

Journal of Conflict Management & Sustainable Development



Embracing Environmental, Social and Governance (ESG) Principles for Sustainable Development in Kenya	Kariuki Muigua
Kenya's Legal Viaduct to Environmental Sustainability	Polycarp M. Ondieki
Impact of Contemporary Weapons and Technology on International Humanitarian Law: A Case for Consideration	Kenneth W. Mutuma
Right to Health: Critical Analysis of Kenyan Legal Framework	Limlim Thomas Elim
Biodiversity Mainstreaming for Food and Nutrition Security in Kenya	Kariuki Muigua
Law History and Politics in Developing Societies: A Comparative Analysis of Constitution Making Process in Australia and United Arab Emirate	Henry K Murigi
Money Laundering and The Role of the Advocate - A Comparative Analysis of Kenyan and South African Law	Viola Wakuthii
Review: Alternative Dispute Resolution Journal Volume 10 Issue 3	Mwati Muriithi
Exploring Poverty in South Sudan through the Lens of Multidimensional Poverty Approach	Matai Muon
Book Review: Exploring Conflict Management in Environmental Matters	Jack Shivugu

Volume 9

Issue 2

2022

ISBN 978-9966-046-15-4

Embracing Environmental, Social and Governance (ESG) Principles for Sustainable Development in Kenya

By: **Kariuki Muigua***

Abstract

The paper critically examines the extent to which Environmental, Social and Governance (ESG) principles have been embraced in Kenya. It argues that ESG has emerged as arguably the most important tool of corporate governance. ESG seeks to shape corporate decision making by advocating for sustainable, responsible and ethical investments. It analyses each of the ESG principles and the progress made towards embracing this concept in Kenya. The paper further addresses some of the ESG challenges in Kenya and suggests the way forward towards embracing ESG principles for sustainable development in Kenya.

1.0 Introduction

The growing threat of climate change and climate crisis has forced many investors to embrace sustainability as a key factor in investment decision-making¹. At the same time, social concerns touching on issues such as human rights, diversity, consumer protection and welfare and protection of animals especially endangered species have led to many companies taking their social responsibilities and especially impact of their commercial activities on the local communities where they operate more seriously than ever². The growth of social media has also increased the public risks associated with socially irresponsible behavior due to more scrutiny on companies and the

*** PhD in Law (Nrb), FCI Arb (Chartered Arbitrator), LL. B (Hons) Nrb, LL.M (Environmental Law) Nrb; Dip. In Law (KSL); FCPS (K); Dip. In Arbitration (UK); MKIM; Mediator; Consultant: Lead expert EIA/EA NEMA; BSI ISO/IEC 27001:2005 ISMS Lead Auditor/ Implementer; Advocate of the High Court of Kenya; Senior Lecturer at the University of Nairobi, Faculty of Law [July, 2022].**

¹ De Francesco. A.J., 'The impact of sustainability on the investment environment.' *Journal of European Real Estate Research* (2008).

² Cedric.R., 'Accountability of Multinational Corporations for Human Rights Abuses.' *Utrecht Law Review* 14.2 (2018): 1-5.'

emergence of socially conscious consumers³. Further, there has been growing corporate governance awareness since the 2008 global economic recession which has led to increase shareholder and stakeholder activism in demanding more responsive management structure, better employee relations, and reasonable executive compensation in companies⁴.

Consequently, how companies handle environmental, social and governance issues is increasingly becoming a major concern especially for investors and other key stakeholders. ESG is an acronym for Environmental, Social and (Corporate) Governance, the key aspects of sustainable, responsible or ethical investment⁵. It has been defined as “a generic term used in capital markets and used by investors to evaluate corporate behaviour and to determine the future financial performance of companies⁶. ESG “is a subset of non-financial performance indicators which include sustainable, ethical and corporate governance issues such as managing a company’s carbon footprint and ensuring there are systems in place to ensure accountability⁷.” ESG has also been defined as standing for the three broad categories, or areas, of interest for “socially responsible investors” who consider it important to incorporate their values and concerns (such as environmental concerns) into their selection of investments instead of simply considering the potential profitability and/or risk presented by an investment opportunity.⁸

³ Mariarosaria, S & Scarpato, D ‘Sustainable Consumption: How Does Social Media Affect Food Choices?’ *Journal of Cleaner Production* 277 (2020): 124036.

⁴ Martin, C et al., ‘Corporate governance and the 2008–09 Financial Crisis.’ *Corporate Governance: An International Review* 19.5 (2011): 399-404; See also Erkens, D.H, et al Corporate governance in the 2007–2008 financial crisis: Evidence from financial institutions worldwide.” *Journal of corporate finance* 18.2 (2012): 389-411.

⁵ Stuart, L.G et al., ‘Firms and social responsibility: A review of ESG and CSR research in corporate finance.’ *Journal of Corporate Finance* 66 (2021): 101889.

⁶ The Financial Times Lexicon, Available at: <https://markets.ft.com/glossary/searchLetter.asp?letter=E> (accessed on 21/07/2022)

⁷ Ibid

⁸ CFI, ESG (Environmental, Social and Governance), Available at: <https://corporatefinanceinstitute.com/resources/knowledge/other/esg-environmental-social-governance/> (accessed on 21/07/2022)

Globally, the importance of Environmental, Social and Governance (ESG) issues is evidenced by the change in the legal and regulatory landscape to reflect the expectations of investors, customers, employees and other stakeholders. Increasingly, the investment decisions including assessment and valuation are incorporating ESG criteria with companies that are rated as having strong sustainability programs enjoying more preference from investors⁹. Issues touching on climate change and sustainability dominate current ESG focus. In addition, human rights and especially the rights of indigenous peoples and governance structures of companies are enjoying prominent attention¹⁰. Many projects investors and sponsors¹⁰ are also demanding more detailed identification and mitigation of environmental and social impacts of investment projects before making commitment or funding¹¹.

