion of ADR and TDR mechanisms. This paper interrogates the role of the ELC in implementing Section 20 of the ELC Act when solving environmental disputes through ADR. This paper recognizes that, at the global level, proponents of specialized environment courts (ECs) argue that due to the complexity of environmental issues and the requirement that judges of ECs possess environmental knowledge and expertise, a specialized EC is in a better place to select the best ADR mechanism to a particular environmental dispute, unlike the general courts. Based on this argument, the ELC as a specialized court will play a pivotal role in establishing court annexed ADR mechanisms in solving environmental disputes. This paper recommends the need for the ELC to implement Section 20 of the ELC Act by encouraging environmental litigants to resolve environmental disputes through ADR.

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1.0 Introduction

For the first time in history, Kenya has established a specialized court to hear and determine environment and land matters. The Environment and Land Court (ELC) is anchored in Article 162(2) (b) of the Constitution of Kenya (CoK). The ELC is the first court to be established in Africa at national level and the first in the world to be anchored in a Constitution. It is a court of superior record with the status of the High Court.¹ The ELC jurisdiction is entrenched in Section 13 of the ELC Act.² It has the jurisdiction to hear and determine matters relating to: environmental planning and protection, climate issues, land use planning, title, tenure, boundaries, rates, rents, valuations, mining, minerals and other resources; compulsory acquisition of land; land administration and management; public, private and community land, choses in action or other instruments granting any enforceable interests in land; and any other disputes relating to land.³

The ELC Act further grants the ELC the mandate to enforce constitutional provisions relating to environment. They include Articles 42, 69 and 70 relating to the enforcement of the right to clean and healthy environment.⁴ The ELC has both appellate and supervisory jurisdiction over decisions made by local tribunals and subordinate courts on land and environmental matters. Section 130 of the Environmental Management and Coordination Act (EMCA) grants the ELC appellate jurisdiction to review the decisions and orders of the National Environment Tribunal (NET).⁵ In 2012, the ELC became operational. In hearing and determining environmental matters, the

¹ The Supreme Court, the Court of Appeal and the High Court are also superior courts.

² Government of Kenya, *Environment and Land Court Act (ELC Act) No. 19 of 2011*, (Government Printers 2011).

³ ELC Act 2012, s 13 (b).

⁴ ELC Act 2011, s 13(3).

⁵ NET has limited and specific jurisdiction to matters set out under Section 129(1) of the EMCA.

ELC is required to develop environmental law, solve environmental disputes and develop environmental jurisprudence.⁶

In discharging its judicial mandate, the ELC Act under Section 20 requires the ELC where appropriate on its own motion in agreement with the parties or at the request of the parties to adopt and implement ADR and TDR mechanisms in accordance with the Article 159(2) (c) of the CoK. Section 20 of the ELC Act provides that:

(1) Nothing in this Act may be construed as precluding the Court from adopting and implementing, **on its own motion, with the agreement of or at the request of the parties, any other appropriate means of alternative dispute resolution** including conciliation, mediation and traditional dispute resolution mechanisms in accordance with Article 159(2) (c) of the Constitution.

(2) Where alternative dispute resolution mechanism is a condition precedent to any proceedings before the Court, the Court shall stay proceedings until such condition is fulfilled.⁷

This paper examines the role of the ELC in adopting and implementing ADR in environmental disputes in accordance with Section 20 of the ELC Act. In any of its proceedings, the ELC Act requires the ELC to act expeditiously, without any undue regard to procedural technicalities and the use of ADR offers this opportunity.⁸

2.0 Benefits of Alternative Dispute Resolution Mechanisms in Environmental Disputes

ADR mechanisms refer to other alternative and appropriate methods of dispute resolution other than the traditional court litigation. They include but are not limited to arbitration, mediation, conciliation, negotiation and expert determination. ADR mechanisms have been recognized as fundamental in

⁶ The general rules of international environmental law, treaties and conventions on international environmental law ratified by Kenya now form part of the Kenyan law in accordance with Article 2 (5) and (6) of the CoK 2010.

⁷ Emphasis added.

⁸ ELC Act 2011, s 19.

resolving environmental disputes and enhancing environmental justice.⁹ The Kenyan independence Constitution did not have provisions relating to the use of ADR.¹⁰ In 2010, the CoK changed this position and formally recognized the fundamental role that ADR plays in settling disputes by entrenching the use of ADR and elevating the same to a constitutional status. In addition to Article 159(2) (c) of the CoK that requires courts and tribunals to be guided by the principle of ADR and TDR mechanisms, Article 189(4) of the CoK requires the national legislation to provide 'procedures for settling inter-governmental disputes by alternative dispute resolution mechanisms, including negotiation, mediation and arbitration'. The recognition of ADR in the CoK has legitimized it under the legal framework and ADR is now part of dispute resolution in Kenyan governance system.¹¹ Muigua argues that the incorporation of ADR mechanisms in the CoK will enhance access to justice as it will create awareness on the role of ADR in solving disputes other than litigation and empower the Kenyan people.¹²

The use of ADR in settling environmental disputes emanates from its ability to promote access to justice, reduce on backlog of cases, low costs and solve disputes expeditiously unlike the traditional litigation system.¹³ The

⁹ Kariuki Muigua, 'Legitimising Alternative Dispute Resolution in Kenya: Towards a Policy and Legal Framework'

<<http://www.kmco.co.ke/attachments/article/156/LEGITIMISING%20ALTERNATIVE%20DISPUTE%20RESOLUTION%20MECHANISMS%20IN%20KENYA.pdf>

>accessed 29 January 2015.

¹⁰ FM Nyakundi, 'Development of ADR Mechanisms in Kenya and the Role of ADR in Labour Relations and Dispute Resolution (Master's Degree Thesis, University of Capetown 2015).

¹¹ Duncan Ojwang', 'Dismantling Kenya Jurist Stereotypes toward the Traditional Justice Systems: Can something good come from Article 159 (2) (C) of the Constitution?' (2015) 3(2) Institute of Chartered Arbitrators Journal of Alternative Dispute Resolution 192.

¹² Kariuki Muigua, 'Empowering the Kenyan People through Alternative Dispute Resolution Mechanism' 2015) 3(2) Institute of Chartered Arbitrators Journal of Alternative Dispute Resolution 64.

¹³ Kariuki Muigua, 'Alternative Dispute Resolution and Article 159 of the Constitution'

<<http://www.kmco.co.ke/attachments/article/107/A%20PAPER%20ON%20ADR%20>

characteristics associated with environmental ADR include: parties voluntarily agree to participate; direct participation of the parties in the process; parties can withdraw from the process; a facilitative approach is used by a neutral party with no decision making authority; and the decision and solutions reached are made by the parties.¹⁴ As a result of these characteristics, environmental ADR encourages constructive approaches to solving disputes, the stakeholders voluntarily participate in the dispute resolution giving them a sense of ownership of the decisions they make, and the court can be called upon to enforce such decisions, ultimately making them binding.¹⁵ This enhances the relationship of the parties involved in the ADR and it is easier to deliver benefits to the broader community.

It should be noted that environmental disputes deal with complex, technical and scientific issues that require that those solving environmental disputes possess expertise, experience and knowledge in environmental matters.¹⁶ Enforcing the complex environmental laws and interpreting the sophisticated environmental principles such as sustainable development requires a multi-faceted approach that goes beyond the traditional litigation.¹⁷ ADR presents such a multi-faceted approach. A specialized EC is known to offer a multi-door courthouse.¹⁸ A multi-door courthouse is a concept developed by Professor Frank E Sander of the Harvard Law School in 1976 who proposed

AND%20ARTICLE%20159%20OF%20CONSTITUTION.pdf> accessed 29 January 2015.

¹⁴ Joseph A Siegel, 'Alternative Dispute Resolution in Environmental Enforcement Cases: A Call for Enhanced Assessment and Greater Use' (2007) 24(1) *Pace Environmental Law Review* 187.

¹⁵ United States Environmental Protection Agency(EPA), *ADR Accomplishment Report* (EPA 2000); John S Andrew, 'Examining the Claims of Environmental ADR: Evidence from Waste Management Conflicts in Ontario and Massachusetts' (2001) 21(1) *Sage Journals*

¹⁶ Richard Macrory and Michael Woods, *Modernizing Environmental Justice: Regulation and the Role of an Environmental Tribunal* (University College London, 2003) 7.

¹⁷ Ellen Hey, *Reflections on an International Environmental Court* (Kluwer Law International 2002) 9; Jane Holder and Maria Lee, *Environmental Protection, Law and Policy* (Cambridge University Press 2007) 340.

¹⁸ *Ibid.*

the need to link cases to appropriate and alternative forums to settle disputes rather than litigation.¹⁹

Environmental ADR is not a futile process even when parties fail to reach an agreement. O'Leary and Husar argue that even where environmental ADR is not successful in resolving environmental disputes, it enhances better information exchange, enhances clarification of issues, it leads to better pre-trial preparation and exploration of options that would not otherwise have been considered.²⁰ Pring and Pring summarize the benefit of environmental ADR mechanisms and provide that:

*The use of ADR, when appropriate, tends to produce a high settlement rate as well as innovative solutions to problems, potentially resulting in better outcomes for the parties and for the environment and reducing the number of cases which must have a full hearing. In addition, ADR can increase public participation and access to justice by including interested stakeholders in collaborative decision making or mediation prior to a judicial decision and can reduce costs to the parties and the courts.*²¹

3.0 Legal Framework Governing the ELC Alternative Dispute Resolution in Environmental Disputes

Once an environmental suit has been filed in the ELC, the ELC can on its own motion and in agreement with the parties or upon the request of the parties adopt and implement ADR mechanisms in solving the environment. Where the ELC has referred environmental dispute to ADR and the environmental ADR mechanism is a condition precedent to any proceedings before the ELC, the ELC will stay the proceedings until when the condition is fulfilled.²² This is aimed at maintaining the status quo and granting the parties time to come up with a settlement agreement.

¹⁹ Larry Ray and Anne L Clare, 'The Multi-Door Courthouse Idea: Building the Courthouse of the Future Today' (1985) 1(1) Journal of Dispute Resolution 7, 9.

²⁰ Rosemary O'Leary and Maja Husar, 'What Environmental and Natural Resource Attorneys Really Think About ADR: A National Survey' (2002) 16 National Resources and Environment Journal 262

²¹ George Pring and Cathreen Pring, *Greening Justice: Creating and Improving Environmental Courts and Tribunals* (Access Initiative 2009) 16.

²² ELC Act 2011, s 20(2).

Before delving and interrogating Section 20 of the ELC Act and the opportunities it offers in settling environmental disputes through ADR, it should be noted that as a specialized court, the ELC is expected to provide a better forum than the general courts in solving environmental disputes and enhance jurisprudence on the use of environmental ADR.²³ Preston argues that indeed specialized ECs provide 'centralization, specialization and the availability of a range of court personnel facilitate a range of alternative dispute resolution (ADR) mechanisms'.²⁴

ELC judicial authority to adopt and implement ADR is governed by a number of statutory, policy and regulatory framework that are important for discussion. They include the CoK, the Arbitration Act,²⁵ the Civil Procedure Act, the Civil Procedure Rules and the Mediation Rules. The choice of the ADR mechanism will require the ELC to abide by the legal framework in place governing it.

a) Constitution of Kenya

The CoK as the supreme law provides the legal basis upon which the ELC would invoke the use of ADR in settling environmental disputes under Article 159(2) (c). In adjudicating environmental disputes through ADR, the ELC is required to abide by the national values and principles of good governance such as public participation, inclusiveness, human rights, sustainable development and good governance as indicated in Article 10 of the CoK.

b) The Environment and Land Court Act No. 9 of 2011

The ELC Act was enacted to give effect to Article 162(2) (b) of the CoK by establishing the ELC and providing for its jurisdiction, functions and powers. In any of its proceedings, the ELC Act requires the ELC to act expeditiously,

²³ C Stukenborg 'The Proper Role of Alternative Dispute Resolution (ADR) in Environmental Conflicts' (1994) 19 *University of Dayton Law Review* 1305.

²⁴ Brian J Preston, 'Characteristics of Successful Environmental Courts and Tribunals' (2014) 26 *Journal of Environmental Law* 365.

²⁵ Government of Kenya, *Arbitration Act No. 4 of 1995* (Government Printers 1995).

without any undue regard to procedural technicalities.²⁶ Section 20 of the ELC requires the ELC where it deems appropriate to adopt and implement ADR and TDR mechanisms in accordance with the CoK. This can be done on its own initiative upon parties agreeing or the parties may request the ELC to refer the matters to ADR. In addition to abiding by the CoK, the ELC Act requires the ELC to abide by the procedure laid down in the Civil Procedure Act (CPA). This means that the ELC will abide by the CPA procedure on ADR mechanisms when adopting and implementing environmental ADR. Section 18 of the ELC provides for the general principles that the ELC should be guided by when discharging its mandate such as adopting and implementing ADR. These principles include: sustainable development; judicial authority under Article 159 of the CoK (which includes the use of ADR); land policy under Article 60(1) of the CoK; national values and principles of good governance under Article 10 of the CoK; and the values and principles of public service under Article 232(1) of the CoK.

c) Civil Procedure Act Chapter 21 2010 and Civil Procedure Rules, 2010.

Section 19 of the ELC Act provides that the ELC in carrying out its functions is bound by the procedure laid down in the CPA. The overriding objective of the CPA is to 'facilitate the just, expeditious, proportionate and affordable resolution of disputes' in the CPA.²⁷ This overriding objective is also reflected under Section 3 of the ELC Act. The ELC shall, where it considers appropriate adopt and implement ADR in resolving environmental disputes in order to give effect to the overriding objectives.²⁸ Muigua argues that the overriding objective serves as 'a basis for the court to employ rules of procedure that

²⁶ ELC Act 2011, s 19.

²⁷ Civil Procedure Act 2010, s 1A.

²⁸ The ELC Act further requires that the parties and their duly authorized representatives assist the ELC to further the overriding objective and participate in its proceedings.

provide for use of Alternative Dispute Resolution mechanisms, to ensure that they serve the ends of the overriding objective'.²⁹

The CPA and Civil Procedure Rules further provide provisions that guide the ADR mechanisms in place. Section 59C of the CPA allows the Court to refer a dispute to any other ADR mechanism on its own motion or where the parties agree to such a referral. This section does not specify the preferred mechanisms of ADR, thus giving parties a wide discretion to choose the appropriate ADR depending on the nature of the environmental dispute in place. Order 46 Rule 20 of the Civil Procedure Rules gives the ELC the power to adopt and implement ADR mechanisms in order to attain the overriding objectives under Section 1A and 1B of the CPA. The ELC, invoking Order 46 Rule 20 (2) of the CPA Rules can make any orders or issue directions that are necessary to facilitate the ADR adopted. The ELC plays a vital role in ensuring that the chosen ADR is well undertaken.

Section 59B of the CPA provides instances when the ELC can refer cases to mediation. This can be done upon the request of the parties concerned, where the ELC on its own motion deems it appropriate that the dispute can be effectively settled through mediation; or where there is a statutory requirement that the dispute be referred to mediation.³⁰ When mediation is adopted as the appropriate environmental ADR mechanism, in addition to abiding with the Mediation Rules, the process must comply with the procedure laid down in the CPA and the Civil Procedure Rules. Mediation is facilitated negotiation. The mediator is a third party whose role is to assist the parties reach consensus. Section 2 of the Civil Procedure Act defines mediation as 'an informal and non-adversarial process where an impartial mediator encourages and facilitates the resolution of a dispute between two or more parties, but does not include attempts made by a judge to settle a dispute within the course of judicial proceedings related thereto'

²⁹Kariuki Muigua, 'Court Annexed ADR in the Kenyan Context'

<<http://www.kmco.co.ke/attachments/article/106/Court%20Annexed%20ADR.pdf>>
accessed 30 January 2018.

³⁰ Civil Procedure Act, s59B.

The CPA establishes the Mediation Accreditation Committee (MAC) in order to: determine the criteria for the certification of mediators; propose rules for the certification of mediators; maintain registers of qualified mediators; enforce the code for ethics for mediators; and set up an appropriate training programmes for mediators.³¹ Taking into account that environmental matters involve a complex of legal issues that are technical and scientific, the ELC having judges with more than ten years' experience in environment and land matters is in a better position to advise parties on the appropriate procedure involving environmental mediation. The ELC can further advise or propose to the parties' mediators that possess experience and expertise in mediating on environmental issues. When referring parties to mediation, the ELC must ensure that the name of the mediator selected appears in the mediation registrar maintained in the MAC register.³²

The mediation should also be conducted in accordance with the Mediation Rules and no appeal will lie against an agreement reached by the parties during the mediation process. The role of the ELC is to enforce the said mediation agreement. In doing so, the parties in accordance with Section 59D of the Civil Procedure Act will reduce the mediation agreement into writing then register with the ELC for enforcement. Currently, the judiciary is undertaking a pilot project on the court annexed mediation. The Alternative Dispute Resolution Operationalization Committee (ADROC) oversees this project. The CPA further governs the procedure in environmental arbitration which the ELC needs to take into consideration when referring parties to arbitration.³³ The procedure governing arbitration is found under Order 46 of the Civil Procedure Rules. It allows parties who are not under any disability agree that the matter they have filed in a suit be referred to arbitration. This should be done before a judgment is pronounced and the parties will agree on the appointment of the arbitrator. The decision of the arbitral award is binding and the court has no power to interfere with the decision of the

³¹ Civil Procedure Act 2010, Section 59A (4).

³² Civil Procedure Act 2010, s59B (2).

