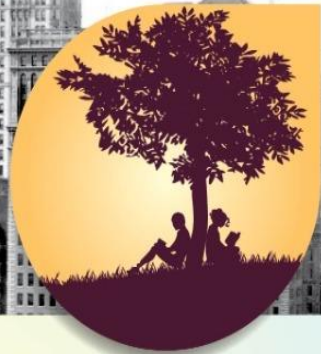


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Kenya's Legal Viaduct to Environmental Sustainability

By: *Polycarp Moturi Ondieki**

Abstract

The environment is not an abstraction but represents the living space, the quality of life and the very health of human beings, including generations unborn.¹ Environmental law is defined as the norms and rules that control the conduct of humans to ensure that their conduct does not weaken the natural balance. This law is primarily concerned with the behavior of humans.² Sustainable development has been defined as development that meets the needs of the present without compromising the ability of future generations to meet their own needs.³ Sustainable development clearly explains the theory of utilitarianism which demands that each action be judged by its utility, that is to say, its usefulness in bringing about consequences of a certain kind to achieve “the greatest good of the greatest number” and that “that action is best which procures the greatest happiness for the greatest numbers”.⁴

**Polycarp Moturi Ondieki is a Postgraduate Student pursuing a Master of Laws (LL.M) degree in Environmental Law at the University of Cape Town. He completed his Undergraduate Degree in Bachelor of Laws (LL.B) with from the University of Nairobi in 2018. He is passionate about Sustainable Development, Environmental Justice, Renewable Energy, Clean Cities, and Climate Change issues.*

¹ Lyster, R., Lipman, Z., Franklin, N., Wiffen, G. and Pearson, L., n.d. Environmental and Planning Law In New South Wales.

² Kenyalawresourcecenter.org.2020.EnvironmentalLaw.[online]Availableat:<<http://www.kenyalawresourcecenter.org/2011/07/environmental-law.html>> [Accessed 20 October 2020].

³ ARE, F., 2020. 1987: Brundtland Report. [online] Are.admin.ch. Available at: <https://www.are.admin.ch/are/en/home/sustainable-development/international-cooperation/2030agenda/un_-milestones-in-sustainable-development/1987--brundtland-report.html> [Accessed 4 October 2020].

⁴ Said Juma Chitembwe v Edward Muriu Kamau & 4 others, Civil Application No. Nai 95 Of 2010 (Ur 70/2010); [2011] Eklr.

Kenya being part of the global community, it's striving to achieve sustainability. The protection and the conservation of the environment in Kenya from a legal perspective became to fruition a decade ago after the promulgation of the new constitution. Before 2010, a few environmental protection laws and authorities existed.⁵ Sustainability was an illusion in Kenya before 2010. Many law practitioners only applied the principles of contract law and tort to advocate for environmental rights and sustainability.⁶ The enforcement of rights under the previous constitution was very difficult. The Constitution of Kenya since its promulgation in 2010 now focuses on the right to a sustainable environment as a fundamental right and freedom.⁷ Many laws, agencies, and policies have since been enacted and created to ensure this baby, sustainability, does not starve to death.

1. Introduction

Man, as a creature of the Almighty God, has some of the qualities of the Creator. One of such is intelligence. Another is reasoning power.⁸ This includes the power to create laws that govern society. Law reflects the values of the society, it dictates the structure, boundaries, rules, and processes within which governmental action takes place⁹.

The environment is not an abstraction but represents the living space, the quality of life and the very health of human beings, including generations unborn.¹⁰ Environmental law is defined as the norms and rules that control the conduct of humans to ensure that their conduct does not weaken the

⁵ Sang, B., 2013. Tending Towards Greater Eco-Protection in Kenya: Public Interest Environmental Litigation and Its Prospects Within the New Constitutional Order. *Journal of African Law*, 57(1).

⁶ Sang, B., 2013. Tending Towards Greater Eco-Protection in Kenya: Public Interest Environmental Litigation and Its Prospects Within the New Constitutional Order. *Journal of African Law*, 57(1).

⁷ Constitution of Kenya, 2010, Article 69.

⁸ O'Connor, D., 1967. *Aquinas and Natural Law*. Macmillan International Higher Education.

⁹ Cosens, B., Craig, R., Hirsch, S., Arnold, C., Benson, M., DeCaro, D., Garmestani, A., Gosnell, H., Ruhl, J. and Schlager, E., 2017. The role of law in adaptive governance. *Ecology and Society*, 22(1).

¹⁰ Lyster, R., Lipman, Z., Franklin, N., Wiffen, G. and Pearson, L., n.d. *Environmental and Planning Law In New South Wales*.

natural balance. This law is primarily concerned with the behavior of humans.¹¹

For a long time, the country did not have defined environmental laws. Policymaking and the whole planning process always tended to fall short of expectations hindering the attainment of sustainability.¹² Environmental matters were strictly private matters and were never a concern of the public. Worse still, Kenya's environmental law regime was dominated by a myriad of sectoral laws that dealt with the natural resource sector.¹³ These laws were ill-structured and scattered over several ministries leading to jurisdictional overlaps hence making implementation an enforcement an uphill task.¹⁴ Attaining sustainability was almost impossible. With the confusion caused by these sectoral laws, it was realized that there was a requirement in creating, one central point that would coordinate various activities and policies and give the government informed decisions on matters of environmental management.¹⁵ The attention in the protection of the environment from the legal perspective gained prominence, some years ago with the enactment of the Environmental and Management Coordination Act of 1999, and the promulgation of the new constitution in 2010.¹⁶ Many laws, agencies, and policies have since been enacted and created to deal with the environment hence sustainability.

¹¹ Kenyalawresourcecenter.org.2020.EnvironmentalLaw.[online]Availableat:<<http://www.kenyalawresourcecenter.org/2011/07/environmental-law.html>> [Accessed 20 March 2020].

¹² Sang, B., 2013. Tending Towards Greater Eco-Protection in Kenya: Public Interest Environmental Litigation and Its Prospects Within the New Constitutional Order. *Journal of African Law*, 57(1)

¹³ Muigua, K. and Kariuki, F., 2013. Towards Environmental Justice in Kenya. (1).

¹⁴ Sang, B., 2013. Tending Towards Greater Eco-Protection in Kenya: Public Interest Environmental Litigation and Its Prospects Within the New Constitutional Order. *Journal of African Law*, 57(1).

¹⁵ Sang, B., 2013. Tending Towards Greater Eco-Protection in Kenya: Public Interest Environmental Litigation and Its Prospects Within the New Constitutional Order. *Journal of African Law*, 57(1).

¹⁶ Sang, B., 2013. Tending Towards Greater Eco-Protection in Kenya: Public Interest Environmental Litigation and Its Prospects Within the New Constitutional Order. *Journal of African Law*, 57(1).

The Judicature Act sets out the various sources of law that are to be applied in Kenya. They include: the Constitution, Acts of Parliament, Acts of Parliament of the United Kingdom; where no written law exists, the substance of the common law, the doctrines of equity, statutes of general application in England as at 12th august 1897 and in so far as they are acceptable in Kenya and customary law.¹⁷

This paper will contextualize and conceptualize how Kenya's legal system has been able to attain sustainability. The laws that have since been enacted, the cases that have been decided and the agencies that have been created to ensure the attainment of sustainability in Kenya will also be discussed. In addition to that, the paper will show how the various principles of sustainable development have been achieved in Kenya through the existing legal system. Finally, the paper will conclude on whether Kenya has achieved sustainability.

