

# **Resolving Environmental Conflicts through Mediation in Kenya**

**Muigua D. Kariuki**

**G80/8785/05**

University of NAIROBI Library



0451801 5

**A thesis submitted in fulfillment of the  
Requirements of the Degree of Doctor of  
Philosophy, School of Law,  
University of Nairobi**

**UNIVERSITY OF NAIROBI  
LIBRARY**

**September, 2011**

## Declaration

I CERTIFY that this thesis is my original work and has not been presented for the award of a degree or any other award in any other university.

Signed:



Muigua D. Kariuki

Reg. No. G80/8785/05

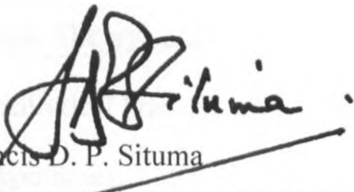
Date:

29/9/11

## Supervisors

The thesis has been submitted for examination with our approval as University supervisors.

Signed:



Prof. Francis D. P. Situma

School of Law, University of Nairobi

Date:

Sept. 29, 2011.

Signed:



Dr. Winnie Kamau

School of Law, University of Nairobi

Date:

29th. September, 2011

# Table of Contents

Dedication.....	v
Acknowledgments.....	vi
Table of Cases.....	vii
List of Statutes.....	ix
List of Conventions & Treaties, Declarations and Memoranda of Understanding... ..	xi
List of Abbreviations.....	xiii
List of Tables/Figures.....	xv

## Chapter One: Introduction to the Study

1.1	Introduction.....	1
1.2	Statement of the Research Problem.....	4
1.3	Objectives of the Study.....	6
1.4	Literature Review.....	6
1.4.1	Sources/Causes of Environmental Conflicts.....	7
1.4.2	Mediation and the Resolution of Environmental Conflicts.....	17
1.4.3	Legal Theory.....	22
1.5	Theoretical Framework.....	27
1.6	Hypotheses.....	30
1.7	Research Methodology.....	31
1.8	Chapter Outline.....	35

## Chapter Two: Negotiation and Mediation in Conflict Resolution

2.1	Introduction.....	37
2.2	Conceptual Study of Mediation.....	37

- 2.3 Negotiation.....41
- 2.4 Understanding Mediation.....42
- 2.5 Perspectives of Mediation.....46
  - 2.5.1 Mediation in the Political Process.....47
  - 2.5.2 Concepts of Mediation in the Political Process.....48
  - 2.5.3 Mediation in the Legal Process.....52
  - 2.5.4 Dispute Settlement.....53
  - 2.5.5 Conflict Resolution.....55
  - 2.5.6 Commonalities Between Political and Legal Perspectives of Mediation.....57
- 2.6 Methods of Conflict Management.....58
- 2.7 A Critique of Mediation.....60
- 2.8 Challenges and Opportunities for Mediation.....66

**Chapter Three: Institutional, Policy and Legal Mechanisms for Environmental Conflict Management in Kenya**

- 3.1 Introduction.....70
- 3.2 International Regime on Environmental Conflict Management.....72
- 3.3 Mechanisms for Managing Environmental Conflicts in Kenya.....74
- 3.4 Efficacy of Environmental Conflict Management Mechanisms in Kenya.....76
  - 3.4.1 Institutions Established under the EMCA.....76
  - 3.4.2 The Use of Litigation in Managing Environmental Conflicts.....86
  - 3.4.3 Efficacy of ADR and Informal Methods.....89
- 3.5 Conflict Management Mechanisms under Sectoral Laws and Institutions in Kenya.....94
  - 3.5.1 Wildlife Sector.....94
  - 3.5.2 Mining Sector.....96

3.5.3	Land Sector.....	97
3.5.4	Forestry Sector.....	102
3.5.5	Water Sector.....	102
3.6	Critique of the Sectoral Laws and Institutions.....	103
3.7	Community-Based Natural Resource Management.....	105

**Chapter Four: Mediating Environmental Conflicts in Kenya**

4.1	Introduction.....	108
4.2	Mediation in the Context of the Kenyan Legal Framework.....	108
4.3	The Law Providing for Mediation .....	112
4.4	Amendments on the Law in Kenya.....	116
4.5	Assessment of the Amendments – Critique .....	122
4.6	The Impact of the Mediation Law to the Resolution of Environmental Conflicts.....	132
4.7	Use of Mediation in Resolving Environmental Conflicts.....	133

**Chapter Five: Resolving Environmental Conflicts through Mediation in Kenya - Case Studies**

5.1	Introduction.....	143
5.2.1	Pan African Paper Mills Case.....	144
5.2.2	Peace Committees – North Eastern & North Rift Kenya.....	148
5.2.3	The Amboseli Conflict.....	153
5.3	Critical Analysis of the Case Studies.....	157
5.4	Resolving Environmental Conflicts Through Mediation in Kenya – Conclusions.....	161

**Chapter Six: Conclusions**

6.1 Introduction.....173

6.2 Reflections on the Theme.....173

6.3 Further Areas of Research.....185

Bibliography.....187

Appendix A: Questionnaire

Appendix B: List of Interviewees and Respondents

## **Dedication**

This work is dedicated to them that have been on the frontier fighting for a pristine environment for all and in the process given the environment itself a voice.

Equally, the work is dedicated to that child who, despite the torn clothes, rumbling empty stomach and biting cold, knows that tomorrow holds a promise to all those who dare to dream.

## **Acknowledgments**

My profound thanks to Nderitu, James, Ann, Denis, Francis and others whom I had the honour to work with.

This thesis would not have been written without insights and inspirations that came out of the numerous discussion sessions with my supervisors Prof. Francis D. P Situma and Dr. Winnie Kamau, both of the University of Nairobi, School of Law at Parklands. I also wish to register my gratitude for the assistance given by Prof. Makumi Mwangiru, Director IDIS, University of Nairobi in effecting amendments to the thesis after its oral examination.

I finally and most importantly wish to sincerely appreciate the unwavering support and understanding given to me by my family throughout this project.

To all of you, I extend my deepest appreciation.



## Table of Cases

<i>Anglo-Norwegian Case</i> (1951) I. C. J. Reports.....	73
<i>Australia v. France (interim protection)</i> , 1973 ICJ Reports 99; Judgment (1974) ICJ Reports 253.....	73
<i>Beef Hormones Case</i> , WT/DS48/AB/R, 16 <sup>th</sup> January 1998.....	73
Case Concerning Land Reclamation by Singapore in and Around the Straits of Johor ( <i>Malaysia v. Singapore</i> ); [2003] ITLOS 1.....	73
<i>Centre for Minority Rights Development (Kenya) and Minority Rights Group International on behalf of Endorois Welfare Council v Kenya – ACHPR Communication No. 276 of 2003</i> .....	87
<i>Corfu Channel Case (United Kingdom v. Albania)</i> (1949) ICJ Reports 4.....	73
<i>Daniel Mwangi Nganga v Athi Water Services Board &amp; Anor.</i> , Appeal No. 2 (WS) of 2008 (unreported).....	103
<i>EpcO Builders Limited-v-Adam S. Marjan-Arbitrator &amp; Another</i> Civil Appeal No. 248 of 2005.....	109
<i>Federal Republic of Germany v. Iceland</i> , 1972 ICJ Reports 30.....	73
<i>Forster v Friedland</i> [1992], Court of Appeal of England and Wales, unreported.....	64
<i>Gabcikovo - Nagymaros (Hungary v. Slovakia)</i> (1997) ICJ Reports 7.....	73
<i>Gitiriku Wainaina &amp; Another V. Kenafic Industries and Another</i> [2007] eKLR.....	86
<i>Halsey v Milton Keynes NHS Trust</i> [2004] EWCA Civ 576.....	126
<i>Jamii Bora Charitable Trust &amp; another v Director General National Environment Management Authority &amp; another</i> [2006] eKLR.....	86
<i>Kuria Greens Ltd v. Registrar of Titles &amp; another</i> [2011] eKLR.....	99
<i>Malaysia v. Singapore</i> [2003] ITLOS 1.....	73
<i>MOX Plant Case (Ireland v. United Kingdom)</i> (Provisional Measures), 41 ILM 405 (2002).....	73
<i>New Zealand v. France (interim protection)</i> 1973 ICJ Reports 135; judgment (1974)ICJ Reports 457.....	73
<i>Olkejuado County Council-v-Commissioner of Lands &amp; Kenya Wildlife Service</i> Nairobi High Court Miscellaneous Civil Application 962 of 1997 (Unreported).....	156
<i>Park View Shopping Arcade v Kangethe &amp; 2 others</i> KLR (E&L) 1, 592 .....	88
<i>Pentecostal Assemblies of God (Bahati P.A.G Church) &amp; 2 others v. Peter Gathungu &amp; 9 others</i> [2011] eKLR.....	98
<i>Peter K. Waweru V. R.</i> , [2006] eKLR.....	88
<i>R v. Kisumu District Lands Officer &amp; another</i> [2010] eKLR.....	99
<i>R v. Minister of Co-operative Development and Marketing &amp; 3 Others Ex parte 3GS Coffee Growers Co-operative Society Limited &amp; 2 Others</i> , H. C. Misc Application No. 1700 of 2004 & 5 of 2005.....	96
<i>R-v-The Minister for Tourism and Wildlife &amp; Kenya Wildlife Service Olkejuado County Council exparte Kenya Tourism Federation, Eastern Africa Environmental Network and Nature Kenya</i> , Nairobi High Court Miscellaneous Application No. 1564 of 2005, (Unreported).....	157
<i>R v. National Environment Management Authority Ex-parte Sound Equipment Limited</i> [2010] eKLR.....	83
<i>R v. National Environment Tribunal &amp; 2 others</i> [2010] eKLR.....	84
<i>R v. Samuel Murimi Karanja &amp; 2 others</i> , SPMCC No.1139 of 2003 (Kiambu).....	102
<i>Rebo Karari-v-Chairman, Gatundu North Land Disputes Tribunal</i> , H.C Misc.	

Civil Application No. 270/2005 (2006) eKLR.....	100
<i>Rodgers Muema Nzioka &amp; Others v. Tiomin Kenya Ltd, Mombasa High Court</i> Civil Suit No.97 of 2001.....	77
<i>Shrimp Turtle case</i> , 12 <sup>th</sup> October 1998; 38 ILM 118 (1999).....	73
<i>Southern Bluefin Tuna Cases (New Zealand v. Japan; Australia v. Japan)</i> , Provisional Measures, 38 ILM 1624(1999).....	73
<i>Unilever Plc v The Procter &amp; Gamble</i> [1999] 2 All ER 691.....	64
<i>United Kingdom v. Iceland</i> , 1972 ICJ Rep. 12.....	73
<i>William Yatich Sitetalia &amp; 72001 Others V Baringo Country Council &amp; 2</i> <i>Others</i> [2002] eKLR.....	87
<i>Youth For Conservation &amp; Others-v-Minister for Tourism and Wildlife, Kenya</i> <i>Wildlife Service and Olkejuado County Council</i> (Unreported), High Court Miscellaneous Civil Application No. 1478/2005.....	156

## **List of Statutes**

The Constitution of Kenya, 2010

The Constitution of Kenya (Revised Edition, 2001)

Agriculture Act Cap 318, Laws of Kenya (Revised Edition, 1986)

Arbitration Act 1995

Civil Procedure Act, Cap 21, Laws of Kenya (Revised Edition, 2007)

Crown Lands Ordinance (1902).

Crown Lands Ordinance (1915).

Environmental Management and Co-ordination Act, No. 8 of 1999.

Forests Act No. 7 of 2005.

Government Lands Act, Cap 280 Laws of Kenya. (Revised Edition, 1984)

Land Acquisition Act, Cap 295 Laws of Kenya. (Revised Edition, 1983)

Land Adjudication Act, Cap 284 Laws of Kenya. (Revised Edition, 1977)

Land Control Act, Cap 302 Laws of Kenya (Revised Edition, 1989)

Land Disputes Tribunal Act 1990.

Local Government Act Cap 265 Laws of Kenya (Revised Edition, 1998)

Land Titles Act, Cap 282 Laws of Kenya (Revised Edition, 1982)

Plant Protection Act, Cap 324 Laws of Kenya (Revised Edition, 1979)

Public Health Act, Cap 242 Laws of Kenya (Revised Edition, 1986)

Registration of Titles Act, Cap 281 Laws of Kenya (Revised Edition, 1982)

Registered Land Act, Cap 300 Laws of Kenya (Revised Edition, 1989)

Suppression of Noxious Weeds Acts, Cap 325 Laws of Kenya (Revised Edition, 1983)

Survey Act, Cap 299, Laws of Kenya (Revised Edition, 1989)

Statute Law (Miscellaneous Amendments) Bill No. 6 of 2009.

Trust Land Act, Cap 288, Laws of Kenya (Revised Edition, 1970)

Water Act No. 8 of 2002.