³³ Civil Procedure Act 2010, s59.

arbitral tribunal.³⁴ Where an environmental dispute is brought before the ELC that was subject to an arbitration agreement, the ELC will have to refer the parties to arbitration first.

d) Arbitration Act No. 4 of 1995

In addition to the Civil Procedure Rules on arbitration, the environmental arbitration will also be governed by the Arbitration Act No.4 of 1995. The Arbitration Act defines arbitration as 'any arbitration whether or not administered by a permanent arbitration institution'.³⁵ Parties in an environmental dispute will agree to submit to arbitration and be bound by the decision of the arbitral tribunal. Where a suit involving an environmental dispute has been brought before the ELC which is subject to an arbitration agreement, then the ELC should stay the legal proceedings and refer the matter to arbitration in accordance with Section 6 of the Arbitration Act. This is to allow the parties to exhaust the arbitration process as indicated. The use of arbitration in environment disputes is not novel and the ELC should embrace it. In 1893 an arbitral award was awarded by an international arbitration tribunal in the *Pacific Fur Seal Arbitration*.³⁶ This case concerned a dispute between the US and the UK on whether the US would interfere with the fishing activities of the British on the high seas.³⁷ It was then referred to arbitration tribunal for settlement.

³⁴ Alvin Gachie, 'The Finality and Binding Nature of the Arbitral Award' (2017) 13(1) The Law Society of Kenya Journal 20.

³⁵ Arbitration Act 1995 (2009), No. 4 Of 1995, Laws of Kenya.

³⁶ J Stanley Brown, 'Fur seal and the Bering Sea Arbitration' (1894) 26(1) Journal of the American Geographical Society of New York 326.

³⁷ Philippe Sands, 'Litigating Environmental Disputes Courts: Tribunals and the Progressive Development of International Environmental Law' (OECD 2008).

4.0 ELC Implementation of Section 20 of the ELC Act: Way Forward

ADR is globally recognized as a means of resolving disputes other than litigation.³⁸ The ELC specialization in dealing land and environmental matters offers it a great opportunity to make use of ADR in determining the disputes before it. The growing explosion of specialized ECs has been applauded for the role they play in enhancing the use of ADR in solving environmental disputes.³⁹ Specialized ECs are therefore expected to offer a forum for the use of ADR which enhances redress mechanisms enhancing the court's efficiency in settling environmental disputes.⁴⁰ According to Pring and Pring, ADR is used in specialized ECs because it can 'reduce costs, reduce court caseload and backlog, shorten time to a decision, and, most importantly, achieve outcomes that actually creatively solve a problem beyond the application of existing legal remedies'.⁴¹ This calls for specialized ECs to incorporate ADR mechanisms such as 'ECT-annexed, facilitated negotiation and mediation'.⁴² The ELC is not an exception.

The ELC as a specialized environment and land court should therefore offer a better forum in solving land and environmental disputes through both litigation and ADR than the previous courts of general jurisdiction. This will increase public confidence and recognition of the ELC in settling environmental disputes. Implementation of Section 20 of the ELC Act must be one of the ELCs priority areas. So far, the use of ADR in solving land disputes by the ELC has been considered as effective in reducing case backlog

³⁸ Jacqueline M Nolan-Haley, *Alternative Dispute Resolution in a Nutshell* (2nd edn West Nutshell Series 1992).

³⁹ Brian J Preston, 'Benefits of Judicial Specialization in Environmental Law: The Land and Environment Court of New South Wales as a Case Study' (2012) 29 (2) *Pace Environmental Law Review* 396.

⁴⁰ *Ibid.*

⁴¹ Pring and Pring (n 19) 61.

⁴² George Pring and Cathreen Pring, *Environmental Courts and Tribunals: Guide for Policy Makers* (UNEP 2016).

and minimizing conflicts among communities.⁴³ In a study carried out by the Land Development Governance Institute (LDGI), it indicated that most people were of the view that the use of ADR fostered relationship and harmony in communities hence an effective means of solving land disputes.⁴⁴ However, the LDGI report further indicates that while ADR was effective and less costly, some respondents provided that in some cases, ADR was not effective. This was attributed to the lack of fair hearing and some respondents resorting to legal redress.⁴⁵ ADR should not be seen as an alternative to litigation but rather ADR and litigation should reinforce each. In so doing, the ELC will determine when it is appropriate to adopt ADR.

Unlike land disputes which are characterized by case backlog, justifying the use of ADR in reducing the case backlog, since the ELC was operationalized in 2012, the number of environment cases has been reported to be fewer than the land cases.⁴⁶ Low environmental caseload in the previous constitutional regime can be attributed to the rigidities of the previous environmental legal framework that barred environmental litigation. Environmental litigation was barred by the strict rule of standing which courts adopted. An environmental litigant had to prove individual interest in an environmental matter. Environmental matters that were of public nature were strictly enforced by public officers who were reluctant to act. In the case of *Wangari Maathai v Kenya Times Media Trust*,⁴⁷ the Court held that it was only the Attorney General who could sue on behalf of the public and the

⁴³ Maureen Wangari Maina, 'Land Disputes Resolution in Kenya: A Comparison of the Environment and Land Court and the Land Disputes Tribunal' (Masters of Law Degree, University of Nairobi 2015).

⁴⁴ LDGI, *An Assessment of the Performance of the Environment and Land Court* (LDGI 16th Scorecard Report 2014); LDGI, *An Assessment of the Performance of the Environment and Land Court* (LDGI 12th Scorecard Report 2013).

⁴⁵ Ibid.

⁴⁶ Samson Okong'o, 'Environmental Adjudication in Kenya: A Reflection on the Jurisdiction of the Environment and Land Court' (A presentation made at the Symposium on Environmental Adjudication in the 21st Century held in Auckland New Zealand on 11th April 2017).

⁴⁷ (1989) 1 KLR.

applicant lacked the *locus standi* in that matter. This changed with the enactment of EMCA,⁴⁸ which dispensed with the mandatory requirement to prove *locus standi*, and the promulgation of the 2010 CoK which has entrenched environmental public interest litigation,⁴⁹ removed procedural technicalities, widened the scope of standing and elevated the right to a clean and healthy environment to a constitutional level.⁵⁰ As a result of the CoK provision on environment and the establishment of the ELC it is predicted that with time the number of environmental cases filed before the ELC will increase.

One of the characteristics of the ELC is the requirement that the judges appointed in the ELC must possess experience and expertise in land and environmental matters. Section 7(b) of the ELC Act requires that a person appointed as the Judge of the ELC must have at least ten years' experience as a distinguished academic or legal practitioner with knowledge and experience in matters relating to land environment'. The transfer of environmental matters from courts of general jurisdiction to specialized ECs have been informed by the complexity of environmental matters and laws requiring that judges who adjudicate environmental disputes possess knowledge and expertise in environmental issues. Due to the possession of environmental knowledge and expertise, the ELC is in a better position to select the best ADR mechanism to a particular environmental dispute where they deem necessary and appropriate, unlike the general courts.

4.1 When can the ELC Invoke Section 20 of the ELC Act?

There are two instances that can trigger the ELC to invoke Section 20 of the ELC Act and refer environmental disputes to ADR. First, the ELC on its own motion can refer parties in an environmental suit to adopt and implement an ADR. Second, parties can request the ELC that the matter be referred to ADR.

⁴⁸ See section 3(4), EMCA, No. 8 of 1999 (Amended in 2015).

⁴⁹ CoK 2010, Article 22 and 258.

⁵⁰ CoK 2010, Article 42

a) The ELC referral

Section 20(1) grants the ELC power on *its own motion* to refer parties to ADR. In referring the parties to use ADR in solving the dispute in question, it is mandatory that the parties must agree to this. The term 'with the agreement of' connotes consensus. The drafters of the ELC Act may have anticipated a scenario whereby it would be useless for the ELC to order parties to use ADR, a process which they don't agree upon. This would lead to wastage of time and in some cases aggravate the dispute. This will also guard against the misuse of the discretionary power of the ELC to refer environmental matters to ADR against the will of the parties concerned. One of the characteristics of ADR is that the process is usually voluntary and allows the parties to negotiate. In agreeing with the Court's order for an out of court settlement, the parties submit to the ADR enhancing its enforcement.

The question that arises is when the ELC can invoke Section 20 (1) of the ELC Act to adopt and implement an ADR mechanism in resolving environmental disputes before it. The ELC can deploy ADR in two instances: early in the process; or any time during the trial but before it makes a final decision. Requesting the parties to adopt ADR early in the process is the most optimal.

Whilst the ELC Act requires that the ELC environmental ADR referral be discretionary, in some cases such a referral can be mandatory. Mandatory referrals arise where the law governing the dispute requires that such a matter be resolved through ADR. Arbitration agreement is the most common. Where an arbitration agreement between the parties in a suit exists, the parties will be required to exhaust the dispute through arbitration.

b) Parties request for referral

It is trite law that where parties request for referral of an environmental dispute to ADR mechanism, the court should not refuse such a request unless it is in the Court's view that such a referral will inhibit justice. In requesting the referral of the dispute to ADR, the parties have an obligation to provide the ELC with sufficient reasons why they would want to refer the matter to ADR. This would caution against wastage of the ELC time and resources.

However, in cases where not all parties in a suit request for referral to ADR, the ELC may refuse such a request until when all parties agree.

4.2 Adopting and Implementing of Environmental ADR in the ELC

The ELC has a number of ADR mechanisms which it can refer the parties to adopt which include arbitration, mediation, conciliation, negotiation etc. Whichever form of ADR the ELC adopts must be determined by the nature of environmental dispute in place and balancing of the interests of the stakeholders involved.

Molly and Rubenstein,⁵¹ provide that one of the key questions to be addressed in adopting environmental ADR is to determine where it can be placed within the existing conventional ADR. They provide that environmental ADR can be annexed to a dispute resolution entity such as the court or environmental regulatory mechanism. There are various ways in which the ELC can adopt and implement environmental ADR. ADR can either be supervised ADR (also referred to as court annexed ADR) or judicial referral of a dispute to an appropriate ADR process.⁵² The Land and Environment of New South Wales in settling environmental disputes adopts both in-house mechanism and external. In-house mechanisms include: adjudication; conciliation; mediation; neutral evaluation; and informal mechanisms which may result into a negotiated settlement.⁵³

The ELC can either adopt the court annexed ADR which is now part of the Kenyan legal system or refer the dispute to an appropriate ADR mechanism in agreement with the parties. Court annexed ADR is ADR process that is undertaken under the umbrella of the Court.⁵⁴ Currently, court annexed

⁵¹ Michael Stone Molly and Wendy Rubenstein, 'Principles of Alternative Environmental Dispute Resolution: Abstracted, Restated and Annotated' (University of Florida 2000).

⁵² Brian J Preston "The Land and Environment Court of New South Wales: Moving towards a multi-door courthouse - Part II" (2008) 19 ADRJ 144 at 149.

⁵³ Preston (n 37).

⁵⁴ The Judiciary, 'Court Annexed Mediation' <

<http://kenyalaw.org/kenyalawblog/wp-content/uploads/2016/04/Court-Annexed-Mediation-at-the-Judiciary-of-Kenya..pdf>> accessed 23 January 2018.

mediation is now recognized under the Kenyan judicial system and the ELC can refer parties to the same for environmental disputes settlement. The ELC can also refer parties to court annexed arbitration in tandem with the Arbitration Act, the CPA and the Civil Procedure Rules.⁵⁵

The ELC can also refer the parties to an appropriate ADR process. In this scenario the environmental dispute is referred to an ADR entity. Parties can either agree to refer the matter to the ADR entity referred to or may choose another ADR entity which in their view is appropriate. In Kenya, the ADR entities include the Chartered Institute of Arbitrators, Dispute Resolution Centre and Mediation Training Institute, Strathmore Mediation and Dispute Resolution Centre and the Nairobi Centre for International Arbitration. While parties are not forced to submit to these bodies and may choose an independent ADR expert, these bodies offer a forum through experience and expertise in solving disputes through ADR.

Molly and Rubenstein provide that environmental ADR can be dedicated to an independent entity dealing solely with environmental disputes.⁵⁶ In Kenya, we do not have an independent ADR entity which deals with environmental ADR only. This initiative can be considered in future by environmental stakeholders.

4.3 Stay of Legal Proceedings in Environmental ADR.

Section 20(2) of the ELC allows the ELC to stay proceedings where ADR is a condition precedent to any proceedings before it. The essence of this provision is to ensure that where parties have agreed to resort to ADR in resolving environmental disputes, the ELC grants them the opportunity to reach a decision. If the aggrieved party wants to pursue their claims, then they must first exhaust the ADR mechanisms. Section 6 of the Arbitration Act requires the Court to stay legal proceedings where the dispute in question has been referred to arbitration.⁵⁷ Section 6(3) of the Arbitration Act is very categorical that, if a Court does not stay the legal proceedings

⁵⁵ Muigua (n 27).

⁵⁶ Ibid.

⁵⁷ Government of Kenya, *Arbitration Act No. 4 of 1995* (Government Printers 1995).

where arbitration is a condition precedent to any proceedings before it, then such proceedings will be of no effect. This maintains the status quo ensuring that the matter is subject to the ADR process.

5.0 Way Forward

Environmental disputes involve a number of complex and technical issues. The ELC in referring parties to ADR will not only consider the benefits that accrue from ADR such as saving costs and time but must take into consideration a number of factors to ensure that ADR in itself is not futile and enhances the overriding objective of ensuring that the dispute is solved expeditiously and in a just manner.

First, it should be noted that the application of ADR in environmental matters in itself can be very complex. A successful environmental ADR will require the ELC to take into consideration stakeholders' engagement, sustainable development and providing a clear mandate. This means that the ELC in implementing environmental ADR will be required to involve other stakeholders in a collaborative and facilitative decision making.⁵⁸ Stakeholders will involve the public, environmental agencies, business community, civil society and many others. The essence is to ensure that the interest of every party is well represented and enhances public participation.

Second, the ELC needs to consider the expertise of those involved in the ADR. It is sensible and reasonable to ensure that the third parties involved in the dispute possess expertise and understanding of the dispute in question. The role of ADR is to solve a dispute expeditiously and expertise is fundamental.

Third, the ELC should consider the nature of the dispute. In some cases, the harm occasioned by environmental violations will continue to deteriorate the environment if urgent measures are not taken in place. It is no doubt that litigation may take long, undermining the essence of solving environmental disputes expeditiously. The nature of the environmental dispute will also be

⁵⁸ Richard Macrory and Michael Woods, *Modernizing Environmental Justice: Regulation and the Role of an Environmental Tribunal* (University College London, 2003) 7.

determined by the scientific and technical expertise required in resolving the dispute. Where the enforcement of the dispute will be a challenge through the ADR, then the ELC will require that where a settlement has been reached, be written down and deposited with the ELC registry for enforcement.

Fourth, the ELC must consider the parties involved and their bargaining power. In most cases, environmental disputes such as environmental degradation as a result of development projects involve the public. The public may lack the bargaining power or it may be weak during settlement negotiations or they may not understand the impact of the said developments to environment. In this case where an environmental dispute arises between private companies and the community at large, the ELC must ask itself whether referring the dispute to ADR is the most appropriate option or not. In so doing it should consider the benefits that will accrue from ADR.

Fifth, the ELC should consider the impact of the dispute on environmental protection and conservation. The principles of sustainable development should inform its decision to adopt and implement environmental ADR. The CoK recognizes sustainable development as a national value and principle of governance which every state organ, state officers and public officer must abide in the application and interpretation of the CoK; enacting, applying or interpreting any law; and making or implementing public policy decisions.⁵⁹ The ELC Act and EMCA further require the ELC in exercising its mandate to be guided by the principle of sustainable development.⁶⁰ The principles of sustainable development include: the principle of public participation in the development of policies, plans and processes for the management of the environment and land; the cultural and social principles 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 not inconsistent with any written law; the principle of international co-operation in the management of environmental resources shared by two or more states; the

⁵⁹ CoK 2010, Art 10.

⁶⁰ ELC Act 2011, s 18(a); EMCA 1999, s 3(5).

principles of intergenerational and intragenerational equity; the polluter-pays principle; and the pre-cautionary principle.⁶¹

In addition to the above factors which the ELC should consider in deciding whether environmental ADR is the most appropriate, the ELC should be innovative in adopting environmental ADR. Depending on the nature of the environmental dispute in question, the ELC should be able to determine the appropriate ADR mechanism that will settle the dispute in question. In most environmental ADR, mediation has been accepted as the most effective. In mediation, a neutral third party uses the facilitative approach to enable the parties reach a consensus and settle the disputes. It ensures that the decision reached is voluntary and this makes it easy for parties to abide by the agreed decision. Environmental arbitration should be invoked where the same is provided in law or the parties have in place an arbitration agreement. The ELC should not only limit itself to mediation, arbitration and conciliation, but endeavour to adopt and implement other methods of ADR. The guiding principle should be to choose an ADR mechanism that is most appropriate to the particular environmental dispute. In choosing the appropriate mode of ADR, the ELC should take into consideration the specific characteristics of environment disputes.

While the CoK provides a legal basis upon which environmental ADR can be invoked, there is need for continued education and awareness on the role of environmental ADR in settling environmental disputes. The judiciary, the ELC, civil society and educational institutions play a key role in creating awareness on the place of ADR on settling environmental disputes. This will enable the environmental litigants to appreciate and recognize the role of environmental disputes.

There is need for the ELC to coordinate and cooperate with ADR institutions in the country. This kind of collaboration is very fundamental as such entities possess the required expertise in ADR.

⁶¹ Ibid.

6.0 Conclusion

Environmental matters involve a complex number of legal, scientific and technical issues. Environmental disputes also involve a number of stakeholders whose interests need to be protected. In some cases, due to the nature of environmental dispute, if not settled in time, it may cause more harm making the use of ADR inevitable. The ELC as a specialized court with judges possessing expertise and knowledge in environmental matters offers a forum for adopting ADR mechanisms. The judicial expertise and knowledge in environmental matters and litigation puts the judges in a better position to choose the best ADR mechanism for a particular dispute as environmental matters involve a complex of legal, scientific and technical issues. The ELC should grab this opportunity and invoke Section 20 of the ELC Act where appropriate in solving environmental disputes.

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Securing the Realisation of Environmental and Social Rights for Persons with Disabilities in Kenya

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Abstract

The Constitution of Kenya, 2010 promotes the development agenda and also human rights in general. The inclusion of all persons is thus provided for. It is necessary to streamline the participation of Persons with Disabilities (PWDs) in society utilizing the legal infrastructure already in place and to also secure the realisation of their human rights. These include environmental and social rights. There are challenges facing PWDs in their quest to be fully recognized and included in society. Consequently, there is need for the empowerment of PWDs, the protection and safeguarding of their human rights and non-discrimination. The writer critically examines the issue of how to secure the full realisation of environmental and social rights for PWDs under the Constitution of Kenya, 2010 and the legal framework in general. The paper further looks at the meaningful inclusion of persons with disabilities in all policies and programmes in Kenya.