According to the Organisation for Economic Co-operation and Development (OECD), the growth of ESG approaches by investors has been driven by private and public sector initiatives to reach the objectives of the Paris Agreement and the Sustainable Development Goals (SDGs)¹². This has seen the incorporation of climate transition factors into investment decisions and the growth of what has come to be known as ESG investing as a leading form of sustainable finance for long-term value and alignment with societal values. OECD defines ESG investing as generally referring to the process of considering Environmental, Social and Governance (ESG) factors when making investment decisions. Bloomberg estimates that the value of ESG investing around the world has risen to almost USD 40 trillion in 2021¹³. At

⁹ Muigua.K., 'Introduction to ESG (Environmental, Social and Governance)' available at <https://thelawyer.africa/2022/02/04/esg-environmental-social-and-governance/> (accessed on 22/07/2022)

¹⁰ Ibid

¹¹ Norton Rose Fulbright, "Environmental, Social and Governance," Available at: <https://www.nortonrosefulbright.com/en/services/203f40d1/environmental-social-and-governance-esg> (accessed on 21/07/2022)

¹² OECD., 'Environmental Social and Governance (ESG) Investing' available at <https://www.oecd.org/finance/esg-investing.htm> (accessed on 21/07/2022)

¹³ Ibid

the same time, as at 2020 ESG ratings were being applied to companies representing around 80% of market capitalization¹⁴.

This paper seeks to critically examine the extent to which ESG principles have been embraced in Kenya. It analyses each of the ESG principles and the progress made towards embracing this concept in Kenya. The paper further addresses some of the ESG challenges in Kenya and suggests the way forward towards realising ESG tenets for sustainable development in Kenya.

2.0 Environment Social and Governance (ESG) Principles

The Environmental ‘E’ pillar of ESG is being increasingly used as a tool to align investments and capital flows with a low-carbon transition and to unlock valuable forward-looking information on firms’ climate transition risks and opportunities¹⁵. The environmental considerations in areas such as climate risk, water scarcity, extreme temperatures and carbon emissions are now considered as key issues that can impact competitive positioning for businesses. Companies are expected to appreciate their role as stewards of the natural or physical environment and to take into account the utilisation of natural resources and the impact of their overall operations on the environment, both locally and across its global supply chains¹⁶. Companies are now required to take precautions against environmental incidents such as oil spills or pollution from mining operations as safeguards against damage to their reputation and shareholder value¹⁷. At the same time, more than 13,000 companies and 3,000 non-business signatories in 160 countries that are signatories of the United Nations Global Compact (UNGC), which helps businesses contribute positively toward some or all of the 17 United Nations (UN) sustainable development goals (SDGs) by 2030¹⁸.

¹⁴ Ibid

¹⁵ OECD (2021), *ESG Investing and Climate Transition: Market Practices, Issues and Policy Considerations*, OECD Paris, <https://www.oecd.org/finance/ESG-investing-and-climatetransition-Market-practices-issues-and-policy-considerations.pdf> (accessed on 21/07/2022)

¹⁶ Ibid

¹⁷ Ibid

¹⁸ Ojiambo, S., “Leadership of the UN Global Compact: Message of CEO and Executive Director,” Available at:

The COVID-19 pandemic, and its diverse implications including healthcare access, workplace safety, cybersecurity and other issues related to the communities that businesses, have proven to be a watershed moment for the often-underappreciated ‘S’ pillar of environmental, social and governance (ESG) considerations with the need to tackle the inequalities exposed and exacerbated by the pandemic becoming a key reason for investors to make allocations for socially conscious investments despite intangibility of social facts¹⁹. Companies are beginning to appreciate the role taking social responsibility can play in mitigating issues such data theft, worker strikes, litigation, workplace accidents and other people-related disruptions that can hurt a business reputation and finances. The repercussions of work-related injuries and deaths on families including on their financial security are also acknowledged as having a bearing on the United Nations Sustainable Development Goals (SDGs) of no poverty, zero hunger, good health and well-being, decent work and economic growth even as many investors are aligned with these goals²⁰.

The “G” Pillar in ESG is the oldest as governance has been an integral part of robust investment for ages²¹. However, what is considered effective governance keeps evolving and the speed of evolution has quickened as institutional investors’ definition of stakeholders continues to broaden beyond shareholders²². While older forms of Governance focused on serving and protecting shareholders, the newer approaches stretch beyond basic dimensions related to financial and accounting misconduct as well as legal and regulatory non-compliance, such as transparency, corporate structures

<https://www.unglobalcompact.org/about/governance/executive-director> (accessed on 21/07/2022)

¹⁹ Create Research, “Passive Investing 2021: Rise of the social pillar of ESG,” Available at:

<https://cdn.efundresearch.com/files/RcfPdrQdAaVI9tiBgrgLq4baO7Wciz6eepZTODEO.pdf> (accessed on 21/07/2022)

²⁰ Standard Chartered Singapore, “The S in ESG,” Available at: <https://www.sc.com/sg/wealth/insights/the-s-in-esg/> (accessed on 21/07/2022)

²¹ Muigua.K., “Introduction to ESG (Environmental, Social and Governance) Op Cit

²² RL360, “Governance-The G in ESG,” Available at:

<https://www.rl360.com/row/funds/investment-definitions/g-in-esg.htm> (accessed on 21/07/2022)

and ethics²³. Investors are also aligning Governance with the 17 United Nations Sustainability Development Goals (SDGs), where governance issues include industry, innovation and infrastructure (Goal 9); peace, justice and strong institutions (Goal 16); and partnerships with public and private institutions (Goal 17)²⁴.

3.0 Environment, Social and Governance (ESG) Disclosure and Reporting Requirements in Kenya

The Nairobi Securities Exchange has developed an ESG Disclosure Manual to guide listed companies in Kenya on ESG reporting. The Manual (ESG Manual) provides that ESG reporting should be on a materiality basis²⁵. In financial reporting, materiality is the threshold for influencing the economic decisions of those using an organisation's financial statements²⁶. A similar concept is also important in ESG reporting. In ESG reporting, "materiality is the principle that determines which relevant topics are sufficiently important that it is essential to report on them²⁷." It is necessary to undertake materiality analysis because not all ESG topics are of equal importance to an organization and an ESG report has to reflect their relative priority of the various topics²⁸.