Wildlife (Conservation & Management) Act, Cap 376 Laws of Kenya (1985)

Wildlife (Conservation and Management) Amendment Act 1989.

## List of Conventions /Treaties

- African Convention on the Conservation of Nature and Natural Resources, 2003, 1001 UNTS 4.
- Agenda 21, UNCED Report, A/CONF.151/26/Rev.1 (Vol. 1) (1993).
- Agreement Establishing the Inter-Governmental Authority on Development (IGAD), March 21, 1996, *IGAD/SUM-96/AGRE*.
- Agreement Establishing the World Trade Organisation, Marrakesh, (1994), 33 ILM 1125.
- Agreement on the Network of Aquaculture Centres in Asia and the Pacific, 1988. Charter of the United Nations, 59 Stat. 1031.
- Constitutive Act of the African Union as Adopted by the Assembly of Heads of State and Government at Lome, Togo on the 11<sup>th</sup> day of July 2000.
- Convention on Access to Information, Public Participation in Decision - making and Access to Justice in Environmental Matters, Aarhus, 38 ILM 517 (1998).
- Convention on Biological Diversity, Rio de Janeiro, 31 ILM 822 (1992).
- Convention on Environmental Impact Assessment in a Transboundary Context, Espoo, 30 ILM 802 (1991).
- Convention on Fishing and Conservation of the Living Resources of the High Seas, Geneva, 559 UNTS 285 (1958).
- Convention on International Trade in Endangered Species of Wild Fauna and Flora, Washington, 993 UNTS 243 (1973 CITES).
- Convention on the Law of the Non-Navigational Uses of International Watercourses, New York, 36 ILM 700 (1997).
- Convention on the Law of Treaties, Vienna, 8 ILM 689 (1969).
- Convention on Long-Range Transboundary Air Pollution, Geneva, 18 ILM 1442 (1979).
- Convention on the Prevention of Marine Pollution by Dumping of Wastes and Other Matter, London, 1046 UNTS 120 (1972).
- Convention on the Prevention of Marine Pollution from Land-Based Sources, Paris, 13 ILM 352 (1974).
- Convention for the Protection and Development of the Marine Environment of the Wider Caribbean Region, Cartagena de Indias, 22 ILM 221 (1983).
- Convention for the Protection of the Mediterranean Sea Against Pollution, Barcelona, 15 ILM 290 (1976).
- Convention for the Protection of Natural Resources and Environment of the South Pacific Region, Noumea, 26 ILM 38 (1987).
- Convention for Protection of the Ozone Layer, Vienna, 26 ILM 1529 (1985).
- FAO Agreement for the Establishment of a General Fisheries Council for the Mediterranean, Rome, 126 UNTS 237 (1949).
- FAO International Plant Protection Convention, Rome, 150 UNTS 67 (1951).
- General Agreement on Tariffs and Trade (GATT), 55 UNTS 194 (1947).
- International Convention on Civil Liability for Oil Pollution Damage, Brussels, 973 UNTS 3 (1969).
- International Convention for the High Seas Fisheries of the North Pacific Ocean, Tokyo, 205 UNTS 65 (1952).
- Nordic Convention on the Protection of the Environment, Stockholm, 13 ILM 511 (1974).
- Permanent Court of Arbitration, Optional Rules for Conciliation of Disputes Relating to Natural Resources and the Environment 16<sup>th</sup> April 2002.

Protocol Relating to the Convention for the Prevention of Pollution from Ships, London, 17 ILM 246 (1978).  
Statute of the International Court of Environmental Arbitration and Conciliation.  
Statute of the International Court of Justice, 1 UNTS xvi (1946).  
The 1907 Convention on the Pacific Settlement of International Dispute (The Hague) 18 October 1907.  
Trade Related aspects of Intellectual Property Rights (TRIPS), 33 ILM 81(1994).  
United Nations Conference on Diplomatic Intercourse and Immunities; Optional Protocol Concerning the Compulsory Settlement of Disputes, Vienna, 1063 UNTS 265 (1963).  
United Nations Conference on Environment and Development, Rio de Janeiro (1992), UN Doc. A/CONF.151/26/Rev.1 (Vols. I – III).  
United Nations Convention on the Law of the Sea, Montego Bay, 21 ILM 1261 (1982).  
United Nations Framework Convention on Climate Change, New York, 31 ILM 849 (1992).  
UNEP Principles on Conservation and Harmonious Utilization of Natural Resources shared by Two or More States, 17 ILM 1094 (1978).

### **List of Declarations**

Declaration on Fact-finding by the United Nations in the Field of the Maintenance of International Peace and Security, A/RES/ 46/59.  
Declaration on the Prevention and Removal of Disputes and Situations Which May Threaten International Peace and Security and on the Role of the United Nations in This Field, A/RES43/51, 1988.  
Declaration on Principles of International Law concerning Friendly Relations and Cooperation among States in accordance with the Charter of the United Nations, A/ RES/2625(XXV), 1970.  
Declaration of the United Nations Conference on the Human Environment, Stockholm, UN Doc. A/CONF/48/14/REV.1 (1972).  
Manila Declaration on the Peaceful Settlement of International Disputes, UNGA RES 2627(XXV); 2734(XXV).  
Universal Declaration of Human Rights, A/RES/217 A (III)

### **Memorandum of Understanding**

Memorandum of Understanding for Co-operation in Environmental Management between the Republic of Kenya, the United Republic of Tanzania and the Republic of Uganda (1998).

## **List of Abbreviations**

ADR	Alternative Dispute Resolution
ASAL	Arid and Semi Arid Lands
BATNA	Best Alternative to a Negotiated Settlement
CAO	Complaints Advisor Ombudsman
CEDEP	Centre for Environmental and Development Education Programs
CIArb	Chartered Institute of Arbitrators
EARP	Environmental Assessment and Review Process
ECJ	European Court of Justice
EIA	Environmental Impact Assessment
EMCA	Environmental Management and Coordination Act
EU	European Union.
FIDA	Federation of Women Lawyers
GLA	Government Lands Act
ICJ	International Court of Justice
IFC	International Finance Corporation
ITDG-EA	Intermediate Technology Development Group-East Africa
IEE	Initial Environmental Evaluation
ITLOS	International Tribunal for the Law of the Sea
IUCN	International Union for the Conservation of Nature
KANU	Kenya African National Union
KLR	Kenya Law Reports
KRCS	Kenya Red Cross Society
KWS	Kenya Wildlife Service
LN	Legal Notice

## **List of Abbreviations**

ADR	Alternative Dispute Resolution
ASAL	Arid and Semi Arid Lands
BATNA	Best Alternative to a Negotiated Settlement
CAO	Complaints Advisor Ombudsman
CEDEP	Centre for Environmental and Development Education Programs
CIArb	Chartered Institute of Arbitrators
EARP	Environmental Assessment and Review Process
ECJ	European Court of Justice
EIA	Environmental Impact Assessment
EMCA	Environmental Management and Coordination Act
EU	European Union.
FIDA	Federation of Women Lawyers
GLA	Government Lands Act
ICJ	International Court of Justice
IFC	International Finance Corporation
ITDG-EA	Intermediate Technology Development Group-East Africa
IEE	Initial Environmental Evaluation
ITLOS	International Tribunal for the Law of the Sea
IUCN	International Union for the Conservation of Nature
KANU	Kenya African National Union
KLR	Kenya Law Reports
KRCS	Kenya Red Cross Society
KWS	Kenya Wildlife Service
LN	Legal Notice



LR	Land Register
Med-Arb	Mediation – Arbitration
MIGA	Multilateral Investment Guarantee Agency
NCKK	National Council of Churches of Kenya
NEAP	National Environmental Action Plan
NEC	National Environment Council
NEMA	National Environment Management Authority
NEPAD	New Partnership for Africa’s Development
NET	National Environment Tribunal
NGOs	Non Governmental Organisations
NLFP	National Land Policy Formulation Process
NLP	National Land Policy
NSC	National Steering Committee
PB& CM	Peace Building and Conflict Management
PCC	Public Complaints Committee
PMM	Pan African Paper Mills
POKATUSA	Pokot, Karamojong, Turkana and Sabinu
RECONCILE	Resource Conflict Institute
RLA	Registered Land Act
RTA	Registration of Titles Act
UN	United Nations
UNCLOS	United Nations Convention on the Law of the Sea
UNEP	United Nations Environment Programme
UNESCO	United Nations Educational Scientific and Cultural Organisation
UNCITRAL	United Nations Commission on International Trade Law

## Table of Figures

1. Figure 1.0 Processes of Mediation.....	57
2. Figure 1.1 Methods of Conflict Management.....	60
3. Figure 2.0 Mediation in the Court Process.....	121

# Chapter One

## Introduction to the Study

### 1.1 Introduction

This study examines the resolution of environmental conflicts through mediation in Kenya. Kenya has experienced many environmental conflicts over the use, access to and management of natural resources such as land, water and forests. The mechanisms that so far have been used to resolve these conflicts have only ended up postponing the dealing with causes of the conflicts and led to animosity between parties to the conflicts.

Environmental conflicts and struggles relating resource use have defined the better part of the history of Kenyan communities. These conflicts have been caused by a number of variables including, scarcity of grazing lands, socio-cultural factors, economic and political marginalization of rangelands which leaves out the people living in the rangelands out of the natural resource sharing agenda. They have also been brought about by unresponsive policies and bad governance of the environment and the diminishing role of traditional conflict resolution mechanisms. Environmental vagaries such as drought, narrow livelihood base and the emerging acts of illegal environmental resource utilisation like log felling have also contributed to the conflicts.<sup>1</sup> Generally therefore, environmental conflicts occur over issues of access and management of natural resources which are used by people in their daily lives.

Although environmental conflicts have been a historical reality, recent developments on their scale, consequences and the actors involved have created a

---

<sup>1</sup> Mohamud Adan and Ruto Pkalya, "The Concept Peace Committee; A Snapshot Analysis of the Concept Peace Committee in Relation to Peace building Initiatives in Kenya", *Practical Action*, (July 2006), p. 2.

situation that threatens the very lives and livelihood of those involved and their neighbours to such an extent that even the state with its power of coercion has not been able to manage the conflicts.

Conflict management mechanisms range from litigation and arbitration before the courts and tribunals (legal methods) to negotiation, enquiry, mediation, conciliation, resort to regional agencies or arrangements or other peaceful means.<sup>2</sup> Recurrent environmental conflicts in Kenya can be attributed to the absence of an effective institutional and legal framework for their resolution. The adversarial system used in the courts and tribunals has not yielded the best results when applied to environmental conflicts.

There is a need to adopt an approach that involves decision making in environmental matters by the people who depend on those environmental resources so as to reach decisions that are acceptable to them without harming the environment. It is therefore arguable that public participation, through Alternative Dispute Resolution mechanisms such as mediation, would ensure resolution of environmental conflicts and a “win-win” situation for the environment and the parties.

Alternative dispute resolution mechanisms such as mediation, negotiation and conciliation allow maximum party autonomy, are flexible, informal and leave room for parties to find their own lasting solutions to their problems.<sup>3</sup> Mediation encourages public participation in decision making as far as the management of environmental resources is concerned. It has distinct advantages over other forms of dispute resolution and encourages “win-win” situations. Parties find their own solutions for

---

<sup>2</sup> Article 33 of the Charter of the United Nations, sourced from <http://treaties.un.org/doc/Publication>, accessed on 21/09/2011.

<sup>3</sup> P. Fenn, *Introduction to Civil and Commercial Mediation*, (Chartered Institute of Arbitrators, London, 2002), p.10.

the conflict and pursue interests rather than strict legal rights. Mediation is informal, flexible and aims at having all parties on board.<sup>4</sup>

Mediation has been a tool for environmental management by communities over a long period of time and it is not new in Kenya. Alternative dispute resolution, and particularly mediation, is a restatement of customary jurisprudence in that under customary law, conflict resolution was people driven and a consensual process involving a party, usually an elder, who acted as a mediator. Mediation and customary law focus on the interests, and needs of the parties to the conflict as opposed to positions, which is what common law and statutory measures emphasize.<sup>5</sup> A lot of resources in Kenya such as land, water, forests and minerals are located where communities live. The study thus inquires into whether mediation that involves the communities who directly depend on these resources can achieve what the formal systems may not be able to. "Community mediation" at this level would ensure that the decisions reached, regarding access to and use of environmental resources, involve as many people as possible and are acceptable to them in the long run.<sup>6</sup>

This study also examines the nexus between the existence of environmental conflicts and failure of the existing legal and institutional mechanisms to resolve or manage environmental conflicts in Kenya. The bulk of the discourse focuses on mediation as a conflict resolution method to determine whether, and how, it can be utilised to render the resolution of environmental conflicts in Kenya effective. The study further examines whether mediation, with its many positive attributes, can be a

---

<sup>4</sup> Ibid.

