

## **Demystifying The Right to A Clean and Healthy Environment in Kenya and how it can be Enforced**

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### **Abstract**

*The Constitution provides in the preamble that the environment is our heritage which should be sustained for the benefit of future generations.<sup>2</sup> The protection of the environment is, therefore, a matter of utmost national priority because the environment plays an integral role in the foundation of sustainable national growth and development. In addition, the right to a clean and healthy environment is at the heart of every citizen's socio-economic rights as well as their right to life. As such, the violation and or infringement thereof is a matter of utmost concern that must be dealt with urgency and austerity, as stated by Justice Ongote, in *Halai Concrete Quarries & 4 others v County Government of Machakos & 4 others; Kenya Power & Lighting Co & another (Interested Parties)*.<sup>3</sup>*

*With a view of making a positive contribution on this debate, this paper underscores the constitutional right to a clean and healthy environment, pursuant to Article 42(a) and (b) of the Constitution of Kenya 2010. This right which has been enunciated in judicial precedence as a fundamental right bestowed on every person as was witnessed in the case of *Adrian Kamotho Njenga vs Council of Governors & 3 others*,<sup>4</sup> has been elucidated a lot of debate within the academic circles, the legal fraternity and the public in equal measure.*

*As a result, this paper first analyzes different legal definitions with regards the said right, in an attempt to conceptualize it effectively. This will be done through analysis of different constitutional, statutory, and international*

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<sup>2</sup> The Preamble, The Constitution of Kenya, 2010.

<sup>3</sup> [2020] eKLR, Environment and Land Petition 19 of 2020 (Formerly High Court Constitutional Petition No. 6 of 2020).

<sup>4</sup> [2020] eKLR, Environment and Land Petition 37 of 2017.

instruments provisions, as well as case laws and writings of highly qualified publicists. The paper will then proceed to establish the current status quo of the said right in Kenya, by analyzing the existing legal framework and jurisprudence with regards to the said right. Thirdly, the paper will establish and conceptualize the existing challenges, with regards the full realization of the right to a clean and healthy environment and lastly, recommendations on how best this right can be best realized.

## 1. Introduction

The right to clean and healthy environment has been recognized as one of the rights under the Chapter 4 of the Constitution, in which the right has been bestowed on every person and has been considered by the courts and eminent authors to be essential for the existence of mankind. In the case of *Adrian Kamotho Njenga vs. Council of Governors & 3 others*,<sup>5</sup> the court opined that Article 42 of the Constitution guarantees every person the right to a clean and healthy environment and to have the environment protected for the benefit of present and future generations through the measures prescribed by Article 69. The right extends to having the obligations relating to the environment under Article 70 fulfilled. It went ahead to state that unlike the other rights in the bill of rights which are guaranteed for enjoyment by individuals during their lifetime, the right to a clean and healthy environment is an entitlement of present and future generations and is to be enjoyed by every person with the obligation to conserve and protect the environment. Further on, in the case of *Cortec Mining Kenya Ltd vs Cabinet Secretary Ministry of Mining & 9 Others*,<sup>6</sup> Mutungi J held that whenever there is real and actual environmental pollution and degradation, with apparent and real adverse effects on flora and fauna, peoples' lives and livelihood, then that is a perfect recipe for a catastrophic time bomb, that will not take so long to explode. It directs us of any luxury of waiting to take action.

As a result, The right has three components; the right itself, the right to have unrestricted access to the courts to seek redress where a person alleges the right to a clean and healthy environment has been infringed or is threatened; and the right to have the court make any order or give any directions it

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<sup>5</sup> [2020] eKLR, Environment and Land Petition 37 of 2017.

<sup>6</sup> [2015] eKLR, Civil Application 119 of 2015 (Ur 95/2015).

considers appropriate to either prevent or discontinue the act harmful to the environment, or compel any public officer to take measures to prevent or discontinue the act that is harmful to the environment or award compensation to any victim of a violation of the right to a clean and healthy environment.<sup>7</sup>

The reasons as to why the enhancement of right to a clean and healthy environment is best captured by Alexander Kiss, who argues that “*an environment degraded by pollution and defaced by the destruction of all beauty and variety is as contrary to satisfactory living conditions and the development as the breakdown of the fundamental ecologic equilibria is harmful to physical and moral health.*”<sup>8</sup> As a matter of fact, this position was relied upon by the African Commission on Human and People’s Rights in the case of *The Social and Economic Rights Action Centre and the Centre for Economic and Social Rights vs. Nigeria*,<sup>9</sup> where it held that environmental rights recognize the importance of a clean and safe environment that is closely linked to economic and social rights in so far as the environment affects the quality of life and safety of the individual, and as a consequence, the state is required under the African Charter to take reasonable measures to prevent pollution and ecological degradation, to promote conservation, and to secure an ecologically sustainable development and use of natural resources.