The ESG Manual requires that listed companies have a structured, documented process on assessment of materiality for ESG disclosure topics²⁹. It is recommended that a materiality assessment exercise be conducted at least on an annual basis and as part of every new ESG reporting

²³ Ibid

²⁴ United Nations, Department of Economic and Social Affairs, 'Sustainable Development' available at <https://sdgs.un.org/goals> (accessed on 21/07/2022)

²⁵ Nairobi Securities Exchange, 'ESG Disclosures Guidance Manual', available at <https://sseinitiative.org/wp-content/uploads/2021/12/NSE-ESG-Disclosures-Guidance.pdf> (accessed on 21/07/2022)

²⁶ Ruth.J., 'The Convergence of Financial and ESG Materiality: Taking Sustainability Mainstream.' *American Business Law Journal* 56.3 (2019): 645-702.'

²⁷ Muigua. K., 'What are the Material Issues for ESG Reporting in Kenya?' available at <https://thelawyer.africa/2022/06/05/material-issues-for-esg-reporting-in-kenya/> (accessed on 21/07/2022)

²⁸ Ibid

²⁹ Nairobi Securities Exchange, 'ESG Disclosures Guidance Manual' Op Cit

season. The ESG Manual also requires that every organization discloses its approach to materiality within the ESG report³⁰. The Global Reporting Initiative (GRI) gives guideline for what is material by providing that the ESG report should cover topics that Reflect the reporting organisation's significant economic, environmental, and social impacts; or substantively influence the assessments and decisions of stakeholders. In other words, for a topic to be relevant and potentially material, it should be based on only one of these dimensions³¹.

It is recommended that a materiality assessment grid be used as a structured guide in prioritizing ESG topics to report on³². That way, by applying an internally developed rating criteria, organisations can plot ESG topics on a grid or heat map indicating the assessed level of importance considering both dimensions of materiality³³. In that regard, materiality is dependent on whether a topic is of low or high importance to the stakeholders and the significance of ESG impacts on economy, environment and/or society. GRI gives detailed guidance that listed companies can refer to when identifying material topics³⁴. The starting point is using the sector standards to understand the sector's content and then deduce the organization content from it³⁵.

The next step is to consider the topics and impact as described in the sector standard and then identify the actual and potential impact to the organization stakeholders, economy, environment and society³⁶. It takes the engagement

³⁰ Ibid

³¹ Global Reporting Initiative., 'ESG Standards, Frameworks and Everything in Between' available at <https://www.globalreporting.org/media/jxkgrggd/gri-perspective-esg-standards-frameworks.pdf> (accessed on 21/07/2022)

³² Ibid

³³ Ibid

³⁴ GRI., 'The Global Standards for Sustainability Reporting' available at <https://www.globalreporting.org/standards/> (accessed on 21/07/2022)

³⁵ Ibid; See also Fonseca.A et al., 'Sustainability reporting among mining corporations: a constructive critique of the GRI approach.' *Journal of cleaner production* 84 (2014): 70-83.'

³⁶ Ibid

of the relevant stakeholders and experts on ongoing basis to achieve assessment of the impact of the topics. In the aftermath, the material topics should be tested against the sector standard to prioritize the most significant impacts for reporting³⁷. After this, the material topics should be tested with experts and information users to determine and come up with a comprehensive list of material topics for ESG reporting for the respective organization.

The approach applied for each step will vary according to the specific circumstances of the organisation, such as its business model; sector; geographic, cultural and legal operating context; ownership structure; and the nature of its impacts³⁸. Given these specific circumstances, the steps should be systematic, documented, replicable, and used consistently in each reporting period. The organisation should document any changes in its approach together with the rationale for those changes and their implications. The organisation's highest governance body should oversee the process and review and approve the material topics³⁹.

The ESG Manual proposes mandatory ESG disclosures for NSE listed companies to help achieve comparability and to facilitate compliance with the CMA Code, relevant international treaties, ESG standards and local regulations⁴⁰. Further, the Capital Markets Authority (CMA) Code of Corporate Governance Practices for Issuers of Securities to the Public in 2015 provides examples of topics that the Boards of listed companies should treat as material⁴¹. As per CMA code, material information means any information that may affect the price of an issuer's securities or influence investment decisions⁴². Listed firms are advised to refer to the Code when selecting material topics for disclosure⁴³. The ESG Manual also recommends

³⁷ Ibid

³⁸ Muigua. K., 'What are the Material Issues for ESG Reporting in Kenya?' Op Cit

³⁹ Ibid

⁴⁰ Nairobi Securities Exchange, 'ESG Disclosures Guidance Manual' Op Cit

⁴¹ Capital Markets Authority., Code of Corporate Governance Practices for Issuers of Securities to the Public in 2015 , Legal Notice No. 1420

⁴² Ibid

⁴³ Ibid

the Sustainable Development Goals (SDGs) as helpful guide in the identification of material topics and or impact as by aligning organisational objectives with the SDGs, organisations can identify significant impact areas that affect their contribution to the SDGs⁴⁴.

The concept of double-materiality is the latest introduction in the discussions around assessment of materiality in ESG reporting. According to the European Commission Guidelines on Non-financial Reporting, “double-materiality refers to assessing materiality from two perspectives, namely, the extent necessary for an understanding of the company’s development, performance and position” and “in the broad sense of affecting the value of the company”; and environmental and social impact of the company’s activities on a broad range of stakeholders⁴⁵. The concept of double-materiality implies the need to assess the interconnectivity of the two.

A GRI research on how double-materiality is implemented in ESG reporting, and the benefits and challenges found that identification of financially materiality issues are incomplete if companies do not first assess their impacts on sustainable development⁴⁶. The GRI white paper also revealed that reporting material sustainable development issues can enhance financial performance, improve stakeholder engagement and enable more robust disclosure⁴⁷. Further, it was established that focusing on the impacts of organisations on people and planet, rather than financial materiality, increases engagement with the Sustainable Development Goals (SDGs)⁴⁸. The ESG Manual thus encourages listed companies to assess impact of ESG issues to their organisations (such as climate change and human rights) in

⁴⁴ Nairobi Securities Exchange, ‘ESG Disclosures Guidance Manual’ Op Cit

⁴⁵ European Commission ‘Guidelines on Non-Financial Reporting’, available at https://ec.europa.eu/info/publications/non-financial-reporting-guidelines_en (accessed on 21/07/2022)

⁴⁶ Adams, C.A., Alhamood, A., He, X., Tian, J., Wang, L. and Wang, Y. (2021) The Double-Materiality Concept: Application and Issues, published by the Global Reporting Initiative (GRI) as a White Paper, Available at: <https://www.globalreporting.org/media/jrbntbyv/griwhitepaper-publications.pdf> (accessed on 21/07/2022)

⁴⁷ Ibid

⁴⁸ Ibid

addition to their organisations own ESG impacts to society (such as material resource use and emissions) when determining material ESG impacts for disclosure. ESG reporting is thus essential in promoting sustainable development.