<sup>5</sup> Paul Obo Idornigie, "Overview of ADR in Nigeria", 73 (1) *Arbitration* 73 (2007), pp. 73-76.

<sup>6</sup> Matthew McKinney and Will Harmon, "*Governing Nature, Governing Ourselves: Engaging Citizens in Natural Resource Decisions*," available at <http://www.cnrep.org/documents/GoverningNature.pdf> (accessed on 30/10/2009).

viable alternative, or can complement the existing mechanisms to deal with environmental conflicts. In doing this however, the limitations of mediation as a method of conflict resolution are not overlooked.

The increasing scarcity of environmental resources, owing to population pressure, degradation, conflicting land use/ tenure systems and government policy, *inter alia*, has heightened environment related tensions considerably and as a result, clashes over environmental resources have occurred in the recent past in Kenya with the result that many lives have been lost.<sup>7</sup> This study criticises the very little focus given to resolution of environmental conflicts. The guiding principle therefore is generally the need for a conflict resolution mechanism that yields acceptable results conducive to sustainable development.

## 1.2 Statement of the Research Problem

The existing legal mechanisms for managing environmental conflicts in Kenya include the courts of law, both under civil and criminal law<sup>8</sup>, the National Environment Tribunal (NET)<sup>9</sup>, Public Complaints Committee (PCC)<sup>10</sup>, arbitral tribunals, statutory tribunals set up under various Kenyan laws<sup>11</sup>, and customary law.<sup>12</sup> There are, on the other hand, what is commonly referred to as alternative

---

<sup>7</sup> Daniel Schwartz & Ashbindu Singh, *Environmental Conditions, Resources and Conflicts: An Introductory Overview and Data Collection*, (UNEP, New York, 1999), p. 6.

<sup>8</sup> Environmental Management and Co-ordination Act, Act. No. 8 of 1999, *Government Printer*, Nairobi, sections 137-146.

<sup>9</sup> *Ibid.*, sections 125-136.

<sup>10</sup> *Ibid.*, section 31.

<sup>11</sup> Such as Land Adjudication Boards Established under the Land Adjudication Act, Cap. 284 Laws of Kenya (Revised Edition 1977), *Government Printer*, Nairobi.

<sup>12</sup> See Patricia Kameri-Mbote, "Towards Greater Access to Justice in Environmental Disputes in Kenya: Opportunities for Intervention", *IELRC Working Paper 2005-1*, available at <http://www.ielrc.org/content/w0501.pdf> (accessed on 01/08/2008).

dispute resolution (ADR) methods which include mediation, conciliation, negotiation and traditional/community based dispute resolution mechanisms.

Despite the existence of these various institutional and legal mechanisms for their management, environmental conflicts have persisted in Kenya. These are conflicts over access to and use of natural resources involving forests, land, water, wildlife, among others. The current legal and institutional framework is weak and has been unable to deal with these conflicts. The current mechanisms face various challenges: the courts are adversarial in nature, technicalities bog down the proceedings and they are out of reach for the ordinary person owing to the high fees charged by lawyers and by the courts for filing a suit.

Cases take too long to finalise while corruption and inefficiency exacerbate the already fragile situation. The courts aim at settling the conflicts and not necessarily resolving them. They are unable to deal with the root causes or the psychological dimensions of the conflict. Arbitration suffers from similar shortcomings. It is a formal process that is only accessible to a few. It is out of reach for the ordinary person.

This study critically examines the nature and scope of environmental conflicts in Kenya. It also examines the legal and institutional mechanisms in place for the management of environmental conflicts. It discusses the extent to which the mechanisms are suitable or adequate for resolving the kind of environmental conflicts occurring in Kenya. The study focuses on mediation and explores the question whether mediation is an effective method for resolving environmental conflicts in Kenya. Mediation has certain attributes such as low costs, flexibility, party autonomy, informality, addresses interests rather than strict legal rights, is voluntary and encourages parties to find solutions that are agreeable to all of them. In a country such

as Kenya where the majority of people are financially handicapped there is a need to explore a conflict resolution mechanism that is efficacious and affordable. The study inquires into whether mediation can offer a solution and what opportunities it offers, considering that a lot of Kenyans depend on natural resources for their livelihood.

The study critically discusses mediation as a concept and the role it could play in the resolution of environmental conflicts in Kenya. The legal and policy changes that would be required to institutionalise mediation, should it be found to be a suitable mechanism for resolution of environmental conflicts are discussed. Natural resource conflicts are unique in the sense that they involve people's livelihood. There is a need to resolve them expeditiously. The search for an effective mechanism for the resolution of environment conflicts is therefore timely and relevant.

### **1.3 Objectives of the study**

The objectives of the study are: -

1. To evaluate critically the existing legal and institutional mechanisms for resolution of environmental conflicts.
2. To examine the extent to which these mechanisms are suitable/adequate for resolving the kind of environmental conflicts occurring in Kenya.
3. To evaluate critically whether mediation is an effective method for resolving environmental conflicts in Kenya.

### **1.4 Literature Review**

The bulk of literature on environmental conflicts especially in Africa has documented the prevalence and escalation of environmental conflicts without proposing the means for their effective resolution. This has been largely motivated by the erroneous over-emphasis on the prevention of environmental conflicts at the



expense of resolving the already existing conflicts. Key studies thus after concluding that the conflicts are caused by environmental resource depletion hasten to conclude that the panacea lies in sound management of environmental and natural resource usage factors and mitigation of environmental degradation. That would be fine but for the fact that, as the studies point out, environmental conflicts are a reality and already manifest in most countries including Kenya.

Equally the lack of focus on resolution of environmental conflicts may be attributable to the notion that all is well with the mechanisms offered by the national legal regime for managing environmental conflicts. The literature is reviewed thematically covering sources/causes of environmental conflicts, their resolution using mediation and some legal theories advanced by scholars on the area under research.

#### **1.4.1 Sources/Causes of Environmental Conflicts**

An environmental conflict has been defined as a conflict caused by environmental scarcity of a resource occasioned by a human-made disturbance of a resource regeneration rate.<sup>13</sup> As noted by Homer-Dixon and Blitt, the effects of environmental scarcity such as constrained agricultural output, constrained economic production, migration, social segmentation and disrupted institutions can, either singly or in combination, produce or exacerbate conflict among groups<sup>14</sup>. For instance, the intercommunity and inter-ethnic fighting in the Nam Ngum Watershed in the Lao

---

<sup>13</sup> Stephan Libiszewski, *What is an Environmental Conflict?*, A paper presented at the first coordination meeting of the Environment and Conflicts Project (ENCOP) in Berne/Zurich, April 30-May 1, 1992.

<sup>14</sup> Homer-Dixon, Thomas and Jessica Blitt, *Ecoviolence: Links Among Environment, Population, and Security*, (Rowman & Littlefield Publishers), London 1998, pp. 2-13.

People's Democratic Republic has been associated with the diverse pressures causing greater natural resource scarcity.<sup>15</sup>

In some parts of the watershed, forced migration into areas already settled by other ethnic groups increased pressure on the forested land used in shifting cultivation systems. In other areas, the disruption of government institutions by reforms of the traditional economy led to the redrawing of administrative boundaries of some villages and the creation of a "no man's land" where tenure rights are vaguely defined. Hydropower development greatly reduced the resource base of villages affected by the flooding, leading to deforestation of areas critical to the conservation of water resources.<sup>16</sup>

Environmental resources scarcity can also result from the overuse of renewable and non-renewable resource or pollution. Thayer sees these scarcities as having conflict generating potential: scarcities of agricultural land, forests, fresh water and fish are the ones which contribute to most violence. He argues that degradation and depletion of renewable resources can generate conflicts through "resource capture" by powerful groups.<sup>17</sup>

Other scholars like Buckles and Rusnak analyse the causes of environmental conflicts and attempt to narrow them down to scarcity, interconnectedness of nature, unequal relations and different uses by people.<sup>18</sup> They argue that environmental crises, intensified by overexploitation of natural resources to feed the modernising

---

<sup>15</sup> Ibid.

<sup>16</sup> Ibid.

<sup>17</sup> "Nature of Conflict over Nature: Protected Areas, Transfrontier Conservation and the meaning of Development", Saratoga Skidmore College- The School for International Training. Available at [www.sit-edu-geneva.ch/natureDaveThaconel.htm](http://www.sit-edu-geneva.ch/natureDaveThaconel.htm) (last accessed on 20/07/2009).

<sup>18</sup> Buckles, D., and G. Rusnak, "Conflict and collaboration in natural resources management", pp. 3 – 4, in D. Buckles, (ed), *Cultivating Peace: Conflict and Collaboration in Natural Resources Management*. International Development Research Centre, Ottawa, Ontario, Canada, 1999, pp. 1-12.

world, highlight the relationship between natural resources and conflict. Conflicts, according to them, are directly connected to contests over natural resources and access to them and are tied into the forces that make such competition widespread. Natural resources are cast as causes of tension and competition that can lead to clashes when triggered by other events. Their argument that in essence the environment is at the base of all social conflicts is valid in many respects.

Other scholars have espoused the view that in today's world, human pressure on environmental resources is increasing, while many resource bases are being depleted, creating an increased potential for competition and conflict between nations or groups within societies.<sup>19</sup> They cite resources that have been sources of contention leading and/or contributing to conflict in the distant or recent past as being fresh water, productive land, fisheries, mineral deposits and fossil fuels. Poverty and marginalisation are identified as factors that interact with the other problems of degradation, and contest over environmental resources to contribute to further environmental degradation and the related resultant conflicts.<sup>20</sup>

Another school of thought has advanced theoretical mechanisms explaining the links that exist between population growth, environmental degradation, natural resource scarcity and violence within countries. In the book *States, Scarcity and Civil Strife in the Developing World*, Kahl argues that demographic and environmental stress can produce significant pressures on societies and states in the developing world. By way of various ecological, economic and social effects, population and

---

<sup>19</sup> A.Gleick, P.H.Enherlich & K. Conca, *Resources and Environmental Degradation as Sources of Conflict*, A paper presented at the 50<sup>th</sup> Pugwash conference on Science and World affairs, 3<sup>rd</sup>- 8<sup>th</sup> August 2000, held at Queens College, Cambridge, United Kingdom.

<sup>20</sup> *Ibid.*, p. 1.

environmental pressures reverberate into politics and produce two potential pathways to civil strife, state failure and state exploitation.

Further, Kahl argues that state failure conflicts occur when demographic and environmental stress substantially weakens state authority, thereby reducing the government's ability to maintain order and increasing the opportunities and incentives for anti-state and inter-group violence via the logic of security dilemma. State exploitation conflicts, in contrast, occur when threatened state elites seize on natural resource scarcities and related social grievances to instigate conflicts and advance their parochial interests.<sup>21</sup>

Kahl also discusses ethnic clashes in Kenya. He contends that demographic and environmental stress provided both the incentives and opportunities for the instigation of large-scale organised ethnic violence. Kahl concludes that land scarcity, resulting from demographic and environmental stress, was a fundamental cause of the ethnic clashes that plagued Kenya throughout the 1990s. Economic marginalization, rooted in land scarcity, generated a number of grievances that KANU elites used to pit ethnic groups against each other in a bid to stay in power and presented opportunities for the state to use promises of access to land as selective incentives to encourage attacks.<sup>22</sup>

This study is important since it recognises the significance of population growth, environmental degradation, increased demand for land and resource capture by elites as causes of ethnic clashes in Kenya. It reinforces the argument that the ethnic clashes experienced in Kenya in the 1990's had an environmental base.

---

<sup>21</sup> Colin H. Kahl, *States Scarcity and Civil Strife in the Developing World*, (Princeton University Press, Princeton, 2006) pp. 12-28

<sup>22</sup> *Ibid.*, pp. 117-209

Other scholars have advanced the following explanations for the proliferation of conflicts related to the use of environmental resources. First, it has to do with the fact that environmental resources are embedded in an environment or interconnected space where actions by one group or individual may generate far off effects. For example, the use of water for irrigation in the upper reaches of a river may pit upstream communities against downstream communities in need of the water for domestic use and consumption.<sup>23</sup>

Secondly, environmental resources are embedded in a shared social space where complex and unequal relations are established among a wide range of social actors, for example, agro export producers, small-scale farmers, ethnic minorities and government. As in other fields with political dimensions, those actors with the greatest access to power are also best able to control natural resource decisions and to swing them in their favour.<sup>24</sup>

Thirdly, environmental resources are subject to increasing scarcity due to environmental change, increasing demand and unequal distribution.<sup>25</sup> Environmental change may involve land and water degradation, overexploitation of wildlife and aquatic resources, extensive land clearing, drainage or climate change. Increasing demands have multiple social and economic dimensions, including population growth, changing consumption patterns, trade liberalisation, rural enterprise development and changes in technology and land use. Natural resource scarcity may

---

<sup>23</sup> See Daniel Buckles & Geret Rusnak *Cultivating Peace: Conflict and Collaboration in Natural Resource Management*, (IDCR/World Bank, 1999), pp. 3- 4.