As a result, therefore, this paper concurs in entirety with Justice Munyao Sila, in the case of *Moffat Kamau & 9 Others vs. Actors Kenya Ltd & 9 Others*<sup>10</sup> averred that where the procedures for the protection of the environment are not followed, then an assumption may be drawn that the right to a clean and healthy environment is under threat. This presumption can only be rebutted if proper procedure is followed and the end result is that any undertaking with regards the environment has been given a clean bill of health or its benefits are found to far outweigh the adverse effects to the

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<sup>7</sup> Ibid, par 19.

<sup>8</sup> Kackar, R. *A Human Right to Environmental Protection: Dream or Reality?* (2013, Available at SSRN 2295693).

<sup>9</sup> Communication No.155/96.

<sup>10</sup> [2016] eKLR, Constitutional Petition 13 of 2015.

environment, as was stated in the case of *Ken Kasinga v Daniel Kiplagat Kirui & 5 others*.<sup>11</sup>

## 2. Definition and conceptualization of the right to a Clean and healthy environment

The Environmental Management and Coordination Act (EMCA),<sup>12</sup> defines the term environment to include: “*the physical factors of the surroundings of human beings including land, water, atmosphere, climate, sound, odour, taste, the biological factors of animals and plants and the social factor of aesthetics and includes both the natural and the built environment.*”

The Black’s Law Dictionary, 10<sup>th</sup> edition defines “health” as the quality, state or condition of being sound or whole in body, mind or soul, especially freedom from pain or sickness; or the relative quality or state of one’s physical or mental well-being whether good or bad.<sup>13</sup>

Pursuant to Article 42 of the Constitution of Kenya 2010, every person has the right to a clean and healthy environment. This includes the right to protection of the environment for the benefit of the present and future generations, as well as fulfilment of the environmental obligations stipulated under Article 70 of the constitution.<sup>14</sup> Constitutional environmental rights can either refer to a specific aspect of the environment such as ecosystems, biodiversity, natural resources, plant and animal species or the environment holistically.<sup>15</sup> The first step towards the full understanding and conceptualization of this right is to define its parameters, under the law.

In his article, *Reconceptualising the right to Clean and Healthy Environment in Kenya*<sup>16</sup>, Dr. Kariuki Muigua argues that there exists a problem in the declaration of this right, as it exists in various documents due to two reasons;

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<sup>11</sup>(2014) eKLR, Petition 50 of 2013.

<sup>12</sup> Section 2, The Environmental Management and Coordination Act No. 8 of 1999, Laws of Kenya.

<sup>13</sup> Black’s Law Dictionary, 10<sup>th</sup> edition.

<sup>14</sup> Article 42(a)(b), The Constitution of Kenya 2010.

<sup>15</sup> Daly, Erin. *Constitutional protection for environmental rights: The benefits of environmental process*, (2012, International Journal of Peace Studies) p. 71.

<sup>16</sup> Dr. Kariuki Muigua, *Reconceptualising the right to Clean and Healthy Environment in Kenya*, (2017) p. 5.

First, there is no clear definition of this right and secondly, its contents have not been clearly demarcated. As a result of the lack of clarity on the legal parameters of the right to a clean and healthy environment, it, therefore, becomes difficult to determine when the right has been violated.

However, there is a close link between the right to a clean and healthy environment and other constitutionally entrenched rights, and hence the right to a clean and healthy environment can be defined and addressed through paying close attention to the prevailing environmental conditions, and not principally through finding an accurate definition for the said right. In the case of *Joyce Mutindi Muthama & another v Josephat Kyololo Wambua & 2 others*,<sup>17</sup> the court stated that:

It is trite that the right to own land and the right to a clean and healthy environment cannot be dealt with in isolation from other rights, like the right to a fair hearing, the right not to be discriminated against, the right to a fair administrative action, the right to equal protection and equal benefit of the law, the right to adequate housing, amongst other rights.

Cullet Philippe argues that; “*the right to a clean environment is not a purely individual right; rather, it has a collective facet, belonging equally to such groups as future generations and indigenous peoples whose cultures depend on the environment for their existence and perpetuation.*”<sup>18</sup>

The ESCR Committee in *General Comment No. 14*<sup>19</sup> stated that:

The right to a clean and healthy environment includes, *inter alia*, preventive measures in respect of occupational accidents and diseases; the requirement to ensure an adequate supply of safe and potable water and basic sanitation; and the prevention and reduction

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<sup>17</sup> (2018) eKLR, Environment & Land Petition 206 of 2017.

<sup>18</sup> Cullet, Philippe. *Definition of an environmental right in a human rights context*, (1995, Netherlands Quarterly of Human Rights 13.) p. 25.