4.0 The ESG Reporting Frameworks Applicable in Kenya

In addition to the ESG Disclosure Manual formulated by the Nairobi Securities Exchange, there are several other organizations that have adopted ESG reporting requirements relevant to listed companies in Kenya⁴⁹. These include the Capital Markets Authority, the United Nations Global Compact, various investment groups, the Carbon Disclosure Programme (CDP) and industry level reporting requirements like those imposed by the Central Bank of Kenya touching on the operations of licensed Banks⁵⁰. This part explores the basics of each of these ESG reporting requirements and how listed companies in Kenya comply with them.

4.1 The Capital Markets Authority

The Capital Markets Authority (CMA) published the Code of Corporate Governance Practices for Issuers of Securities to the Public in 2015⁵¹. It requires listed companies to explain in their annual reports how they have applied the recommendations contained in the Code⁵². Within the Code, the CMA also provides examples of topics that the Boards of listed companies should treat as material⁵³. The ESG Manual gives guidelines on how the ESG reporting approach suggested in it can be used to meet the reporting requirements of the CMA code⁵⁴. These include by identifying the CMA as a key stakeholder for listed companies within the situational analysis and

⁴⁹ Muigua.K., ‘The ESG Reporting Frameworks Applicable in Kenya’ available at <https://thelawyer.africa/2022/06/05/esg-reporting-frameworks-applicable-in-kenya/> (accessed on 21/07/2022)

⁵⁰ Ibid

⁵¹ Capital Markets Authority., Code of Corporate Governance Practices for Issuers of Securities to the Public in 2015, Legal Notice No. 1420

⁵² Ibid

⁵³ Ibid

⁵⁴ Nairobi Securities Exchange, ‘ESG Disclosures Guidance Manual’ Op Cit

stakeholder engagement phases⁵⁵. Second, it involves analysing the CMA's expectations of the organisation and the reporting requirements contained in the CMA Code⁵⁶.

Third, complying with the CMA code under the ESG Manual means including disclosures requirements on the Code as part of the assessed material ESG topics for disclosure⁵⁷. These have been proposed as a mandatory disclosure topic for all listed companies, that is, governance under general disclosure topics. In addition, it takes generating content on the organisation's performance around these topics using the guide proposed in this manual and reference to the GRI Standards on governance disclosures. It also entails submitting extracts or the full ESG report discussing performance on these indicators to the CMA within the agreed timelines with the CMA. In this case, the ESG report should be published within the reporting timelines required for CMA submissions.

4.2 Investor groups

As a way of managing assessed environmental and social risk in debt and equity investments, some institutional investors typically require the implementation of an environmental and social management system⁵⁸. Thus, depending on the assessed risk profile, beneficiary organisations are required to report at least annually on performance on several pre-identified environmental and social performance metrics⁵⁹. Through such reporting process, investors should be able to develop content around the organisation's approach to these topics and demonstrate performance during the reporting period⁶⁰. It is noteworthy that environmental and social risk management is one of the mandatory ESG topics proposed for all listed

⁵⁵ Ibid; See also Magale. E., 'Developing a green bond market in Kenya: perspectives from practitioners and lessons from developing markets.' *Journal of Sustainable Finance & Investment* (2021): 1-18.

⁵⁶ Ibid

⁵⁷ Ibid

⁵⁸ Muigua.K., 'The ESG Reporting Frameworks Applicable in Kenya' available at <https://thelawyer.africa/2022/06/05/esg-reporting-frameworks-applicable-in-kenya/> (accessed on 21/07/2022)

⁵⁹ Ibid

⁶⁰ Ibid

companies. The International Finance Corporation (IFC) Performance Standards on Environmental and Social Sustainability is one example of ESG indicators and metrics that investors commonly refer to when evaluating investments⁶¹.

4.3 United Nations Global Compact

There are more than 200 Organisations in Kenya, including some listed companies, that are participants of the Global Compact Network Kenya, the local arm of the United Nations Global Compact (UNGC)⁶². The UNGC has developed a set of 10 principles that organisations can voluntarily adopt and integrate into their own strategies and operations⁶³. These principles cover four issue areas including Human Rights, Labour, Environment and Anti-corruption⁶⁴. In turn, the Ten Principles of the United Nations Global Compact is a key guideline in that regard.

The UNGC encourages participants to self-assess, prepare, and submit a Communication on Progress report to the UNGC on their performance around these four topical areas⁶⁵. According to the UNGC, the Communication on Progress report should be fully integrated into a company's main stakeholder communications, most often the annual or sustainability report⁶⁶. By developing an annual ESG report discussing organisational performance around these topics, listed companies can submit an extract of the ESG report to fulfil the requirements of the annual Communication on Progress report submissions to the UNGC. Further,

⁶¹ International Finance Corporation., 'Performance Standards on Environmental and Social Sustainability' available at https://www.ifc.org/wps/wcm/connect/c02c2e86-e6cd-4b55-95a2-b3395d204279/IFC_Performance_Standards.pdf?MOD=AJPERES&CVID=kJtjHBzk (accessed on 21/07/2022)

⁶² United Nations Global Compact: available at <https://www.unglobalcompact.org/engage-locally/africa/kenya> (accessed on 21/07/2022)

⁶³ Ibid

⁶⁴ Ibid; See also Global Compact Network Kenya., 'The Ten Principles of the United Nations Global Compact' available at <https://www.globalcompactkenya.org/what-we-do/ten-principles> (accessed on 22/07/2022)

⁶⁵ Ibid

⁶⁶ Ibid

applying the Global Reporting Initiative standards ensures compliance to the Communication on Progress reporting requirements⁶⁷. Organisations can also refer to the UNGC guidance document on Using GRI's Guidelines to Create a CoP.