1.0 Introduction

The enactment of the current Constitution of Kenya, 2010¹ ushered in an era where human rights and the participation of all in the development agenda of the country gained new weight. Central to this is the concept of empowerment of all persons. This is captured in the spirit of the preamble and also under Article 10 thereof which spells out the national values and principles of governance².

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¹ Constitution of Kenya, 2010, Kenya Government Printer

² Most noticeable are the principles of equality, participation of the people, human dignity, equity, social justice, inclusiveness, equality, human rights, non-discrimination and protection of the marginalized, inter alia

The Constitution provides for the inclusion of all persons in the development agenda. Such inclusion, when defined within the circles of persons with disabilities, means the concept of everybody - irrelevant of any kind of ability - being accepted into society without pity, restriction or limitation.³

Persons with Disabilities (PWDs) are also known as persons with special abilities (PWSA). The Kenyan legal and institutional framework had not adequately taken into account the rights of PWDs prior to the enactment of the Persons with Disabilities Act of 2003 and the Constitution of Kenya 2010⁴.

There is a need to secure the realization of human rights for PWDs in Kenya. They require greater inclusion in access to and management of natural resources and the environment plus all other sectors. PWDs need not be afforded special favours; they should be exposed to an enabling environment through education, access to information⁵ and empowerment to enable them actualize their special abilities.

PWDs on the other hand, have an obligation to participate, contribute and advance the aspirations of the country and to respect the rights of other

³Cbm,' Inclusion means equal rights for all.' Available at:

<http://www.cbm.org/Inclusion-246762.php> [accessed 2 October 2013]

⁴ Article 54, Constitution of Kenya 2010.

⁵ See the *Access to Information Act, No. 31 of 2016* whose object and purpose of the Act is to—(a) give effect to the right of access to information by citizens as provided under Article 35 of the Constitution; (b) provide a framework for public entities and private bodies to proactively disclose information that they hold and to provide information on request in line with the constitutional principles; (c) provide a framework to facilitate access to information held by private bodies in compliance with any right protected by the Constitution and any other law; (d) promote routine and systematic information disclosure by public entities and private bodies on constitutional principles relating to accountability, transparency and public participation and access to information; (e) provide for the protection of persons who disclose information of public interest in good faith; and (f) provide a framework to facilitate public education on the right to access information under this Act. The Act guarantees that subject to this Act and any other written law, every citizen has the right of access to information held by—(a) the State; and (b) another person and where that information is required for the exercise or protection of any right or fundamental freedom.

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people in the society since rights go hand in hand with obligations. PWDs have not been fully considered in the development discourse. The manifest challenges in the near exclusion of PWDs stem from a discriminatory attitude that has been institutionalized in our various laws in a way that sees the same laws cater for general persons without offering specialized regard to PWDs. This paper critically examines the issue of how to secure the full realization of environmental and social rights for PWDs under the Constitution of Kenya, 2010 and the legal framework in general. The discourse further explores the meaningful inclusion of persons with disabilities in the development agenda. The argument is that such inclusion should not be driven by pity or temporary uplifting.

The writer suggests solutions and opportunities based on the existent local and international frameworks and policies to offer all round inclusiveness of PWDs in policies and programmes. There is need for empowerment of persons with disabilities in all other aspects including social, economic amongst others. PWDs are entitled to full realization of their environmental and social rights as well as fundamental freedoms without discrimination of any kind on the basis of disability.

2.0 Overview of International Legal and Institutional Framework on Persons with Disabilities

International human rights law lays down obligations which States are bound to abide by. By becoming parties to international treaties, states assume obligations and duties under international law to respect, to protect and to fulfill human rights. The obligation to respect means that states must refrain from interfering with or curtailing the enjoyment of human rights. The obligation to protect requires states to shield individuals and groups from human rights abuses. The obligation to fulfill means that states must take positive action to facilitate the enjoyment of basic human rights.⁶

⁶ See United Nations Human Rights, <http://www.ohchr.org/en/professionalinterest/Pages/InternationalLaw.aspx> [accessed 2 October 2013].

There are various legal instruments at the international level that seek to provide a guiding legal framework on the minimum standards that must be attained in the domestic laws dealing with the welfare of persons with disabilities so as to ensure that their rights are well entrenched, protected and promoted by the member states. This section examines such legal instruments. Of particular concern are the international instruments that form part of Kenya's legal framework on the protection of the rights of PWDs, on the basis of Article 2 (6) of the Constitution of Kenya, 2010⁷, which provides that treaties or conventions ratified by Kenya shall form part of the Law of Kenya.

2.1 The Universal Declaration of Human Rights (UDHR)⁸

The UDHR is the main legal instrument that sets down the basic principles guiding the recognition, promotion and protection of the human rights in the world. It informs the setting of standards, laws and institutions for the protection of human rights in States around the world and is always considered to be part of the International Bill of Human Rights.⁹

Everyone is entitled to all the rights and freedoms set forth in the Declaration without distinction of any kind, such as race, colour, sex, language, religion,

⁷ Constitution of Kenya, 2010, op. cit.; See also the Treaty Making and Ratification Act, No. 45 of 2012 which was enacted apply to—(a) multilateral treaties; (b) bilateral treaties which deal with—

(i) the security of Kenya, its sovereignty, independence, unity or territorial integrity; (ii) the rights and duties of citizens of Kenya; (iii) the status of Kenya under international law and the maintenance or support of such status; (iv) the relationship between Kenya and any international organisation or similar body; and (v) the environment and natural resources.

⁸UN General Assembly, Universal Declaration of Human Rights, 10 December 1948, 217 A (III), available at: <http://www.refworld.org/docid/3ae6b3712c.html> [accessed 2 October 2013] UN Doc A/810 at 71 (1948)

⁹ The international Bill of Human rights entails the UDHR, together with the International Covenant on Civil and Political Rights and its two Optional Protocols, and the International Covenant on Economic, Social and Cultural Rights.

political or other opinion, national or social origin, property, birth or other status¹⁰. Furthermore, it provides that no distinction shall be made on the basis of the political, jurisdictional or international status of the country or territory to which a person belongs, whether it be independent, trust, non-self-governing or under any other limitation of sovereignty. PWDs are therefore to be treated as any other person without undue regard to their disability status. Under the UDHR, everyone has the right to freedom of opinion and expression including the right to hold opinions without interference and to seek, receive and impart information and ideas through any media and regardless of frontiers.¹¹

The UDHR further provides for the right of all to participate in the governance affairs of their country.¹² In this respect, the UDHR applies to the inclusion of PWDs in Kenya in governance issues. The UDHR provides that everyone, as a member of society, has the right to social security and is entitled to realization, through national effort and international co-operation and in accordance with the organization and resources of each State, of the economic, social and cultural rights indispensable for his dignity and the free development of his personality.¹³

The right to education is safeguarded in the UDHR¹⁴. It provides that such education shall be free and compulsory, at least in the elementary and fundamental stages. It requires that technical and professional education should be made generally available and higher education should be equally accessible to all on the basis of merit. Relating this to the Kenyan scenario, it is vital that education is guaranteed for all. This strengthens the enabling environment for PWDs hence they can actualize their special abilities. Article 54 of the Constitution of Kenya, 2010 secures the right of PWDs to access educational institutions and facilities in society. Education under the UDHR should be directed to the full development of the human personality and to

¹⁰ UDHR, Article 2.

¹¹ Ibid, Article 19.

¹² Ibid, Article 21.

¹³ Ibid, Article 22.

¹⁴ Ibid, Article 26(1).

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the strengthening of respect for human rights and fundamental freedoms¹⁵. General human rights and the most basic freedoms are herein secured. Such security is guaranteed to all humans. In society, PWDs are not to be viewed any differently.

2.2 International Covenant on Civil and Political Rights (ICCPR)¹⁶

This Covenant was enacted for the purposes of promotion of the ideal of free human beings enjoying civil and political freedom.¹⁷ The ICCPR offers rights and prohibitions such as everyone having the inherent right to life.¹⁸ Under the ICCPR, torture is prohibited and so is cruel, inhuman or degrading treatment¹⁹ and slavery²⁰. Everyone has the right to liberty and security of person²¹ and if a person is to be deprived of their liberty, they should be treated with humanity and respect for the inherent dignity of the human person.²² The ICCPR provides that everyone has the right to recognition everywhere as a person before the law.²³ PWDs are free human beings who should enjoy their full civil and political rights.

2.3 Draft Principles on Human Rights and the Environment²⁴

PWDs and all persons alike have the right to active, free and meaningful participation in planning and decision-making activities and processes that may have an impact on the environment and development²⁵. This includes the right

¹⁵ Ibid, Article 26(2)

¹⁶ UN General Assembly, *International Covenant on Civil and Political Rights*, 16 December 1966, United Nations, Treaty Series, vol. 999, p. 171, available at: <http://www.refworld.org/docid/3ae6b3aa0.html> [accessed 3 October 2013]

¹⁷ See preamble.

¹⁸ ICCPR at Article 6(1).

¹⁹ Ibid, Article 7.

²⁰ Ibid, Article 8.

²¹ Ibid, Article 9.

²² Ibid, Article 10.

²³ Ibid, Article 16.

²⁴ E/CN.4/Sub.2/1994/9/ Annex I (1994).

²⁵ Principle 18.

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to a prior assessment of the environmental, developmental and human rights consequences of proposed actions.

2.4 International Covenant on Economic, Social and Cultural Rights (ICESCR)²⁶

The ICESCR aims to ensure the protection of economic, social and cultural rights. It recognises that all peoples have the right of self-determination. This is to enable them freely determine their political status and freely pursue their economic, social and cultural development²⁷. Article 2 of the ICESCR places an obligation on each State Party to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the present Covenant, without discrimination of any kind as to race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status. It also obligates them to adopt legislative measures that will facilitate enjoyment of such rights. Kenya has made commendable progress towards implementation of this, as seen under the current Constitution.

Chapter Four of the Constitution of Kenya, 2010 provides for the Bill of Rights and fundamental freedoms that are to be enjoyed by all persons without any discrimination. Indeed, it provides that the Bill of Rights is an integral part of Kenya's democratic state and is the framework for social, economic and cultural policies²⁸. It further provides that the purpose of recognizing and protecting human rights and fundamental freedoms is to preserve the dignity of individuals and communities and to promote social justice and the realization of the potential of all human beings²⁹.

²⁶UN General Assembly, *International Covenant on Economic, Social and Cultural Rights*, 16 December 1966, United Nations, Treaty Series, vol. 993, p. 3, available at: <http://www.refworld.org/docid/3ae6b36c0.html> [accessed 3 October 2013].

²⁷ ICESCR at Article 1(1).

²⁸ Constitution of Kenya, 2010, Op. Cit. Article 19(1).

²⁹ Ibid, Article 19(2).

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The Constitution of Kenya, 2010 prohibits either the State or any person from discriminating against any person on any of these grounds including: race, sex, pregnancy, marital status, health status, ethnic or social origin, colour, age, disability, religion, conscience, belief, culture, dress, language or birth³⁰.

States parties are to ensure the equal right of men and women to the enjoyment of all economic, social and cultural rights.³¹ Furthermore, the ICESCR recognizes the right of education to everyone³². The empowerment of PWDs through education as advocated by the writer is thus anchored in international law such as the ICESCR.

2.5 The United Nations Convention on the Rights of Persons with Disabilities³³

This convention was passed to facilitate the realization of human rights for the special group of PWDs. It re-emphasizes the equality of all persons regardless of their physical status.³⁴ The convention in its preamble also states that PWDs should have the opportunity to be actively involved in decision-making processes about policies and programmes. The purpose of the Convention as laid out under Article 1 is to promote, protect and ensure the full and equal enjoyment of all human rights and fundamental freedoms by all persons with disabilities, and to promote respect for their inherent dignity. The Convention outlines some important principles for promotion of the rights of PWDs under Article 3 which are as follows: Respect for inherent dignity, individual autonomy including the freedom to make one's own choices, and independence of persons; non-discrimination; full and effective participation and inclusion in society; respect for difference and acceptance

³⁰ Ibid, Article 27 (4).

³¹ ICESCR at Article 3.

³² Ibid, Article 13

³³ UN General Assembly, *Convention on the Rights of Persons with Disabilities*, resolution / adopted by the General Assembly, 24 January 2007, A/RES/61/106, available at: <http://www.refworld.org/docid/45f973632.html> [accessed 2 October 2013].

³⁴ Ibid, Preamble.

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of persons with disabilities as part of human diversity and humanity; equality of opportunity; accessibility; equality between men and women; and respect for the evolving capacities of children with disabilities and respect for the right of children with disabilities to preserve their identities. Noteworthy is the principle of full and effective participation and inclusion in society for PWDs. This principle together with that of equality of opportunity can only be effectively promoted where PWDs are armed with the relevant skills and knowledge to empower them economically, socially, culturally and to strengthen their role in the development agenda.

Article 4 of the Convention lays down the general obligations of the member states which include adopting all appropriate legislative, administrative and other measures for the implementation of the rights recognized in the present Convention. Member states are also required to modify or abolish existing laws, regulations, customs and practices that constitute discrimination against persons with disabilities. PWDs are also entitled to protection and promotion of their human rights in all policies and programmes initiated by member states. The Convention seeks to alleviate the lives of PWDs through promoting research and development in the use of new technologies, including information and communications technologies, mobility aids, devices and assistive technologies, suitable for persons with disabilities, giving priority to technologies at an affordable cost.³⁵

Further, the Convention provides that with regard to economic, social and cultural rights, each State Party undertakes to take measures to the maximum of its available resources and, where needed, within the framework of international cooperation, with a view to achieving progressively the full realization of these rights.³⁶ Article 4(3) provides for consultations between the state and the representative organisations in decision making processes. The foregoing obligations are meant to ensure that the member states do more than just put it down on paper that PWDs have recognizable rights. They must take practical steps to ensure that the same is promoted at all

³⁵ *Convention on the Rights of Persons with Disabilities*, Article 4(g).

³⁶ *Ibid*, Article 4 (2).

levels and by all persons in their territories. Article 8 further provides for awareness raising by member states for PWDs in recognition of their special skills and abilities *inter alia*.

In order to enable PWDs live independently and participate fully in all aspects of life, State Parties should take appropriate measures to ensure they are on an equal basis with others in matters physical environment, transportation, information and communications plus their respective systems, and to other facilities and services open or provided to the public, both in urban and in rural areas³⁷.

Other important provisions are to be found under Article 24 (I) which provides that States Parties recognize the right of persons with disabilities to education. With a view to realizing this right without discrimination and on the basis of equal opportunity, States Parties are to ensure an inclusive education system at all levels and lifelong learning directed to the full development of human potential and sense of dignity and self-worth, and the strengthening of respect for human rights, fundamental freedoms and human diversity, the development by PWDs of their personality, talents and creativity, as well as their mental and physical abilities, to their fullest potential and to enabling persons with disabilities to participate effectively in a free society.

Relating this Convention to the Kenyan scenario, the Constitution of Kenya, 2010 has specific provisions on the rights of PWDs as a group of persons recognised under it. It is to the effect that a person with any disability is entitled to be treated with dignity and respect and to be addressed and referred to in a manner that is not demeaning, to access educational institutions and facilities for persons with disabilities that are integrated into society to the extent compatible with the interests of the person, to reasonable access to all places, public transport and information, to use Sign language, Braille or other appropriate means of communication, and to access materials and devices to overcome constraints arising from the person's

³⁷ Ibid, Article .9

disability.³⁸ Further, it places an obligation on the State to ensure the progressive implementation of the principle that at least five percent of the members of the public in elective and appointive bodies are persons with disabilities³⁹.

The former Constitution of Kenya did not have much to offer in terms of specific protection of persons with disabilities. However, Parliament had already taken initiative to promote equality and equity for all groups of persons without necessarily making it appear like a reactive measure resulting from international law pressure. For instance, *The Persons with Disabilities Act* was enacted in 2003. The problem, however, has been full implementation of the same. There is need for ensuring that all stakeholders, especially in the education sector, take part in promoting and protecting the rights of PWDs. In South Africa, efforts to implement inclusive education started before the *Convention on the Rights of Persons with Disabilities* came into force. It is an obligation for every educational institution to ensure physical accessibility for PWDs.⁴⁰ Kenya should also ensure that not only special institutions of learning conform to the international standards for protection of PWDs' rights but all considering that some forms of disability do not necessarily require a person to join a special institution. As such, wherever they choose to be, they should find a conducive environment that enables them to achieve their life goals, as envisaged under the *UN Convention on the Rights of Persons with Disabilities*.

³⁸ Constitution of Kenya, 2010, op. cit. Article 54(1).

³⁹ Ibid, Article 54(2).

⁴⁰ Realisation of inclusive education for persons with disabilities at rural universities in South Africa. Posted on 10 September 2013 available at: <http://africlaw.com/2013/09/10/realisation-of-inclusive-education-for-persons-with-disabilities-at-rural-universities-in-south-africa/> [accessed 16 October 2013].

2.6 Committee on the Rights of Persons with Disabilities

This Committee is established under Article 34 of the United Nations Convention on the Rights of Persons with Disabilities.⁴¹ The Committee on the Rights of Persons with Disabilities (CRPD) is the body of independent experts which monitors implementation of the Convention by the States Parties. All States parties are under obligation to submit regular reports to the Committee on how the rights are being implemented. States must report initially within two years of accepting the Convention and thereafter every four years. The Committee examines each report and shall make such suggestions and general recommendations on the report as it may consider appropriate and shall forward these to the State Party concerned.⁴²

The Optional Protocol to the Convention gives the Committee competence to examine individual complaints with regard to alleged violations of the Convention by States parties to the Protocol.⁴³ It is however noteworthy that Kenya has neither signed nor ratified the Optional Protocol yet and may therefore not be reported to the Committee by individual complainants. It is however still bound to submit the regular reports on the progress in implementation of PWDs' rights.⁴⁴

⁴¹ UN General Assembly, Convention on the Rights of Persons with Disabilities, op. cit.