<sup>19</sup> UN Committee on Economic, Social and Cultural Rights (CESCR), *General Comment No. 14: The Right to the Highest Attainable Standard of Health (Art. 12 of the Covenant)*, 11 August 2000, E/C.12/2000/4, available at: <https://www.refworld.org/docid/4538838d0.html> [accessed 21 October 2020].

of the population's exposure to harmful substances such as radiation and harmful chemicals or other detrimental environmental conditions that directly or indirectly impact upon human health.

Contrary to what many legal scholars argue that the right to a clean and healthy environment is a third generation right, this paper concurs with Dr. Kariuki Muigua's assertion that it is in fact a fundamental right, for the enjoyment of other rights.<sup>20</sup> In justifying this argument, he argues that when life-sustaining ecosystems are destroyed and there is an exponential increase in environmental pollution, then there is an inhibition of the effective exercise and efficient enjoyment of the other human rights.<sup>21</sup>

From the foregoing, it is imperative that we undertake positive actions to ensure that the environment is protected and conserved, if the right to a clean and healthy environment is to be actualized. This is best captured in the second part of both *the Stockholm Principle 21*<sup>22</sup> and *the Rio Declaration Principle 2*,<sup>23</sup> which collectively establishes a State's responsibility to ensure that activities within its activity or control do not cause damage to the environment of other States or to areas beyond national jurisdiction or control.

Professor Günther Handl argues that this obligation is balanced by the declarations' recognition, in the first part of the respective principles of a State's sovereign right to "exploit" its natural resources according to its "environmental" (Stockholm) and "environmental and developmental" policies (Rio). While at Stockholm, some countries still questioned the customary legal nature of the obligation concerned.<sup>24</sup> Today, there is no

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<sup>20</sup> Dr. Kariuki Muigua, *Reconceptualising the right to Clean and Healthy Environment in Kenya*, (2017) p. 6.

<sup>21</sup> J.A. Downs, *A Healthy and Ecologically Balanced Environment: An Argument for A Third Generation Right*, (Duke Journal of Comparative & International Law, Vol. 3, 1993) pp. 351.

<sup>22</sup> Principle 21, *The Stockholm Declaration on the Human Environment*, 1972.

<sup>23</sup> Principle 2, *The 1992 Rio Declaration on Environment and Development*, UN Doc. A/CONF.151/26 (vol. I), 31 ILM 874 (1992).

<sup>24</sup> Handl G, *The Declaration Of The United Nations Conference On The Human Environment Stockholm, 16 June 1972 & The Rio Declaration On Environment And Development Rio De Janeiro, 14 June 1992* (United Nations Audio Visual Library

doubt that this obligation is part of general international law. Thus in its *Advisory Opinion on the Legality of the Threat or Use of Nuclear Weapons*<sup>25</sup> first, and again more recently in *the Case concerning Pulp Mills on the River Uruguay*,<sup>26</sup> the International Court of Justice expressly endorsed the obligation as a rule of international customary law. Moreover, the Pulp Mills decision clearly confirms that the State's obligation of prevention is one of due diligence.<sup>27</sup>

### **3. The current status quo regarding the right to a clean and healthy environment; the legal framework vis a vis the actual reality**

According to experts at the Constitution Review Commission, Article 42 of the Constitution 2010 was formulated to “facilitate the realization of environmental rights and to ensure effective environmental protection, management and conservation in Kenya.”<sup>28</sup> However, in his article, *Reconceptualising the Right to a Clean and Healthy Environment in Kenya: The Need to Move from an Anthropocentric View to a Bicentric View*, Timonah Chore, contends that the right to a clean and healthy environment, as envisaged under Article 42, seems to focus disproportionately on human well-being rather than holistic and intrinsic environmental protection and conservation.<sup>29</sup> As a result, the right has not met its expectations as it is shrouded with anthropocentric concerns which create barriers in the effective realization of the right. The concept of anthropocentrism is conceptualized

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of International law 2021) <https://legal.un.org/avl/ha/dunche/dunche.html> accessed 9 June 2021

<sup>25</sup> *Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion*, ICJ GL No 95, [1996] ICJ Rep 226, ICGJ 205 (ICJ 1996), 8<sup>th</sup> July 1996, United Nations [UN]; International Court of Justice [ICJ].

<sup>26</sup> *Pulp Mills on the River Uruguay, Argentina v Uruguay*, Order, Provisional Measures, ICJ GL No 135, [2006] ICJ Rep 113, (2006) 45 ILM 1025, ICGJ 2 (ICJ 2006), 13<sup>th</sup> July 2006, United Nations [UN]; International Court of Justice [ICJ].

<sup>27</sup> Handl, Günther. *Declaration of the United Nations conference on the human environment (Stockholm Declaration), 1972 and the Rio Declaration on Environment and Development, 199, (2012, United Nations Audiovisual Library of International Law 11).*

<sup>28</sup> Constitution of Kenya Review Commission, *Expert review of the draft bill seminar*, 2003, pp. 63-64.