4.4 The Carbon Disclosure Project (CDP)

The CDP is a non-profit charity helps in promoting transparency in environmental reporting by cities and companies around the world⁶⁸. Signatory companies provide performance data on climate change, water security and deforestation on a self-disclosure basis⁶⁹. This self-reported data is then used by investors and other stakeholders to make informed data driven decisions with regards to the reporting company's environmental impacts⁷⁰. For example, investors can use data in the CDP database to calculate the carbon intensity of their portfolio⁷¹. Investors can also select entities that demonstrate climate resilience by evidenced implementation of strategies that future proof their organisations against climate related policies and regulations⁷². There is need to consider that the CDP and GRI use common metrics on reporting on carbon emissions. ESG reporting can be used to collect and report data to the CDP. Organisations can select any or all the disclosure topics as part of their materiality assessment exercise and build reporting content within the ESG report that meets the CDP self-disclosure requirements.

4.5 Industry level reporting

Certain industry groups in Kenya have developed voluntary ESG related guidelines for consideration by member organisations. For example, in the

⁶⁷ Muigua.K., 'The ESG Reporting Frameworks Applicable in Kenya' Op Cit

⁶⁸ Carbon Disclosure Project, available at <https://www.cdp.net/en> (accessed on 21/07/2022)

⁶⁹ Ibid; See also Matisoff.D et al., 'Convergence in environmental reporting: assessing the Carbon Disclosure Project." *Business Strategy and the Environment* 22.5 (2013): 285-305.'

⁷⁰ Ibid

⁷¹ Muigua.K., 'The ESG Reporting Frameworks Applicable in Kenya' Op Cit

⁷² Ibid

banking sector in Kenya, the Kenya Bankers Association, the trade association for banks in Kenya, has developed the Sustainable Finance Initiative (SFI) industry principles for the banking sector⁷³. Further, recently the Central Bank of Kenya (CBK) has developed Guidance on Climate Related Risk Management for the banking sector⁷⁴. The aim of the Guidance is to sensitize the banking sector on mitigation of climate-related risks and harnessing of opportunities⁷⁵. It also offers guidance on the development and implementation of appropriate climate-related strategies and policies⁷⁶. Given the current trajectory of ESG and emphasis placed by investors on ESG integration, it is expected that more trade associations and industry groupings in Kenya will develop specific ESG guidelines for adoption by their members. Industry guidelines provide relevant insights on ESG issues impacting the industry and listed companies can refer to such guidelines when identifying material ESG topics for disclosure using the framework proposed in this manual.

5.0 ESG Concerns in Kenya

The concept of ESG acknowledges some of the Environmental, Social and Governance concerns that arise from the activities of corporations. From an environmental perspective, the activities of corporations have resulted in direct and indirect greenhouse gas emissions contributing to the climate change menace⁷⁷. Further, the activities of multinational corporations especially those involved in the exploration of natural resources have resulted in environmental concerns such as environmental degradation,

⁷³ Sustainable Finance Initiative, available at <https://sfi.kba.co.ke/> (accessed on 22/07/2022)

⁷⁴ Central Bank of Kenya., 'Guidance on Climate-Related Risk Management' October 2021, available at <https://www.centralbank.go.ke/wp-content/uploads/2021/10/Guidance-on-Climate-Related-Risk-Management.pdf> (accessed on 22/07/2022)

⁷⁵ Ibid

⁷⁶ Ibid

⁷⁷ Peterdy.K., 'ESG (Environment, Social and Governance): A Framework for Understanding and Measuring How Sustainably an Organization is Operating' available at <https://corporatefinanceinstitute.com/resources/knowledge/other/esg-environmental-social-governance/> (accessed on 21/07/2022)

extinction of biodiversity, contamination and destruction of soil and air pollution affecting the socio-economic lives of indigenous populations⁷⁸.

In the social context, ESG acknowledges some of the challenges that organization's face in their relationship with stakeholders. Some of these challenges include unfair labour practices and standards. In Kenya, there have been accusations of human right abuses such as killings, rape, and other forms of sexual and gender-based violence, bad labour practices and land injustices against the neighbouring communities perpetrated by certain multinational corporations⁷⁹. The activities of an organization can also impact the communities where such an organization operates resulting in social concerns such as land injustices and displacement of people.

Governance challenges have also impacted the profitability and sustainability of organizations. These challenges include mismanagement of organizations, lack of transparency, accountability by the board of directors, conflict of interest and poor internal controls⁸⁰. These challenges have resulted in failure of some of the leading organizations in Kenya. ESG acknowledges these challenges and seek to integrate good governance practices in the affairs of organizations.

6.0 Way Forward

There is need for corporations to embrace the concept of ESG in Kenya in order to promote sustainable development. According to the Nairobi Securities Exchange, listed companies in Kenya have a general awareness of ESG issues and corporate sustainability but there is need for capacity building on how to integrate ESG into business strategies of listed companies and how to report ESG performance in a consistent, transparent and

⁷⁸ Ajibade, L.T & Awomuti, A.A. 'Petroleum Exploitation or Human Exploitation? An Overview of Niger Delta Oil Producing Communities in Nigeria' *African Research Review* Vol. 3 (1), 2009. Pp. 111-124

⁷⁹ Kenya Human Rights Commission., 'Heavy price for Kakuzi's egregious human rights violations' available at <https://www.khrc.or.ke/2015-03-04-10-37-01/press-releases/737-heavy-price-for-kakuzi-s-egregious-human-rights-violations.html> (accessed on 21/07/2022)

⁸⁰ Seth.A., 'Corporate governance challenges in emerging economies.'" *Corporate Governance: An International Review, Forthcoming* (2017).

principle-based approach that meets stakeholder expectations⁸¹. The ESG Disclosures Guidance Manual (ESG Manual) is thus designed to guide listed companies in Kenya and other organizations interested in ESG reporting on how to collect, analyse, and publicly disclose important ESG information in a way that meets international sustainability reporting standards⁸².

The ESG Manual is proposed to act as a guide on how to progressively integrate ESG in strategy, operations, and performance management. It recommends the adoption of the Global Reporting Initiatives (GRI) Standards as the common framework for ESG Reporting for listed companies in Kenya to help reduce uncertainties⁸³. For an organization to claim that it has prepared information in accordance with the GRI Standards, it is required to have applied the GRI Reporting Principles. This is a set of reporting principles which guide organizations in ensuring the quality and proper presentation of the reported information⁸⁴. The principles include accuracy, balance, clarity, comparability, completeness, sustainability context, timeliness and verifiability⁸⁵.