2. Legal Provisions on Environmental Law and Sustainability in Kenya

2.1. Constitution of Kenya, 2010

Since the promulgation of the new constitution in 2010,¹⁸ there has been a paradigm shift towards the implementation of environmental rights and the principles of sustainable development.¹⁹ There has been a significant expansion of the scope of elementary rights and freedoms and their enforcement mechanisms.²⁰ Particularly, the recognition of sustainable development in the bill of rights.²¹

In its preamble, the Constitution recognizes the principle of sustainability by stating that, "the people of Kenya should be respectful of the environment,

¹⁷ Judicature Act, Section 3.

¹⁸ Africa Research Bulletin: Political, Social and Cultural Series, 2010. KENYA: Constitution Voted In. 47(8), pp.18495A-18498C.

¹⁹ Sang, B., 2013. Tending Towards Greater Eco-Protection in Kenya: Public Interest Environmental Litigation and Its Prospects Within the New Constitutional Order. *Journal of African Law*, 57(1).

²⁰ Sang, B., 2013. Tending Towards Greater Eco-Protection in Kenya: Public Interest Environmental Litigation and Its Prospects Within the New Constitutional Order. *Journal of African Law*, 57(1).

²¹ Constitution of Kenya 2010, Articles 10, 42, 43 and 69.

which is our heritage, and determined to sustain it for the benefit of future generations.”²² Further, Article 2 (5) and (6) of the Constitution, acknowledge the general rules of international law as being part of the Kenyan laws and any treaty or convention ratified by Kenya also forms part of the laws of Kenya respectively.²³ Through this, the many treaties and conventions that embrace the principle of sustainability apply in Kenya. Some of the treaties and conventions that form part of the laws of Kenya include: the Bamako Convention, the Langkawi Declaration on the Environment, African Convention on the Conservation of Nature and Natural Resources, the Coolum Declaration, the African Youth Charter, Vienna Convention for Protection of the Ozone Layer, United Nations Framework Convention on Climate Change.²⁴

In Chapter 5, the Constitution discusses issues of land and the environment.²⁵ Article 69 sets forth the role of the state in promoting sustainable development and ensuring equitable utilization, exploitation, and management of the environment and natural resources.²⁶ Particularly, it obligates the state to strive to achieve a ten percent tree cover, which is a worldwide goal in curbing climate change.²⁷ Moreover, it obligates the estate to ensure the promotion of traditional knowledge and the role of indigenous communities in the conservation of genetic resources and biological diversity of the communities.²⁸ Through the promotion of this knowledge, future generations can use it in different inventions and innovations that are economically and environmentally viable.

Additionally, Article 69, entitles the state with the responsibility of encouraging public participation in the management, protection, and conservation of the environment.²⁹ Public participation is one of the

²² Constitution of Kenya 2010, Preamble.

²³ Constitution of Kenya 2010, Article 10.

²⁴ Kenyalaw.org. 2020. *NCLR Home Page | Treaties Database*. [online] Available at: <<http://kenyalaw.org/treaties/>> [Accessed 2 June 2020].

²⁵ Constitution of Kenya 2010.

²⁶ Constitution of Kenya 2010.

²⁷ Constitution of Kenya 2010, Article 69 (1)(b).

²⁸ Constitution of Kenya 2010, Article 69 (1)(c).

²⁹ Constitution of Kenya 2010.

important principles of sustainable development and with its recognition in the constitution, it means the country is in the right direction towards achieving sustainability. The state should also protect genetic resources and biological diversity.³⁰ Article 69 obligates the state to create systems of Environmental Impact Assessment, environmental audit, and monitoring of the environment.³¹ Through these systems, the state will have achieved the precautionary principle and the polluter pay principle which are the core principles of sustainable development. Lastly, Article 69, places a duty on every person to cooperate with the state and other persons in protecting and conserving the environment and ensuring ecologically sustainable development and use of natural resources.³² This is a sign of good governance a core principle of sustainability.

Sustainable development is recognized as one of the national values and principles of governance.³³ In Article 10, the Constitution elucidates the principles of good governance, transparency, accountability, public participation, and equality as national values and principles of governance.³⁴ These principles bind all state organs and persons and they are the main principles of sustainability.³⁵

In Article 42, the Constitution recognizes the right to a clean and healthy environment which includes the right to have the environment protected for the benefit of the present and future generations.³⁶ It through this recognition that the principles of inter and intra-generational equity have been respectively embraced.

The Constitution not only recognizes sustainable development rights and environmental rights but also provides for mechanism through which these rights can be enforced. Any person whose environmental rights have been

³⁰ Constitution of Kenya 2010, Article 69 (1)(e).

³¹ Constitution of Kenya 2010.

³² Constitution of Kenya 2010.

³³ Constitution of Kenya 2010.

³⁴ Constitution of Kenya 2010, Article 10 (2).

³⁵ Constitution of Kenya 2010, Article 10 (1).

³⁶ Constitution of Kenya 2010.

threatened, infringed, denied, or violated can petition the court for redress.³⁷ Various other rights regarding access of justice have also been recognized in the constitution and they include, right to access justice,³⁸ right to fair administrative action,³⁹ economic and social rights, and right to access information.⁴⁰ Along the same lines, the constitution created a special court, the Environment and Land Court, with the status of the high court to specifically deal with land and environment matters.⁴¹

The Constitution creates two levels of governments; the national government and the county governments.⁴² The fourth schedule provides for the distribution of functions between the two levels of government. The national government is responsible for protection of the environment and natural resources to establish a durable and sustainable system of development, including, fishing, hunting, and gathering, protection of animals and wildlife and energy policy.⁴³ On the other hand, the county governments are responsible for control of air pollution, noise pollution and implementation of the national laws and policies regarding natural resources and environmental protection.⁴⁴ The two levels of government should always work in harmony through consultation and cooperation to achieve the constitutional goals.⁴⁵ This a sign of good governance and the principle of intergenerational equity is achieved through preservation of natural resources.

Article 113 of the Constitution acknowledges the importance of physical planning as being essential to the efficient and sustainable utilization and management of land and land-based resources. Physical planning helps in proper integration of economic, environmental and social matters in development hence attaining the goal of sustainable development.

³⁷ Constitution of Kenya 2010, Article 70.

³⁸ Constitution of Kenya 2010, Article 48.

³⁹ Constitution of Kenya 2010, Article 47.

⁴⁰ Constitution of Kenya 2010, Article 43.

⁴¹ Constitution of Kenya 2010, Article 162(2)(b); Environment and Land Court Act.

⁴² Constitution of Kenya 2010, Article 6.

⁴³ Constitution of Kenya 2010, Fourth Schedule, Section 22.

⁴⁴ Constitution of Kenya 2010, Article 6.

⁴⁵ Constitution of Kenya 2010, Article 6(2).

2.2. Environmental Management and Coordination Act (EMCA)

This is an Act of parliament that was established with the main purpose of creating the necessary legal and institutional framework for environmental management.⁴⁶ This Act consolidated power and responsibility which had been disseminated by the various sectoral laws in many government departments. These sectoral laws made coordination towards the protection of the environment difficult.⁴⁷

Section 3 of the Act echoes the provisions of Articles 42 and 70 of the Constitution with regards to the right to a clean and healthy environment and access to justice respectively.⁴⁸ In Section 3A, the right to access information has been eloquently elucidated.⁴⁹ Through this Section, every person has a right to access information that is important to the management and protection of the environment. Access to information is one of the principles of good governance and when tied with public participation, sustainability is easily achieved. Section 108 of EMCA provides for the issuance of environmental restoration orders on any person by National Environmental Management Authority (NEMA) or by a court of law.⁵⁰ When issued, such an order would, *inter alia*, require restoration of the environment to the condition it was before the degrading action and award compensation to any person harmed by the degrading action. In this case, the perpetrator of the degrading action is liable to meet the full cost. This is an example of the polluter pays principle of sustainability reflected in this law.