⁴² Visit <http://www.ohchr.org/en/hrbodies/crpd/pages/crpdindex.aspx> [accessed 2 October 2013].

⁴³ Article I, UN General Assembly, *Optional Protocol to the Convention on the Rights of Persons with Disabilities*, 13 December 2006, A/RES/61/106, Annex II, available at: <http://www.refworld.org/docid/4680d0982.html> [accessed 2 October 2013].

⁴⁴ All States parties to the Convention on the Rights of Persons with Disabilities are obliged to submit regular reports to the Committee on how the rights are being implemented. Available at: <http://www.refworld.org/publisher/CRPD.html> [accessed 16 October 2013].

2.7 African (Banjul) Charter on Human and Peoples' Rights

The Banjul Charter⁴⁵ provides that every citizen should have the right to participate freely in their government, either directly or through freely chosen representatives in accordance with the provisions of the law. Every citizen is conferred with the right to equal access to the public service of their country as well as the right of access to public property and services in strict equality of all persons before the law. In Kenya, participation of the people in governance is envisaged in the national values and principles of governance enshrined in Article 10 of the Constitution.

Some documented cases uphold the sanctity of general human rights. The case of *the Social and Economic Rights Action Center and the Center for Economic and Social Rights v. Nigeria* asserted the rights of the Ogoni people.⁴⁶ In South Africa, in a matter involving a local council's termination of water supply to a block of flats (*Residents of Bon Vista Mansions v Southern Metropolitan Local Council*⁴⁷), the Court held that this amounted to a failure to 'respect' the right (of continuing access) to water, that this was prima facie in breach of the obligations of the local council (which was part of the state), and that accordingly there was an onus on the council to justify it in a manner consistent with the Constitution.

⁴⁵ Adopted June 27, 1981, OAU Doc. CAB/LEG/67/3 rev. 5, 21 I.L.M. 58 (1982), entered into force October 21, 1986.

⁴⁶ In 1996, the Social and Economic Rights Action Centre (SERAC) brought a case against Nigeria to the African Commission on Human and Peoples' Rights alleging that the military government had, through its business relationship with Shell Petroleum Development Corporation (SPDC), exploited oil reserves in Ogoniland with no regard for the health or environment of the Ogoni People. The Commission found, in a 2001 decision on the merits, that Nigeria had violated many of the rights enshrined in the African Charter on Human and Peoples' Rights (Arts. 2, 4, 14, 16, 18(1), 21 and 24)

"The SERAC case" available at: <http://www.escr-net.org/docs/i/404115>

⁴⁷ 2002 (6) BCLR 625 (W)

2.8 Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa⁴⁸

Article 23 of the Protocol⁴⁹ specifically provides for the protection of the rights of women with disabilities. It is to the effect that States Parties must undertake to ensure the protection of women with disabilities and take specific measures commensurate with their physical, economic and social needs to facilitate their access to employment, professional and vocational training as well as their participation in decision-making; and ensure the right of women with disabilities to freedom from violence, including sexual abuse, discrimination based on disability and the right to be treated with dignity. According to Kenya's Initial National Report of 31st August 2011 on the rights of PWDs submitted to the United Nations, women constituted over 50 per cent of the total population yet they remained largely marginalized. Generally, women face a myriad of challenges including the fact that they have limited access to and control of resources, be it natural or not. They also miss out on other socio-economic opportunities. Fewer women enrolled in mainstream education as compared to men and the levels of stigma surrounding them in every circle of life were at alarming levels.⁵⁰

The national report cited that women with disabilities were more vulnerable, neglected and deprived of their rights. Traditional and conservative views were blamed for reinforcing the misconception about the ability of women and girls with disabilities to adequately perform their roles as other peers. Article 27(3) of the Constitution of Kenya, 2010 guarantees all citizens (including women and men with disabilities) the right to equal treatment.

⁴⁸Available at: <http://www.achpr.org/instruments/women-protocol/> [accessed 2 October 2013]

⁴⁹ Organization of African Unity (OAU), *Protocol to the African Charter on Human and People's Rights on the Establishment of an African Court on Human and People's Rights*, 10 June 1998, available at: <http://www.refworld.org/docid/3f4b19c14.html>.

⁵⁰Kenya's initial national report of 31st August 2011 on the rights of PWDs submitted to the United Nations available at: http://www2.ohchr.org/SPdocs/CRPD/futuresession/CRPD.C.KEN.I_en.doc. [accessed 2 October 2013]

Equality and equity should entail equal rights in political, economic, cultural and economic spheres of life.

2.9 Sustainable Development Goals and the Rights of Persons with Disabilities

The 2030 Agenda and the Sustainable Development Goals (SDGs)⁵¹ is a plan of action for people, planet and prosperity. It is meant to eradicate poverty in all its forms and dimensions, including extreme poverty, which is considered to be the greatest global challenge and an indispensable requirement for sustainable development.⁵²

The 17 Sustainable Development Goals and 169 targets seek to build on the Millennium Development Goals and complete what these did not achieve. They seek to realize the human rights of all and to achieve gender equality and the empowerment of all women and girls. They are integrated and indivisible and balance the three dimensions of sustainable development: the economic, social and environmental.⁵³

The SDGs reaffirm the importance of the Universal Declaration of Human Rights, as well as other international instruments relating to human rights and international law. They emphasize the responsibilities of all States, in conformity with the Charter of the United Nations, to respect, protect and promote human rights and fundamental freedoms for all, without distinction of any kind as to race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth, disability or other status.⁵⁴ The SDGs also seek the empowerment of people who are vulnerable including all children, youth, persons with disabilities (of whom more than 80% live in poverty), people living with HIV/AIDS, older persons, indigenous

⁵¹ A/RES/70/1 - Transforming our world: the 2030 Agenda for Sustainable Development.

⁵² United Nations Sustainable Development knowledge Platform, "Transforming our world: the 2030 Agenda for Sustainable Development-Preamble," <https://sustainabledevelopment.un.org/post2015/transformingourworld>

⁵³ Ibid.

⁵⁴ Ibid.

peoples, refugees and internally displaced persons and migrants. The aim is to take further effective measures and actions, in conformity with international law, to remove obstacles and constraints, strengthen support and meet the special needs of people living in areas affected by complex humanitarian emergencies and in areas affected by terrorism.⁵⁵

The SDGs also seek to commit countries to provide inclusive and equitable quality education at all levels – early childhood, primary, secondary, tertiary, technical and vocational training. All people, irrespective of sex, age, race, ethnicity, and persons with disabilities, migrants, indigenous peoples, children and youth, especially those in vulnerable situations, should have access to life-long learning opportunities that help them acquire the knowledge and skills needed to exploit opportunities and to participate fully in society. The goal is to also provide children and youth with a nurturing environment for the full realization of their rights and capabilities, helping our countries to reap the demographic dividend including through safe schools and cohesive communities and families.⁵⁶

In order to ensure inclusive and equitable quality education and promote lifelong learning opportunities for all, Goal 4 provides that all countries should ensure that by 2030, they eliminate gender disparities in education and ensure equal access to all levels of education and vocational training for the vulnerable, including persons with disabilities, indigenous peoples and children in vulnerable situations. They are also supposed to build and upgrade education facilities that are child, disability and gender sensitive and provide safe, non-violent, inclusive and effective learning environments for all. Goal 8 provides that one of the ways of promoting sustained, inclusive and sustainable economic growth, full and productive employment and decent work for all will be to achieve full and productive employment and decent work for all women and men, including for young people and persons with disabilities, and equal pay for work of equal value by the year 2030.

⁵⁵ Ibid.

⁵⁶ Ibid.

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Countries are also supposed to ensure that, by 2030, they empower and promote the social, economic and political inclusion of all, irrespective of age, sex, disability, race, ethnicity, origin, religion or economic or other status.⁵⁷ Goal 11 requires that, by 2030, countries should provide access to safe, affordable, accessible and sustainable transport systems for all, improving road safety, notably by expanding public transport, with special attention to the needs of those in vulnerable situations, women, children, persons with disabilities and older persons. Related to this is also the requirement to provide universal access to safe, inclusive and accessible, green and public spaces, in particular for women and children, older persons and persons with disabilities.⁵⁸

The SDGs provide good guidelines to countries to promote sustainable development agenda that is sensitive and responsive to the rights and special needs of PWDs and they should therefore be incorporated across all sectors in order to achieve an all-inclusive and meaningful development agenda for all persons in Kenya. While Kenya has shown its willingness to adopt these goals, they should be actively promoted and implemented for the sake of all people including PWDs.⁵⁹ PWDs should actively participate in the realisation and enjoyment of sustainable development. They should be free from poverty, access justice and also access funding for development as envisaged in the SDGs 2030 Agenda.⁶⁰

3.0 Domestic Legal and Institutional Framework on the Protection of the Rights of Persons with Disabilities (Pwds)

This section offers a broad overview of the current legal and institutional framework in Kenya governing and protecting the rights of PWDs. In specific

⁵⁷ Goal 10.2.

⁵⁸ Goal 11.7.

⁵⁹ See Framework for Implementing Sustainable Development Goals (SDGs) In Kenya, November 25, 2016, available at <https://ayubmacharia.com/2016/11/25/framework-for-implementing-sustainable-development-goals-sdgs-in-kenya/>

⁶⁰ For instance, see SDG goals 1, 16 & 17.

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focus will be the Persons with Disabilities Act⁶¹ and the Constitution of Kenya, 2010.

3.1 Persons with Disabilities Act

This Act⁶² was enacted to provide for the rights and rehabilitation of persons with disabilities; to achieve equalization of opportunities for persons with disabilities; and to establish the National Council for Persons with Disabilities.⁶³ Section 2 of the Act defines “disability” to mean a physical, sensory, mental or other impairment, including any visual, hearing, learning or physical incapability, which impacts adversely on social, economic or environmental participation.

To facilitate the realization of the above-mentioned purpose, the Act establishes the National Council for Persons with Disabilities⁶⁴. It is charged with the task of promoting the rights of persons with disability in Kenya and mainstreaming disability issues into all aspects of national development.⁶⁵ The functions of the Council are set out under section 7 of the Act as *inter alia*: to formulate and develop measures and policies designed to achieve equal opportunities for persons with disabilities by ensuring to the maximum extent possible that they obtain education and employment, and participate fully in sporting, recreational and cultural activities and are afforded full access to community and social services; advise the Minister on the provisions of any international treaty or agreement relating to the welfare or rehabilitation of persons with disabilities and its benefits to the country; and encourage and secure the establishment of vocational rehabilitation centers and other institutions and other services for the welfare, rehabilitation and employment of persons with disabilities.

⁶¹ No. 14 of 2003, Laws of Kenya.

⁶² Persons with Disabilities Act, No. 14 of 2003, Revised Edition 2010 [2003] Government Printer, Nairobi.

⁶³ Ibid, Preamble.

⁶⁴ Ibid, section 3.

⁶⁵ Website, Visit <http://ncpwd.go.ke/> [accessed 2 October 2013].

Part III of the Act provides for the rights and the privileges of Persons with Disabilities. Section 11 places an obligation on the Government to take steps to the maximum of its available resources with a view to achieving the full realization of the rights of persons with disabilities set out in this Part. Section 12 of the Act prohibits any person from denying a person with a disability access to opportunities for suitable employment. Section 19 of the Act mandates the Council to work in consultation with the relevant agencies of Government to make provisions in all districts for an integrated system of special and non-formal education for persons with all forms of disabilities and the establishment where possible, of Braille and recorded libraries for persons with visual disabilities. In recognition of the international recognition of civic rights, part IV of the Act provides for the civic rights of PWDs. The Government of Kenya noted in the Initial Report 2011, as cited above, on the rights of PWDs presented to the United Nations that the PWD Act of 2003 did not specifically take into account the peculiar needs of women and girls with disabilities⁶⁶. On the other hand, the Children Act⁶⁷ provides for the protection of the rights and welfare of the child in which special emphasis is placed on the girl child and children with disabilities. In South Africa, the Government is under a duty to give special assistance to groups who find it particularly difficult to meet their basic needs and such groups include people living with disabilities *inter alia*.⁶⁸ The Association for People with Disabilities (APD) is a social service provider in South Africa that partners with PWDs with the aim of removing disabling barriers so that they can be fully integrated into society.⁶⁹

The National Council should closely work with other relevant stakeholders to protect and promote recognition and realization of the rights of PWDs.

⁶⁶ Kenya's initial national report of 31st August 2011, op. cit.

⁶⁷ No. 8 of 2001, Kenya Government Printer.

⁶⁸ Economic, Social and Cultural Rights in South Africa. A study prepared for the Swedish NGO Foundation for Human Rights by the Human Rights Committee of South Africa, January 2000, p 96.

⁶⁹ Ibid, p 120.

3.2 The Constitution of Kenya, 2010

The Constitution of Kenya, 2010 is founded on the pillars of the national values and principles of governance as set out under Article 10 thereof. Article 10(1) provides that these values and principles shall bind all State organs, State officers, public officers and all persons whenever any of them: applies or interprets this Constitution; enacts, applies or interprets any law; or makes or implements public policy decisions. Such values and principles have been listed to include: patriotism, national unity, sharing and devolution of power, the rule of law, democracy and participation of the people; human dignity, equity, social justice, inclusiveness, equality, human rights, non-discrimination and protection of the marginalized; good governance, integrity, transparency and accountability; and sustainable development.

Chapter Four of the Constitution provides for the Bill of Rights and fundamental freedoms that are to be enjoyed by all persons without any discrimination. The framework for social, economic and cultural policies is therein established under Article 19(1).⁷⁰ Discrimination of PWDs among other persons of different status is prohibited under Article 27(4) of the Constitution of Kenya, 2010⁷¹.

The Constitution guarantees the right to a clean and healthy environment⁷². Enforcement of environmental rights under Article 70 of the Constitution is also guaranteed. If a person alleges that a right guaranteed under Article 42 has been or is likely to be denied, violated, infringed or threatened, the person may apply to Court for redress in addition to any other legal remedies that are available in respect to the same matter. However, it is important to note that citizens have a duty to participate in environmental conservation and protection. Ojwang Ag. J (as he then was) in *Park View Shopping Arcade v Kangethe & 2 others*⁷³ observed that "...Environmental conservation, by its

⁷⁰ Constitution of Kenya, 2010 op. cit.

⁷¹ Constitution of Kenya, 2010 op. cit.

⁷² Article 42, See case of *Peter K. Waweru vs Republic* [2006] eKLR available at: http://www.kenyalaw.org/CaseSearch/view_preview.php?link=51646334621357351283598&words= [accessed 15 October 2013].

⁷³ KLR (E&L) I, 592.

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*intrinsic character, cannot be supposed to be a task for Government alone, and all citizens have a right and a duty to make an input...*⁷⁴

Article 43 (1) provides for the economic and social rights of all persons including the right to the highest attainable standard of health, which includes the right to health care services, including reproductive health care; 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.

Article 48 guarantees the right to access to justice. This right has for the longest time been considered as one of the most important rights entitled to a person in a democratic society⁷⁵. Over time, judicial and legislative reforms have been initiated with the aim of improving access to justice in Kenya. However institutional inadequacies and lack of appropriate policy and legislative frameworks continue to hinder equal access to justice⁷⁶. In accordance with its Constitutional mandate, the Commission for the Implementation of the Constitution (CIC) held a consultative forum on access to justice to review laws and policies relating to access to justice. The aim of the forum was to align the respective laws and policies to the Constitution. The forum also discussed current gaps in policy and legislation. What is especially noteworthy is that the forum discussed ways of improving judicial services and equal access to justice for PWDs. This included the provision of procedural accommodations in order to facilitate the role of PWDs as direct or indirect participants in all legal proceedings, including at investigative and other preliminary stages.⁷⁷

⁷⁴Muigua, K & Kariuki, F, Safeguarding Environmental Rights in Kenya. Paper available at:

<http://www.kmco.co.ke/attachments/article/100/A%20Paper%20on%20%20Safeguarding%20Environmental%20Rights%20in%20Kenya.pdf> [accessed 15 October 2013].

⁷⁵<http://www.cickenya.org/cicoldsite/news/aligning-laws-and-policies-access-justice-cok-2012> [accessed 11 October 2013].

⁷⁶ Ibid.

⁷⁷ This forum was announced at the launch of the CIC Annual report 2011/2012 at the K.I.C.C Nairobi on the 31st of October 2012.

The provisions of Article 54 of the Constitution are mirrored by section 13 of the Persons with Disabilities Act that reserves employment for them.⁷⁸ Article 59 establishes the Kenya National Human Rights and Equality Commission which has the mandate to *inter alia*: promote respect for human rights and develop a culture of human rights in the Republic; promote gender equality and equity generally and to coordinate and facilitate gender mainstreaming in national development; promote the protection, and observance of human rights in public and private institutions; and to act as the principal organ of the State in ensuring compliance with obligations under treaties and conventions relating to human rights.

Chapter Five of the Constitution deals with natural resources use, access and management. Article 60 provides for the principles of land management. Of utmost importance amongst these are: 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.⁷⁹

Further, Article 69 outlines the obligations of the State in regard to environment to include *inter alia*: ensuring sustainable exploitation, utilization, management and conservation of the environment and natural resources, ensuring the equitable sharing of the accruing benefits; encourage public participation in the management, protection and conservation of the environment; and utilizing the environment and natural resources for the benefit of the people of Kenya.⁸⁰

Article 69(2) provides that every person has a duty to cooperate with State organs and other persons to protect and conserve the environment and ensure ecologically sustainable development and use of natural resources. For PWDs to be able to fulfill this duty, the State needs to set up and implement measures that facilitate and empower their participation. Article 72 of the

⁷⁸ The National Council for Persons with Disabilities shall endeavor to secure the reservation of five percent of all casual, emergency and contractual positions in employment in the public and private sectors for PWDs.

⁷⁹ Constitution of Kenya, 2010 op. cit.

⁸⁰ Ibid.

Constitution provides that Parliament shall enact legislation to give effect to the provisions of the part dealing with the environment. The inclusion of PWDs in such legislation especially relating to management, preservation and protection of natural resources and the environment would be a major milestone in securing their rights.