According to a 2020 Global Survey on Sustainability reporting conducted by KPMG, the GRI Standards are the most widely used framework for sustainability reporting⁸⁶. The listed companies on the NSE that were reporting on ESG performance had already settled on and were using the GRI standards as their preferred framework for ESG Reporting even before the ESG Manual⁸⁷. The ESG Manual proceeds to propose a common set of ESG metrics for reporting by all listed companies to help facilitate comparability of ESG performance of listed companies in Kenya. It is also projected that over time, upon maturity of the ESG disclosures, it will

⁸¹ Nairobi Securities Exchange, 'ESG Disclosures Guidance Manual' Op Cit

⁸² Ibid

⁸³ Ibid

⁸⁴ GRI., 'The Global Standards for Sustainability Reporting' Op Cit

⁸⁵ Ibid

⁸⁶ KPMG, "The Time has Come: The KPMG Survey on Sustainability Reporting 2020," Available at:

https://assets.kpmg/content/dam/kpmg/be/pdf/2020/12/The_Time_Has_Come_KP MG_Survey_o (accessed on 22/07/2022)

⁸⁷ Ibid

become possible for stakeholders to correlate financial performance with specific ESG indicators such as diversity and air emissions⁸⁸.

Further, applying the ESG Manual is expected to assist listed companies comply with reporting requirements for other organizations such as the Carbon Disclosure Project (CDP) and UN Global Compact (UNGC). The manual also includes a guide on how to meet corporate governance reporting requirements contained in the Capital Markets Authority (CMA) Corporate Governance Code. The ESG Manual also includes examples of sector specific ESG disclosures for reference by listed companies in its Annex 6⁸⁹. The ESG Manual is expected, with time, to make it possible to compare the ESG performance of organizations reporting within the same sectors including adopting common reporting framework for the respective sectors. The ESG Manual also seeks to support future plans for a responsible investment index by the Nairobi Securities Exchange (NSE).

The ESG criteria proposed in the Manual is also anticipated to be applied in investment selection given the momentum the trend has gained in recent years which is expected to continue in the future⁹⁰. According to the Manual, along with national policies and directives, ESG considerations in investments have become the most important driving force for ESG integration and disclosure in capital markets. As such, companies seeking to attract responsible investors are incentivized to ensure that they adopt the top ESG metrics commonly sought by investors⁹¹. These include having an overarching ESG policy, assigning ESG management responsibility, having a Corporate code of ethics, presence of litigation on matters touching on environmental, social and ethical affairs, the presence or absence of People diversity among employees, Board and management, net employee composition including ratio of part-time and full-time employees, having formal environmental policy and estimation of carbon footprint, data and

⁸⁸ Nairobi Securities Exchange, 'ESG Disclosures Guidance Manual' Op Cit

⁸⁹ Ibid

⁹⁰ Muigua.K., 'The Need and Benefits of ESG Reporting in Kenya' available at <https://thelawyer.africa/2022/06/04/benefits-of-esg-reporting-in-kenya/> (accessed on 22/07/2022)

⁹¹ Ibid

cybersecurity incidents if any that can put the company at risk and health and safety events that affect ability to provide safe working environments for employees, contractors and the wider value chain⁹².

The expected benefits for Listed Companies adopting the ESG Manual include ensuring transparency in ESG disclosures which helps in building integrity and trust in the capital markets thus enhancing competitiveness to attract investment to the capital markets. The adoption and promotion of ESG reporting by the NSE is expected to enhance trust and integrity of the capital markets in Kenya by providing valuable information that is of increasing importance to investors, thus contributing to more efficient capital allocation⁹³. Other key benefits of integrating and disclosing ESG performance by listed companies in Kenya include the fact that it ensures investors can assess and preferentially invest in issuers that demonstrate better ESG linked financial performance, resulting in more efficient capital allocation⁹⁴. Further, implementation of the ESG Manual is geared to ensure that organisations that demonstrate responsible investment practices are able to access new sources of capital from sustainability conscious investors such as Development Finance Institutions (DFIs) and Private Equity firms⁹⁵.

In addition, a holistic view of corporate value facilitates product innovation by enabling consideration and management of the embodied environmental and social impacts of products and services. Measuring and reporting ESG performance also enables organisations embed circularity in their operating models and achieve operational efficiencies by optimizing energy and raw costs in production⁹⁶. By adding and demonstrating ESG integration into their supply chains, production systems and service delivery, the listed companies applying the manual will benefit from preferential access to new

⁹² Broderick, S., “The Top 10 ESG Metrics Private Equity Funds Should Collect,” IHS Markit, 2019; Available at: <https://cdn.ihsmarkit.com/www/pdf/0720/ESGTop10-Digital-Final-HiRes.pdf> (accessed on 22/07/2022)

⁹³ Muigua, K., ‘The Need and Benefits of ESG Reporting in Kenya’ Op Cit

⁹⁴ Ibid

⁹⁵ Nairobi Securities Exchange, ‘ESG Disclosures Guidance Manual’ Op Cit

⁹⁶ Ibid

markets. ESG value creation framework also helps organisations to proactively address non-financial but critical environmental and social risks, thereby preserving and creating long term value for stakeholders. ESG integration enhances regulatory compliance and helps anticipate the impact of future ESG related regulations and policies. Finally, organizations are perceived as responsible corporate citizens and achieve brand value enhancement by systematically identifying and responding to stakeholder needs and expectations⁹⁷.

The implementation timelines of the ESG Manual for listed companies on the NSE includes the requirement of issuing a public report on their ESG performance at least annually⁹⁸. The steps outlined in the ESG Disclosures Guidance Manual are expected to guide such reporting. In addition, the manual is also made available as a public good for other organisations in Kenya that would be interested in ESG reporting. On their part, listed companies have been given a grace period of one year from the date of issuance of the guidelines (29th November 2021) to interact and familiarize themselves with the ESG reporting steps contained in these guidelines for implementation⁹⁹. Thus, listed companies will after 29th November 2022 be expected to include a sustainability/ESG report in their annual integrated reports¹⁰⁰. The Sustainability/ESG Report under the NSE ESG Manual must at minimum contain the mandatory ESG disclosures discussed in Chapter 6 of the manual. Issuers can also choose to publish a separate ESG/sustainability report. Adopting and adhering to the ESG manual will thus be an important step in promoting ESG in Kenya.