The Act is complemented by subsidiary legislations that ensure proper management of environmental matters and attainment of sustainability. The Environmental (Impact Assessment and Audit) Regulations, 2003; the Constitution in Article 69(f) obligates the state to create environmental impact assessment and audit systems. Environmental Impact Assessment

⁴⁶ Environmental Management and Coordination Act 1999.

⁴⁷ Muigua, K. and Kariuki, F., 2013. Towards Environmental Justice in Kenya. (1).

⁴⁸ Environmental Management and Coordination Act 1999; Constitution of Kenya 2010.

⁴⁹ Environmental Management and Coordination Act 1999; Constitution of Kenya 2010.

⁵⁰ Environmental Management and Coordination Act 1999; Constitution of Kenya 2010.

(EIA) helps in the anticipation and reduction of the injurious effects of development.⁵¹ The aspect of EIA arose from increased population growth, urbanization, and industrialization which posed a big threat to natural resources through degradation and pollution.⁵² Regulation 4 puts restrictions on the implementation of projects that may have negative impacts on the environment.⁵³ Through EIA, the precautionary principle is realized. Further, it states that “no licensing authority should issue a license for any project for which an Environmental Impact Assessment is required under the Act...”⁵⁴ Where there has been no such EIA, an injunction can be sought in court to restrain the activity.⁵⁵ Additionally, the regulations provide for Environmental Audit (EA) which is the systematic documentation, periodic and objective evaluation of activities and processes of an ongoing project.⁵⁶ The goal of EA is to establish if proponents are complying with environmental requirements and enforcing legislation. This aims to achieve the principles of good governance, hence achieving sustainability.

The Environmental Management and Co-ordination (Conservation of Biological Diversity and Resources, Access to Genetic Resources and Benefit Sharing), 2006, states that no person should be allowed to engage in activities that may cause damage to the ecosystem, lead to the introduction of alien species and/or lead to the unsuitable use of natural resources.⁵⁷ Alien species in most cases have been a menace in many ecosystems, hence hindering sustainability. An example is the introduction of an alien species, *Prosopis Juliflora*, around 1984 at the shores of Lake Bogoria.⁵⁸ This plant has caused wanton destruction of the natural ecosystem and even causing death to animals that feed on it. These Regulations are now in place to curb such vices that lead to the destruction of the natural ecosystem. The

⁵¹ Environmental (Impact Assessment and Audit) Regulations 2003, Regulation 2.

⁵² Muigua, K. and Kariuki, F., 2013. Towards Environmental Justice in Kenya. (1).

⁵³ Environmental (Impact Assessment and Audit) Regulations 2003.

⁵⁴ Environmental (Impact Assessment and Audit) Regulations 2003, Regulation 4.

⁵⁵ Nzioka & 2 Others v Tiomin Kenya Ltd, Civil Case No. 97 of 2001.

⁵⁶ Environmental (Impact Assessment and Audit) Regulations 2003, Regulation 31.

⁵⁷ Environmental Management and Co-ordination (Conservation of Biological Diversity and Resources, Access to Genetic Resources and Benefit Sharing) 2006, Regulation 4.

⁵⁸ Swallow, B. and Mwangi, E., 2008. *Prosopis juliflora* Invasion and Rural Livelihoods in the Lake Baringo Area of Kenya. Conservation and Society.

regulations also state that any person who wants to get a genetic resource from Kenya must get permission from the National Council for Science and Technology.⁵⁹ This helps in sustainability as it prevents unwarranted use of genetic resources and ensures that the resources are available for use by future generations.

Environmental Management and Co-ordination (Waste Management) Regulations, 2006. These Regulations apply to all classes of wastes including, Industrial wastes, Pesticides, and toxic substances, Biomedical wastes, Radio-active substances, and Hazardous and toxic wastes.⁶⁰ It is through these Regulations that proper handling, transportation, and disposal of all these categories of wastes are outlined.⁶¹ With proper handling and disposal of wastes, pollution is avoided and in turn, the society, economy and natural environment will tremendously thrive thus achieving to sustainability.

2.3. Forest Conservation and Management Act

This Act was enacted for the principal purpose of ensuring proper management and sustainable use of forests and forest resources.⁶² It provides for the rational use of forest resources to ensure the socio-economic development of the nation at large.⁶³ The Act establishes the Kenya Forestry College which offers forestry education, technical and vocational training courses in forest conservation, management and sustainable utilization of forest.⁶⁴ It also offers short courses to communities, private forest owners, and forest industries in the protection of forests and allied natural resources. Education is an important aspect of the attainment of sustainability and for individuals to achieve any goal in life, they always need to have good

⁵⁹ Environmental Management and Co-ordination (Conservation of Biological Diversity and Resources, Access to Genetic Resources and Benefit Sharing) 2006, Regulation 9.

⁶⁰ Environmental Management and Co-ordination (Waste Management) Regulations, 2006.

⁶¹ Environmental Management and Co-ordination (Waste Management) Regulations 2006, Regulation 18.

⁶² Forest Conservation and Management Act 2016.

⁶³ Forest Conservation and Management Act 2016, Section 5.

⁶⁴ Forest Conservation and Management Act 2016, Section 17.

knowledge of the subject matter. Besides, the Act creates the Kenya Forest Service which is a body corporate whose mandate is to ensure the conservation of forest resources both at the national and county levels in an equitable manner for the benefit of the present and future generations.⁶⁵

2.4. Wildlife and Conservation and Management Act

The Act creates the Kenya Wild Service (KWS) which is a body mandated to enforce the Act through conservation of flora and fauna.⁶⁶ It is also mandated to manage national parks and game reserves sustainably by preventing illegal activities such as poaching. This helps in the achievement of the principle of inter-generational equity.

2.5. Mining Act

This Act controls the mining industry through the provision of licences and mining permits. It provides for compulsory EIA in any prospective mining activity and compensation to parties affected by mining activity.⁶⁷ The Act also helps in preventing illegal and unsustainable mining activities. This helps in achieving the precautionary principle and polluter pays principle of sustainable development.

2.6. Public Health Act

This Act prohibits anyone from causing a nuisance that is dangerous to human beings and the environment.⁶⁸ It also obligates county governments to protect all water supplies in their jurisdictions from any form of pollution.⁶⁹ This elaborates the precautionary principle as it encourages individuals to take measures to avoid causing danger to the environment which might lead to negative economic and social effects.

2.7. Penal Code

It provides for sanctions that will be applied to any person who commits environmental offenses. Section 192 states that any person who vitiates the

⁶⁵ Forest Conservation and Management Act 2016, Section 7.

⁶⁶ Wildlife Conservation and Management Act 2013, Section 6.

⁶⁷ Mining act 2016, Section 78.

⁶⁸ Public Health Act 1921, Section 115.

⁶⁹ Public Health Act 1921, Section 129.

atmosphere in any space so as to make it noxious to the environment or the neighborhood is guilty of a misdemeanor.⁷⁰ Section 191 states any person who voluntarily contaminates water to make it unfit for ordinary use is guilty of a misdemeanor.⁷¹

Other important statutes that are important in achieving sustainability include: Physical and Land Use Planning Act, which provides for regulation, management and proper use of land in to attain sustainability;⁷² Climate Change Act, provides for regulatory framework necessary in combating climate change. It also provides for mechanisms that help in achieving low carbon climate development;⁷³ Access to Information Act, which gives effect Article 35 of the Constitution⁷⁴ and helps in achieving administrative justice which is an important aspect in attaining sustainability;⁷⁵ Protected Areas Act which prevents illegal entry into protected areas.⁷⁶ This helps in preservation of important flora and fauna for the future generations; And Fair Administrative Action Act which helps in seeking environmental justice.⁷⁷

2.8. Policies

2.8.1. National Environment Policy, 2013

The goal and objective of this policy are to provide a better life for the present and future generations through the sustainable management of the environment and the use of natural resources.⁷⁸ It ensures that the linkage between the environment and poverty reduction is integrated into all government activities and agencies. This is aimed at the realization of sustainable development at all levels in the context of the green economy by enhancing social inclusion, improving human welfare, and creating

⁷⁰Penal Code, Cap 63.