<sup>24</sup> See generally R. Peet & M. Natts, *Liberation Ecologies: Environment, Development and Social Movements*, (Routledge, London, 1996).

<sup>25</sup> T. Homer-Dixon, J. Blit, *Ecoviolence: Links Among Environment, Population and Security*, (Rowman & Littlefield, Lanham, MD., 1998), p. 8.

also result from the unequal distribution of resources among individuals and social groups or ambiguities in the definition of rights to common property resources.

Lastly, environmental resources are used by people in ways that are defined symbolically. Land, forests and waterways are not just material resources people compete over, but are also part of a particular way of life (farmer, rancher, fisher, and logger), an ethnic identity and a set of gender and age roles. These symbolic dimensions of natural resources lend themselves to ideological, social and political struggles that have enormous practical significance for the management of natural resources and the process of conflict management.<sup>26</sup> Ideological, social and political practices are contested in most settings, making it difficult to bring to bear the diverse knowledge and perspectives of the resource users on environmental problems.

As a result of these diverse dimensions of environmental management, each specific environmental conflict usually has multiple causes, some proximate, others underlying or merely contributing. A pluralistic approach that recognizes the multiple perspectives of stakeholders and the simultaneous effects of adverse causes on environmental conflicts is needed to understand the initial situation and identify strategies for promoting change.

Credible theorists have also shown that even abundance may cause conflicts. Ross in his paper reviews the works of De Soysa<sup>27</sup>, Collier and Hoeffler<sup>28</sup>, Elbadawi

---

<sup>26</sup> J. Chevalier & D. Buckles, *A Land Without Gods: Process Theory, Mal-Development and The Mexican Natives*, (Zed Books, London, 1995), pp. 1-12.

<sup>27</sup> Indra de Soysa, *Natural Resources and Civil War: Shrinking Pie or Honey Pot?*, a paper presented at the International Studies Association, Los Angeles, March 2000.

<sup>28</sup> Collier, Paul, Anke Hoeffler, and Mans Söderbom (2001), *On the Duration of Civil War*, a paper presented at the Workshop on Civil Wars and Post-Conflict Transitions, University of California, Irvine, May 18-20, 2001.

and Sambanis,<sup>29</sup> Fearon<sup>30</sup> and other scholars who, in their separate discourses, have drawn analogous conclusions that natural resources and civil war are highly correlated.<sup>31</sup> They draw this conclusion from different data reviewed showing that states which rely heavily on the export of natural resources face a much higher risk of civil war than resource-poor states and also that resource dependence is correlated with the duration of civil wars.

Another group of scholars to which Jack Goldstone,<sup>32</sup> Thomas Homer-Dixon<sup>33</sup> and Auty<sup>34</sup> view the sources of conflict from a different prism, namely the deprivation, state failure, honey pot and resource curse approaches, which still gives credence to the abundance theory. Advocates of the deprivation approach argue that population growth, environmental degradation and mal-distribution of natural resources often conspire to produce absolute and relative deprivation among the poor in developing countries, thereby increasing the risk of political turmoil.

Proponents of the state failure approach, notably Goldstone and Homer-Dixon, posit that population growth and environmental pressures in developing countries often generate intense hardship among agricultural labourers and urban poor. They contend, however, that the strong and capable states (mainly developed countries) are

---

<sup>29</sup> Ibrahim Elbadawi and Nicholas Sambanis, "How Much War Will We See? Explaining the Prevalence of Civil War", *The Journal of Conflict Resolution*, Vol. 46, No. 3, June 2002, pp. 307-334.

<sup>30</sup> James D. Fearon, "Counterfactuals and Hypostudy Testing in Political Science", *World Politics*, Vol. 43, No. 2 pp. 169-195, Jan., 1991.

<sup>31</sup> Michael L. Ross, "How Do Natural Resources Influence Civil War? Evidence from Thirteen Cases", *International Organization*, Vol. 58, No. 1, pp. 35-67, Winter, 2004.

<sup>32</sup> Jack A. Goldstone, "State Breakdown in the English Revolution: A New Synstudy", *American Journal of Sociology*, Vol. 92, No. 2 (The University of Chicago Press Sep., 1986), pp. 257-322

<sup>33</sup> Cited in Daniel Schwartz & Ashbindu Singh's, *Environmental Conditions, Resources and Conflicts: An Introductory Overview and Data Collection*, op. cit., p. 10.

<sup>34</sup> Richard M. Auty, "Resource Abundance and Economic Development: Improving the Performance of Resource Rich Countries", *Research for Action* 44, (UNU World Institute for Development Economics Research, 1998).

and Sambanis,<sup>29</sup> Fearon<sup>30</sup> and other scholars who, in their separate discourses, have drawn analogous conclusions that natural resources and civil war are highly correlated.<sup>31</sup> They draw this conclusion from different data reviewed showing that states which rely heavily on the export of natural resources face a much higher risk of civil war than resource-poor states and also that resource dependence is correlated with the duration of civil wars.

Another group of scholars to which Jack Goldstone,<sup>32</sup> Thomas Homer-Dixon<sup>33</sup> and Auty<sup>34</sup> view the sources of conflict from a different prism, namely the deprivation, state failure, honey pot and resource curse approaches, which still gives credence to the abundance theory. Advocates of the deprivation approach argue that population growth, environmental degradation and mal-distribution of natural resources often conspire to produce absolute and relative deprivation among the poor in developing countries, thereby increasing the risk of political turmoil.

Proponents of the state failure approach, notably Goldstone and Homer-Dixon, posit that population growth and environmental pressures in developing countries often generate intense hardship among agricultural labourers and urban poor. They contend, however, that the strong and capable states (mainly developed countries) are

---

<sup>29</sup> Ibrahim Elbadawi and Nicholas Sambanis, "How Much War Will We See? Explaining the Prevalence of Civil War", *The Journal of Conflict Resolution*, Vol. 46, No. 3, June 2002, pp. 307-334.

<sup>30</sup> James D. Fearon, "Counterfactuals and Hypostudy Testing in Political Science", *World Politics*, Vol. 43, No. 2 pp. 169-195, Jan., 1991.

<sup>31</sup> Michael L. Ross, "How Do Natural Resources Influence Civil War? Evidence from Thirteen Cases", *International Organization*, Vol. 58, No. 1, pp. 35-67, Winter, 2004.

<sup>32</sup> Jack A. Goldstone, "State Breakdown in the English Revolution: A New Synstudy", *American Journal of Sociology*, Vol. 92, No. 2 (The University of Chicago Press Sep., 1986), pp. 257-322

<sup>33</sup> Cited in Daniel Schwartz & Ashbindu Singh's, *Environmental Conditions, Resources and Conflicts: An Introductory Overview and Data Collection*, op. cit., p. 10.

<sup>34</sup> Richard M. Auty, "Resource Abundance and Economic Development: Improving the Performance of Resource Rich Countries", *Research for Action* 44, (UNU World Institute for Development Economics Research, 1998).



typically able to prevent such deprivation from coalescing into organised violence through a mix of relief for aggrieved individuals, co-optation of opposition leaders and outright coercion. Therefore, large-scale violence is only likely to occur when social grievances resulting from rapid population growth, environmental degradation and natural resource scarcity combine with eroding state authority.<sup>35</sup>

The 'honey pot approach' together with the 'resource curse approach' are arguments that directly address the relationship between natural resources and civil strife. The former centres its claims on the so-called 'honey pot' effects. According to the honey pot approach, abundant supply of valuable natural resources creates incentive for conflict groups to form and fight to capture them.<sup>36</sup> This may spawn attempts by regional warlords and rebel organisations to cleave off resource rich territories or violently hijack the state machinery. Once seized, control over valuable natural resources fuels conflict escalation by allowing the parties the luxury and wherewithal to purchase weaponry and mobilise potential recruits. In short, profit seeking motivates and empowers insurgents in resource rich countries. Echoing these sentiments, De Soysa contends that greed, rather than grievance (at least in terms of the availability of natural resources), is more likely to generate armed conflict.<sup>37</sup>

Some economists argue that natural resource abundance increases risks of civil strife by producing weak states through a set of developmental pathologies known collectively as the 'resource curse'. Proponents of the resource curse approach provide both economic and political foundations for this claim.<sup>38</sup> Resource abundance

---

<sup>35</sup> Colin H. Kahl, *States Scarcity and Civil Strife in the Developing World*, op. Cit., pp. 12-28.

<sup>36</sup> Indra de Soysa, *Natural Resources and Civil War: Shrinking Pie or Honey Pot?*, op. cit.

<sup>37</sup> Ibid.

<sup>38</sup> See Richard M. Auty, "Resource Abundance and Economic Development: Improving the Performance of Resource Rich Countries", op. cit.

typically able to prevent such deprivation from coalescing into organised violence through a mix of relief for aggrieved individuals, co-optation of opposition leaders and outright coercion. Therefore, large-scale violence is only likely to occur when social grievances resulting from rapid population growth, environmental degradation and natural resource scarcity combine with eroding state authority.<sup>35</sup>

The 'honey pot approach' together with the 'resource curse approach' are arguments that directly address the relationship between natural resources and civil strife. The former centres its claims on the so-called 'honey pot' effects. According to the honey pot approach, abundant supply of valuable natural resources creates incentive for conflict groups to form and fight to capture them.<sup>36</sup> This may spawn attempts by regional warlords and rebel organisations to cleave off resource rich territories or violently hijack the state machinery. Once seized, control over valuable natural resources fuels conflict escalation by allowing the parties the luxury and wherewithal to purchase weaponry and mobilise potential recruits. In short, profit seeking motivates and empowers insurgents in resource rich countries. Echoing these sentiments, De Soysa contends that greed, rather than grievance (at least in terms of the availability of natural resources), is more likely to generate armed conflict.<sup>37</sup>

Some economists argue that natural resource abundance increases risks of civil strife by producing weak states through a set of developmental pathologies known collectively as the 'resource curse'. Proponents of the resource curse approach provide both economic and political foundations for this claim.<sup>38</sup> Resource abundance

---

<sup>35</sup> Colin H. Kahl, *States Scarcity and Civil Strife in the Developing World*, op. Cit., pp. 12-28.

<sup>36</sup> Indra de Soysa, *Natural Resources and Civil War: Shrinking Pie or Honey Pot?*, op. cit.

<sup>37</sup> Ibid.

<sup>38</sup> See Richard M. Auty, "Resource Abundance and Economic Development: Improving the Performance of Resource Rich Countries", op. cit.

is argued to contribute to economic stagnation over the long run through a number of crowd-out effects sometimes referred to as “Dutch Disease”.<sup>39</sup> This in turn leads to environmental conflicts. As the economists Jeffrey Sachs and Andrew Warner note “the core of the Dutch Disease story is that resource abundance in general or resource booms in particular shift resources away from sectors of the economy that have positive externalities for growth.”<sup>40</sup>

When capital and labour focus on booming natural resource sectors, they are drawn away from other sectors of the economy increasing their production costs. These economic distortions slow the maturity of non-resource tradable sectors, harm their competitiveness and thereby inhibit the kinds of economic diversification, especially the early period of labour intensive manufacturing that many neoclassical economists suggest is vital for long-term growth.<sup>41</sup>

An over-reliance on exports of minimally processed natural resources is also argued to make countries vulnerable to declining terms of trade and the highly volatile nature of commodities markets.<sup>42</sup> In the absence of a diverse array of exports, especially manufactured goods that tend to have more stable prices, resource rich countries are prone to dramatic economic shocks when prices for primary commodities inevitably crash.<sup>43</sup>

---

<sup>39</sup> Colin H. Kahl, *States Scarcity and Civil Strife in the Developing World*, op. cit., p. 13.

<sup>40</sup> Ibid, p. 15; see also Jeffrey D. Sachs & Andrew M. Warner, “The Big Push, Natural Resource Booms and Growth” 59 *Journal of Development and Economics* 43 (1999), p. 48.

<sup>41</sup> Richard M. Auty “The Political Economy of Resource-Driven Growth”, 45 *European Economic Review* p.839-846 (2001); Terry L. Karl *The Paradox of Plenty: Oil Booms and Petrol States* (University of California Press, Berkeley, California, 1997), pp. 52-53.

<sup>42</sup> Colin H. Kahl, *States Scarcity and Civil Strife in the Developing World*, op. cit., p. 15.

<sup>43</sup> Michael Boss, “The Political Economy of the Resource Curse World Politics”, 51(2) *World Politics*, (1999) pp. 297-322.