<sup>29</sup> Chore, Timonah. *Reconceptualising the Right to a Clean and Healthy Environment in Kenya: The Need to Move from an Anthropocentric View to a Bicentric View*, (2019, *Strathmore L. Rev.* 4) p. 73.

as a human-centered approach towards environmental conservation and protection,<sup>30</sup> which has been criticized by many environmental scholars and commentators for focusing excessively on human well-being, while neglecting intrinsic environmental conservation.<sup>31</sup>

However, from a contextual reading and understanding of Article 42 of the Constitution read together with section 2 of EMCA, it can be concluded that the environment needs to be protected across all spheres (both living and non-living aspects of the environment), in order to realise the maximum realization of the right to a clean and healthy environment. So as to get a practical touch of the current status quo with regards the extent to which this fundamental right is abused, this paper is guided by the facts and the ensuing decision in the case of *Martin Osano Rabera & Another v Municipal Council of Nakuru & 2 Others*,<sup>32</sup> where the court in analyzing violations and infringements on Article 42, stated that:

...the dumpsite attracts chickens, cows, goats and sheep that are left unattended and when they consume the refuse from the dumpsite they get infected only to be later slaughtered and consumed by the unsuspecting public; flies that get attracted to decomposing refuse fly to homesteads thus spreading diseases like dysentery; that the dumpsite harbours rodents like rats and reptiles like snakes which find their way to people's homes: that the dumpsite emits offensive gases which are toxic and pose the risk of causing respiratory ailments...

Additionally, the Court in the case of *The Kenya Association of Manufacturers and 2 Others v Cabinet Secretary of the Ministry of Environment and Natural Resources & 3 Others*,<sup>33</sup> while weighing the

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<sup>30</sup> Du Plessis, Alida Anél. *Fulfilment of South Africa's constitutional environmental right in the local government sphere*, (2008, PhD diss., North-West University).

<sup>31</sup> Scholtz W, *The anthropocentric approach to sustainable development in the National Environmental Management Act and the Constitution of South Africa*, (2005, 1 Journal of South African Law).

<sup>32</sup> (2018) eKLR, Petition 53 of 2012.

<sup>33</sup> (2017) eKLR, Petition 32 & 35 of 2017 & Judicial Review Application 30 of 2017 (Consolidated) para. 58-59.



economic loss to be suffered by the manufacturers and the infringement of Article 42 caused by the use of plastic bags stated that:

...in my view, this apprehended loss is to be carefully weighed against the public interest of the over 40 million Kenyans whose right to a clean environment the legal notice seeks to secure. Grant of a conservative order in the circumstances of this dispute would mean that the offensive plastic bags continue to suffocate the environment to the detriment of the Kenyan population, while serving the commercial interests of a section of the plastic bags dealers. In my view, that would offend Kenya's Constitutional and legal framework on protection and management of the environment.

This is a *locus classicus* case of the effects that plastic bags have on environmental pollution due to the extensive environmental harm and degradation that they cause, and hence affecting the right to clean and healthy environment.

In her final report to the UN Commission on Human Rights,<sup>34</sup> Ksentini, Fatma Zohra, the UN. Special Rapporteur on Human Rights and the Environment recognized that the right to health extends to include protection from natural hazards and freedom from pollution, including the right to adequate sanitation, a position that this paper concurs with. She explained that the term "healthy environment" has been generally interpreted to mean that the environment must be healthy in itself (ecological balance) as well as healthful, which requires that it is conducive to healthy living.

All this analysis so far demonstrates one fundamental concept, that for the right to a clean and healthy environment to be realized, it is imperative that the concept of environmental protection must be considered. Simply put, environmental protection and conservation is a pre-qualifier to the realization of the right to a clean and healthy environment.

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<sup>34</sup> Commission on Human Rights, *Final Report of the UN Special Rapporteur on Human Rights and the Environment, Mrs. Zohra Ksentini*, UN Doc. E/CN.4/Sub.2/1994/9 (6 July 1994).

#### **4. Challenges facing the realization of a clean and healthy environment in Kenya**

In order to protect and conserve the environment, it is prudent that we make a diagnosis of the factors that lead to degradation and pollution of the environment, such that it circumvents and hinders the full realization of the right to a clean and healthy environment. The purpose for making this diagnosis is to enable us to recommend and/or take the proper measures and actions towards the realization of a clean and healthy environment. In that respect, this paper discusses two major challenges: the concept of development at the expense of environmental consciousness and poverty.