⁷¹ Penal code, Cap 63.

⁷² Physical and Land Use Planning Act

⁷³ Climate change Act

⁷⁴ Constitution of Kenya 2010.

⁷⁵ Access to information Act

⁷⁶ Protected Areas Act

⁷⁷ Fair Administrative Action Act

⁷⁸ National Environmental Policy 2013,

opportunities for employment and maintaining the healthy functioning of the ecosystem.

2.8.2. Vision 2030

This is a blueprint that is aimed at helping the country achieve its goal of becoming a middle-income country with the highest quality of life to all its citizens by 2030.⁷⁹ The blueprint incorporates all the Millennium Development Goals which are important in achieving sustainable development in the country.⁸⁰ The blueprint is also guided by three important pillars which are the economic, social, and environmental pillars.⁸¹ These pillars are core in achieving sustainability. Most importantly, it focusses on environmental governance, conservation of natural resources and pollution, and waste management.⁸² Through this blueprint sustainable cities like Konza and Tatu cities are coming up. The blueprint aims at helping the country achieve the Sustainable Development Goals.⁸³

2.9. Authorities and Agencies

2.9.1. Ministry of Environment, Water and Natural Resources

This office is created through Section 5 of the EMCA.⁸⁴ It is headed by the Cabinet Secretary in charge of the environment and natural resources.⁸⁵ This is the highest policy-making body under EMCA. The ministry is responsible

⁷⁹ Vision2030.go.ke. 2020. [online] Available at:
<<http://vision2030.go.ke/inc/uploads/2018/05/Vision-2030-Popular-Version.pdf>>
[Accessed 2 May 2020].

⁸⁰ Vision2030.go.ke. 2020. [online] Available at:
<<http://vision2030.go.ke/inc/uploads/2018/05/Vision-2030-Popular-Version.pdf>>
[Accessed 17 May 2020].

⁸¹ Vision2030.go.ke. 2020. [online] Available at:
<<http://vision2030.go.ke/inc/uploads/2018/05/Vision-2030-Popular-Version.pdf>>
[Accessed 17 May 2020].

⁸² Vision2030.go.ke. 2020. [online] Available at:
<<http://vision2030.go.ke/inc/uploads/2018/05/Vision-2030-Popular-Version.pdf>>
[Accessed 17 May 2020].

⁸³ Vision2030.go.ke. 2020. [online] Available at:
<<http://vision2030.go.ke/inc/uploads/2018/05/Vision-2030-Popular-Version.pdf>>
[Accessed 17 May 2020].

⁸⁴ Environmental Management and Coordination Act 1999.

⁸⁵ Environmental Management and Coordination Act 1999.

for policy formulation and directions for the EMCA. It sets national goals and objectives and promotes cooperation among both public and private organizations engaged in environmental protection programmers.⁸⁶

2.9.2. National Environment Management Authority

The National Environment Management Authority (NEMA) is a government agency established under Section 7 of the EMCA.⁸⁷ Its mandate is to exercise general supervision and coordination over all matters relating to the environment. The Authority is the principal instrument through which the government implements all policies relating to the protection of the environment.

2.9.3. National Environment Tribunal

The National Environment Tribunal (NET) is established under Section 125 of the EMCA. The function of NET is to hear appeals from administrative decisions by organs responsible for enforcement of environmental standards.⁸⁸ The proceedings of NET are quite flexible, and they do not follow the strict laws of evidence. This makes it easier and fast in the determination of issues hence making access to justice easier.

2.9.4. National Environmental Complaints Committee

The National Environmental Complaints Committee (NECC) is established under Section 31 of the EMCA.⁸⁹ The NECC is concerned with the investigation of complaints relating to environmental damage and degradation generally.⁹⁰ NECC has powers to investigate complaints against any person or even against NEMA concerning the condition of the environment in Kenya.⁹¹ It is also required to report to the cabinet secretary periodically on its development.⁹² This is a sign of good governance a principle aimed at achieving sustainability.

⁸⁶ Environmental Management and Coordination Act 1999.

⁸⁷ Environmental Management and Coordination Act 1999.

⁸⁸ Environmental Management and Coordination Act 1999.

⁸⁹ Environmental Management and Coordination Act 1999.

⁹⁰ Environmental Management and Coordination Act 1999.

⁹¹ Environmental Management and Coordination Act 1999.

⁹² Environmental Management and Coordination Act 1999.

2.10. Conservation Programs

The government allows some conservation programs to run hence ensuring the protection of endangered species such as the Elephants, Hirola, and Rhinos.⁹³ It allows private conservancies that work closely with the Kenya Wildlife Service to ensure protection and conservation of wildlife.⁹⁴ An example is the Ole Pejeta conservancy which is home for the white Rhinos. The government, through KWS also encourages community-based programs that allow local communities to help in the management and conservation of the neighboring game reserves.⁹⁵ This is a sign of good governance aimed at the preservation of flora and fauna for the present and future generations.

2.11. International Laws

2.11.1. Convention On Biological Diversity

The main objectives of this convention are to conserve biodiversity, sustainably use the components of biodiversity and share equitably, the resources that arise from the use of genetic resources.⁹⁶ Through this, future generations can enjoy the fruits of the existing genetic resources.

2.11.2. United Nations Framework Convention for Climate Change

This Convention was created with the sole purpose of the realization of the effects of climate change and the need to employ measures to prevent the adverse effects of climate change.⁹⁷ In article 3, the Convention states its principles and encourages countries to protect climate change for the sake of present and future generations.⁹⁸ State parties should also take precautionary measures to minimize the causes of climate change and ensure that the lowest cost possible is applied.

⁹³ Wildlife Conservation and Management Act 2013, Section 40.

⁹⁴ Wildlife Conservation and Management Act 2013, Section 12.

⁹⁵ Wildlife Conservation and Management Act 2013, Section 12.

⁹⁶ Convention on Biological Diversity of 5 June 1992 (1760 U.N.T.S. 69).

⁹⁷ United Nations Framework Convention for Climate Change.

⁹⁸ United Nations Framework Convention for Climate Change.

2.11.3. Ramsar Convention On Wetlands

It aims at protecting land as a habitat through conservation and wise use of wetlands by national action and international cooperation to achieving sustainable development throughout the world.⁹⁹

2.11.4. The African Convention on the Conservation of Nature and Natural Resources

The objectives of this convention are to encourage conservation, utilization, and development of soil, water, flora, and fauna for the present and future welfare of mankind, from an economic, nutritional, scientific, educational, cultural, and aesthetic point of view.¹⁰⁰ Through the realization of the objectives of this convention, Kenya will be able to achieve sustainability.

3. Cases

3.1. Pre-2010 Cases

In the case of Wangari Maathai v Kenya Times Media Trust,¹⁰¹ the Plaintiff moved to court seeking an injunction to restrain the Defendant from constructing a complex on Uhuru Park which is a public recreational site in the middle of the city.

The Court stated that the Plaintiff had no *locus standi* to institute proceedings on behalf of the public. Only the Attorney General could institute proceedings on behalf of the public and a private individual could only institute proceedings against the public where they could show that they sustained injury arising from the public wrong.