In addition to the economic distortions created by local resource abundance, there is also a political dimension to the resource curse. The most common political argument focuses on problems associated with 'rentier states'. States that accrue a significant amount of revenue from natural resource exports that they directly control are prone to develop corrupt authoritarian or quasi-democratic governing institutions. The reason is because such a state enjoys enormous rents from natural resources and has, as a result, far fewer incentives to bargain away greater economic and political accountability in exchange for broader rights of taxation.<sup>44</sup>

In any case, the natural resources wealth can be used by a government to stay in power through patronage networks and outright coercion. The institutional makeup of rentier states therefore reduces the prospects for broad-based, economic and political reform, weakening the state over the long-term and generating substantial societal grievances. These conditions are likely to yield violent conflicts.<sup>45</sup>

Conflicts need to be resolved or, at any rate, managed. Scholars clearly distinguish between conflicts and disputes. Conflicts are seen as the contests between two or more parties who perceive incompatible goals, scarce resources and interference from others in achieving their goals.<sup>46</sup> A conflict exists when parties wish to carry out acts which are mutually inconsistent. Disputes have been described as merely superficial elements of the conflicts which can be negotiated or arbitrated.<sup>47</sup>

---

<sup>44</sup> Ibid.

<sup>45</sup> Colin H. Kahl, *States Scarcity and Civil Strife in the Developing World*, op. cit.; See also William Reno, *Warlord Politics and African States*, (Lynne Rienner Boulder, Colorado, 1998); Fred Peace "Blood, Diamonds and Oil," *New Scientist* 29<sup>th</sup> June 2002, pp. 36-41.

<sup>46</sup> See Joyce Hock & William Wilmont, *Interpersonal Conflict*, 2<sup>nd</sup> ed. (C. Brown Publishers, Dubuque Iowa, 1985).

<sup>47</sup> Makumi Mwangi, *Conflict in Africa: Theory, Processes and Institutions of Management*, (Centre for Conflict Research, Nairobi, 2006), p. 42.

It is clear from the literature reviewed above that the sources and causes of environmental conflict are varied and are not dependent on any one factor at all times. Different environmental conflicts occurring in Kenya can be a result of either one or a combination of any of the several causes discussed above. The study will discern the nature of environmental conflicts occurring in Kenya and their causes.

#### 1.4.2 Mediation and the Resolution of Environmental Conflicts

Research by scholars has shown that the use of mediation in the resolution of environmental conflict has been on the rise since mid 1970s and is likely to rise as an alternative to litigation in the coming years. Neghin Modavi's analysis adopts a political economy approach informed by the structural class-centric state perspective in order to illustrate the economic roots of political facilitation of environmental mediation<sup>48</sup>. He argues that environmental mediation has emerged as an important political tool to demobilize and depoliticize environmental conflicts on behalf of state and industry interests. He thus moots environmental mediation as the ideal mechanism for use by the state to cope with its dual and contradictory role that involves both the minimization of environmental destruction for industrial purposes and the promotion of capital accumulation and expansion.<sup>49</sup>

The Malaysian Nature Society commissioned a report in the 2004. The report, *The Mediation of Environmental Conflicts Involving the Indigenous Peoples of Malaysia*,<sup>50</sup> made arguments for the utilisation of mediation within environmental

---

<sup>48</sup> Neghin Modavi, "Mediation of Environmental Conflicts in Hawaii: Win-Win or Co-Optation?", 39(2) *Sociological Perspectives*, (1996), pp. 301-316.

<sup>49</sup> *Ibid.*, p. 313.

<sup>50</sup> Mark Fowler, *The Mediation of Environmental Conflicts Involving the Indigenous Peoples of Malaysia*, (2004), available at the University of New England Website < [www.ecoman.une.edu.au.html](http://www.ecoman.une.edu.au.html) > (accessed on 16/5/09).

disputes in Malaysia. The study was necessitated by the high levels of resource-based conflicts occurring between indigenous peoples and groups extraneous to their society. Kenya which experiences such conflicts could learn from the research and encourage mediation in environmental conflict resolution.

In order to better make the case for environmental mediation and to understand what contributes to environmental mediation success, a group of federal and state agencies in the United States of America led by the U.S. Institute for Environmental Conflict Resolution (ECR) developed an evaluation mechanisms and data collection instruments to assess its performance.<sup>51</sup> The mechanisms represented a shared articulation of environmental mediation practice and its intended outcomes and impacts. After evaluation of the results, the agencies found that there was a positive performance based account of what can be accomplished through environmental mediation. In particular, the study concluded that environmental mediation is an effective tool for solving environmental problems and resolving environmental issues.

Secondly, the study concluded that environmental mediation processes significantly improve relationships and build trust among stakeholders. The analysis also established that participants in the studies analyzed believed that more progress and better outcomes are achieved through environmental mediation than alternative processes such as litigation.<sup>52</sup> These findings reinforce one of the hypotheses of this study - that mediation is the more suitable method for environmental conflict resolution.

---

<sup>51</sup> U.S. Institute for Environmental Conflict Resolution (ECR), *Environmental Conflict Resolution: Performance Evidence from the Field*, (2009), available at: <http://sro.srs.gov/EATC%202009/ecrperformanceevidencefromthefield.pdf> (accessed on 26/12/2009).

<sup>52</sup> Ibid.

*Mediating Environmental Conflicts* discusses both the theory and practice of environmental mediation.<sup>53</sup> The collected essays explore the nature of environmental conflict, and examine various approaches to its mediation. First, the point is made that the new environmental agenda calls for new approaches to environmental conflict and that the approaches should aim at creating sustainable communities. Environmental mediation is identified as one such promising approach. The book also includes a critical overview of research on environmental mediation. Special emphasis is given to the problems of knowledge development in environmental mediation. Environmental mediation is also explored from the perspective of law and economics. It is argued that these perspectives provide a better insight into the environmental mediation process.

In addition, the book focuses on community-based mediation and, in particular, discusses at length the special issues which arise in environmental mediation in small communities. The theme of citizen participation in environmental mediation is also dealt with. It is argued that alternative dispute resolution (ADR) and especially mediation is a useful way of promoting citizen input in environmental matters.<sup>54</sup> As such, the book provides an introduction to contemporary issues and approaches in environmental mediation and is an important background to the analysis in this study. Similar sentiments are also captured in the book *Mediating Environmental Conflicts: Theory and Practice*.<sup>55</sup>

In other arenas related to mediation, the work of Dabelko & Conca in the area of environmental peacekeeping is also an important eye opener. Their argument is

---

<sup>53</sup> J. Walton Blackburn and Willa Marie Bruce, (eds.), *Mediating Environmental Conflicts*, (Quorum Books, Westport, Connecticut, 1995), pp. 1 – 9.

<sup>54</sup> Ibid.

<sup>55</sup> R.O. Leary & Blackburn J., *Mediating Environmental Conflicts: Theory and Practice*, (Quorum Books, Westport CT, 1995), pp. 1-23.

that scholars must push forward with the growing effort to invest in the environmental security approach and search for environmental pathways to confidence-building and peacemaking.<sup>56</sup> This is a pragmatic approach that focuses on solutions rather than bare academic discourse. The scholars emphasise cooperation and peacekeeping after resolving environmental conflicts. The proposed use of mediation as a legal means of resolving environmental conflicts also emphasises sustenance of the agreements reached at the mediation table. The solutions reached by the parties should be self-sustaining and long-lasting.

Beierle and Cayford bring together, for the first time, the collected experience of 30 years of public involvement in environmental decision-making.<sup>57</sup> Using data from 239 cases, the authors evaluate the success of public participation and the contextual and procedural factors that lead to it. In essence, the book is a systematic examination of whether public involvement in environmental decision-making has to date made any contribution towards better environmental management.

The authors demonstrate that public participation has not only improved environmental policy, but has also played an important educational role and helped to resolve the conflict and mistrust that often plague environmental issues. They argue that intensive "problem-solving" entailed in public involvement processes is most effective for achieving a broad set of social goals, and that participant motivation and agency responsiveness are key factors for success.<sup>58</sup>

---

<sup>56</sup> See generally Conca Ken & Geoffrey D. Dalbey (eds), *Environmental Peacekeeping*, (The Woodrow Wilson Centre Press, Washington, 2002), pp. 1-5.

<sup>57</sup> Thomas C. Beierle and Jerry Cayford, *Democracy in Practice: Public Participation in Environmental Decisions*, (Resources for the Future, Washington, DC, 2002).

<sup>58</sup> *Ibid.*, pp. 1 – 12.



O'Leary and Bingham's *Promise and Performance of Environmental Conflict Resolution* is the first book to systematically evaluate the use of Environmental Conflict Resolution (ECR) in the United States of America.<sup>59</sup> Environmental Conflict Resolution (ECR) is a process of negotiation that allows stakeholders in a dispute to reach a mutually satisfactory agreement on their own terms. The tools of ECR, such as facilitation, mediation and conflict assessment, suggest that it fits well with other ideas for reforming environmental policy.

O'Leary and Bingham present empirical research along with insights from some of ECR's most experienced practitioners. Beginning with a primer about concepts and methods, the book describes the kinds of cases where ECR has been applied, making it clear that ECR is not applicable to all environmental conflicts. The contributions that follow investigate the record and potential of ECR, drawing on perspectives from political science, public administration, regional planning, philosophy, psychology, anthropology, and law. The authors find that ECR is being extended to almost every area of environmental policy. They argue that truly effective use of ECR requires something more than advocacy, that is, policy-making based on concrete research about the potential of the various tools of ECR.<sup>60</sup>

Finally, Michelle LeBaron introduces the often overlooked concept of culture in conflicts.<sup>61</sup> She says that culture is an essential part of conflict and conflict resolution. Cultural messages, she reiterates, shape the understandings of relationships and of how to deal with the conflict and harmony that are always present whenever

---

<sup>59</sup> Rosemary O'Leary and Lisa Bingham, *The Promise and Performance of Environmental Conflict Resolution*, (Resources for the Future, Washington, DC, 2003)

<sup>60</sup> Ibid.

<sup>61</sup> LeBaron, Michelle, "Culture and Conflict." *Conflict Research Consortium*, University of Colorado, Boulder, July 2003 available at <[http://www.beyondintractability.org/essay/culture\\_conflict/](http://www.beyondintractability.org/essay/culture_conflict/)> accessed on 6/6/09.

two or more people come together. She connects conflicts and culture by saying that cultures are embedded in every conflict because conflicts arise in human relationships. Cultures affect the ways we name, frame, blame, and attempt to tame conflicts. Whether a conflict exists at all is a cultural question. LeBaron concludes by saying that there is no one-size-fits-all approach to conflict resolution, since culture is always a factor. Cultural fluency is therefore, a core competence for those who intervene in conflicts or simply want to function more effectively in their own lives and situations. Cultural fluency involves recognizing and acting respectfully from the knowledge that communication, ways of naming, framing, and taming conflict, approaches to meaning-making, and identities and roles vary across cultures.<sup>62</sup> Chew states that individuals of different races, ethnic groups, religions, genders and socioeconomic classes have distinct cultures and cultural profiles.

This review emphasises the fact that there is a body of knowledge on the various sources and triggers of conflicts over natural resources. It also demonstrates that mediation, among other peaceable mechanisms of environmental conflicts resolution, have been considered as possible solutions for the unending environmental conflicts in other parts of the world such as the United States of America. It is also evident from the literature that there is no authoritative discussion of environmental mediation and the legal mechanisms for resolution of environmental conflicts in the Kenyan context.

### 1.4.3 Legal Theory

Law, including environmental law, is a product of developing and evolving legal theories postulated over time. Environmental rights are a branch of human rights

---

<sup>62</sup> See Pat K. Chew, "The Pervasiveness of Culture in Conflict," 54(1) *Journal of Legal Education* 60 (2004), pp. 60 – 61.

and the notion of human rights emerged from the tenets of the natural law theory.<sup>63</sup> The essence of natural law may be said to lie in the constant assertion that these are objective moral principles which depend on the nature of the universe and which can be discovered by reason.<sup>64</sup> These principles constitute natural law. Natural law is believed to be a rational foundation for moral judgment.

Natural lawyers accept that natural law principles do not always have the effect that they would like them to have, but argue that the principles remain true even if they are ignored, misunderstood, abused in practice or defined in practical thinking.<sup>65</sup> This informs the thinking that environmental conflicts are unique, and reliance cannot solely be had on the existing institutions and mechanisms, without actively involving those affected in resolving such conflicts. Natural law is said to have Roman origins, where it was believed that natural law embodied those elementary principles of justice that constituted right reason, that is, in accordance with nature, unalterable and eternal.

Natural law theory led to natural rights theory, the theory most closely associated with modern human rights. The chief proponent of this theory was John Locke who imagined the existence of human beings in a state of freedom, able to determine their actions and also in a state of equality in the sense that no one was subjected to the will or authority of another. However, to end the hazards and inconveniences of the state of nature, men and women entered into a 'social contract' by which they mutually agreed to form a community and set up a body politic.