Basically, the Constitution seeks to ensure that all persons regardless of their social or health status are treated equally and afforded the same chances for self development and/or actualization as well as participating in all spheres of development. In conjunction with the international legal human rights instruments discussed, the Constitution can be seen as further promoting the social and environmental rights of PWDs and assisting a great deal in securing the realization of these rights.

4.0 Challenges

Despite the robust and well meaning human rights framework set out under the Constitution, the reality on the ground is that there exist cultural, social, economic and perhaps political impediments to realization of social and environmental rights by PWDs. Before they are realized, the foregoing impediments must conclusively be dealt with.

Some communities erroneously believe that disability is an infliction by evil spirits leading to the view that such people can never amount to anything important in life and can only survive through a life of constant dependency.⁸¹ They are even shunned by the larger society and sometimes even by their own families. Children are denied the right to education as they are locked in the house by parents to avoid 'embarrassing' the family.

Socially, they are stigmatized so that even those who manage to secure a place in the mainstream educational centers suffer silently as they are labeled 'disabled' persons with no ability. Actually, recent campaigns are determined to change this notion and activist groups often use the term 'persons with

⁸¹ Persons Living with Psychosocial Disabilities in Kenya, Available at: www.un.org/disabilities/documents/mental_disabilities_kenya.doc [accessed 2 October 2013].

special abilities' together with the slogan 'disability is not inability'. Not many employers are willing to absorb such people into their organizations and these often leads to financial dependency by PWDs. A person who is economically challenged faces huge hurdles in their endeavours for self-determination and personal development.

Politically, the main challenge that exists is that although laws and policies have been put in place, there often lacks the political will power to enforce them and/or to realize the rights guaranteed therein. The rights of entitlement that only exist on paper may not do much for a group that already faces discrimination right from their own homes and which discrimination is sometimes perpetrated by their closest relatives.

Our current laws are also a hindrance to the inclusion of PWDs in the development agenda as well as to safeguarding their rights. The same laws should undergo specific reviews that consider PWDs in all spheres of development including but not limited to management of natural resources. Courts have ruled that for one to benefit and be recognised as falling under PWD, they must be registered with the National Council for Persons with Disabilities. The question was canvassed in the case of *Esau Rodgers Mumia v Central Bank of Kenya* [2017] eKLR, Cause no. 940 of 2014, where the Court stated as follows:

"How then does one become certified as a person with disability for purposes of accessing the rights and privileges under the Act? In my view, the answer lies in Section 7(1)(c) which provides for registration of persons with disabilities by the National Council for Persons with Disabilities" [para. 18].

In the *Esau* case, the Court went further to rule that:

"The gist of these decisions with which I fully agree, is that disability as defined in the Persons with Disabilities Act is not an internal matter between an employee and their employer. For an employee to access the benefits of disability set out in law, their disability must be certified through registration by the National Council for Persons with Disabilities relying on duly completed medical reports" [para. 21].

In ***Suleman Angolo & another v Executive Officer Teachers Service Commission* [2015] eKLR** the Court also stated as follows:

"Persons with Disabilities enjoy certain rights and benefits as provided in the Persons with Disabilities Act. These include tax exemption as provided in the

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Persons with Disabilities (Income Tax Deductions and Exemptions) Order. To enjoy such benefits however one must be registered with the Council-The National Council for Persons with Disabilities. The same would apply in the area of retirement.”

While mandatory registration of persons with disabilities may be well meaning, it presents challenges especially when it comes to PWDs who are not in formal employment. They may easily miss out on any intended benefits on this ground.

While it is also important to promote equality, the aspect of equity should also be considered as women and girls face unique gender-based challenges that become even more complicated by disabilities. These unique circumstances should be considered in coming up with any plans or policies. Unfortunately, the current framework on protection of the rights of PWDs seems to address the problem in isolation without factoring in the need to identify the unique challenges facing each of the groups falling under PWDs. This would be the essence of the value of equity and not just equality, as guaranteed under the current Constitution of Kenya.

The National Council for Persons with Disabilities thus should work harder to engage various stakeholders to eliminate discrimination and ensure that PWDs are not disadvantaged by their non-registration. Alternatively, where such registration is mandatory, they should ensure that there is enough sensitization of PWDs and the general public to ensure that's they get registered regardless of the physical location or social status.

4.1 A Review of Various Laws⁸²

In the pursuit of securing the realization of environmental and social rights for PWDs and that of including them in the development discourse, a review of some major laws is necessary. These laws and frameworks are instrumental in aiding the growth and development of various social and environmental

⁸² VSO Jitolee Report for Consultancy on a Technical Review of Environment and Natural Resource Management Policies and Regulations, July 2013.

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sectors. However, the question comes in of whether PWDs in Kenya have adequately been provided for under these laws and frameworks.

In a bid to achieve an integrated and harmonized policy and legal framework, the Environment Management and Coordination Act was enacted in 1999. However, the National Environment Council as established under Section 4, the National Environment Management Authority (NEMA) as established under Section 7 and the NEMA management board have no provisions whatsoever for inclusion of persons with disabilities in environmental management and coordination. Provincial and District Environment Management Committees as currently established under Section 29 do not provide for representation of persons with disabilities. Under Section 37 regarding the establishment of the National Environment Action Committee, there is no representation of persons with disabilities. This is a major hindrance towards safeguarding of the environmental rights of PWDs. The existent non-representation or under-representation of PWDs in management of such an essential natural resource only leaves them disadvantaged and robs them of their much needed due priority. The requirement under section 29(3) of Environment (Management and Coordination) (Amendment) Act 2015 which requires a County Governor, in making the appointments under this section, to ensure equal opportunities for persons with disabilities and other marginalized groups is hardly sufficient to realise this goal due to the wide discretion without necessarily putting in place any mechanisms to ensure that this is actually achieved.

The National Environment Policy⁸³ provides for environmental quality and health. It focuses on issues relating to air quality, water and sanitation, waste management, radiation and noise, all elements which may aggravate disability or cause disability among the populace. This policy was meant to enhance the social and environmental rights of PWDs.

Similarly, the National Water Policy does not expressly and adequately provide for equitable access to water by PWDs. Also, the representation of PWDs in Water Sector Institutions and especially their management is at a

⁸³ Revised Draft 8, August 2012.

minimum. This is a further and continued hindrance to the realization of their environmental right to access to water.

The Water Act 2016⁸⁴ was enacted to provide for the regulation, management and development of water resources and water and sewerage services in line with the Constitution.⁸⁵ The Water Act 2016 provides that every person has the right to access water resources, whose administration is the function of the national government as stipulated in the Fourth Schedule to the Constitution.⁸⁶

The Water Act establishes the following institutions: the Water Resources Authority⁸⁷, the Basin water Resources Committee⁸⁸, the Water Resources Users Association⁸⁹, the National Water Harvesting and Storage Authority⁹⁰, the Water Works Development Agencies⁹¹, the Water Services Regulatory Board⁹², the Water Sector Trust Fund⁹³ and the Water Tribunal⁹⁴. Despite the constitutional provisions on provision for opportunities for PWDs as part of special groups, the Water Act 2016 and its powers and functions relating to the above institutions houses no clear provisions for the inclusion of persons with disabilities⁹⁵. Further, the Act does not give due regard to the unique needs of persons with disabilities in the management, conservation and access to water. There is need to streamline the Water Act so that it takes into account the environmental rights of PWDs. PWDs need to be included in water resource management because they require special priority in governance of this natural resource. To this end, their access to the natural

⁸⁴ No. 43 of 2016, Laws of Kenya.

⁸⁵ Ibid., s.3.

⁸⁶ Ibid., s. 9.

⁸⁷ Section 11(I) of the Water Act 2016.

⁸⁸ Section 25 of the Water Act 2016.

⁸⁹ Section 29 of the Water Act 2016.

⁹⁰ Section 30 of the Water Act 2016.

⁹¹ Section 65, Water Act 2016.

⁹² Section 70, Water Act 2016.

⁹³ Section 113, Water Act 2016.

⁹⁴ Section 119, Water Act 2016.

⁹⁵ VSO Jitolee Report, Op. Cit., p 10

resource can be enhanced and improved and ultimately their social and environmental rights secured.

5.0 Opportunities and Way Forward

To ensure that these persons fully enjoy the guaranteed constitutional rights, there is need for a paradigm shift in the push for the rights of PWDs. The efforts should be directed towards empowerment of PWDs as against adoption of affirmative action as this is short-lived while empowerment offers a lasting solution not only to the individual but also to their own families due to the ripple effect of improved livelihoods. An educated person need not depend on favours as they will competently seek public offices while the person who perennially depends on handouts and favors may never achieve fulfillment in their lives.

Article 43 of the Constitution guarantees every person's right to access to education.⁹⁶ To ensure that even PWDs fully participate in the development of the country, the first step should be to empower them through ensuring that they acquire relevant education and/or skills or training.

Article 53 of the Constitution also guarantees the right of every child to access free and compulsory basic education.

The International Covenant on Economic, Social and Cultural Rights (ICESCR) provides under Article 13(1) that the States Parties to the Covenant should recognize the right of everyone to education. It further provides that education should be directed to the full development of the human personality and the sense of its dignity, and shall strengthen the respect for human rights and fundamental freedoms. The provisions also note that education shall enable all persons to participate effectively in a free society, promote understanding, tolerance and friendship among all nations and all racial, ethnic or religious groups, and further the activities of the United Nations for the maintenance of peace.

To actualize this, Article 13(2) lays out the obligations of member States by providing that primary education shall be compulsory and available free to all;

⁹⁶ Constitution of Kenya, 2010, Op. Cit. Article 43(1)(f)

secondary education in its different forms, including technical and vocational secondary education, shall be made generally available and accessible to all by every appropriate means, and in particular by the progressive introduction of free education; higher education shall be made equally accessible to all, on the basis of capacity, by every appropriate means, and in particular by the progressive introduction of free education; fundamental education shall be encouraged or intensified as far as possible for those persons who have not received or completed the whole period of their primary education; the development of a system of schools at all levels shall be actively pursued, an adequate fellowship system shall be established, and the material conditions of teaching staff shall be continuously improved.

This emphasis by the Covenant supports the assertion that education has the ability to empower PWDs in a way not realizable through affirmative action. The Basic Education Act, 2013⁹⁷ is an Act of Parliament that was enacted to give effect to Article 53 of the Constitution and other enabling provisions; to promote and regulate free and compulsory basic education; to provide for accreditation, registration, governance and management of institutions of basic education; to provide for the establishment of the National Education Board, the Education Standards and Quality Assurance Commission, and the County Education Board and for connected purposes. This Act has important provisions that would be useful in realization of the right to access to education by PWDs.

It is perhaps noteworthy that the Act under section 2 defines "basic education" to mean the educational programmes offered and imparted to a person in an institution of basic education and includes Adult basic education and education offered in pre-primary educational institutions and centers.⁹⁸ The Act also recognises "special education needs" which it defines to mean conditions, physical, mental or intellectual conditions with substantial and long term adverse effects on the, learning ability (other than exposure) or the needs of those who learn differently or have disabilities that prevent or hinder

⁹⁷ No. 14 of 2013.

⁹⁸ Ibid, section 2.

or make it harder for them to access education or educational facilities of a kind generally provided for learners of the same age in the formal education system. Further, the Act provides that "special needs education" includes education for gifted or talented learners as well as learners with disability and includes education which provides appropriate curriculum differentiation in terms of content, pedagogy, instructional materials, alternative media of communication or duration to address the special needs of learners and to eliminate social, mental, intellectual, physical or environmental barriers to learners.⁹⁹

Section 4 is also important as it provides the guiding values and principles in the provision of basic education to include *inter alia*: the right of every child to free and compulsory basic education; equitable access for the youth to basic education and equal access to education or institutions; promotion of quality and relevance; encouraging independent and critical thinking; and cultivating skills, disciplines and capacities for reconstruction and development; promotion of peace,, integration, cohesion, tolerance, and inclusion as an objective in the provision of basic education; imparting relevant knowledge, skills, attitudes and values to learners to foster the spirit and sense of patriotism, nationhood, unity of purpose, togetherness, and respect; promotion of good governance, participation and inclusiveness of parents, communities, private sector and other stakeholders in the development and management of basic education; transparency and cost effective use of educational resources and sustainable implementation of educational services; promoting the respect for the right of the child's opinion in matters that affect the child; promotion of innovativeness, inventiveness, creativity, technology transfer and an entrepreneurial culture; non-discrimination, encouragement and protection of the marginalized, persons with disabilities and those with special needs; and provision of appropriate human resource, funds, equipment, infrastructure and related resources that meet the needs of every child in basic education.

⁹⁹ Ibid.

As a reflection of the provisions of the International Covenant on Economic, Social and Cultural Rights, section 28 of the Act obligates the Cabinet Secretary in liaison with other stakeholders to provide for the establishment of: pre-primary, primary and secondary schools, mobile schools, and adult and continuing education centers, within a reasonably accessible distance within a county; appropriate boarding primary schools in arid and semi-arid areas, hard-to-reach and vulnerable groups as appropriate; and academic centers, or relevant educational institutions to cater for gifted and talented learners; special and integrated schools for learners with disability.¹⁰⁰ This should be actualized at the earliest.

Section 39 of the Act spells out the responsibility of the Government regarding basic education to include *inter alia*: providing free and compulsory basic education to every child; ensuring compulsory admission and attendance of children of compulsory school age at school or an institution offering basic education; ensuring that children belonging to marginalized, vulnerable or disadvantaged groups are not discriminated against and prevented from pursuing and completing basic education; providing human resource including adequate teaching and non-teaching staff according to the prescribed staffing norms; providing infrastructure including schools, learning and teaching equipment and appropriate financial resources; ensuring quality basic education conforming to the set standards and norms; providing special education and training facilities for talented and gifted pupils and pupils with disabilities; and ensuring compulsory admission, attendance and completion of basic education by every pupil; monitoring functioning of schools.

Section 44 of the Act obligates the Government to establish and run special institutions for offering special needs education.

Going by the foregoing provisions on education provision to all and with special emphasis on the PWDs, the stage is set for the empowerment of PWDs through ensuring that they access education and acquire relevant skills that will enable them compete ably with everyone else when it comes to inclusion and/or participation in the governance of all sectors of the country's

¹⁰⁰ Ibid, Section 28(2).

economy. What remains is the political will to enforce the implementation of this right as provided for under the various legal instruments.

There is need to include everyone in this campaign and role of ensuring that PWDs are not sidelined in accessing educational facilities and training. It has been noted that this is not a Kenyan problem only but actually in both developed and developing countries, in order to achieve more inclusive societies and employment opportunities for people with disabilities there is need for improved access to basic education, vocational training relevant to labour market needs and jobs suited to their skills, interests and abilities, with adaptations as needed.¹⁰¹

The existing situation will not change unless support is rallied from all quarters. Most of the disabled people in Kenya, as in most developing countries in the world, live in poverty, have limited opportunities for accessing education, health, suitable housing and employment opportunities.¹⁰²

The emphasis around the world is generally on the PWDs' ability to carry out the given task rather than the notion of entitlement. This is captured in the fact that any person or state organ is prohibited from denying a PWD an employment opportunity on the ground of disability if such a person is qualified for the job. The notion of entitlement may create the wrong impression that it will not matter whether the person is qualified or not but will get a favour on the ground that they are disabled. The reality is that unless PWDs are empowered with skills, training and/or formal education, any meaningful inclusion and participation in the development affairs will never be achieved.

Participation and inclusion in the governance affairs across such areas as environment, politics, and others will require arming the PWDs with the relevant skills and expertise.

¹⁰¹ International Labour Organisation, 'Inclusion of People with Disabilities in Kenya' page 1, Available at: www.ilo.org/wcmsp5/groups/public/.../documents/.../wcms_115097.pdf [accessed 2 October 2013]

¹⁰² Ibid.

Under Section 9 of the EMCA (1999), the National Environment Management Authority (NEMA) should incorporate the function of advising National and County Governments on the impacts of natural resource management on PWDs.¹⁰³ Bearing in mind the concept of the new devolution structure presented by the Constitution of Kenya, 2010, EMCA was amended by the *Environmental Management and Co-ordination (Amendment) Act, 2015*¹⁰⁴ to conform with the new dispensation. The Provincial and District Environment Management Committees in this regard were restructured into County Environment Management Committees. Section 29(3) of the Amendment Act requires that the Governor, in making the appointments under this section, should ensure equal opportunities for persons with disabilities and other marginalized groups. This is a laudable move that should be fully implemented. While it is hardly sufficient, it is a good place to begin as the body in question influences policy and should therefore expand opportunities for the PWDs within the counties' environmental governance structures. There is need to secure some positions that should be exclusively reserved for PWDs in order to achieve the objective of section 29(3) as highlighted above.

Section 38 of EMCA on the National Environment Action Plan should set guidelines on how natural resource management in Kenya has an impact on the rights and fundamental freedoms of persons with disabilities. This would mainly be in the areas of mobility, utilisation and access to natural resources. Part VI on Environmental Impact Assessment ought to provide that impact assessments address how proposed projects would impact on persons with disabilities. Activities likely to negatively impact on the mobility, utilization and access to natural resources by PWDs could be tracked through modifying Part VII on Environmental Audit and Monitoring. Part VIII on Environmental Quality Standards ought to be modified so that it can take into account provisions requiring standards that do not aggravate disabilities or cause disability in the populace. Environment quality in this regard should be structured in a way that mitigates disabilities that may be aggravated or caused

¹⁰³ VSO Jitolee Report, op. cit.