In the case of Kenya Ports Authority v East Africa Power & Lighting Company,¹⁰² the Respondent was operating a power station next to the Appellant's premises. In the process, a pipe was damaged and there was oil

⁹⁹ African Convention on The Conservation of Nature and Natural Resources.

¹⁰⁰ African Convention on The Conservation of Nature and Natural Resources.

¹⁰¹ Wangari Maathai v Kenya Times Media Trust, Civil Case No 5403 Of 1989; [1989] eKLR.

¹⁰² Kenya Ports Authority v East African Power & Lighting Company Ltd, Civil Appeal No. 41 Of 1981; [1982] eKLR.

leakage into the ocean waters. The Appellant being wary of the possible effects, she cleaned up the waters and sued for compensation.

The court held that damage was only caused to the ocean waters and the Appellant did not own the waters as they were *res nullius*. There was no damage to the Appellant's property and his claims of negligence and breach of the rule of *Rayland v. Fletcher* were misplaced.¹⁰³ The suit was dismissed.

In the case of *Nairobi Golf Hotels Ltd v Pelican Engineering & Construction Co. Ltd*,¹⁰⁴ the Plaintiff owned a golf course and a hotel in which land, a lot of indigenous trees grew. At the center of the land, a River Gatharani flowed and as a riparian owner, the Plaintiff was allowed by the Water Apportionment Board (WAB) to use the water for the river for watering the golf course and hotel activities. The Defendant without permission from WAB erected a concrete wall upstream and erected a temporary reservoir pending construction of the dam.

The Plaintiff filed a suit restraining the Defendant from constructing the dam as it would affect the natural vegetation in the golf course and other ecological lives downstream. The court held that the Plaintiff had no *locus standi* as the river belonged to the government.

With the enactment of the EMCA in 1999, the jurisprudential approach towards environmental rights took a different positive approach. In the case of *Rodgers Muema Nzioka & 2 other v Tiomin Kenya Limited*,¹⁰⁵ the Plaintiffs sought an injunction on behalf of the local inhabitants of Kwale District against a company that was accruing out mining of titanium in the area. They argued that the mining would cause massive environmental degradation and health effects to the locals.

¹⁰³ *Rylands v Fletcher* UKHL 1, (1868) LR 3 HL 330.

¹⁰⁴ *Nairobi Golf Hotels Ltd v Pelican Engineering & Construction Co. Ltd*, Civil Case 706 of 1997; [1997] eKLR.

¹⁰⁵ *Rodgers Muema Nzioka & 2 other v Tiomin Kenya Limited*, Civil Case No 97 of 2001; [2001] Eklr.

The court took a liberal approach by stating that, in cases where a person's right to a clean and healthy environment is being violated, the person need not show interest in the property that is being invaded.

3.2. Post-2010 Cases

In the case of *Save Lamu & 5 Others v NEMA & Amu Power Company Limited*,¹⁰⁶ the Kenya National Environmental Tribunal set aside an EIA license that had been issued by NEMA to Amu Power Co. for the construction of a coal power plant. The coal plant would be the first coal-powered plant in Kenya. The Tribunal stated that NEMA had ignored public participation rules in granting the EIA license. The Tribunal continued to state *inter alia* that "...these environmental impacts are not restricted to the ecological effects alone, but extend to the wide areas that affect their lives like the health impacts to them and their families, to their livelihood and economic opportunities, socio-cultural and heritage traditions..."¹⁰⁷ Additionally, in considering the precautionary principle and issues of climate change, the Tribunal noted that the EIA carried by Amu Power Co. was incomplete and scientifically inadequate hence in violation of the EIA regulations.

In the case of *Joseph Leboo & 2 Others v Director Forest Services & Another*,¹⁰⁸ the Plaintiffs made application to the court for an injunction to bar the Defendants from harvesting trees without seeking prior and informed consent from the neighboring community members. Among the issues of determination were whether the community had the locus standi to commence legal proceedings against the alleged irregular harvesting and whether public participation was necessary for the management of forests.

The Court held that the community had a right in the management and sustainable use of the forest. Additionally, there was a need to involve the community in public participation before the harvesting of forest resources.

¹⁰⁶ *Save Lamu & 5 others v National Environmental Management Authority (NEMA) & another*, Tribunal Appeal No. Net 196 of 2016 [2019] eKLR.

¹⁰⁷ *Save Lamu & 5 others v National Environmental Management Authority (NEMA) & another*, Tribunal Appeal No. Net 196 of 2016 [2019] eKLR

¹⁰⁸ *Joseph Leboo & 2 others v Director Kenya Forest Services & another*, Environment and Land Case No. 273 of 2013; [2013] eKLR.

The court further held that the purported act of harvesting the forest resources would lead to environmental degradation in the area. The application was upheld, and the Respondents were ordered to stop the harvesting of trees.

In the case of *Friends of Lake Turkana Trust v Attorney General & 2 Others*,¹⁰⁹ the government of Kenya entered into a contract to purchase 500 megawatts of electricity from the government of Ethiopia. The electricity would be sourced from dams that were to be built along the Omo river which is the source of water for Lake Turkana.

The Plaintiffs filed a suit alleging that the construction and operation of the dams would greatly lead to a reduction of waters in Lake Turkana which is the source of economic wellbeing and cultural livelihoods for the surrounding community. They, Plaintiff further claimed that they were not consulted by defendants in brokering the contract. Additionally, the Defendants refused to produce information to the Plaintiffs about the power purchase agreement.

Although the project continued as it was on a different jurisdiction, the court held that the government of Kenya had a duty to protect and conserve the environment and ensure sustainable use of natural resources. The Court elaborated on the principle of sustainable development and the precautionary principle by stating that, "...the respondents must establish that no environmental harm arises from (electricity) agreements and projects [with the Ethiopian government]."¹¹⁰ The court continued to stated that "[the respondents] as trustees of the environment and natural resources owe a duty and obligation to the petitioner to ensure that the resources of lake Turkana are sustainably managed, utilized and conserved, and to exercise necessary precautions in preventing environmental harm that may arise from the agreements and projects entered into with the government of Ethiopia in this regard."¹¹¹

¹⁰⁹ *Friends of Lake Turkana Trust v Attorney General & 2 Others*, ELC suit No 825 of 2012; [2014] eKLR.

¹¹⁰ *Friends of Lake Turkana Trust v Attorney General & 2 Others*, ELC suit No 825 of 2012; [2014] eKLR. para 15.

¹¹¹ *Friends of Lake Turkana Trust v Attorney General & 2 Others*, ELC suit No 825 of 2012; [2014] eKLR. para 16.

Accordingly, the court ordered the Respondents to provide every bit of information about the power purchase agreement and ensure that all steps necessary are taken to ensure the resources of lake Turkana are conserved and protected regarding any agreement entered with the government of Ethiopia.

It is exceedingly evident that there has been a good improvement in the way courts have dealt with issues to deal with sustainability. With the introduction of the EMCA in 1999 and the promulgation of the new Constitution in 2010, courts have positively embraced sustainability.

4. The Place of Sustainability in Kenya; Analysis of The Sustainability Principles with Regards to The Laws

4.1. Precautionary Principle

This principle originated in Germany as environmental policy in the 1970s. The precautionary principle (*vorsorgeprinzip*) was adopted to help in the control of environmental degradation through careful and well-calculated planning.¹¹² With the rise of acid rain, pollution, and global warming, Germany placed this requirement of industry operators to use the available technology to prevent further pollution.¹¹³

The principle has since gained traction in the international arena and it's now documented in Principle 15 of the Rio Declaration which stated that “to protect the environment, the precautionary approach should be widely applied by states according to their capabilities. Where there are threats of damage to the environment, whether serious or irreversible, lack of full scientific certainty should not be used as a reason for postponing cost-effective measures to prevent environmental degradation.”¹¹⁴ This means that, through synchronized and comprehensive research, any threat to the

¹¹² Jan Glazweski and Lisa Plit, ‘Towards the Application of the Precautionary Principle in South African Law’ (2015) 26 Stellenbosch Law Review 190.