---

<sup>63</sup> See J.G. Riddal, *Jurisprudence*, (Butterworths, London, 1980), p.169.

<sup>64</sup> M.D.A Freeman. *Lloyd's Introduction to Jurisprudence*, 7<sup>th</sup> ed., (Sweet & Maxwell, London, 2001), p. 90.

<sup>65</sup> *Ibid.*

Nonetheless, in setting up that political authority, individuals retained the natural rights to life, liberty and property, which were their own.<sup>66</sup>

Natural law evolved through the medieval period, the Renaissance, Reformation and Counter-Reformation to its present day restatement by Finnis,<sup>67</sup> as a set of principles of practical reasonableness in ordering human life and human community.<sup>68</sup> Finnis lists out what he describes as objective values in the sense that every reasonable person “must assent to their value as objects of human striving.”<sup>69</sup> These include life, knowledge, play, aesthetic experience, sociability and friendship, practical reasonableness and religion.<sup>70</sup>

Fuller was a noted legal philosopher who wrote a number of books and other publications, among them *The Morality of Law*.<sup>71</sup> Fuller believed that an essential element of a legal system is that there must be tacit cooperation between the lawgiver and the citizen as to what is moral or immoral, just or unjust, as the case may be. His view provides more opportunity for citizen participation through their elected representatives to enact laws and makes it less likely that such laws would be held unconstitutional by the courts. It also provides mechanisms for the realization of the ideals of a republic, where the ultimate power rests with the people, not the courts.<sup>72</sup> This view is supported by Grotius who defined natural law as a “dictate of right

---

<sup>66</sup> John Locke, *Two Treatises of Government*, by Peter Laslett, (Rev. ed.), (Cambridge University Press, 1988).

<sup>67</sup> J. M. Finnis, “Natural Law: The Classical Tradition”, in Jules Coleman and Scott Shapiro (ed.), *The Oxford Handbook of Jurisprudence and Philosophy of Law*, (Oxford University Press, 2002), p. 1 – 60.

<sup>68</sup> *Ibid.*

<sup>69</sup> M.D.A Freeman, *Lloyd's Introduction to Jurisprudence*, op. cit, p. 176.

<sup>70</sup> *Ibid.*, p. 175.

<sup>71</sup> See Lon Luvois Fuller, *The Morality of Law*, (Yale University Press, New Haven, 1969).

<sup>72</sup> *Ibid.*, p. 192.

reason”<sup>73</sup>; an act, according to whether it is or is not in conformity with rational nature, has in it a quality of moral necessity or baseness.

One of the fruits of natural law as it developed over the years is the notion of “human rights”. “Human rights” have found their way into international law.<sup>74</sup> The right to participate in decision making in all spheres of life is slowly gaining universal acceptance and has been the subject of such treaties as the Convention on Access to Information, Public Participation in Decision Making and Access to Justice in Environmental Matters (Aarhus Convention).<sup>75</sup> “Environmental Democracy” is used to refer to the right of a person to take part in governance in the area of the environment.<sup>76</sup> It incorporates the idea of public participation in the making of environmental decisions. The right to a clean and healthy environment and to public participation are recognised in Kenya today.<sup>77</sup> The study adopts a natural law and human rights approach and critically examines mediation, which can be regarded as being partly premised on natural law and human rights, in the resolution of environmental conflicts.

The study thus examines the roadmap that would be necessary for introducing mediation, if found suitable, as a mechanism for the resolution of environmental

---

<sup>73</sup> Hugo Grotius, *On the Law of War and Peace*, Book 1, (Paris, 1625).

<sup>74</sup> Universal Declaration of Human Rights, U.N. Doc. A/811 (1948), International Covenant on Civil & Political Rights (ICCPR), 999 U.N.T.S. 717, International Covenant on Economic, Social and Cultural Rights (ICESCR), 993 U.N.T.S. 3.

<sup>75</sup> 38 *ILM* 517 (1999).

<sup>76</sup> Susan Hazen, *Environmental Democracy*, sourced at <http://www.ourplanet.com> (accessed on 16<sup>th</sup> January 2009); Csaba Kiss and Michael Ewing (eds), “Environmental Democracy: An Assessment of Access to Information, Participation in Decision-making and Access to Justice in Environmental Matters in Selected European Countries: European Regional Report.”, *The Access Initiative Europe*, available at <http://www.accessinitiative.org> (accessed on 26<sup>th</sup> January 2009).

<sup>77</sup> Section 59 of the Environmental Management Coordination Act, op. cit., on environmental impact assessment and the notion of public participation in Regulation 17 of the Environmental (Impact assessment and Regulations 2003), LN No. 101 of 2003. See also Articles 42 and 70 of the New Constitution of Kenya.

conflicts in Kenya. This has not been done before in the Kenyan legal and institutional mechanisms. The theme of environmental conflicts, its causes, manifestations and modes of addressing the conflicts has been addressed by a number of writers. Successful use of environmental mediation has been documented and analysed by several authors in jurisdictions such as Canada,<sup>78</sup> Australia,<sup>79</sup> Belize, Guatemala,<sup>80</sup> Burkina Faso, Mali<sup>81</sup> and the United States<sup>82</sup>. Whereas a lot has been written on it elsewhere, the discourse on utilization of mediation to resolve environmental conflicts is somewhat arid in the Kenyan academic circles.

It is this gap that this study fills by examining environmental conflicts occurring in Kenya, identifying the causes of the conflicts, the challenges facing Kenyans in their attempts to resolve environmental conflicts using the existing mechanisms, the resolution of such conflict through peaceful means, major among them being mediation, from a Kenyan standpoint. It also examines what environmental mediation can offer in a customised setting for environmental conflict resolution in Kenya.

---

<sup>78</sup> Sourced from [www.ceaa.gc.ca](http://www.ceaa.gc.ca), (Canadian Environmental Assessment Agency), accessed on 5/6/10. See also M. Doelle, "The Canadian Environmental Assessment Act: New Uncertainties but a step in the right direction." 4 *JELP* 80 (1994); Canadian Round Tables, *Building Consensus for a Sustainable Future: Guiding Principles*, (an Initiative Undertaken by the Canadian Round Tables, Ottawa, 1993); see also J. Mathers, (1995), "Sandspit Small Craft Harbour Mediation Process", *Canadian Environmental Assessment Agency*, Hull. Sourced from <[www.strategics.ic.gc.ca/epie.html](http://www.strategics.ic.gc.ca/epie.html)>accessed on 29/5/10.

<sup>79</sup> Senior, C. "The Yandicoogina Process: A Model for Negotiating Land Use Agreements.", Native Title Research Unit Regional Agreement Issues Paper No. 6., *Australian Institute of Aboriginal and Torres Strait Studies* (AIATSIS), Canberra 1998; see also Sullivan, P. "Regional Agreement in Australia: An Overview Paper.", Native Title Research Unit Issues Paper No. 17., *Australian Institute of Aboriginal and Torres Strait Studies* (AIATSIS). Canberra 1997.

<sup>80</sup> [www.caricom.org/Belize-Guatemala](http://www.caricom.org/Belize-Guatemala) (accessed on 03/08/2009).

<sup>81</sup> International Court of Justice, Frontier Dispute (Burkina Faso/Republic of Mali). Sourced from <http://www.icj-cij.org/docket/index.php>, (accessed on 15/5/10).

<sup>82</sup> U.S. Institute for Environmental Conflict Resolution. *BLM Bridgeport Land Sale Mediation*. Sourced from <<http://www.ecr.gov/cases/pdf/Bridgeport.pdf>>, (accessed on 15/5/10)

Environmental mediation has not been tried out in Kenya within the legal and institutional mechanisms. The study addresses this “opportunity gap”. The study inquires into whether, in light of the literature, stronger legal mechanisms incorporating environmental mediation would lead to a decrease in the incidences of environmental conflicts and promote the realisation of sustainable development. It searches for possible legal solutions to environmental conflicts through the use of mediation, within strengthened and streamlined legal and institutional mechanisms.

### 1.5 Theoretical Framework

The study favours the natural law and environmental democracy approaches to conflict resolution. Environmental democracy is used to refer to the right of a person to take part in governance in the area of the environment.<sup>83</sup> It captures the principle of equal rights for all including the public, community groups, advocates, industrial leaders, workers, governments, academics and other professionals to be involved in environmental governance. It connotes the right of all whose daily lives are affected by the quality of the environment to participate in environmental decision-making as freely as they do in other public interest matters such as education, health care, finance and government. The right to a clean and healthy environment and the right to public participation are recognised in Kenya today.<sup>84</sup> The right can also be found under Articles 42 and 70 of the Constitution of Kenya.

Environmental conflicts often result in hostility and violence, leading to loss of livelihoods and in Kenya, as in the rest of the world, there does exist mechanisms for the peaceful resolution of environmental conflicts. The fact that environmental

---

<sup>83</sup> Susan Hazen, *Environmental Democracy*, op. cit.

<sup>84</sup> EMCA, op. cit., section 59 on Environmental Impact Assessment and the notion of Public Participation in Regulation 17 of the Environmental (Impact assessment and Regulations 2003), LN No. 101 of 2003.

conflicts continue to escalate in spite of the existence of these conflict management mechanisms means that they are not completely effective and something still needs to be done to put in place effective mechanisms that deal with environmental conflicts in a manner that brings lasting solutions that are acceptable to the contesting parties.

The study examines whether environmental mediation offers such an opportunity. Environmental mediation is not widely used in Kenya. The legal and institutional mechanisms that currently exist emphasise the use of courts and tribunals for the management of environmental conflicts. This is not however, to say that mediation will be a panacea for all environmental conflicts. Other mechanisms used for the management of environmental conflicts such as litigation and administrative action still need to remain in place. Indeed mediation, if found suitable, can be used together with other existing conflict management structures and legal mechanisms in a manner that makes it more viable as a conflict resolution mechanism in the Kenyan context.

The study does not advocate for the abrogation of other conflict management mechanisms that can be applied to resolve environmental conflicts. Rather it seeks to explore the applicability of environmental mediation in Kenya with a view to enhancing its use together with other existing mechanisms. The resulting synergy, it is submitted, can only be good for the Kenyan people. The participatory nature of mediation gives Kenyans a chance to enjoy democratic environmental governance where they have a say in the use, access to and utilisation of environmental resources in their localities.

Closely connected with the question of resolution of environmental conflicts is the concept of sustainable development. The Environmental Management and Coordination Act at Section 2 defines sustainable development to mean development



that meets the needs of the present generation without compromising the ability of future generations to meet their needs by maintaining the carrying capacity of the supporting ecosystems. It is argued in this study that it is not possible to attain sustainable development in an atmosphere of unresolved environmental conflicts. Sustainable development is closely connected to the concept of sustainable use of environmental resources. The concepts of inter-generational and intra-generational equity are relevant here. It is suggested that environmental mediation may offer a solution; communities are given a chance to decide how their environmental resources are to be managed by the present generation for future generations.

Given the causes of environmental conflicts, they can hardly be resolved by the adversarial method offered by the law. The reason is that environmental conflicts are peculiar as there are not necessarily any enforceable legal rights and duties that attend them. Hence, the proposal for review of the existing legal and institutional mechanisms for resolving environmental conflicts in order to see what challenges the alternative dispute resolution methods and especially mediation can meet. Basically, this study adopts the “deprivation”, “state failure”, “honey pot” and “resource curse” approaches that provide theoretical mechanisms on environmental conflicts.<sup>85</sup>

Environmental conflicts need to be managed since unmanaged conflicts impact negatively on sustainable development. Resolving environmental conflicts results in “environmental security.”<sup>86</sup> Environmental conflicts, if left unchecked, have the potential of tearing the world apart, lead to clashes and loss of lives. There is, thus, a need to enhance mechanisms that are geared towards resolving or, at any rate, managing environmental conflicts. The study examines whether mediation has the

---

<sup>85</sup> See Colin H. Kahl, *States Scarcity and Civil Strife in the Developing World*, op. cit., pp.11-12.

<sup>86</sup> Schwartz and Singh, *Environmental Conditions, Resources and Conflicts: An Introductory Overview and Data Collection* op. cit. pg. 10.

capacity to achieve desirable results in resolution of such conflicts and ensure that there is peaceful co-existence between communities and other parties, such as developers and government agencies. Closely related to environmental democracy is the concept of community-based natural resource management (CBNRM). CBNRM relates to approaches where the focal unit for joint natural resource management is the local community. Often, it is applied to designate approaches where local communities play a central, but not exclusive, role in natural resource management.<sup>87</sup>

Okoth–Ogendo concludes that the responsibility for the management of the environment lies ultimately with agrarian resource managers – the farmers, livestock producers, conservationists and resource merchants - rather than state agencies and thus, it is important to enquire into how the legal regime influences or is likely to shape anthropogenic decisions. He proceeds to observe that an analysis of decision making processes in the agrarian sector suggest that the large body of sectoral laws and institutions function mainly as “externalities to be evaded than complied with.”<sup>88</sup> The theories discussed above greatly impact on the legal issues that surround mediation as a mechanism of environmental conflict resolution.