##### **i. The concept of development at the expense of environmental consciousness**

The environmental legal framework within Kenya describes the legal rules relating to the environment broadly into social, economic, philosophical, and jurisprudential issues raised by attempts to protect, conserve, and reduce the impacts of human activity on the Kenyan environment.<sup>35</sup> This can be divided into two major areas, pollution control and resource conservation.

However, in most instances, we see cases where development-oriented activities seem to take the centre-stage, at the expense of environmental conservation and protection.<sup>36</sup> Collectively, this leads to increase in activities that lead to environmental degradation, such as pollution, permanent damage to nature, soil erosion, global warming leading to climate change, loss of biodiversity, release of long term toxins to the environment among other development oriented activities, at the expense of environmental protection and conservation for a clean and healthy environment.<sup>37</sup>

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<sup>35</sup> Mwanza, R. *The relationship between the principle of sustainable development and the human right to a clean and healthy environment in Kenya's legal context: An appraisal*, (2020, *Environmental Law Review*, 22(3)) pp. 184-197.

<sup>36</sup> Spiegel, J., & Maystre, L. Y. *Environmental pollution control and prevention*, (1998, *Encyclopedia of Occupational Health and Safety*. 4<sup>th</sup> ed. Geneva: International Labour Office) p. 2.

<sup>37</sup> National Research Council. *Global environmental change: Understanding the human dimensions*, (1991, National Academies Press).

In their book, *The Constitution of Kenya, 2010: An Introductory Commentary*, the authors, Professor P.L.O Lumumba and Luis Franceschi, while quoting Justice J.B Ojwang, argue that:

The environment is accorded an eminent place in the governance agenda of the Constitution of Kenya 2010. Governance, which is required to be performed as a service to the people, must comply with ‘national values and principles’ one of which is sustainable development. It is common knowledge that the first principles of sustainable development relate to the basic elements that sustain life: and the conservation of the environment is invariably the first component of this principle. The complexities of the environment, and its vulnerability to inappropriate human activity, render it a sensitive sphere of disputes in respect of which the judicial role is mandatory. A constitution so pre-occupied with safeguards for social welfare has necessarily to accord primacy to the environment and to the judicial role therein.<sup>38</sup>

There has been a quite extensive jurisprudence to this effect. For instance, in the case of *Wangari Maathai v Kenya Times Media Trust*,<sup>39</sup> the petitioner, who was a coordinator of an environmental pressure group (the Greenbelt Movement) sought a temporary injunction to restrain the respondent company from constructing an office complex at the Uhuru public park which could have led to the destruction of the park’s ecosystem. However, the court dismissed the applicant’s claim on the grounds that the petitioner lacked the *locus standi* to initiate such an action, stating that the law then only allowed the Attorney General to bring a legal action or claim on behalf of the public. Contradicted with jurisprudence from India in the case of *T. Damodhar Rao and Ors. vs The Special Officer, Municipal Corporation, Hyderabad*,<sup>40</sup> the Andhra Pradesh High Court held that even actions that may not directly affect physical health, but that “disturb the environmental balance” have been found to violate the right to life broadly interpreted.

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<sup>38</sup> Lumumba, Patrick LO, and Luis G. Franceschi. *The Constitution of Kenya, 2010: an introductory commentary*, (2014, Strathmore University Press) p. 196.

<sup>39</sup> [1989] eKLR, Civil Case 5403 of 1989.

<sup>40</sup> AIR 1987 AP 171.

Thus, for example, a government's failure to protect a recreational area or park from development was found to violate the right to a clean and healthy environment in the *Damodhar case*. This poses the question, to what extent are the Kenyan courts willing to go, in pursuit of environmental protection and conservation, in the quest to achieve the right to a clean and healthy environment?

In the case of *Peter K. Waweru v Republic*,<sup>41</sup> the court held that any development that jeopardizes life is not sustainable development and ought to be halted. In *Kenya Medical supplies Agency (KEMSA) –v- Mavji Kanji Hirani & 8 Other*,<sup>42</sup> it was held that the courts have a duty to identify and uphold the public interest, alive to the fact that their decisions ought to conduce to the attainment of that which is for the advancement of the public good, and as a result, this paper submits that the Kenyan Courts, must strive to strike a balance between these two equally important but competing interests.

At the international level, in the *Case Concerning the Gabcikovo-Nagymaros Project*,<sup>43</sup> the ICJ considered that Sustainable Development should balance development with environmental concerns. Judge Weeramantry expressed that the principle of sustainable development constitutes a principle which enables the balancing between environmental concerns and development concerns.

This just shows how much there is preference for undertaking of development projects even if it means that the environment is degraded, which translates to the violation of the right to a clean and healthy environment, since the environment will have been subjected to conditions that no longer make it neither clean nor healthy.

## ii. The challenge of poverty

In its report, *Why a Healthy Environment is Essential to Reducing Poverty*,

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<sup>41</sup> (2004), eKLR (Environment and Land), Mis. Civl Appli.No. 118 of 2004.