¹¹³ Jan Glazweski and Lisa Plit, ‘Towards the Application of the Precautionary Principle in South African Law’ (2015) 26 Stellenbosch Law Review 190.

¹¹⁴ www2.ecolex.org. 2020. [online] Available at: <<http://www2.ecolex.org/server2neu.php/libcat/docs/LI/MON-091033.pdf>> [Accessed 18 May 2020].

health of the environment should be avoided in advance. This should be done with the absence of any ascertained scientific understanding notwithstanding.¹¹⁵

Kenya being part of the global community, it has made several legal strides in trying to achieve this principle. With the recognition of the principle of sustainable development in the Constitution,¹¹⁶ EMCA, and the various policies as illustrated hereinabove, Kenya has made an important step in ensuring sustainability is achieved. Sustainable development incorporates various principles including the precautionary principle.¹¹⁷ Particularly, Kenya has promulgated EIA regulations to help in the development of various projects that may be influencing the environment.¹¹⁸

Additionally, Kenya controls the use of private land uses through police power.¹¹⁹ This is the legal authority of the government to limit private rights to protect the environment and public interests such as health.¹²⁰ EMCA grants NEMA considerable power to control the use of private land for the benefit of environmental management and sustainable development.¹²¹ The case of Republic V The National Environmental Tribunal & 2 Others is a good example where the court upheld an order given by NEMA preventing a leaseholder from constructing a game lodge next to Maasai Mara game reserve.¹²² The order would preserve the neighboring cheetah breeding ground and crucial for the conservation of the black rhino.

¹¹⁵ Jan Glazweski and Lisa Plit, 'Towards the Application of the Precautionary Principle in South African Law' (2015) 26 Stellenbosch Law Review 190.

¹¹⁶ Constitution of Kenya 2010, Article 69.

¹¹⁷ Peter P Rogers, Kazi F Jalal and John A Boyd, *An Introduction to Sustainable Development* (Earthscan Publications Ltd 2007).

¹¹⁸ Environmental (Impact Assessment and Audit) Regulations 2003.

¹¹⁹ RAYMOND A HAIK, 'Police Power Versus Condemnation' (1974) 7 Natural Resources Lawyer 21.

¹²⁰ RAYMOND A HAIK, 'Police Power Versus Condemnation' (1974) 7 Natural Resources Lawyer 21.

¹²¹ Environmental Management and Coordination Act 1999, Section 9.

¹²² Republic V The National Environmental Tribunal & 2 Others, Miscellaneous Application 111 Of 2008; [2010]eKLR.

The ban on plastic bags is one of the major steps Kenya has taken towards preventing future environmental degradation. These plastic bags were major pollutants of the environment. They clogged up drainage systems and even led to flooding during the rainy season.¹²³ A study by NEMA indicated that 50% of animals near urban areas had plastic bags in their stomachs.¹²⁴ Stringent fines were introduced with the ban hence making the ban effective.¹²⁵

Unfortunately, despite all these good laws and policies, for many years Kenya has not been able to address the problem of historical land injustices.¹²⁶ The issue has been a serious problem since Kenyan gained independence and all the governments have always ignored them despite being incorporated in various reports.¹²⁷ The land injustices have always led to increased squatter problem in the country hence leading to unsustainable use of land which in turn lead to the destruction of the environment. Through the unresolved land problems, there has been increased encroachment of forest and wildlife areas.¹²⁸ This has led to the destruction of natural forests and escalated the issue of human-wildlife conflicts. Additionally, most rural-urban migration has been caused by this problem, leading to increased slum dwellings in urban areas. Consequently, pollution due to poor sewage disposals in the slum areas has increased.

¹²³ Irungu, S., 2020. National Environment Management Authority (NEMA) - Plastic Revolution. [online] Nema.go.ke. Available at: <http://www.nema.go.ke/index.php?option=com_content&view=article&id=275&Itemid=426> [Accessed 18 May 2020].

¹²⁴ Irungu, S., 2020. National Environment Management Authority (NEMA) - Plastic Revolution. [online] Nema.go.ke. Available at: <http://www.nema.go.ke/index.php?option=com_content&view=article&id=275&Itemid=426> [Accessed 18 May 2020].

¹²⁵ Environmental Management and Coordination (Plastic Bags and Management) Regulations, 2018.

¹²⁶ Kenyalaw.org. 2020. [online] A Report of the Land Commission of Inquiry into the Illegal or Irregular Allocation of Land 2004.pdf Available at: <<http://kenyalaw.org/kl/fileadmin/CommissionReports/>> [Accessed 18 May 2020].

¹²⁷ Kenyalaw.org. 2020. [online] A Report of the Land Commission of Inquiry into the Illegal or Irregular Allocation of Land 2004.pdf Available at: <<http://kenyalaw.org/kl/fileadmin/CommissionReports/>> [Accessed 18 May 2020].

¹²⁸ Sessional Paper No. 3 of 2009, National Land Policy 2009

4.2. Polluter Pays Principle

The principle was introduced in the 1970s by the organization for economic cooperation and development as an economic principle.¹²⁹ Its main objective was to prevent distortions in international trade. The principle was later incorporated in principle 16 of the Rio Declaration which requires the polluter shall bear the cost of pollution caused to the environment.¹³⁰ The cost should be reflected generally in all the goods and services that cause pollution and environmental degradation.

In Kenya, the principle has been incorporated in several laws including the Constitution.¹³¹ Particularly, Section 142 of EMCA states that in imposing pollution penalties, "...the court may direct a person to pay the full cost of cleaning up the polluted environment and of removing the pollution; clean up the polluted environment and remove the effects of pollution to the satisfaction of the Authority.."¹³²

In implementing these laws, the government through NEMA has been working tirelessly in identifying polluters. Most factories discharging raw sewage to Nairobi river have had their licenses revoked and their officials arrested and prosecuted in courts.¹³³ This way, the factories will incur an extra cost of pollution as they will be forced to pay for the new licenses. Additionally, without production, the factories will run into losses hence indirectly paying for their sins. In 2019, NEMA identified 78 facilities on riparian reserves and 25 of these facilities were demolished as they were causing pollution to the rivers.¹³⁴

¹²⁹ Rowena Maguire, 'Incorporating International Environmental Legal Principles into Future Climate Change Instruments' (2012) 2012 *Carbon & Climate Law Review* 101.

¹³⁰ www2.ecolex.org. 2020. [online] Available at: <<http://www2.ecolex.org/server2neu.php/libcat/docs/LI/MON-091033.pdf>> [Accessed 18 May 2020].

¹³¹ Constitution of Kenya 2010, Article 69.

¹³² Environmental Management and Coordination Act 1999.

¹³³ Daily Nation. 2020. Nema Shuts Down 25 Factories. [online] Available at: <<https://www.nation.co.ke/news/Nema-to-close-down-25-factory-in-Nairobi-River-cleanup/1056-5116302-b2o0shz/>> [Accessed 18 May 2020].

¹³⁴ Irungu, S., 2020. National Environment Management Authority (NEMA) - Factories Closed, Owners Arrested For Polluting Environment. [online]

4.3. Principle of Intragenerational and Intergenerational Equity

The preservation of the environment is important in achieving the equity of generations and without it, the achievement of sustainability will be a nightmare.¹³⁵ The present generations should hold the environment in trust for future generations. Sustainability is achieved through the integration of social development, economic equitable development, and sound environmental protection. Through this, the principles of both intergenerational and intrageneration equity are achieved.