## 1.6 Hypotheses

The following hypotheses will be tested in this study:

1. The existing legal mechanisms are not suitable for the resolution of environmental conflicts.

---

<sup>87</sup>Thorsten Treue and Iben Nathan, *Community Based Natural Resource Management*, (Ministry of Foreign Affairs of Denmark, Copenhagen, 2004), p. 2. See also G. Borrini-Feyerabend, M. Pimbert, M.T. Farvar, A. Kothari and Y. Renard, *Sharing Power: Learning-by-Doing in Co-management of Natural Resources Throughout the World*, (IIED and IUCN/ CEESP/CMWG, Cenesta, Teheran, 2004), p. 69.

<sup>88</sup>Okoth – Ogendo, “Managing the Agrarian Sector for Environmental Sustainability”, in C.O. Okidi, P. Kameri – Mbote and Migai Akech (eds.), *Environmental Governance in Kenya: Implementing the Framework Law*, (East African Educational Publishers Ltd, Nairobi, 2008), pp. 222 – 234: 230 and 231.

2. Environmental conflicts in Kenya result from lack of effective mechanisms for their resolution.
3. Mediation is the most suitable mechanism for environmental conflict resolution.

### 1.7 Research Methodology

The study employs the descriptive, analytical and prescriptive modes of research. Equally, the research makes use of purposive sampling in collecting data that is key to informing the topic under inquiry.

The study utilises both primary and secondary sources of information. The primary sources include the Constitution of Kenya, other statutes and international conventions. The primary sources are very useful to the research in that they state the current sectoral laws that inform environmental governance in Kenya and form the substratum of its critique. Secondary sources used include the internet and on-line libraries, journal articles, newspapers and other media reports, conference papers and textbooks. The secondary sources are useful in their own right. They also give insights into efficiency, challenges and opportunities in mediation environmental conflicts in the international arena and emerging trends in environmental conflict resolution.

The study makes use of questionnaires where appropriate, in order to capture people's perceptions on the environment and environmental conflicts that arise. The questionnaires contain structured and unstructured questions as well as contingency or filter questions so as to achieve the goal of obtaining as much information and as accurately as possible. The research also employed the use of interviews where the author identified key resource persons who are likely to give detailed information about particular conflict situations under investigation and provide documentation.

The study uses case studies that have the required information with respect to the objectives of the study and which enabled an in depth study of this subject area. Purposive sampling is used to select cases of environmental conflicts in Kenya such as the Amboseli and Mau conflicts. The cases possess manifestations of environmental conflicts arising out of contests over natural resources or environmental conflicts arising out of scarcity, loss of livelihood or other similar causes of conflicts. Court cases and decisions of tribunals discussed in the study are also chosen for similar reasons.

Primary data contained in the Constitution, statutes and other official publications was obtained through accessing and analysing them. The author was able to access scholarly journals and books by visiting various libraries such as the University of Nairobi Libraries. Such journals and books were also accessed online through Journal Storage (JSTOR). The author also obtained primary data through direct communication with respondents to the questionnaire<sup>89</sup> and through personal interviews with select key resource persons.

The writer conducted several personal interviews and administered the questions outlined in the questionnaire and other relevant questions in a face to face contact with various persons. The interviews were mostly structured and the author used a set of predetermined questions. Unstructured interviews were also utilized with the author exercising flexibility of approach to questioning. Supplementary questions were asked and certain questions were outlined as the situation required.

The author also conducted focused interviews with certain respondents so as to focus attention on their experiences and views on how best conflicts could have been resolved. Clinical interviews were also conducted with the aim of getting the

---

<sup>89</sup> Appendix A to the study.

broad underlying feelings or motivations in the course of the respondents' life experience with regards to access and use of environmental resources.

The questionnaire (appendix A) was sent to various respondents with a request that they answer the questions and return the questionnaire. The questionnaire contained a number of questions that require them to give personal information such as age, ownership of property, environmental resources occurring in their area, utilization of these resources, environmental conflicts occurring as a result of contests over those resources and the methodology used to resolve them. The respondents were also required to propose conflict resolution mechanisms that they thought should be used in the resolution of conflicts over natural resources.

The questionnaires were administered on targeted persons such as decision makers and certain opinion leaders in their communities. The basis of the sampling was mostly purposive with those who are likely to give representative views for a certain group being either interviewed or sent the questionnaire. The study relied on extreme sampling to select case studies such as the Amboseli conflict.<sup>90</sup> The reason is that these cases have characteristics that are of interest to the study. They represent intractable conflicts that the legal and institution framework has not been able to resolve.

## **Data Analysis**

The data obtained is qualitative. The researcher critically analyses and evaluates primary and secondary data collected in the context of the research objectives.

---

<sup>90</sup> Discussed in chapter 5.

## **Sampling**

The study relied on biased or non probability sampling so as to focus on in depth information. Cases of environmental conflicts involving various natural resources are highlighted and examined critically; the genesis, occurrence and effects on the lives of people are discussed. The existing conflict resolution mechanisms within these samples were indentified and analysed. The weaknesses and strengths in the conflict resolution systems were examined; the efficacy of mediation as a tool for the resolution of environmental conflicts in the various contexts is analysed.

As indicated earlier the study used purposive sampling. The aim is to select cases that have the required information with respect to the objectives of this study. The cases highlighted in the study are handpicked as it were; they all manifest environmental conflicts arising out of contexts over natural resources owing to scarcity or other causes. Individuals are studied so as to capture the perceptions of local communities and Kenyans in general in the dynamics and possible resolution of environmental conflicts within a specific area.

## **Sampling Frame**

The source list from which the samples are drawn are all the cases of potential or actual environmental conflicts in Kenya. The sampling population was then selected in a purposive or random manner as circumstances dictated.

## **Parameters of Interest**

The study is qualitative. It includes case studies, critiques and analysis of existing law and its implications for conflict resolution. Views of respondents were analysed qualitatively. The findings of the study include the analytical views of the author based on the data collected and evaluated.

## **1.8 Chapter Outline**

### **I Chapter One – Introduction to the Study**

This chapter contains a general overview of the nature, causes, effects and scope of environmental conflicts occurring in Kenya, the statement of the problem, justification for the study, literature review, the objectives of the study, the hypotheses and a theoretical framework, the gap in knowledge that the study fills and methodology of the study.

### **II Chapter Two – Negotiation and Mediation in Conflict Resolution**

This chapter is a conceptual study of mediation and discusses mediation as a continuation of negotiation with the assistance of a third party. The chapter discusses the essence of mediation, mediation in the political and legal process, the commonalities between them, and also the link between negotiation and mediation. Equally the chapter focuses on the practices and concepts of the political process of mediation which leads to a resolution.

### **III Chapter Three - Institutional, Policy and Legal Frameworks for Environmental Conflict Management in Kenya**

This chapter addresses the types and causes of environmental conflicts occurring in Kenya and what exists by way of the legal, policy and institutional framework for the management of the conflicts, discusses environmental conflict resolution at a generic level, briefly considers the international regime on environmental conflict management and further examines the advantages and disadvantages of the various conflict management mechanisms.

## **1.8 Chapter Outline**

### **I Chapter One – Introduction to the Study**

This chapter contains a general overview of the nature, causes, effects and scope of environmental conflicts occurring in Kenya, the statement of the problem, justification for the study, literature review, the objectives of the study, the hypotheses and a theoretical framework, the gap in knowledge that the study fills and methodology of the study.

### **II Chapter Two – Negotiation and Mediation in Conflict Resolution**

This chapter is a conceptual study of mediation and discusses mediation as a continuation of negotiation with the assistance of a third party. The chapter discusses the essence of mediation, mediation in the political and legal process, the commonalities between them, and also the link between negotiation and mediation. Equally the chapter focuses on the practices and concepts of the political process of mediation which leads to a resolution.

### **III Chapter Three - Institutional, Policy and Legal Frameworks for Environmental Conflict Management in Kenya**

This chapter addresses the types and causes of environmental conflicts occurring in Kenya and what exists by way of the legal, policy and institutional framework for the management of the conflicts, discusses environmental conflict resolution at a generic level, briefly considers the international regime on environmental conflict management and further examines the advantages and disadvantages of the various conflict management mechanisms.



#### **IV Chapter Four - Mediating Environmental Conflicts in Kenya**

This chapter deals with mediating environmental conflicts in Kenya, discusses the legal, institutional and other supportive frameworks that facilitate mediation in Kenya and also discusses the process of mediation and the use of mediation in resolving environmental conflicts.

#### **V Chapter Five – Resolving Environmental Conflicts through Mediation in Kenya - Case Studies**

This chapter contains local case studies showing successes of the use of mediation in resolving environmental conflicts in Kenya and the opportunities offered by mediation. The chapter also discusses cases of intractable environmental conflicts occurring in Kenya and also contains the findings and conclusions of the study.

#### **VI Chapter Six – Conclusions**

This final chapter contains the conclusions of the study.

# Chapter Two

## Negotiation and Mediation in Conflict Resolution

### 2.1 Introduction

Chapter One contained a general overview of the nature, causes, effects and scope of environmental conflicts occurring in Kenya, the statement of the problem, justification for the study, literature review, the objectives of the study, the hypotheses and a theoretical framework, the gap in knowledge that the study fills and methodology of the study.

This chapter is a conceptual study of mediation and discusses mediation as a continuation of negotiation with the assistance of a third party. The chapter discusses the essence of mediation, mediation in the political and legal process, the commonalities between them, and also the link between negotiation and mediation. Equally the chapter focuses on the practices and concepts of the political process of mediation which leads to a resolution. This chapter thus advances the argument that mediation in the political process is the true mediation and that this is what should be adopted in Kenya in resolving environmental conflicts.

### 2.2 Conceptual Study of Mediation

Mediation has been practised since antiquity and is a restatement of customary jurisprudence. Mediation existed before Alternative dispute resolution mechanisms were invented. Both mediation and Alternative dispute resolution focus on the interests and needs of the parties to the conflict as opposed to positions, which is emphasised by common law and statutory measures.<sup>1</sup>

---

<sup>1</sup> Paul Obo Idornigie, "Overview of ADR in Nigeria", 73 (1) *Arbitration* 73, (2007), p.73.

Moore says that mediation involves the intervention into a dispute or negotiation by an acceptable, neutral third party who has no authoritative decision-making power to assist disputing parties in voluntarily reaching their own mutually acceptable agreement on the issues in dispute.<sup>2</sup> Greenhouse says that “Mediation is simple enough to describe: it is a triadic mode of dispute settlement, entailing the intervention of a neutral third party at the invitation of the disputants, the outcome of which is a bilateral agreement between the disputant...”<sup>3</sup>

Perhaps the best definition of mediation is offered by Bercovitch who defines it as a method of conflict management where conflicting parties gather to seek solutions to the conflict, with the assistance of a third party who facilitates discussion and the flow of information, and thus aiding in the processes of reaching an agreement. Since mediation is, in essence, a form of “assisted negotiation” it does not have any direct legal basis.<sup>4</sup> The agreement reached does not have to be in writing. It is binding because the parties have undertaken to negotiate the conflict voluntarily. Mwangi defines what a mediation process entails and states that it is a continuation of the negotiation process by other means where instead of having a two way negotiation, it now becomes a three way process: the mediator in essence mediating the negotiations between the parties.<sup>5</sup>

The underlying point in the mediation process is that it arises where the parties to a conflict have attempted negotiations, but have reached a deadlock. In such

---

<sup>2</sup> Christopher Moore, *The Mediation Process: Practical Strategies for Resolving Conflict*, (Jossey-Bass Publishers, San Francisco, 1996), p. 14

<sup>3</sup> Carol J. Greenhouse, “Mediation; A Comparative Approach”, *Man, New Series*, Vol. 20, No. 1, *Royal Anthropological Institute of Great Britain and Ireland*, (Mar., 1985), pp. 90-114: 90.