¹⁰⁴ No. 5 of 2015, Laws of Kenya.

by the environment including but not restricted to blindness and deafness. This would mean that the Standards and Enforcement Review Committee established under Section 70 undertakes studies on environmental quality standards as well as their implications on disability. Environmental inspections under Section 117 should be trained on disability issues relating to the environment.¹⁰⁵

Under the Environmental Management and Coordination (Amendment) Act 2015, section 4¹⁰⁶, PWDs should utilize Article 35 of the Constitution of Kenya, 2010 to access information relating to natural resource management held by the State. This is necessary to reflect the provisions of the Access to Information Act¹⁰⁷ which requires public entities to disclose information but such information should be disseminated taking into consideration the need to reach persons with disabilities, the cost, local language, the most effective method of communication in that local area, and the information should be easily accessible and available free or at cost taking into account the medium used.¹⁰⁸ Notably, the Access to Information Act 2016 also requires that, where an applicant is unable to make a written request for access to information in accordance with subsection (1) because of illiteracy or disability, the information officer should take the necessary steps to ensure that the applicant makes a request in manner that meets their needs.¹⁰⁹ The Act goes ahead to spell out offences which include failure to comply with the duty to take reasonable steps to make information available in a form that is capable of being read, viewed or heard by a requester with disability in accordance with section 11 (3).¹¹⁰

¹⁰⁵ Ibid.

¹⁰⁶ The principal Act is amended by inserting the following new section immediately after section (3)-

3A. (1) Subject to the law relating to access information to information, every person has the right to access any information that relates to the implementation of this Act that is in the possession of the Authority, lead agencies or any other person.

¹⁰⁷ No. 31 of 2016, Laws of Kenya.

¹⁰⁸ Ibid., Section 5(2).

¹⁰⁹ Ibid., s. 8(2).

¹¹⁰ Ibid., s. 28(3)(d).

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In keeping in line with Article 54 of the Constitution and based on consultations between the National Council for Law Reporting and individuals and institutions on the frontlines of serving the needs of persons with physical disabilities, particularly visually impaired persons, the Council established that over 10% of the world's population suffers from a variety of disabilities. However, information and communication technologies (ICT) have the potential for making significant improvements in the lives of these persons. The Council also established that ICTs offer individuals the ability to compensate for physical or functional limitations, thus allowing them to enhance their social and economic integration in communities by enlarging the scope of activities available to them.¹¹¹

The Council, in this regard, proposed a solution to counter the problem. The solution was put across as converting the Council's public legal information into universally acceptable formats. In achieving this, the Council partnered with the Rockefeller Foundation towards an initiative known as Improving Public Access to Information through Impact Sourcing (IMPACT-IS). This was set to ensure that the Council translates and converts its online content, particularly the Laws of Kenya into universally acceptable formats using a set of document translation and conversion standards, guidelines and templates already developed and documented¹¹². User interface components and navigation were the key elements to be made easily operable.

The National Environment Policy 2013, on implementation of strategies and actions, should have proposed mainstreaming of issues relating to PWDs. Further, public participation ought to purposely have policy statements on inclusion of persons with disabilities in all policy, legislative and decision-making processes.

Under the National Water Policy, disability provisions should have been included in the management of Water Sector Institutions and safeguarding of water. PWDs' access to water should be included in the framework to expressly secure their rights. Equitable access to water by PWDs should also

¹¹¹ <http://www.kenyalaw.org/Forum/?p=1144> [accessed 11 October 2013].

¹¹² *Ibid.*

be expressly covered under the framework. A vital area that should also be addressed is the inclusion of PWDs in the management structures of Water Sector Institutions. This way, PWDs' representation and participation in natural resource management is achieved.¹¹³

It is also important that the Water Act 2016 is reviewed so that in the end it can achieve the inclusion of PWDs in water resource management. The Water Act also needs to be sensitive to the unique needs of PWDs in the management, conservation and access to water.

6.0 The Law in Operation

The case of *Fredrick Gitau Kimani vs The Attorney General, The Ministry of State & Provincial Administration and Internal Security and the Police Commissioner*¹¹⁴ illustrates that the rights of PWDs are guaranteed and recognized in Kenya. Discrimination of PWDs is a gross violation of their rights.

The Petitioner was until his retirement in March 2004, a public officer having been employed as such in January 1974. He lodged his Petition dated 13th September 2011 pursuant to the provisions of Article 27(4), (5) and (6) of the Constitution as well as the Persons with Disabilities Act¹¹⁵.

The Petitioner served the Republic of Kenya until March 2004 when he was relieved of his duties on medical grounds. He was diagnosed with diabetes and his left leg had to be amputated and upon being discharged he was forced to have an artificial limb fitted. The National Council for Persons with Disabilities certified him as a person with disability and the 2nd and 3rd Respondents were so informed. The 3rd Respondent expressed the decision that the Petitioner had to retire upon attaining the mandatory age of 55 years. The Petitioner complained that the action amounted to discrimination on the grounds of health, status, age as well as disability which was a direct violation of Article 27(4) of the Constitution as read together with Section 15(6) of

¹¹³ VSO Jitolee Report, op. cit.

¹¹⁴ High Court Petition 157 of 2011 Judgment available at: http://kenyalaw.org/CaseSearch/view_preview1.php?link=42776934588462347088247.

¹¹⁵ Cap. 14, Laws of Kenya.

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the Persons with Disabilities Act. The Petitioner argued that the Court had a duty to protect him as is its obligation under Articles 20(3), (b), 22(1) and 23 of the Constitution.

The Learned Judge quoted from Article 27(4) of the Constitution citing that the State was barred from discriminating directly or indirectly against any persons on any grounds; one of the grounds being discrimination on the basis of disability. The 3rd Respondent had already advised the Petitioner through a letter that the latter was a beneficiary of Section 15(6)¹¹⁶ of the PWD Act and so his retirement ought to have been sixty (60) years and not fifty five (55) years. Bearing in mind that the Respondent had requested for his retirement age to be extended in light of the circumstances, the same had also not been responded to let alone acknowledged but was blatantly denied. In this regard, the Learned Judge agreed that the Petitioner was in fact discriminated against and the blatant disregard of Section 15(6) of the PWD Act only served to strengthen the discrimination allegations put forward.

The Learned Judge allowed the Petition and granted Orders after finding that the Petitioner's right not to be discriminated against under Article 27(4) (5) (6) and (7) of the Constitution and Article 7 of the Universal Declaration of Human Rights had been violated; that failure by the 2nd and 3rd Respondent in extending the Petitioner's retirement age from 55 years to 60 years in total disregard to the provisions of Section 15(6) of the Persons With Disabilities Act amounted to a violation of his right not to be discriminated against on grounds of health, age and disability; that failure by the 2nd and 3rd Respondents in recognizing the Petitioner as a disabled person pursuant to Section 15(6) of the Persons With Disabilities Act, Chapter 14 Laws of Kenya, was discrimination against the Petitioner, hence a violation of his right as aforementioned; and that as a result of the breaches afore-mentioned, the Petitioner had been unfairly treated and subjected to serious economic hardship thus deprived of his right to livelihood.

¹¹⁶ Section 15(6) of the Persons with Disabilities Act Op. Cit. provides as follows; "The minimum retirement age for persons with a disability shall be sixty (60) years".

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It was ordered that the Petitioner be paid Kshs. 500,000/= as compensation by the 2nd and 3rd Respondents jointly and severally. It was also ordered that costs be paid to the Petitioner by the 2nd and 3rd Respondents jointly and severally.

This case shows that the rights of PWDs are justiciable. It also displays that PWDs can access the Court system in Kenya. This case was also a test of the efficacy of Article 54 of the Constitution of Kenya, 2010. The case sought to secure the realization of and safeguard environmental and social rights for a person with disability in Kenya. Undoubtedly, it set a strong precedent for PWDs in general. They are now recognizable before the legal, social as well as environmental front. The realization of PWDs' environmental and social rights in Kenya was secured by this case and the society can no longer afford to ignore the rights of PWDs. There is need to streamline the statutory and constitutional provisions on protection and implementation of the rights of PWDs across all sectors and especially those related to environmental and social rights. The principles of public participation, equity and equality as recognised under the Constitution and the sustainable development agenda can only be fully realized when all persons including PWDs are brought on board in governance matters.

7.0 Conclusion

There is a need to streamline the law as discussed in order to include PWDs in the access to and management of natural resources. They need empowerment through education. In view of the international legal human rights instruments, there is the need to streamline the existent corresponding laws in Kenya to echo the provisions guaranteed by the former so that PWDs' social and environmental rights can be safeguarded in a harmonized manner globally. The opportunities and way forward are ideally envisioned solutions to eliminating the discriminatory notion perpetuated by society towards PWDs. Their empowerment lies not only in education and the formulation of laws and policies, but also in the provision of infrastructure that best suits their special needs.

As is evident in the foregoing discourse, the rights of PWDs have not been fully realized let alone actualized. The laws, policies and frameworks reviewed

are in dire need of re-evaluation so that as a democratic State, Kenya can enhance the social and environmental rights of PWDs.

Securing the environmental and social rights of PWDs in Kenya is an imperative whose time has come. We have to walk the talk and ensure the legal and institutional framework supports and promotes these rights. PWDs can then be fully involved in the development agenda. After all, in the end, we are one.

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A Critical Analysis of the Challenges Facing Arbitration as a Tool of Access to Justice in Kenya

By: **James Ngotho Njung'e***

Abstract

Access to justice refers to a system by which people may vindicate their rights and/or resolve their disputes under the general auspices of the state.¹ It is also 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.

In Kenya, it is a constitutional right which every citizen is entitled to as expressed in the constitution.² All persons have a right to access the justice system but now various questions may arise out of this such as; how do the disadvantaged people including women, the poor and persons with disabilities fair in accessing justice? Is there public awareness and information about the available methods of accessing and achieving satisfactory results of justice? How do the associated costs and expenses affect access to justice? Are the available services, methods and mechanisms for achieving justice suitable to the perceived needs of the people?

Until now, there has been an outcry over the backlog of cases that are yet to be resolved in the Kenyan courts and the statistics have shown that the numbers keep on rising. Arbitration and the other Alternative Dispute Resolution mechanisms have played a major role in reducing these numbers. However, there is no guarantee to most of the Kenyans that justice will be served as arbitration has a few shortcomings. These challenges make it difficult for arbitration to be the most preferred method of dispute resolution in Kenya.

There is therefore a need to analyze these challenges affecting arbitration as a tool for accessing justice in Kenya and further to discuss various ways in which we can

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¹ K. Muigua; *Alternative Dispute Resolution; Heralding a New Dawn: Achieving Justice Through Effective Application of Alternative Dispute Resolution Mechanisms (ADR) in Kenya*, 2013, Vol. 1, No. 1 (Glenwood Publishers, Kenya) page 54.

² The Constitution of Kenya 2010 (Government Printer, Nairobi, 2010) Article 48.

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*overcome these challenges to make arbitration a more effective alternative to
dispute resolution.*

1.0 Introduction

Human conflicts are inevitable and therefore disputes are equally inevitable. They arise among people in relation to all the aspects of their lives including g their personal life, economic life and political life. The fact that disputes are inevitable creates a need to find a quick and easy method of resolving them. Disputes must be resolved at the minimum possible cost both in terms of money and time so that more time and more money can be spared and used for more constructive pursuits.³

The strict western concept of access to justice was understood as access of courts of law. According to people's perception, the courts were the only way in which one could achieve justice. These days the courts have become inaccessible due to various barriers such as poverty, social and political backwardness, ignorance, procedural formalities and the like. These are some of the challenges encountered by a person who refers a matter through the complex and costly procedures involved in litigation.⁴

Therefore, a movement started throughout the world for ADR, and arbitration is one among them because with the Economic Liberalization and the opening up of the market, there was a phenomenal growth of international trade, commerce, investment, development and construction works, banking activities and the like. In all these fields, disputes are bound to arise and the parties therein often times opt to adopt mechanisms that take less time and are cost-effective, in which the aftermath does not also damage the relationship between parties as the companies need to keep their customers as well as their businesses.⁵

³ K. Muigua, "*Settling Disputes through Arbitration in Kenya*", (Glenwood Publishers, Kenya 2012) page 4.

⁴ K. Muigua, "*Traditional Dispute Resolution Mechanisms under Article 159 of the Constitution of Kenya 2010*", www.kmco.co.ke (Accessed on 05/03/2018).

⁵ Ibid, (n 1) page 5.

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In a perfect world there would be no conflict, but the world today is far from perfect. In the society we live in today, conflict arises everywhere. Conflict arises because of various reasons including but not limited to differing opinions or lack of respect for others' opinions which may also lead to a conflict.

2.0 Historical Development of Arbitration

Many writers have attempted to trace the origins and evolution of arbitration, with a consensus that it was being used long before the 20th Century.⁶ One of its earliest roots can be traced back to the biblical story where King Solomon is seen to be the first arbitrator when he took it up to determine the real mother of a child in a case where two mothers were laying claim to one baby boy.⁷

In England, arbitration began even before the establishment of the King's Courts.⁸ It is also documented that Philip the second, the father of Alexander the Great also used arbitration as a means of settling territorial disputes from a peace treaty he had negotiated with the state of Greece.⁹

The first Arbitration Act was enacted in 1968 and was seen as the exact replica of the Arbitration Act 1950 of the United Kingdom. It was later repealed in 1995.¹⁰ Arbitration has continually gained popularity all over the world and its incorporation under the United Nation Charter¹¹ as one of the

⁶ See generally, K. Noussia, "The History, Importance and Modern Use of Arbitration," In *Confidentiality in International Commercial Arbitration*, pp. 11-17. Springer, Berlin, Heidelberg, 2010; E.S. Wolaver, "The Historical Background of Commercial Arbitration," *University of Pennsylvania Law Review* 83, no. 2 (1934): 132.

⁷ The King James Bible, 1 Kings 3:16-28.

⁸ W. Herbert Page, *The Law of Contract*, vol. 4, (The W.H. Anderson Company, 1919) c. 75 at 2526ff (As quoted in G., Xavier, "Evolution of Arbitration as a Legal Institutional and the Inherent Powers of the Court," Asian Law Institute Working Paper Series No. 009 (2010), p.2.).

⁹ Ibid.

¹⁰ Arbitration Act, No. 4 of 1995 (2009) (Government Printer, Nairobi, 1995)

¹¹ United Nations, Charter of the United Nations, 24th October 1945, Article 33.

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recognised means of settling international disputes between states and persons shows a great significance in its development.

In Kenya, arbitration, among other forms of Alternative Dispute Resolution mechanisms has been incorporated in the constitution of Kenya 2010 where it expressly states that in exercising judicial authority, the courts and tribunals should be guided by the principle of promotion of alternative forms of dispute resolution including reconciliation, mediation, arbitration and negotiation.¹²

The elevation of arbitration and other ADR mechanisms to constitutional recognition under the 2010 Constitution of Kenya demonstrates their significance and central role that they can play in enhancing access to justice for all.

3.0 Arbitration as a Tool of Access to Justice in Kenya

This paper seeks to explore the various ways in which arbitration and the other forms of Alternative Dispute Resolution mechanisms can be employed as a tool for enhancing, to boost their participation in conflict management, governance matters and improve socio-economic aspects of their lives.¹³ It highlights the main challenges and barriers in the efforts to empower the Kenyan people to in access justice through the ADR mechanisms. The paper also suggests ways and recommendations as to how this issue can be resolved, ways in which the empowerment of the Kenyan people can be achieved and the realization of an environment based on the values of human values and goal enshrined under the constitution of Kenya 2010.¹⁴

It is widely understood that access to justice is one of the most critical human rights since it acts as the basis for the enjoyment of other rights and it requires an enabling framework for realization.¹⁵ The constitution provides for the

¹² The Constitution of Kenya, Article 159 (2) (c).

¹³ See also K. Muigua, *"Alternative Dispute Resolution; Empowering the Kenyan People through Alternative Dispute Resolution"*, (2015) Vol. 3, No.2, Glenwood Publishers Ltd, Kenya), page 64.

¹⁴ The Constitution of Kenya, the preamble and Article 10 (2) (b).

¹⁵ See generally, Republic of Kenya, *Sessional Paper No 3 Of 2014 on National Policy and Action Plan on Human Rights*, August 2014 (Government Printer, Nairobi, 2014); N.S.

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right of access to justice and obligates the state to ensure access to justice for all.¹⁶ This right to access justice has been hampered by many unfavourable factors such as high court charges, bureaucracy, complex procedures, illiteracy and lack of legal knowhow thus making litigation accessible for only a chosen few.¹⁷ This goes against the constitutional right to access justice for all enshrined under the constitution and also the right of equality of all persons before the law¹⁸.

In light of the foregoing, it is worth pointing out that although the legal recognition and use of arbitration and the other ADR mechanisms is growing at a high rate in Kenya, many people are not aware of its existence which is the main reason why it is not widely practiced in Kenya, at least in its formal conceptualisation. Secondly, for those who use Arbitration and ADR mechanisms, there are fundamental problems that need to be addressed to make them the most preferred mechanism of resolution of disputes in Kenya. The next section looks at some of these challenges and consequently makes recommendations to address the same. The discussion focuses on the challenges facing the practice of arbitration in Kenya, the arbitrators themselves as well as the arbitral institutions in Kenya.

4.0 Challenges Facing Access to Justice and the Practice of Arbitration in Kenya

In a perfect world there would be no conflict, but the world today is far from perfect. Conflicts are therefore inevitable. They arise among people in relation to all the aspects of their lives which include their personal life, economic life and political life. There is therefore a need to find a quick and easy method of resolving disputes. Disputes must be resolved at the minimum

Okogbule, "Access to justice and human rights protection in Nigeria: problems and prospects," *Sur. Revista Internacional de Direitos Humanos* 2, no. 3 (2005): 100-119.

¹⁶ The Constitution of Kenya, Article 48.

¹⁷ See Muigua, Kariuki, "Heralding a New Dawn: Achieving Justice through effective application of Alternative Dispute Resolution Mechanisms (ADR) in Kenya," *Alternative Dispute Resolution*: 40.

¹⁸ The Constitution of Kenya, Article 27 (1).