Despite the recognition of these principles in various Kenyan laws, and policies, the country is still grappling to achieve them. The recent evictions from the Mau forest are one of the major steps the government has taken in ensuring the present and future generation benefit in equal measure.¹³⁶ Mau forest in one of the largest water catchment areas in the East Africa region as it is the source of many rivers that flow into Lake Victoria. Over the years, the forest has faced wanton destruction and deforestation hence threatening many lives not only in Kenya but those that depend on Lake Victoria.¹³⁷

On the other hand, principle 4 of the Rio Declaration states that " ...in order to achieve sustainable development, environmental protection shall constitute an integral part of the development process and cannot be considered in isolation from it'. Surprisingly, Kenya has always ignored this view; the country has been embracing the Kuznets's theory.¹³⁸ This is a

Nema.go.ke. Available at:
<http://www.nema.go.ke/index.php?option=com_content&view=article&id=298:factories-closed-owners-arrested-for-polluting-environment&catid=10:news-and-events&Itemid=454> [Accessed 18 May 2020].

¹³⁵ Barral, V., 2012. Sustainable Development in International Law: Nature * and Operation of an Evolutive Legal Norm. *European Journal of International Law*, 23(2), pp.377-400.

¹³⁶ Environment.go.ke. 2020. Ministry Of Environment And Forestry » Blog Archive » Second Phase Of Mau Evictions To Kick Off Soon. [online] Available at: <<http://www.environment.go.ke/?p=6844>> [Accessed 18 May 2020].

¹³⁷ M. Chrisphine, u. and A. Maryanne, O., 2015. Assessment of Hydrological Impacts of Mau Forest, Kenya. *Journal of Waste Water Treatment & Analysis*, 07(01).

¹³⁸ Peter P Rogers, Kazi F Jalal and John A Boyd, *An Introduction to Sustainable Development* (Earthscan Publications Ltd 2007).

cornucopian approach which submits that the environment will always take care of itself and economic development proceeds.¹³⁹ In the recent past, Kenya has embarked on economic developments at the expense of the environment. This can be witnessed in mega-projects like the standard gauge railway that cut through Nairobi national Park causing ripple effects to the entire ecosystem; the construction of an expressway from Jomo-Kenyatta International Airport to Westlands area. The road was designed to cut through Uhuru Park which is the largest public recreation area within the city; the construction of Lamu Port-South Sudan-Ethiopia-Transport (LAPSSET) Corridor project which has caused massive destruction of mangrove forests and sea creatures along the Lamu coast. The project incorporates the construction of the largest coal plant in Kenya. Although environmental impact assessments were carried out, it is outrightly clear that they carried out as a matter of formality but in the real sense, the projects would cause massive effects to the environment hence affecting the lives of both the present and future generations.

4.4. Principle of Good Governance

Kenya has tried to move miles in achieving this principle in different ways. Article 10 of the Constitution recognizes the principle of governance and obligates all state organs and officers to apply it.¹⁴⁰ The constitution further obligates both the national government and the county governments to work together harmoniously and in consultation with each other to achieve efficiency and effectiveness in service delivery.¹⁴¹ Devolution has helped in the equitable distribution of resources to different parts of the country hence leading to uniform development in the country. This has been achieved through annual budgetary allocation to the county governments.¹⁴² With the development in the county governments, poverty eradication is easily achieved, inclusivity and rural-urban migration are curtailed. Chapter 6 of the Constitution also talks about leadership and integrity. Through this Kenyan has been able to fight corruption which has always been a stumbling

¹³⁹ Peter P Rogers, Kazi F Jalal and John A Boyd, *An Introduction to Sustainable Development* (Earthscan Publications Ltd 2007).

¹⁴⁰ Constitution of Kenya 2010.

¹⁴¹ Constitution of Kenya 2010, Article 6.

¹⁴² Constitution of Kenya 2010, Articles 217 & 219.

block in achieving sustainable development. Inclusivity has also been embraced with the new Constitution dispensation hence helping women and people with disabilities to be part of the governance and decision-making environment.¹⁴³

Astonishingly, with all the legal provisions on good governance, Kenya is still lagging on the issue of good governance. Rule of law has not been fully embraced in Kenya. Separation of powers between three arms of the government is still a problem. The executive for a long time has dominated the other arms of government and even effecting budget cuts to the judiciary.¹⁴⁴ This has crippled access to justice and propelled corruption. Disregard of courts is the order of the day in Kenya. An example is the Endorois Case where Kenya forcefully evicted the indigenous community from their ancestral land even after receiving an order from the African Court of Justice not to do so.¹⁴⁵ Well-orchestrated corruption activities with state officers have also seen a rise in poaching activities. This can be witnessed with the recent killing of the white giraffe a rare species in northern Kenya and extinction of the white rhino.¹⁴⁶

4.5. Principle of Shared but Differentiated Responsibilities

States have a common duty to protect the environment at the national, regional, and international levels. The ability of a state to prevent and control environmental degradation is always taken into consideration.¹⁴⁷

¹⁴³ Constitution of Kenya 2010, articles 54, 55,97,100 and 232.

¹⁴⁴ Africa Check. 2020. *Budget Cuts Hit Kenya'S Judiciary – But There'S No 'Global Funding Target' | Africa Check.* [online] Available at: <<https://africacheck.org/reports/budget-cuts-hit-kenyas-judiciary-but-theres-no-global-funding-target/>> [Accessed 4 June 2020].

¹⁴⁵ Centre for Minority Rights Development (Kenya) and Minority Rights Group International on behalf of Endorois Welfare Council v. Kenya,276/203 African Commission on Human and People's Rights.

¹⁴⁶ allAfrica.com. 2020. Rare White Giraffes Killed in Kenya. [online] Available at: <<https://allafrica.com/view/group/main/main/id/00072326.html>> [Accessed 18 May 2020].

¹⁴⁷ Christina Voigt, *Sustainable Development as a Principle of International Law* (Brill 2009)

<<http://gen.lib.rus.ec/book/index.php?md5=fb8827a2454876e3d82b4ddb348d6f6>> accessed 18 May 2020.

Kenya has embraced this principle through the enactment of laws that help in curbing environmental degradation. The banning of plastic papers,¹⁴⁸ the increased crackdown on environmental polluters¹⁴⁹, and reclaiming forests such as the Mau forest through massive evictions are examples of ways through which Kenya is striving to achieve this principle.¹⁵⁰

Conversely, with good legal progress in achieving its responsibility, the country is still struggling to achieve sustainability. Kenya has not been able to balance economic development and environmental protection. Despite the good laws, policies, and regulations, Kenya still embraces the Kuznets theory in development.¹⁵¹ An example is the construction of a railway line through a national park and entering into a hydro-electric power-sharing agreement with Ethiopia which is constructing dams that will have massive environmental and social effects of Lake Turkana.¹⁵² This dam is likely to cause effects such as the one experienced in Uzbekistan and Kazakhstan where the world's fourth-largest inland water body was turned into dry barren land. The Aral Sea turned into Aralkum Desert due to unsustainable upstream activities on the rivers that fed the sea.¹⁵³ Another example is the

¹⁴⁸ Irungu, S., 2020. National Environment Management Authority (NEMA) - Factories Closed, Owners Arrested For Polluting Environment. [online] Nema.go.ke. Available at:

<http://www.nema.go.ke/index.php?option=com_content&view=article&id=298:factories-closed-owners-arrested-for-polluting-environment&catid=10:news-and-events&Itemid=454> [Accessed 18 May 2020].

¹⁴⁹ Irungu, S., 2020. National Environment Management Authority (NEMA) - Plastic Revolution. [online] Nema.go.ke. Available at:

<http://www.nema.go.ke/index.php?option=com_content&view=article&id=275&Itemid=426> [Accessed 18 May 2020].