<sup>42</sup> (2018) eKLR, Civil Appeal 115 of 2017.

<sup>43</sup> *Gabcikovo-Nagymaros Project, Hungary v Slovakia*, Judgment, Merits, ICJ GL No 92, [1997] ICJ Rep 7, [1997] ICJ Rep 88, (1998) 37 ILM 162, ICGJ 66 (ICJ 1997), 25th September 1997, International Court of Justice [ICJ].

the Organization for Economic Co-operation and Development contends that poverty reduction, economic growth, and the maintenance of life-supporting “environmental resources” are closely linked and for that reason, this is why reversing environmental degradation is one of the Millennium Development Goals, since most of these goals have strong links with the environment.<sup>44</sup>

Poverty often causes people to put relatively more pressure on the environment which results in larger families (due to among other factors, high death rates and insecurity), improper human waste disposal leading to unhealthy living conditions, more pressure on fragile land to meet their needs, overexploitation of natural resources and more deforestation.<sup>45</sup> According to a report by the World Bank, data collected indicated that poor countries are much more dependent on natural resources as assets than rich countries. The ratio of people to forested land is more than three times higher in low-income than in high income countries, hence putting a lot of pressure to the environment.<sup>46</sup>

According to the World Vision, environmental problems are an added source of misery for the poor. This is premised on the fact that they cause additional suffering among them, since environmental damage leads to increase on the impact of floods and other environmental catastrophes, with specific focus to the poor. Soil erosion, land degradation and deforestation on the other hand have a correlative effect on the decline in food production, which along with a shortage of wood for fuel contribute to inflation, hence more and more suffering. Simply put, the worst consequences of environmental deterioration, whether economic, social, or related to mental or physical wellbeing, are experienced to the largest extent by poor

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<sup>44</sup> OECD, *Why A Healthy Environment Is Essential To Reducing Poverty* (2018) <http://Why a Healthy Environment is Essential to Reducing Poverty> accessed 9 June 2021.

<sup>45</sup> Niranjana D.B. *The relationship between poverty and the environment, (Voices of youth, Unicef for every child)*. <https://www.voicesofyouth.org/blog/relationship-between-poverty-and-environment>.

<sup>46</sup> World Bank. *Poverty and Environment: Understanding Linkages at the Household Level. Environment and Development*, (2007, Washington, DC: World Bank). <https://openknowledge.worldbank.org/handle/10986/6924> License CC BY 3.0 IGO.

people.<sup>47</sup>

This on the overall is a clear indicium that the poverty levels of a given community are directly proportional to the kind of environment in which they live in. A good example is in the informal settlement areas, popularly known as *ghettos*, which is slang for slums, the standard of life is disparaging, since the environment is very unwelcoming, marred with raw sewage and close dumpsites nearby, which are not licensed to be in operation, but exists, nevertheless. This illegal disposal of waste amounts to nuisance as categorized under Section 118 as read with Section 117 of the Public Health Act,<sup>48</sup> which poses a real and imminent health hazard to the public at large, as was espoused in the case of *County Government of Kitui vs. Sonata Kenya Limited & 2 others*.<sup>49</sup>

## 5. Recommendations towards the realization of the right to a clean and healthy environment

In spite of the fact the right to a clean and healthy environment in Kenya is a constitutionally entrenched right, its meaningful implementation still remains an uphill task. However, this paper contends that despite the many challenges that currently subsist with regards the realization of the right to a clean and healthy environment, several recommendations can be actualized in order to realize the dream of the drafters of the Constitution 2010, specifically with regards Article 42. Some of the recommendations are as discussed below.

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<sup>47</sup> World Vision, *Poverty And The Environment* (2006, World Vision) [https://www.worldvision.org.nz/getmedia/26362f6f-eb18-47a7-a1dd-a6c33c38bfd7/topic-sheet-poverty and the environment/#:~:text=Environmental%20problems%20cause%20more%20suffering,increase%20the%20risk%20of%20disease.&text=shortages%20of%20wood%20for%20fuel,it%20more%20expensive%20to%20buy.&text=soil%20erosion%20and%20deforestation%20cause%20declining%20crop%20yields.](https://www.worldvision.org.nz/getmedia/26362f6f-eb18-47a7-a1dd-a6c33c38bfd7/topic-sheet-poverty%20and%20the%20environment/#:~:text=Environmental%20problems%20cause%20more%20suffering,increase%20the%20risk%20of%20disease.&text=shortages%20of%20wood%20for%20fuel,it%20more%20expensive%20to%20buy.&text=soil%20erosion%20and%20deforestation%20cause%20declining%20crop%20yields.) accessed 8 June 2021.

<sup>48</sup> Section 117, Public Health Act, Act No. 12 of 2012.