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possible cost both in terms of money and time so that more time and more money can be spared and used for more constructive pursuits.¹⁹

The Traditional western concept of access to justice was understood as access of courts of law. According to this perception, the courts were the only way in which one could achieve justice. These days the courts in many jurisdictions especially in the developing world have become inaccessible due to various barriers such as poverty, corruption, backlog of cases, few judges and magistrates, social and political backwardness, ignorance, procedural formalities and the like. These are some of the challenges encountered by a person who refers a matter through the complex and costly procedures involved in litigation.²⁰

Kenya has had laws on Arbitration from as early as 1914 yet up to date it has not won the people's confidence as one of the most efficient and effective dispute resolution mechanisms in the country. The level of utilization of this important method of dispute resolution is significantly low and there is an overwhelming paradigmatic shift of emphasis of litigation to Arbitration.²¹

Other challenges affecting access to justice and the growth of arbitration in Kenya as pointed out by other writers include, politicization of disputes, lack of professional interaction, lack of diversity, proliferation of regional arbitration centers, language and territorial barriers, the African cultural context, corruption, experience (the law of diminishing returns), professional training and mentorship of arbitrators, open bias, arbitrability, implementation among others.²² These challenges have led to the resolution

¹⁹ K. Muigua, *Settling Disputes through Arbitration in Kenya*, *op cit.*, page 4.

²⁰ See generally, K. Muigua, "Traditional Dispute Resolution Mechanisms under Article 159 of the Constitution of Kenya 2010."

²¹ J.K., Gakeri, "Placing Kenya on the Global Platform: An Evaluation of the Legal Framework on Arbitration and ADR," *International Journal of Humanities and Social Science*, Vol. 1 No. 6; June 2011, 219-241 at 219.

²² P. Ngotho, "Challenges Facing Arbitrators in Africa," Paper presented at the Chartered Institute of Arbitrators (Kenya Branch) & Centre For Alternative Dispute Resolution (CADR), An East Africa International Arbitration Conference held at The Norfolk Hotel, Nairobi on 28th and 29th July 2014. Available at

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of disputes through other means other than arbitration and ADR mechanisms.²³

Various scholars have explored this subject and have highlighted some of the challenges arbitral institutions in Africa experience to include breach of confidentiality of their matters to third parties through publications unless the parties enter into a separate confidentiality agreement limiting disclosure of their dealings.²⁴ A challenge also exists in the capacity of the institutions to handle disputes as well as the regulation of the arbitration process. It is believed that some of these institutions both in Kenya as well as in Africa need a greater focus on capacity building to improve the number and quality of training for arbitrators and also more funds to facilitate efficient administrative services thus making the arbitration process more effective.²⁵ Another major challenge and one that should be taken into great consideration is the national court's interference with the arbitration process. Litigators who are in most cases lawyers who are also practicing advocates infuse the litigation procedures which slows down the arbitral process through unnecessary requests for adjournments and interlocutory applications at the national courts such as injunctions, which only delay the process and increase the associated costs.²⁶ For example, in Kenya, the

<http://www.ngotho.co.ke/assets/challenges.norfolk.july2014.pdf> (Accessed on 07/03/2018).

²³ Ibid.

²⁴ K. Muigua, "Reawakening Arbitral Institutions for Development of Arbitration in Africa" (May 2015) Available at

<http://www.kmco.co.ke/attachments/article/154/Reawakening%20Arbitral%20Institutions%20for%20Development%20of%20Arbitration%20in%20Africa.pdf> (Accessed on 06/03/2018).

²⁵ K. Muigua, "Making East Africa a Hub for International Commercial Arbitration: A Critical Examination of the State of the Legal and Institutional Framework Governing Arbitration in Kenya", page 14 - Available at

https://profiles.uonbi.ac.ke/kariuki_muigua/publications/making-east-africa-hub-international-commercial-arbitration-critical-exa (Accessed on 06/03/2018).

²⁶ Kariuki Muigua, 'Reawakening Arbitral Institutions for Development of Arbitration in Africa' (May 2015); See also C. Namachanja, "Meeting the challenges: CIArbs in Africa: Learning from Africa," CI Arb Centenary Conference, 15-17 July, 2015. Available at

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arbitral institutions do not allow the arbitrators to issue summons to witnesses or injunctions to restrain continuing events pending the full determination of the dispute, instead they opt for the courts for such orders which ends up corrupting the whole process of arbitration.²⁷

One of the key pillars of arbitration that has been in practice is the autonomy of the parties who are disputants.²⁸ It is believed that parties are at liberty to choose the impartial third party to solve their disputes and this is well explained in the flexibility principle.²⁹ The challenge now comes in the appointment of international Arbitrators by the parties. Notwithstanding the national individuals and institutions with the relevant knowledge, skill and experience specialized in the resolution of dispute through arbitration and the other forms of dispute resolution mechanisms, there has been a great tendency by parties to a dispute to select non-Africans instead of focusing on development of local home-grown talent thereby ending up in choosing incompetent arbitrators because their main focus is on their nationality and not their expertise and experience.³⁰

Arbitrability is yet another challenge that poses great challenge to the process of arbitration and its practice.³¹ It refers to the determination of the type of

<https://www.ciarb.org/docs/default-source/centenarydocs/speaker-assets/collins-namachanja.pdf?sfv> (Accessed on 14/03/2018).

²⁷ J.T. McLaughlin, "Arbitration and Developing Countries" *The International Lawyer*, Vol. 13, No. 2 (Spring: Dordrecht: Martinus Nijhoff, 1979) page 212.

²⁸ See generally, L.O.W., Odoe, *Party autonomy and enforceability of arbitration agreements and awards as the basis of arbitration* (Doctoral dissertation, University of Leicester, 2014), available at

<https://lra.le.ac.uk/bitstream/2381/28773/1/2014OdoeLOWphd.pdf> (Accessed on 14/03/2018).; N.R. Nguyo, *Influence of Arbitration On Dispute Resolution in The Construction Industry: A Case of Nairobi County, Kenya*, M.A. Diss., University of Nairobi, 2014; N.R.A. Salama, "Nature, extent, and role of parties' autonomy in the making of international commercial arbitration agreements." PhD diss., University of Manchester, 2016.

²⁹ Ibid.

³⁰ C. Namachanja, "Meeting the challenges: CIArbs in Africa: Learning from Africa," CI Arb Centenary Conference, 15-17 July, 2015.

³¹ K. Muigua, "Promoting International Commercial Arbitration in Africa," Paper Presented at the East Africa International Arbitration Conference, held on 28-29 July

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disputes that can be settled through arbitration and those that are in the domain of the national courts. It deals with the question of whether specific classes of disputes are barred from the scope arbitration covers because of the subject matter of the dispute. In most cases, you will find that matters that are arbitrable in one jurisdiction fail the test of arbitrability in other jurisdictions.³²

In Tanzania, for example, the Arbitration Act is not clear on arbitrability of subject matter under the Act. It has also been argued that under the Kenyan law, arbitrability might have acquired a broader scope after the passage of the current Constitution 2010 which has elevated the status of the Alternative Dispute Resolution as one of the guiding principles of the judiciary in the exercise of judicial authority by the court and tribunals.³³

The recognition of international arbitral awards is yet another challenge facing the process of arbitration and in this, the issue comes in when the recognition and enforcement of a foreign arbitral award poses a threat to the public policy of the country where such recognition and enforcement are sought. The Arbitration Act 1995, notably provides for this and states that international arbitration shall be recognized and enforced in accordance to the provisions of the New York Convention or any other convention to which Kenya is a signatory and relating to arbitral awards.³⁴ Despite of these express

2014, at Fairmont the Norfolk, Nairobi. Available at https://profiles.uonbi.ac.ke/kariuki_muigua/files/promoting_international_commercial_arbitration_in_africa-eaia-conference_presentation.pdf (Accessed on 14/03/2018); See also G.A., Bermann, "The "Gateway" Problem in International Commercial Arbitration," *Yale Journal of International Law* 37, no. 1 (2012): 2.

³² C. Namachanja, *"The Challenges facing Arbitral Institutions in Africa"* Alternative Dispute Resolution Journal Vol. 3, No.2, Glenwood Publishers Ltd, Kenya (2015) page 138.

³³ R. Rana, *"The Tanzania Arbitration Act: meeting the Challenges of Today with Yesterday's Tools"*, in Chartered Institute of Arbitrators, Kenya, Alternative Dispute Resolution Journal, Vol. 2, No. 1, 2014. Page 231.

³⁴ Arbitration Act, Chapter 49, Laws of Kenya, section 36 (2).

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provisions, arbitral awards are still a challenge to enforce them where the award is against the public policy of that jurisdiction.³⁵

Corruption is also another major challenge that affects most if not all spheres of government as well as private enterprises. Though nothing much is revealed about the transactions that involve corrupt practices, we can all attest to the fact that it still exists in the country. One of the reasons why it is so prevalent in Kenya is that there is no law regulating corruption and it is not a crime to accept bribes and other corrupt practices in Kenya as it is the case in other countries. The perception of corruption in various counties and governments is believed to be interfering with private commercial arbitration matters. For example, the government may try to interfere with the outcome of the process especially where its interests are at stake and put forth the argument of ground of public policy. This negatively impacts on investors as well as disputants to have the confidence to uptake the resolution of their disputes through international commercial arbitration.³⁶

There are other challenges which face arbitrators themselves as they arbitrate over their matters where some of the problems facing arbitrators in Africa are Afro-centric while others are universal.³⁷

³⁵ G.A., Bermann, "Recognition and Enforcement of Foreign Arbitral Awards: The Interpretation and Application of the New York Convention by National Courts." In *Recognition and Enforcement of Foreign Arbitral Awards*, pp. 1-78. Springer, Cham, 2017; R. Sharma, "Enforcement of Arbitral Awards and Defence of Sovereignty: The Crouching Tiger and the Hidden Dragon." In *in March 2010, the Chair of Legal Linguistics, the Legal Linguistics Association of Finland and the University of Lapland hosted a conference on legal linguistics. The focus was on law and language in international partnerships and conflicts. The members of the organizing committee were Professor Tarja Salmi-Tolonen (Chair), Ms Iris Tukiainen and Mr Richard Foley.*, p. 252. 2011; H.N. Mboce, *Enforcement of International Arbitral Awards: Public Policy Limitation in Kenya*, LLM Diss., University of Nairobi, 2014.

³⁶ K. Muigua; *Alternative Dispute Resolution; Heraldng a New Dawn: Achieving Justice through Effective Application of Alternative Dispute Resolution Mechanisms (ADR) in Kenya*, page 21.

³⁷ P. Ngotho, "Challenges Facing Arbitrators in Africa," Paper presented at the Chartered Institute of Arbitrators (Kenya Branch) & Centre for Alternative Dispute Resolution

5.0 Recommendations

There is need for increased investment and assistance in the arbitration sector to boost its relevance and efficiency in promoting access to justice. The assistance can be in form of supporting or facilitating enforcement of international and domestic arbitral awards as well as ensuring that there is minimal interference in the process so as to win the confidence of the potential users inside and outside the region. Parliament and Courts should also work in promoting law reforms to reflect the current trends in arbitration practice in the world.

Public confidence in arbitrators may be enhanced through publication of available arbitrators in the region for consideration by prospective parties to an arbitration dispute. This may only be addressed if the other building blocks of arbitration are considered, such as increase in capacity of the arbitrators. There is also need for putting up the relevant infrastructure which includes ICT and other physical structures. This should be coupled enhanced training for purposes of capacity building. Training should start at school level as opposed to institutional professional courses as is the case with most countries. A good example is the University of Nairobi School of Law which currently offers international commercial arbitration as a course in its Masters of Law Programs.

Political instability, being a matter not within the control of the arbitral institutions may not be directly addressed at an individual institution level. However, the institutions should participate in awareness campaigns, and support research into the relationship between actions of political leadership on dispute resolution. This may contribute through sensitization of political leaders on the impact of their actions on arbitration, and more pertinently on the economic results of diverting foreign direct investment to other regions of the world.

Regarding challenges faced by the judiciary, to enhance the levels of knowledge and experience in arbitration, it is proposed that the arbitral

(CADR), An East Africa International Arbitration Conference held at The Norfolk Hotel, Nairobi on 28th and 29th July 2014.

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institutions in each country and especially Kenya give particular attention to training of the judges of the superior courts on arbitration. Moreover, we need special training of experts in the area, outreach programs, public sensitization programs and more important is adopting regular training to judges, magistrates and advocates for them to suit the international dynamism of trade and commerce.

Lawyers must be more involved in arbitration training efforts. Due to the stake the arbitral institutions have in smooth development of the arbitral process, the institutions should organize seminars, workshops and training sessions for lawyers as well as non-lawyers across the continent. This focus should not be confined to lawyers who intend to be arbitrators, but also to general counsel who should be abreast of the nature of arbitration process. The training would also be especially important to lawyers involved in drafting of the arbitration clauses in contracts, to ensure that the clauses withstand the possible challenges at the initial stages of arbitration.

An accountant would be more comfortable appearing before an arbitrator (or judge) who has studied and understands accounting. The same would also be ideal for a doctor, engineer or any other professional. The multi professional training will enhance cultural backgrounds that will develop arbitration and arbitrators. This will also bring in competition and quality assurance standardization in the field of arbitration since the regulation and misconduct of a professional member arbitrator can be taken up by his professional association.

This will reduce the controversial arbitral awards and decisions. What needs to be done is to ensure that the training to the multi professional practitioners ensure the standards of fair judicial practice and the right for a fair hearing and trial to any party to a dispute are maintained. This may promote arbitration while reducing the consistency in the arbitration practice. This argument is further substantiated by Justice Torgbor in his recent paper "Opening up International Arbitration in Africa".³⁸

³⁸ Justice Edward Torgbor, "Opening up International Arbitration in Africa," ADR Journal (2015) Vol 3 Nairobi ISBN 978-9966-046-04-8 Page 21 and 23.

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Lastly, there is need to conduct further in-depth research in the area. Due to the geographical spread of counties in the country the problems prevalent in Nakuru and Kericho may not be exactly similar to the ones present in the counties of Wajir and Garisssa and thus there may exist unique challenges in the inculcation of arbitration within the counties. More justice sector players should also be involved extensively in this research. Justice is a collective responsibility. The private sector, Non-Governmental Organizations and governance sector players should also be approached to give and input. Attaining justice is a pooled action for a better nation.

6.0 Conclusion

It is evident from the discussion herein above that arbitration is a suitable method of resolving commercial disputes in Kenya. The paper has in essence discussed and met the set objectives as were outlined herein above which were to bring into the attention of the public of the existing modes and ways in which they can access justice in Kenya in a potentially more affordable and quicker way and to inform them that it is a constitutional right enshrined in the constitution and the courts also treat it with the seriousness it deserves. This paper therefore predicts that if these challenges are addressed, the future of arbitration in Kenya is brighter and really promising in brings about just society where disputes are disposed of more expeditiously and cost effectively.

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The Efficacy of the ban on use of plastic bags in Kenya

*By: John Kariuki Njuguna**

1.0 Introduction

A lot has changed in the way business is done in the 21st century. Artificial products have taken over the supermarkets shelves. Almost all home appliances, tools and other consumables have a plastic component in it. From the watches we wear, phones, televisions, fridges and cars, they all have some parts made from plastic material. It would thus be fool hardy to imagine that Kenya, as a nation, can implement a total ban on the use of plastics. So what is this plastic ban that has been publicized a lot in this country? Legal notice number 2356 of 14th March 2017¹ provides;

IN EXERCISE of the powers conferred under section 3 and 86 of the Environmental Management and Co-ordination Act, it is notified to the public that the Cabinet Secretary for Environment and Natural Resources has with effect from 6 months from the date of this notice banned the use, manufacture and importation of all plastic bags used for commercial and household packaging defined as follows:

(a) Carrier bag—

bag constructed with handles, and with or without gussets;

(b) Flat bag—

bag constructed without handles, and with or without gussets.

From the onset, it is important to clarify that it is erroneous to claim that there is a plastic bags ban in the country. What has been outlawed is the use of plastic bags as specified in the gazette notice. This ban is very unique in that while it outlaws the use of the specified plastic bags, the regulator has opened a window for their use through exemptions. By making an application to NEMA, one is allowed the use of the same bags for industrial purpose and for garbage collection. The big factories in Industrial Area, Nairobi, are

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¹ NEMA,

https://www.nema.go.ke/images/Docs/Awariness%20Materials/Gazette_legal_Notice_on_carrier_bags.pdf

permitted to wrap bread or sweets with the very bags that the 'sukumawiki'² vendor cannot use while serving his/her customers in their groceries business. This is on the face of it discriminatory as the effect on the environment does not discriminate the source of the pollution. The bags that wrap the bread are of the same quality as the ones used to wrap meat at the butchery and thus the effect on the environment is the same. One is left to wonder what guided the Cabinet Secretary in making the distinction.

Unknown to many people, plastic bags are manufactured using crude oil.³ During manufacturing, it emits considerable amounts of pollution, and the product is not biodegradable.⁴ In other words, it is difficult to produce, and nearly impossible to get rid of plastic bags once produced. It is estimated that 60 to 100 million barrels of oil are required to manufacture a year's worth of plastic bags worldwide, and it takes approximately 400 years at least for a bag to biodegrade.⁵ Some of these plastics bags are used for less than 10 minutes before their disposal.

This paper is intended to look at the effects of plastics bags waste on the environment and discuss the various ways that the same can be managed to achieve better results.

1.1 Effects of Plastics on The Environment

There are various ways through which plastics bags are a source of environmental pollution. According to the Northern Territory Environmental Protection Authority (NTEPA), the following are some of the effects of plastic bags on the environment:⁶

² Swahili word for kales.

³ See Sharma, B.K., Moser, B.R., Vermillion, K.E., Doll, K.M. and Rajagopalan, N., "Production, characterization and fuel properties of alternative diesel fuel from pyrolysis of waste plastic grocery bags," *Fuel Processing Technology*, 122, 2014, pp.79-90.

⁴ Ibid.