7.0 Conclusion

Environment, Social and Governance (ESG) has emerged as arguably the most important tool of corporate governance in the current era. It acknowledges the environmental, social and governance concerns faced by

⁹⁷ Ibid; See also Africa Sustainability Matters., ‘What do ESG guidelines mean for corporates?’ available at <https://africasustainabilitymatters.com/what-do-esg-guidelines-mean-for-corporates/> (accessed on 22/07/2022)

⁹⁸ Ibid

⁹⁹ Nairobi Securities Exchange, ‘ESG Disclosures Guidance Manual’ Op Cit

¹⁰⁰ Ibid

corporations and seeks to integrate these concerns in corporate decision making in order to promote sustainable, responsible and ethical investments. There is need for organizations to continue embracing ESG in order to promote corporate sustainability. Embracing ESG as a pillar of sustainable development is an ideal whose time has come.

References

Adams, C.A., Alhamood, A., He, X., Tian, J., Wang, L. and Wang, Y. (2021) The Double-Materiality Concept: Application and Issues, published by the Global Reporting Initiative (GRI) as a White Paper, Available at: <https://www.globalreporting.org/media/jrbntbyv/griwhitepaper-publications.pdf>

Africa Sustainability Matters., ‘What do ESG guidelines mean for corporates?’ available at <https://africasustainabilitymatters.com/what-do-esg-guidelines-mean-for-corporates/>

Ajibade, L.T & Awomuti, A.A. ‘Petroleum Exploitation or Human Exploitation? An Overview of Niger Delta Oil Producing Communities in Nigeria’ *African Research Review* Vol. 3 (1), 2009. Pp. 111-124

Broderick, S., “The Top 10 ESG Metrics Private Equity Funds Should Collect,” IHS Markit, 2019; Available at: <https://cdn.ihsmarkit.com/www/pdf/0720/ESGTop10-Digital-Final-HiRes.pdf>

Capital Markets Authority., Code of Corporate Governance Practices for Issuers of Securities to the Public in 2015 , Legal Notice No. 1420

Carbon Disclosure Project, available at <https://www.cdp.net/en>

Cedric.R., ‘Accountability of Multinational Corporations for Human Rights Abuses.’ *Utrecht Law Review* 14.2 (2018): 1-5.’

Central Bank of Kenya., ‘Guidance on Climate-Related Risk Management’ October 2021, available at <https://www.centralbank.go.ke/wp-content/uploads/2021/10/Guidance-on-Climate-Related-Risk-Management.pdf>

CFI, ESG (Environmental, Social and Governance), Available at: <https://corporatefinanceinstitute.com/resources/knowledge/other/esg-environmental-social-governance/>

Create Research, "Passive Investing 2021: Rise of the social pillar of ESG," Available at: <https://cdn.efundresearch.com/files/RcfPdrQdAaVI9tiBgrgLq4baO7Wciz6epZTODEO.pdf>

De Francesco. A.J., 'The impact of sustainability on the investment environment.' *Journal of European Real Estate Research* (2008)

Erkens. D.H, et al Corporate governance in the 2007–2008 financial crisis: Evidence from financial institutions worldwide." *Journal of corporate finance* 18.2 (2012): 389-411.

European Commission 'Guidelines on Non-Financial Reporting', available at https://ec.europa.eu/info/publications/non-financial-reporting-guidelines_en

Fonseca.A et al., 'Sustainability reporting among mining corporations: a constructive critique of the GRI approach.' *Journal of cleaner production* 84 (2014): 70-83.'

Global Compact Network Kenya., 'The Ten Principles of the United Nations Global Compact' available at <https://www.globalcompactkenya.org/what-we-do/ten-principles>

Global Reporting Initiative., 'ESG Standards, Frameworks and Everything in Between' available at <https://www.globalreporting.org/media/jxkgrggd/gri-perspective-esg-standards-frameworks.pdf>

GRI., 'The Global Standards for Sustainability Reporting' available at <https://www.globalreporting.org/standards/>

International Finance Corporation., ‘Performance Standards on Environmental and Social Sustainability’ available at https://www.ifc.org/wps/wcm/connect/c02c2e86-e6cd-4b55-95a2-b3395d204279/IFC_Performance_Standards.pdf?MOD=AJPERES&CVID=kTjHBzk

Kenya Human Rights Commission., ‘Heavy price for Kakuzi’s egregious human rights violations’ available at <https://www.khrc.or.ke/2015-03-04-10-37-01/press-releases/737-heavy-price-for-kakuzi-s-egregious-human-rights-violations.html>

KPMG, “The Time has Come: The KPMG Survey on Sustainability Reporting 2020,” Available at: https://assets.kpmg/content/dam/kpmg/be/pdf/2020/12/The_Time_Has_Come_KPMG_Survey_o

Magale. E., ‘Developing a green bond market in Kenya: perspectives from practitioners and lessons from developing markets.’ *Journal of Sustainable Finance & Investment* (2021): 1-18.

Mariarosaria. S & Scarpato. D ‘Sustainable Consumption: How Does Social Media Affect Food Choices?’ *Journal of Cleaner Production* 277 (2020): 124036

Martin.C et al., ‘Corporate governance and the 2008–09 Financial Crisis.’ *Corporate Governance: An International Review* 19.5 (2011): 399-404

Matisoff.D et al., ‘Convergence in environmental reporting: assessing the Carbon Disclosure Project.’ *Business Strategy and the Environment* 22.5 (2013): 285-305

Muigua. K., ‘What are the Material Issues for ESG Reporting in Kenya?’ available at <https://thelawyer.africa/2022/06/05/material-issues-for-esg-reporting-in-kenya/>

Muigua.K., ‘Introduction to ESG (Environmental, Social and Governance) available at <https://thelawyer.africa/2022/02/04/esg-environmental-social-and-governance/>

Muigua.K., ‘The ESG Reporting Frameworks Applicable in Kenya’ available at <https://thelawyer.africa/2022/06/05/esg-reporting-frameworks-applicable-in-kenya/>

Muigua.K., ‘The Need and Benefits of ESG Reporting in Kenya’ available at <https://thelawyer.africa/2022/06/04/benefits-of-esg-reporting-in-kenya/>