<sup>49</sup> [2018] eKLR, Environment and Land Petition 2 of 2018.

### **iii. Observation and implementation of other rights in order to realize the right to a clean and health environment (Indivisibility and interdependence)**

From there foregoing, this paper has taken the position that there is an integral link between the right to a healthy environment and other human rights and underscores the fact that all human beings depend on the environment in which we live.<sup>50</sup> Indeed, it may often be easier to address environmental concerns through other human rights than through the as yet not well-defined right to a healthy environment. The deterioration of the environment affects the right to life, health, work and education, among other rights.

This is an indication of the indivisible and interdependent nature of human rights, pursuant to the Bill of rights under chapter four of the Constitution of Kenya 2010.<sup>51</sup> It is, therefore, imperative that the respect for and observance of other rights, up to and including environmental rights will go a long way towards the realization to a clean and healthy environment.

### **iv. Implementation and Enforcement Mechanisms**

The recognition of the right to a healthy and clean environment in the constitution under Article 42, legislations such as the EMCA and other national policy arrangements will not have a real effect in reality, if it is not accompanied by the availability of means to implement the right and adequate mechanisms of enforcement of the said legal framework. Over time, the enforcement mechanisms of the legal framework in Kenya has been found to short fall of the expected outcomes and, hence, there is a dire need for a radical change in the implementation and enforcement framework.<sup>52</sup>

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<sup>50</sup> Special Rapporteur on human rights and the environment, *About Human Rights And The Environment* <https://www.ohchr.org/EN/Issues/Environment/SREnvironment/Pages/AboutHRandEnvironment.aspx> accessed 9 June 2021

<sup>51</sup> Chapter Four, The Constitution of Kenya, 2010.

<sup>52</sup> Onjala Joseph, O. *Managing Water Scarcity in Kenya: Industrial Response to Tariffs and Regulatory Enforcement*, (2002, Unpublished Ph. Dissertation, Department of Environment, Technology and Social Studies, Roskilde University, Denmark).

Some mechanisms that can be further adopted include: effective spatial planning management systems (the effectiveness would depend on the participatory process of the spatial planning), participatory Environmental Impact Assessment (EIA) as a tool for the government to make environmentally sound decisions and the existence of a public/citizen complaint mechanism that provides the opportunity for citizens to lodge complaints and grievances about the violation/infringement of their rights.<sup>53</sup>

#### **v. Use of National Human Rights Commissions (e.g KNHRC, KHRC), Civil Societies and pressure groups**

National Human Rights Commissions can also be utilized for protecting the right to a clean and healthy environment. There have been successful domestic court cases guaranteeing the right to a clean and healthy environment in various countries, courtesy of the pressure put on the government by national human rights bodies, civil society organizations and pressure groups in different countries. For instance, The Supreme Court of Costa Rica in the case of *Carlos Roberto Mejia Chacón v. Municipalidad de Santa Ana* affirmed the right to a clean and healthy environment,<sup>54</sup> The plaintiff (the action was brought by the National Human Rights Commission of Costa Rica and other pressure groups in Costa Rica) brought the action on the grounds that his and his neighbour's right to life and a clean and healthy environment had been violated because a cliff in their neighborhood was being used as a dump. The court ordered that the dump be closed immediately and held that the authorities had not been effective or diligent enough in carrying out their obligation to protect life and the environment. The court stated that:

life is only possible when it exists in solidarity with nature, which nourishes and sustains us-not only with regard to physical food but also with physical well-being. It constitutes a right which all citizens possess to live in an environment free from contamination.<sup>55</sup>

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<sup>53</sup> Module 15: *The Right to A Healthy Environment*, (2020, Hrlibrary.umn.edu. Retrieved 1 November 2020) retrieved, from [http://hrlibrary.umn.edu/edumat/IHRIP/circle/modules/module15.htm#\\_edn6](http://hrlibrary.umn.edu/edumat/IHRIP/circle/modules/module15.htm#_edn6).

<sup>54</sup> Costa Rica Constitutional Chamber of the Supreme Court Vote No. 3705, 30 July 1993.

<sup>55</sup> Commission on Human Rights, Costa Rica, op. cit., 92.



As a result, therefore, this paper contends that the civil societies in Kenya and other non-governmental stakeholders have a crucial role in the advocacy for the respect for the right to a clean and healthy environment. This is not just with regards to litigations, but diverse positive activities aimed at the pursuance for a clean and healthy environment, through activities such civil education, activism, public interest litigation and being the voices of reason on behalf of the common citizen.

#### **vi. Recourse through courts**

Pursuant to Article 70(1) of the Constitution of Kenya 2010, if a person alleges that a right to a clean and healthy environment recognized and protected under Article 42 of the Constitution 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 of the same matter.<sup>56</sup> Just like in many jurisdictions world-over, Kenya has a redress cause through the courts, for those who feel like this right is being or likely to be violated.