¹⁵⁰ Environment.go.ke. 2020. Ministry of Environment And Forestry » Blog Archive » Second Phase Of Mau Evictions To Kick Off Soon. [online] Available at: <<http://www.environment.go.ke/?p=6844>> [Accessed 18 May 2020].

¹⁵¹ Peter P Rogers, Kazi F Jalal and John A Boyd, *An Introduction to Sustainable Development* (Earthscan Publications Ltd 2007).

¹⁵² Friends of Lake Turkana Trust v Attorney General & 2 Others, ELC suit No 825 of 2012; [2014] eKLR.

¹⁵³ Atlas Obscura. 2020. Why It's So Hard to Study The Toxic Dust Blowing From Earth's Youngest Desert. [online] Available at:

<https://www.atlasobscura.com/articles/aralkum-worlds-newest-desert?utm_medium=atlas-page&utm_source=facebook.com> [Accessed 18 May 2020].

Belo Monte hydroelectric dam effects on the Amazon River to the local indigenous community.¹⁵⁴

Additionally, the proposed construction of a nuclear power plant. Nuclear plants do not burn fuel and they do not emit air pollutant emissions. Nevertheless, they use uranium, a non-renewable raw material for nuclear energy production.¹⁵⁵ Abandoned uranium mines contaminated with high-level radioactive waste can continue to pose radioactive risks for as long as 250,000 years after closure.¹⁵⁶ Nuclear energy often subjects minority and low-income groups to disproportionate environmental and health risks when it comes to uranium mining, enrichment, and waste disposal.¹⁵⁷ Kenya being a developing country, with unsophisticated control measures, it might not be able to control leakage from a nuclear power plant. This might lead to effects like the ones caused by the Chernobyl accident of 26th April 1986 where there was a sudden uncontrollable power surge, in the nuclear power plant destroying the reactor and fire, which caused a prolonged release of radioactive materials into the environment.¹⁵⁸

¹⁵⁴ Watts, J., 2020. Poorly Planned Amazon Dam Project 'Poses Serious Threat to Life'. [online] the Guardian. Available at:

<<https://www.theguardian.com/environment/2019/nov/08/death-of-a-river-the-ruinous-design-flaw-in-a-vast-amazon-rainforest-dam>> [Accessed 18 May 2020].

¹⁵⁵ Eia.gov. 2020. Nuclear Power and The Environment - U.S. Energy Information Administration (EIA). [online] Available at:

<<https://www.eia.gov/energyexplained/nuclear/nuclear-power-and-the-environment.php>> [Accessed 18 May 2020].

¹⁵⁶ Eia.gov. 2020. Nuclear Power and The Environment - U.S. Energy Information Administration (EIA). [online] Available at:

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¹⁵⁷ Eia.gov. 2020. Nuclear Power and The Environment - U.S. Energy Information Administration (EIA). [online] Available at:

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¹⁵⁸ World-nuclear.org. 2020. Chernobyl | Chernobyl Accident | Chernobyl Disaster - World Nuclear Association. [online] Available at: <<https://www.world-nuclear.org/information-library/safety-and-security/safety-of-plants/chernobyl-accident.aspx>> [Accessed 18 May 2020].

5. Conclusion

From the foregoing, it is crystal clear that the legal and regulatory framework regarding sustainability is indisputably developing and encouraging. There are express references for sustainable development in many laws and regulations, but they less occur as one would anticipate. However, there is a mismatch between the good laws and policies and their implementation process. Laws can create rights and duties which are apparent and self-evident; nevertheless, they cannot robotically implement themselves. Travelling in the legal ship to sustainability requires a lot of determination, respect for the rule of law, proper implementation, and enforcement of the laws and regulations, something that Kenya needs to serious embrace for it to cross the sustainability bridge.

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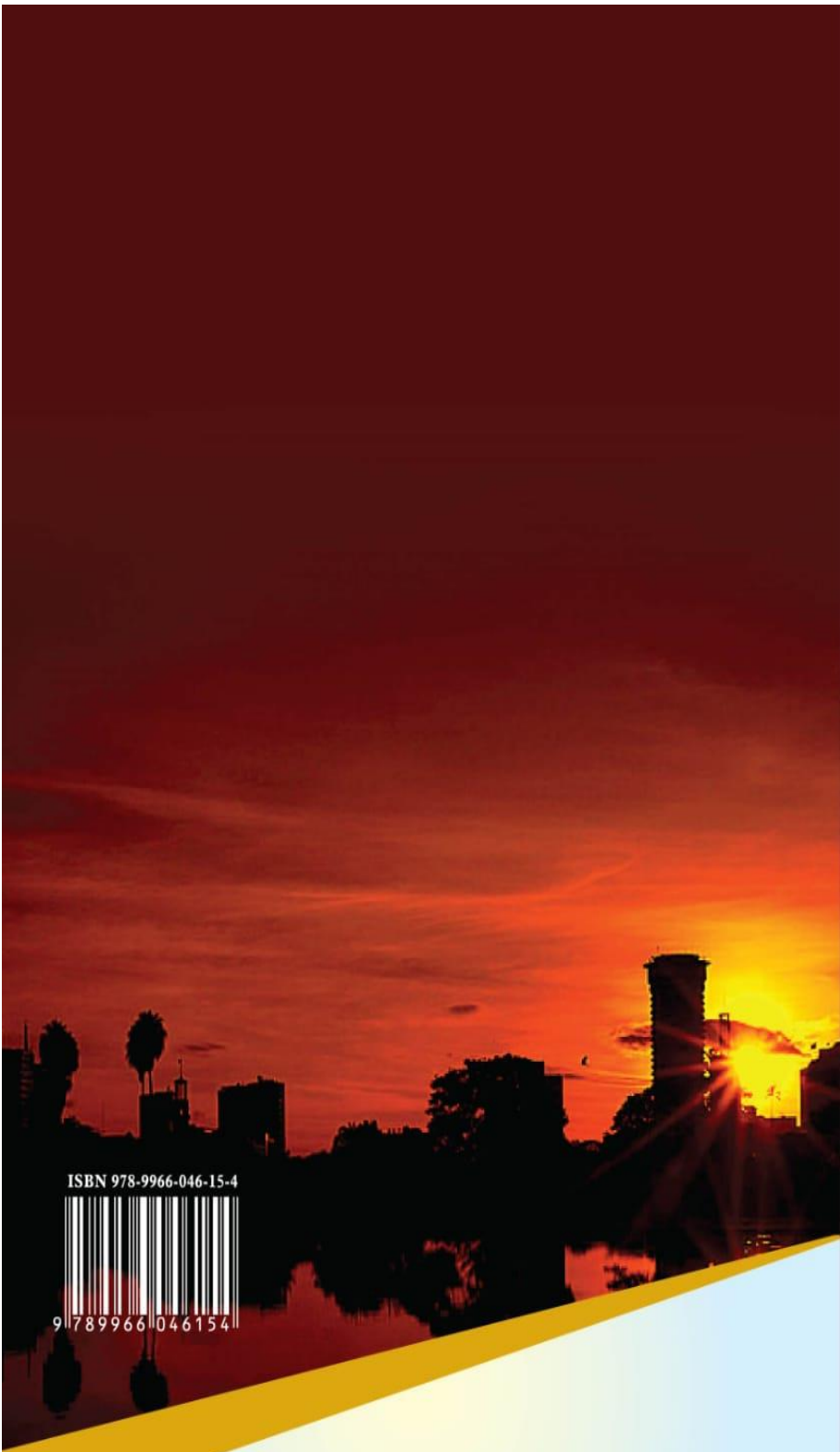
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