Nairobi Securities Exchange, ‘ESG Disclosures Guidance Manual’, available at <https://sseinitiative.org/wp-content/uploads/2021/12/NSE-ESG-Disclosures-Guidance.pdf>

Norton Rose Fulbright, “Environmental, Social and Governance,” Available at: <https://www.nortonrosefulbright.com/en/services/203f40d1/environmental-social-and-governance-esg>

OECD (2021), ESG Investing and Climate Transition: Market Practices, Issues and Policy Considerations, OECD Paris, <https://www.oecd.org/finance/ESG-investing-and-climate-transition-Market-practices-issues-and-policy-considerations.pdf>

OECD., ‘Environmental Social and Governance (ESG) Investing’ available at <https://www.oecd.org/finance/esg-investing.htm>

Ojiambo, S., “Leadership of the UN Global Compact: Message of CEO and Executive Director,” Available at: <https://www.unglobalcompact.org/about/governance/executive-director>

Peterdy.K., ‘ESG (Environment, Social and Governance): A Framework for Understanding and Measuring How Sustainably an Organization is Operating’ available at <https://corporatefinanceinstitute.com/resources/knowledge/other/esg-environmental-social-governance/>

RL360, “Governance-The G in ESG,” Available at: <https://www.rl360.com/row/funds/investment-definitions/g-in-esg.htm>

Ruth.J., ‘The Convergence of Financial and ESG Materiality: Taking Sustainability Mainstream.’ *American Business Law Journal* 56.3 (2019): 645-702.’

Seth.A., ‘Corporate governance challenges in emerging economies.’ *Corporate Governance: An International Review, Forthcoming* (2017).

Standard Chartered Singapore, “The S in ESG,” Available at: <https://www.sc.com/sg/wealth/insights/the-s-in-esg/>

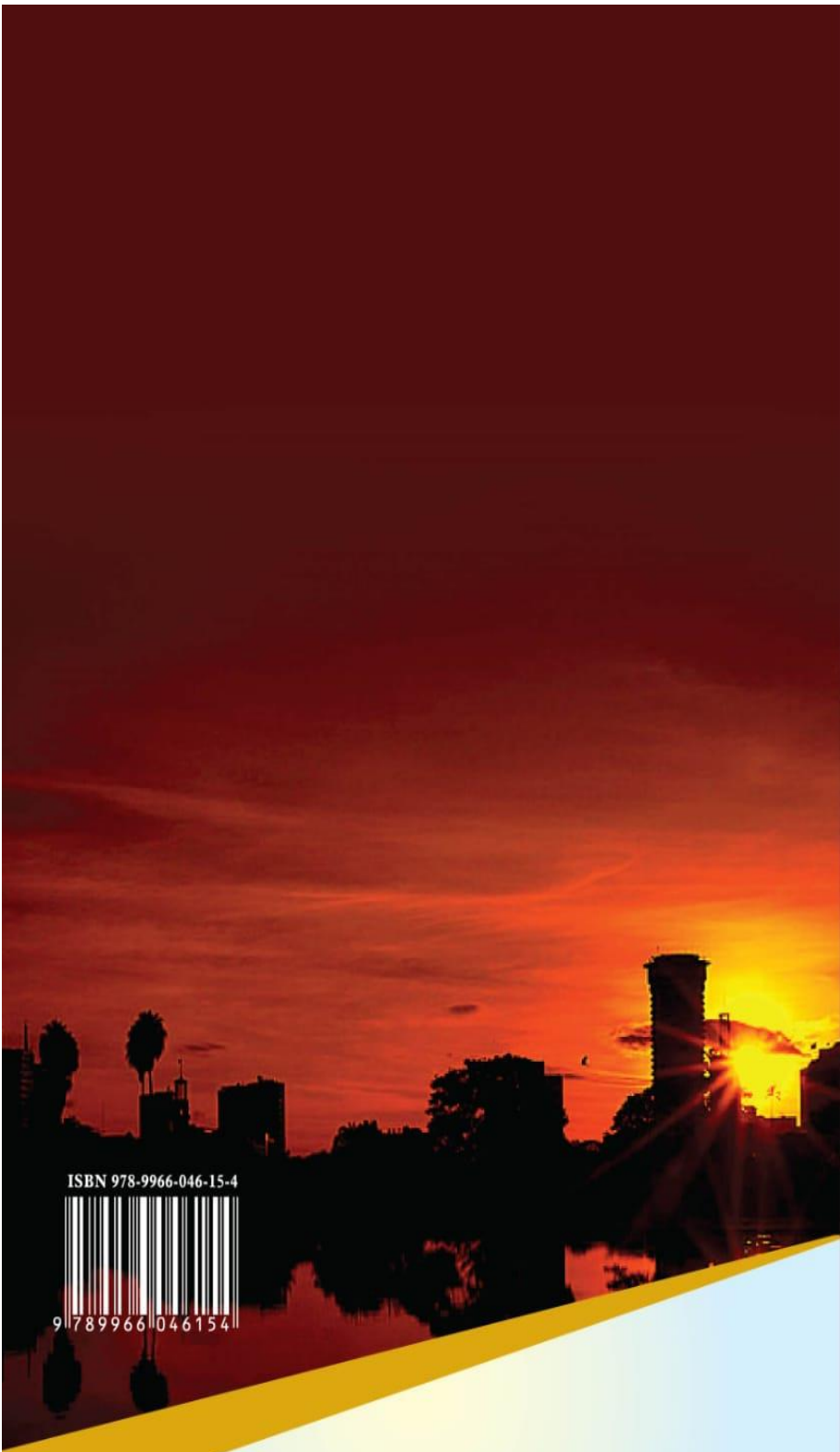
Stuart. L.G et al., ‘Firms and social responsibility: A review of ESG and CSR research in corporate finance.’ *Journal of Corporate Finance* 66 (2021): 101889.

Sustainable Finance Initiative, available at <https://sfi.kba.co.ke/>

The Financial Times Lexicon, Available at: <https://markets.ft.com/glossary/searchLetter.asp?letter=E>

United Nations Global Compact: available at <https://www.unglobalcompact.org/engage-locally/africa/kenya>

United Nations, Department of Economic and Social Affairs, ‘Sustainable Development’ available at <https://sdgs.un.org/goalsDDDDDD>



ISBN 978-9966-046-15-4



9 789966 046154