⁵ Maggie New, "Why Are Plastic Bags So Bad for the Environment?" Available online at <https://www.livestrong.com/article/156603-advantages-of-paper-bags-vs-plastic-bags/> accessed on 08/03/18

⁶ Northern Territory Environmental Protection Authority website at

a. Danger to animal life

Plastic bags are quite commonly mistaken for food by animals, especially when the bags carry food residues, are brightly coloured or are animated by the movement of water. The risk is spread to all animals including marine ones. The animals can choke to death on bags, experiencing much pain and distress. If swallowed whole, animals may not be able to digest real food and die a slow death from starvation or infection. In Kenya, we have seen the effects when animals are slaughtered and plastics bags are found to occupy large parts of the animal's digestive system.

b. Pacific Trash Vortex

The Pacific Trash Vortex is a 'gyre' or vortex of marine litter in the North Pacific Ocean.⁷ The vortex is characterised by exceptionally high concentrations of suspended plastics, such as plastic bags, bottles, containers and other debris, that have been trapped by currents. Its impact on marine ecosystems is catastrophic due to its toxic nature and threat to marine life.⁸ It is scary to imagine what humans are doing to marine life as the human race.

c. Litter problem

Plastic bags are a highly visible, ugly component of litter. In Nairobi, plastic bags and bottles have been the most visible litter anywhere in the city. During the rainy season, they often contributed a lot in the blockage of the drainage system. The County Government appears to have been unable to deal with this menace. This is not a problem peculiar to Kenya. The Local and State Governments around Australia spend more than \$200 million per year picking up litter.⁹ If plastic bags continue to be used, the number of bags littering the environment will increase over time.

<https://ntepa.nt.gov.au/waste-pollution/plastic-bag-ban/environmental-impacts>
[Accessed on 08/03/18].

⁷ Ibid.

⁸ Ibid.

⁹ Northern Territory Environmental Protection Authority website.

d. Loss of resources

Plastic bags are typically used for a short period of time but take hundreds of years to break down in landfill. While plastic bags can be recycled, only a tiny proportion of plastic bags are collected and reprocessed.

e. Greenhouse gases

According to NEPTA¹⁰, using ten lightweight plastic bags per week over a 2-year period, the resultant greenhouse gas impact has more than three times the greenhouse gas impact of a reusable 'green bag'. A lightweight plastic bag consumes about 4.5 times more energy in its manufacture than reusable 'green bags'. To get the full greenhouse gas benefit from a reusable 'green bag', it must be reused over 100 times. Starch-based biodegradable (or 'compostable') bags consume less than one-third of the energy to produce as plastic alternatives, but emit marginally more carbon dioxide (CO₂ - a greenhouse gas) as they decompose. However, unlike single use plastic bags, biodegradable bags will completely breakdown.¹¹

2.0 How Are Plastics Disposed off in Kenya?

There are no specific laws or regulations in Kenya that deal specifically with disposal of plastic bags. The regulations provide for disposal of wastes as per the different categories provided therein. The Waste Management Regulations, 2006, for instance, provide the general guidelines on disposal of waste.¹² The Regulations categorise waste according to origin, that is, it has specific provisions dealing with either domestic or industrial waste¹³. They further categorise waste according to whether it is biomedical¹⁴ or radioactive. The Regulations also have a whole Schedule dealing with what

¹⁰ Ibid.

¹¹ Ibid.

¹² The Environmental Management and Co-Ordination (Waste Management) Regulations 2006, Part II.

¹³ The Environmental Management and Co-Ordination (Waste Management) Regulations 2006, Part III.

¹⁴ The Environmental Management and Co-Ordination (Waste Management) Regulations 2006, Part VI.

is considered hazardous wastes.¹⁵ The definition of 'hazardous waste' is given using scientific terms not easily understood by laymen. It is arguable whether even the NEMA inspectors have sufficient knowledge to interpret the scientific formulas.

This basically means that whether wastes are hazardous or not is not a straight forward issue, but it is subject to a complicated analysis of some scientific formulas. Nevertheless, if the formulas were to be interpreted properly, you will find out that plastic will fit in the category of hazardous wastes by virtue of having elements like carbon, hydrogen, oxygen, nitrogen, chlorine, and sulfur in its composition¹⁶, and also by virtue of being persistent or being carcinogenic¹⁷. The challenge then would be that plastic bags are not generally harmful if used to just carrying or wrapping goods but become toxic when not properly used and disposed.

The common way of disposing plastic bags in Kenya is mainly by depositing them into a dumpsite. At the dumpsite, all solid wastes are burned in the open. There are no controls on what to do with the fumes generated at the dumpsite. The regulator does not seem to be concerned by this. This is where plastic is highly poisonous. Other ways where the plastics become a bother is when they are allowed to litter the entire landscape from cities, farms, rivers, forests, game reserves and oceans. In Kenya, the situation has basically been getting out of control.

3.0 How Is It Done Elsewhere?

'Newspapers are turned into paper mass, bottles are reused or melted into new items, plastic containers become plastic raw material; food is composted and

¹⁵ The Environmental Management and Co-Ordination (Waste Management) Regulations 2006, Fourth Schedule.

¹⁶ American Chemistry Council website available at

<https://plastics.americanchemistry.com/How-Plastics-Are-Made/> accessed 12/03/18

¹⁷ See generally, Worm, B., Lotze, H.K., Jubinville, I., Wilcox, C. and Jambeck, J., "Plastic as a persistent marine pollutant," *Annual Review of Environment and Resources*, 42, 2017, pp.1-26; see also "Dangerous Health Effects of Home Burning of Plastics and Waste: Fact Sheet", available at http://www.wecf.eu/cms/download/2004-2005/homeburning_plastics.pdf [Accessed 12/05/18].

becomes soil or biogas through a complex chemical process. Rubbish trucks are often run on recycled electricity or biogas. Wasted water is purified to the extent of being potable. Special rubbish trucks go around cities and pick up electronics and hazardous waste such as chemicals. Pharmacists accept leftover medicine. Swedes take their larger waste, such as a used TV or broken furniture, to recycling centers on the outskirts of the cities. Swedes recycle nearly 100 per cent of their household waste. They even have to import waste to have something to burn, to turn waste into energy. A true recycling revolution'.¹⁸

The above quote sums up the situation in Sweden. This has made Sweden a role model for other countries to emulate. To imagine that the country has been so successful in waste management to an extent that they are importing wastes to feed to their incinerators is incredible. Such a situation can only be imagined in a dream by the average Nairobi resident. So how has Sweden managed to achieve this?

Swedish waste management is governed by the principle of waste minimization as a top priority in accordance to its Waste Framework Directive. Historically, Sweden has shown strong commitment to environmental protection initiatives and policies, particularly in the area of waste.¹⁹ This has been backed by strict laws. For example, as early as 1969, The Environment Protection Act imposed far-reaching environmental obligations on new waste treatment facilities.²⁰ These laws have been reviewed regularly to enforce the policies, including the increasing importance of producer responsibility and a concentrated effort on measures to reduce the landfilling of waste. In 1999, the country passed the Environmental Code replacing the previous Environmental Protection Act. The Code integrated 15 previously existing environmental laws and formed an umbrella legislation governing all environmental impacts within the framework of a sound sustainable development for Sweden. In 2005, Sweden's Waste Plan 'A Strategy for Sustainable Waste Management' laid

¹⁸ Jonas Freden, The Swedish Recycling Revolution, available at <https://sweden.se/nature/the-swedish-recycling-revolution/>

¹⁹ Ibid.

²⁰ Leonidas Milios, 'Municipal waste management in Sweden' European Environmental Agency report of February 2013.

down the future direction of waste management and set distinctive targets to be met by 2010, based on the Swedish Environmental Objectives, which were enacted by the Swedish government in the same year.²¹

The laws alone would not have enabled Sweden to achieve its recycling goals. What has supplemented the good laws is a spirited public awareness campaign that has enabled the government to obtain the cooperation of the citizens in handling of wastes. The Swedish Environmental Protection Agency (EPA) is the umbrella body in charge of environmental protection. It is equivalent to National Environment Management Authority (NEMA) in Kenya. Its mandate include developing standards or regulations pursuant to environmental statutes; enforces those standards, regulations, and statutes; monitors pollutants in the environment; conducts research; and promotes public environmental education²²

EPA, together with government agencies and corporations, has developed an action plan for waste prevention, including how to encourage producers to make products that last longer. Many companies have joined in greener production. Companies are accepting back wastes especially plastic bags. Others are manufacturing carrier bags from sugarcane that are biodegradable. Most Swedes separate all recyclable waste in their homes and deposit it in special containers in their block of flats or drop it off at a recycling station.²³ This clearly shows that environmental protection can only be achieved through the participation of all stakeholders and is not something that can be left to the regulator alone.

One thing to note is that while the swedes have managed to recycle most of the waste, the remaining ones are not dumped at a dumpsite. The hazardous and dangerous wastes are deposited in landfills, which attract a very high tax. The rest of the waste are used to generate energy through incineration. To encourage production of electricity from municipal wastes, the energy producer is tax exempt. However, the key focus is in the reduction of waste generation rather than disposal thereof.

²¹ Ibid.

²² Environmental Protection Agency website available at <http://www.swedishepa.se/> accessed on 14.03.18

²³ Supra note 15

In 2011, the Government of Sweden presented a new environmental technology strategy to establish favourable conditions for the growth and development of environmental technology companies. It had three main objectives:²⁴

- i. Promote the export of Swedish environmental technology and thus contribute to sustainable economic growth in Sweden and globally;
- ii. Promote research and innovation in environmental technology and create the conditions required for green technology companies to flourish in Sweden; and
- iii. Make it easier to commercialise innovations.

The strategy was backed by SEK 400 million in total funding, with SEK 100 million allocated each year from 2011 to 2014. Sweden's environmental technology sector employs roughly 40,000 people and has revenues of about SEK 120 billion, according to Statistics Sweden and the then Swedish Environmental Technology Council.²⁵ This is a very big budget compared to what our NEMA receives.

It is clear from the above that the whole process of protecting the environment in Sweden is done in an integrated manner. The government is solidly behind the efforts by providing the policy and legal framework and backing it with adequate funding. The private sectors have also adopted the policies and are implementing them in their production processes and further, in the disposal process. They have also invested heavily in innovations that promote greener production. The citizens have played their part by embracing cleaner consumption methods and actively participating in sorting out garbage and delivering plastics to the designated sites so that the companies can take them back.

²⁴ Supra note 15

²⁵ Ibid.

4.0 What Does the Ban Aim to Achieve?

When the Gazette Notice no 2356 was published NEMA issued a statement which read in part as follows:

“As the implementation of the Gazette Notice No. 2356 takes shape, many Kenyans have applauded the environmental watch dog (NEMA) for taking the bold step to save the country from the plastic bags menace which has resulted in major consequences to our environment and other sectors of our economy including livestock, fisheries, tourism and the built environment. This is compounded by the fact that plastic bags take over 100 years to degrade. It is known that 100 million plastic bags are handed out in Kenya by supermarkets alone. These bags end up clogging the drainage systems leading to flooding in major cities in Kenya. Recent studies have found that more than 50% of cattle in peri-urban had plastic bags in their rumens.”²⁶

It is clear that the target was to reduce the amount of plastic bags in circulation but not to ban them totally from our environment. This is because as earlier stated, the same plastic bags are still allowed in industrial packaging. There was no attempt to address the issue of disposal. How are the plastic bags used in industrial packaging supposed to be disposed?

It appears that the NEMA has a very narrow view of the problem. Their only concern is the clogging of drainage and animals eating the plastics. The authority is not addressing the issue of plastics being a poisonous substance when not disposed properly. The plastics bags will end up in dumpsites where they will be burnt and poisonous gases will end up into the atmosphere.

Recently, the ministry in charge of the environment and NEMA were seen to be pulling in different directions on the subject of the ban of plastic bottles.²⁷ While NEMA supports a ban on plastic bottles, the ministry is against it and would prefer to encourage recycling and re-use.²⁸ This signifies the absence of constitutional coherence in the management of public affairs in the country.

²⁶ NEMA website <https://www.nema.go.ke> accessed on 19/03/18

²⁷ East African Standard E-paper available at <https://www.standardmedia.co.ke/article/2001268040/environment-ps-differs-with-nema-on-plastic-bottles-ban> accessed on 19/03/18

²⁸ Ibid.

5.0 Way Forward

The Constitution provides that Kenyans are entitled to a clean and healthy environment.²⁹ The right includes having the environment preserved for the present and future generations. This right is further discussed in Articles 69 and 70. Under Article 69 the state is obligated to among other things:

- a) Encourage public participation in the management, protection and conservation of the environment,
- b) Establish systems of environmental impact assessment (EIA), environmental audit and monitoring of the environment,
- c) Eliminate processes and activities that are likely to endanger the environment.

The citizens are obligated to cooperate with state organs and other persons to protect and conserve the environment.³⁰

The ball is squarely in the hands of the government to encourage the citizens to participate in environmental protection and conservation. This can be done by use of various tools including;

a) **Taxation regimes:** By taxing use of products that are not environmental friendly, the government will reduce their use or eliminate them altogether. On the flip side companies dealing with greener alternatives can be given tax incentives to promote the use of their products.

b) **Take backs:** Companies that manufacture or use plastic bags to wrap their products should be forced via legislation to have a working system of taking them back after the use by consumers. Once they take back they should have a system of re-using them or recycling.

c) **Use of landfills:** When plastics cannot be re-used or recycled for whatever reason they should not be put in an open dumpsite. There should be proper landfills constructed to international standards. There should be a

²⁹ Article 42, Constitution of Kenya.

³⁰ Article 69(2) of the Constitution of Kenya.

heavy penalty levied on use of the landfills to discourage disposal and encourage re-use or recycling.

d) **Public education and awareness:** All organs of the government and their agencies led by NEMA should carry out a sustained public education and awareness campaign targeting all stakeholders from manufacturers, consumers and young people so as to encourage greener production and consumption methods.

e) **Enforcement:** There are very good laws in our statutes starting with the Constitution and Environmental Management and Coordination Act (EMCA) among others. They provide strict procedures to be followed whenever any project is to be implemented in the country. This includes carrying out an EIA. However, these procedures are not adhered to strictly and where EIA is done, the purpose is not to find out the real impact the project will have on the environment but to overcome a legal technicality. The government should be stricter in enforcing the laws and regulations.

f) **Monitoring:** The government should invest more on monitoring the impact that all human activities have on the environment so that any negative impact is addressed at the earliest opportunity. Plastic bags menace has been with us for a while now. The government has been slow to act and the longer the problem persists the greater the negative effect on the environment.

f) **Encouraging industrial symbiosis:** The bigger problem with the country is poor planning or lack of planning. Development seems to be moving faster than the regulator. The regulator is always playing catch up. With proper planning the regulator can place together industries that can utilize each other's wastes. This will reduce or totally eliminate wastes from these industries.

Kenya has in place the National Spatial Plan.³¹ Part of its vision is to “Integrate Waste Management and Pollution Control in all policies”.³² This is a brilliant document that needs to be followed up with proper legislations incorporating both the National and County Governments.

6.0 The Role of the Citizens

The Constitution obligates the citizens to cooperate with the state in conserving and protecting the environment.³³ This obligation assumes that the state would have taken measures and put in place proper policies that the citizens can support. This is not always the case. The state can sleep on the job or be compromised by business interest. The citizens should thus use the right provided under article 70, which provides that:³⁴

1) 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

(2) On application under clause (1), the court may make any order, or give any directions, it considers appropriate—

(a) to prevent, stop or discontinue any act or omission that is harmful to the environment;

(b) to compel any public officer to take measures to prevent or discontinue any act or omission that is harmful to the environment; or

(c) to provide compensation for any victim of a violation of the right to a clean and healthy environment.

(3) For the purposes of this Article, an applicant does not have to demonstrate that any person has incurred loss or suffered injury.

³¹ Government of Kenya National Spatial Plan 2015-2045.

³² Ibid at pg. 33

³³ Article 70 of the constitution of Kenya.

³⁴ Ibid.

The courts have been steadfast in enforcing environmental rights in the recent past. The case of **Sam Odera vs Republic**³⁵ and that of **Peter K. Waweru vs Republic**³⁶ are good examples of the kind of jurisprudence being employed by our courts. The courts seem to have adopted the use of the Principles of International Environmental Law as backed by a similar requirement under the Environment (Management and Coordination) Act, 1999³⁷ for courts to be guided by the principles of sustainable development when deciding on environmental matters³⁸. The courts have not been shy in ordering the government to implement measures aimed at ensuring citizens enjoy the right to a clean and healthy environment. What is remaining is for the citizens to be more proactive and move the courts more frequently until the government is forced to implement proper sustainable development policies.

Ultimately, the citizens should be conscious of those actions that damage the environment and take initiative to eliminate them at the personal level. Be it cleaner consumption, proper waste disposal or advocacy. The duty to preserve and protect the environment should be a shared responsibility by all human beings.

Kenya can emulate Sweden in ensuring that environmental ethics become part of daily life of every citizen as one of the most viable means of addressing plastics disposal in the country. The fact that there are still some forms of plastics that are still in use means that the country still has to address the issue of disposal of such plastics. As evidenced by the case of Sweden, it is important to ensure that citizens are actively involved in enforcement and compliance with environmental laws aimed at securing clean and healthy environment for all. There should be a call beyond the statutory measures to tap into the concerted efforts of all stakeholders, including the general public, in addressing the plastics bags menace. This is the only way that Kenya, just like Sweden, can record tangible success in eliminating the adverse environmental effects of use of plastic bags in the country.

³⁵ Sam Odera v NEMA and Another, [2006] eKLR Misc. Application No 400 of 2006.

³⁶ Peter K. Waweru v Republic, [2006] eKLR, Misc. Application No. 118 of 2004.

³⁷ Act No. 8 of 1999 (2015), Laws of Kenya.

³⁸ Ibid, sec. 3(5); See also Article 10, Constitution of Kenya 2010.

7.0 Conclusion

Plastics have become part of human daily lives and cannot be wished away. While efforts to minimize their production are commendable, ultimately, the other major goal should be to find ways of dealing with the ones that have already been produced. Whether it is imposing heavy taxes on their manufacture and/or use, investing on technology to produce viable alternatives or forcing manufacturers to re-use and recycle, something needs to be done urgently to control their production, use and disposal.

This can only be achieved if all stakeholders are involved in the formulation of policy and regulations. A lot of public education and awareness need to be carried out and which should be backed by heavy investment in proper technology and strict laws to deal with errant entities. At the end, there is need for concerted efforts from all to ensure that the right to clean and healthy environment is realized as soon as possible.

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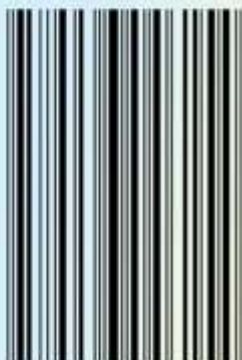
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