Section 3 of EMCA allows any person who alleges that the right to a clean and healthy environment has been or is being infringed or violated to apply to the Environment and Land Court in the public interest. The test of whether an infringement is happening or is likely to occur was enunciated in the case of *Adrian Kamotho Njenga vs. Council of Governors & 3 others*,<sup>57</sup> which was to the effect that a petitioner is not obliged to prove that he or she has suffered loss or damage in his or her application for enforcement of the right to a clean and healthy environment.

This was further enunciated in the case of *Joseph Leboo & 2 others vs. Director Kenya Forest Services & another*,<sup>58</sup> where the court rendered itself that the above position was in fact the applicable position, and still is the position, under the Environmental Coordination and Management Act (EMCA), 1999, which preceded the Constitution of Kenya, 2010:

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<sup>56</sup> Article 70(1), The Constitution of Kenya 2010.

<sup>57</sup> [2020] eKLR, Environment and Land Petition 37 of 2017.

<sup>58</sup> [2013] eKLR, Environment and Land Case 273 of 2013.

It can be seen that Section 3(4) above permits any person to institute suit relating to the protection of the environment without the necessity of demonstrating personal loss or injury. Litigation aimed at protecting the environment, cannot be shackled by the narrow application of the locus standi rule, both under the Constitution and statute, and indeed in principle. Any person, without the need of demonstrating personal injury, has the freedom and capacity to institute an action aimed at protecting the environment. The plaintiffs have filed this suit as representatives of the local community and also in their own capacity. The community, of course, has an interest in the preservation and sustainable use of forests. Their very livelihoods depend on the proper management of the forests. Even if they had not demonstrated such interest, that would not have been important, as any person who alleges a violation of any law touching on the environment is free to commence litigation to ensure the protection of such environment. I am therefore not in agreement with any argument that purports to state that the plaintiffs have no locus standi in this suit.<sup>59</sup>

Borrowing from a foreign jurisdiction, in India for instance, the enforcement of the constitutional right to a clean and healthy environment (similar provision as Article 70(1) of the Kenya Constitution 2010) can be seen in the case of *M.C. Mehta v. Union of India*.<sup>60</sup> This case regards pollution by a number of tanneries and the failure of the authorities to take appropriate steps. The petition asked the court to restrain certain industries from discharging trade effluents into the Ganges River. The Supreme Court of India ordered the tanneries to close down unless the trade effluents were subjected to a pre-treatment process by setting up primary treatment plants as approved by the State Pollution Board. The court noted that "closure of tanneries may bring unemployment [and] loss of revenue, but life, health and ecology have greater importance to the people."<sup>61</sup>

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<sup>59</sup> Ibid.

<sup>60</sup> *Mehta v. Union of India & Ors*, (2006) 3 SCC 399.

<sup>61</sup> Ibid, Par 47.

It is the position of this paper that an undertaking that seeks to negatively alter environmental balance should be interpreted in line with Article 70 of the Constitution, and as a result, action should be taken to reverse or avert the happening of the undertaking, or if it is already in motion, necessary compensation to be made to that end. This is best seen in the case of *National Environment Management Authority & Another vs Gerick Kenya Limited*,<sup>62</sup> Justice Mutungi held that:

In this matter we have a situation where we have competing interest. On the one hand we have the public interest where the Community needs protection against potential harm to the environment through contamination or pollution, and on the other hand, we have the defendant's private commercial interest where the defendant wishes to develop the site for commercial gain. Where in a case such as the instant one, the public interest as the public interest is pitted against private interest, the public interest overrides the private interest is for the good of the wider public as opposed to the narrow private interest. The public interest no doubt outweighs the private individual interest.

## 6. Conclusion

The human constitutional right under Article 42 read with article 71 of the Constitution to a clean healthy environment brings together the environmental dimensions of civil, cultural, economic, political, and social rights, and protects the core elements of the natural environment that enable a life of dignity. Diverse ecosystems and clean water, air, and soils are indispensable for human health and security. The right also protects the civic space for individuals to engage in dialogue on environmental policy.<sup>63</sup> Without it, government policies would often cater to the commercial interests of the powerful, not the public, and certainly not the politically disenfranchised. Therefore, it is important that this right is advocated for, in

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<sup>62</sup> [2016] eKLR, Environment and Land Case 155 of 2015.

<sup>63</sup> The United Nations Human Rights Watch, *The Case for a Right to a Healthy Environment*. (2020). Retrieved 1 November 2020, from <https://www.hrw.org/news/2018/03/01/case-right-healthy-environment#:~:text=The%20human%20right%20to%20a,enable%20a%20life%20of%20dignity.>

order for it to be effectively realized and enjoyed by all citizens, regardless of their social status.

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