<sup>4</sup> J. Bercovitch, “Mediation Success or Failure: A Search for the Elusive Criteria”, *Cardozo Journal of Conflict Resolution*, Vol.7.289, p.290

<sup>5</sup> Makumi Mwangi. *Conflict in Africa: Theory, Processes and Institutions of Management*, (Centre for Conflict Research, Nairobi, 2006), pp. 115-116.

circumstances, they agree to involve a third party to assist them continue with the negotiations and ultimately break the deadlock. This whole notion of agreeing on a third party to assist in the negotiations shows that mediation is a voluntary process since both parties to the conflict have to agree both to the mediation process and the mediator.<sup>6</sup>

On the other hand a mediator has been defined as one "who comes between the conflicting parties with the aim of offering a solution to their dispute and/or facilitating mutual concessions." As Ott has argued the presumed effectiveness of the mediator derives from the diverse functions he can serve in a conflict situation.<sup>7</sup> For instance he can change for the better the behaviour of the parties in conflict by just being present. He quotes Arthur Meyer who observes that

"The mediator is a catalytic agent. The mere presence of an outsider, aside from anything he may do or say, will cause a change, and almost certainly a change for the better, in the behaviour of the disputing parties. . . Progress has been made through the mediator's presence, though that presence has brought nothing more than temperate speech."<sup>8</sup>

In the anthropological literature, mediation tends to be discussed either in contrast to adjudication or as a contrast to dyadic processes such as negotiation, coercion and avoidance. Greenhouse says that when it is compared to adjudication, mediation is the 'softer' mode: it is therapeutic, conciliatory, and flexible procedurally and substantively.<sup>9</sup> Though approached from differing perspectives, all the definitions seem to agree that mediation is a negotiation process in which parties are assisted by a third party known as a mediator. It would seem from the above discussion therefore

---

<sup>6</sup> Ibid., p. 115

<sup>7</sup> Marvin C. Ott, "Mediation as a Method of Conflict Resolution: Two Cases", *International Organization*, Vol. 26, No. 4, *The University of Wisconsin Press*, Autumn, 1972, pp. 595-618: 597.

<sup>8</sup> Arthur Meyer, "Function of the Mediator in Collective Bargaining," *Industrial and Labor Relations Review*, XIII, No. 2 (January, 1960), p. 161.

<sup>9</sup> Carol J. Greenhouse, "Mediation; A Comparative Approach", op. cit., p. 90.

that mediation can only be understood as an aspect of the general structure and process of negotiation.

A mediator does not have to be impartial. However, the mediator must be acceptable to the parties. Mwagiru gives the reasons for this assertion as the fact that the mediator possesses certain resources valued by the parties. Since they value those resources they are less concerned with the impartiality of the mediator. Mwagiru also cites psychological factors as alternative reasons for a mediator's lack of impartiality. He gives the example of a heterogeneous mediator like Moi in the Uganda conflict where he did not possess any resources that the parties in the conflict valued. However since his psychological relationship with the parties was so deep he could not be impartial.<sup>10</sup>

According to Bercovitch the main difference between negotiation and mediation is with the additional resources and expended relationships and communication possibilities that he brings to the conflict management. Bercovitch adds that the entry of a mediator into a conflict transforms the structure of the conflict from a dyad into a triad and in this sense he becomes one of the parties to the conflict pursuing his own interests just as the other parties to the conflict.<sup>11</sup> Baylis and Carroll argue that neutrality or impartiality should not be seen as an attribute of the mediator in a mediation context. Impartiality is not the sole factor that lends legitimacy to the mediation process. They further argue that impartiality or neutrality of a mediator should be focused on what he does to ensure that the parties control the process and

---

<sup>10</sup> Makumi Mwagiru, *Conflict in Africa; Theory, Processes and Institutions of Management*, (Centre for Conflict Research, Nairobi, 2006), pp.53-54

<sup>11</sup> J. Bercovitch, "Mediation Success or Failure: A Search for the Elusive Criteria", *Cardozo Journal of Conflict Resolution*, op.cit, p.290.

outcome of the process and thus ensuring that both parties are free of pressure and coercion.<sup>12</sup>

### 2.3 Negotiation

Negotiation is a process involving two or more people of either equal or unequal power meeting to discuss shared or opposed interests in relation to a particular area of mutual concern.<sup>13</sup> According to Fischer and Ury, the most common form of negotiation depends upon successfully taking and the giving up a sequence of positions. They argue that positional bargaining is not the best form of negotiation because arguing over positions produces unwise agreements, is inefficient, endangers an ongoing relationship and also leads to formation of coalition among parties whose shared interests are often more symbolic than substantive.<sup>14</sup>

As an alternative to this genre on negotiation, the authors under the auspices of the Harvard Negotiation Project developed the principled negotiation method,<sup>15</sup> which is pegged upon four basic points/principles: separate the people from the problem, focus on interests rather than positions, generate a variety of options before settling on an agreement and insist that the agreement be based on objective criteria. According to Mwagiru, the negotiation phase is the one during which the parties hammer out an agreement, or even agree to disagree and it is during this stage that the core issues of the conflict are negotiated or bargained. It has been said that negotiation leads to

---

<sup>12</sup> Claire Baylis and Robyn Carroll, "Power Issues in Mediation", *ADR Bulletin*, Vol.7, No.8 [2005], Art.1, p.135

<sup>13</sup> "Negotiations in Debt and Financial Management", *United Nations Institute of Training and Research*, (UNITAR), (December 1994), pp. 1-5.

<sup>14</sup> Roger Fischer and William Ury, *Getting to Yes: Negotiating Agreement Without Giving In*, (Penguin Books, New York, 1981), p.4.

<sup>15</sup> *Ibid.*, p. 10.

mediation because the need for mediation arises after the conflicting parties have attempted negotiation, but have reached a deadlock.<sup>16</sup>

## 2.4 Understanding Mediation

There are certain elements that must be present in a mediation situation: the parties in conflict, a mediator, process of mediation and the context of mediation. These elements are important in understanding mediation and its outcomes.<sup>17</sup>

In discussing the mediation paradigm, Wall states that the mediation system consists of the mediator, the two negotiators, and the relationships among them. In this paradigm Wall says that the mediation environment is wider and includes other actors such as the negotiator's constituents, the mediator's constituents and the third parties who affect or are affected by the process and outcome of the mediation. He further argues that this environment also includes other factors such as societal norms, economic pressures and institutional constraints which affect the mediation process and the outcome either directly or indirectly.

The mediation environment is thus one of exchange where parties have expectations, receive rewards and incur costs as they deal with each of the other parties.<sup>18</sup> This means that no party whether as a mediator or any third party engages in a conflict management process for purely altruistic reasons but that they expect

---

<sup>16</sup> Makumi Mwangi, *Conflict in Africa: Theory, Processes and Institutions of Management*, op. cit., p. 115.

<sup>17</sup> J. Bercovitch, "Mediation Success or Failure: A Search for the Elusive Criteria", *Cardozo Journal of Conflict Resolution*, op.cit, pp.290-291.

<sup>18</sup> James A. Wall, Jr, "An Analysis, Review, and Proposed Research", *The Journal of Conflict Resolution*, Vol. 25, No.25 [March., 1981], pp.157-160.

certain gains from acting as third parties whether as an individual, an institution, official or non-official although the motives may vary from one actor to another.<sup>19</sup>

In essence, mediation is generally an informal, strictly confidential and consensual conflict resolution mechanism in which a third party with no decision-making authority attempts to bring the conflicting parties to end their conflict by agreement.<sup>20</sup> A mediator is not part of the conflict, but an outsider who strives to ensure that the process of the conflict resolution turns out to be a perfect picture in the estimation of the parties. The mediator, thus, takes care of the details of the mediation process, brings the parties together and irons out elements that stand in the way of resolution through such methods as joint meetings, private plenary meetings and/or sub-group meetings.<sup>21</sup> The parties to the conflict are given the opportunity to play the lead role, although the mediator may be involved in direct communications between them or their representatives. The mediator may also seek to transform the relationship between the parties and to lead parties to reach an outcome that addresses the aggregate of their interests in the conflict.<sup>22</sup>

While contrasts between mediation and adjudication generally stress the relative informality of the mediation process, comparisons with dyadic modes stress the potential retention of control by the mediator.<sup>23</sup> According to Meschievitz, mediation attempts to remove the parties' adversarial posturing replacing it with a

---

<sup>19</sup> Makumi Mwagiru, *The Water's Edge: Mediation of Violent Electoral Conflict in Kenya*, op.cit, pp.43-44

<sup>20</sup> Mordehai Mironi, "From Mediation to Settlement and from Settlement to Final Offer Arbitration: an Analysis of Transnational Business Dispute Mediation", 73(1) *Arbitration* 52 (2007), p. 53.

<sup>21</sup> Craig Pollack, "The Role of the Mediation Advocate: a User's Guide to Mediation", 73(1) *Arbitration* 20, (2007), p 20-23.

<sup>22</sup> Ibid.

<sup>23</sup> Ibid.



harmonious relationship.<sup>24</sup> This transformation may take place by an explicit agreement, a reciprocal acceptance of the "social norms" relevant to the parties' relationship, or by a mutual recognition of a new or more perceptive understanding of one another's problems.<sup>25</sup> It may be conducted by one or more persons and may be nonpartisan, bipartite, or tripartite. In discussing the mediation paradigm, Wall, Stark and Standifer<sup>26</sup> say that;

"The origin of mediation is the interaction between two or more parties who may be disputants, negotiators, or interacting parties whose relationship could be improved by the mediator's intervention under various circumstances (determinants of mediation), the parties/disputants decide to seek the assistance of the third party, and this party decides whether to mediate. As the mediation gets under way, the third party selects from a number of available approaches and is influenced by various factors (labelled determinants of approaches), such as environment, mediator's training, disputants' characteristics and nature of their conflict."<sup>27</sup>

Mediation is often believed to work best in a conflict in which the parties have had a significant prior relationship or when the parties have an interest in continuing a relationship in the future.<sup>28</sup> The voluntary nature of mediation refers to the fact that parties to the mediation cooperate in the process voluntarily. This distinction is important given that participation in mediation is not universally a matter of choice. In some jurisdictions, mediation is court annexed and provided for under the law and, as such, the parties are not given much choice in deciding whether or not to mediate their

---

<sup>24</sup> Catherine S. Meschievitz, "Mediation and Medical Malpractice: Problems with Definition and Implementation", *Law and Contemporary Problems*, Vol. 54, No. 1 in, *Medical Malpractice: Lessons for Reform*, (The Medical Malpractice System and Existing Reforms), (Duke University School of Law, Winter, 1991), pp. 195-215.

<sup>25</sup> Lon Fuller, "Mediation-Its Forms and Functions", 44 *S Cal L Rev* 305, (1971), p. 308.

<sup>26</sup> James A. Wall, Jr., John B. Stark, Rhetta L. Standifer, "Mediation: A Current Review and Theory Development", *Journal of Conflict Resolution*, Vol. 45 No. 3, June 2001, pp. 370-391.

<sup>27</sup> *Ibid.*, pg. 371.

<sup>28</sup> John S. Murray, Alan Scott Rau & Edward F. Sherman, *Processes of Dispute Resolution: The Role of Lawyers*, op. cit., p. 47.

conflict before lodging it to the court. However, as it has been pointed out, 'there is a difference between coercion into mediation and coercion in mediation.'<sup>29</sup>

Thus, mediation is distinguishable from the other mechanisms of conflict resolution in that the resolution framework is owned by the parties who drive the process of reaching a negotiated outcome.<sup>30</sup>

According to Bercovitch the process of mediation refers to what takes place at the mediation table. He thus argues that mediation is successful if the parties to the conflict have autonomy over the process. That is if the parties in conflict feel empowered or that their concerns are addressed in a respectful manner, then the outcome will be acceptable and enduring. Mediation as a conflict management episode is thus successful if it is fair and effective.<sup>31</sup> The argument by Bercovitch is supported by Sheppard who says that success in mediation can be attributed to both the process and the outcome of the mediation.<sup>32</sup>

There is an argument that mediation is merely a stage in the conclusion of an agreement between the parties to resolve their conflict. As such, the argument goes, mediation is 'solely governed by the law of contract'<sup>33</sup>, the relationship between the parties and the third party and the result of the mediation are contractual. Contractual freedom is seen as the basis of all mediation and mediation is not 'an alternative

---

<sup>29</sup> Frank Sanders, "The Future of ADR", 1 *Journal of Dispute Resolution* 3 (2000), at p. 7-8.

<sup>30</sup> Mercedes Tarrazon, "The Pursuit of Harmony: the Art of Mediating, the Art of Singing", 73(1) *Arbitration* 49, (2007), pp. 50-51.

<sup>31</sup> J. Bercovitch, "Mediation Success or Failure: A Search for the Elusive Criteria", *Cardozo Journal of Conflict Resolution*, op.cit, pp.291-292

<sup>32</sup> Blair Sheppard, *Third Party Conflict Intervention: A Procedural Framework*, 6 RES. ORG. BEHAV.226, 226-275 (1984)

<sup>33</sup> Jean Timsit, "Mediation: An Alternative to Judgment, not an Alternative Judgment", 69 (3) *Arbitration* 161, (2003), p. 161.

adjudication, but an alternative to adjudication.’<sup>34</sup> Mediation applies to different fields, with some common peculiar elements and some differences for each of its specialities.

## 2.5 Perspectives of Mediation

Mediation depicts a political and legal facade: the legal and the political perspective. This dichotomy is based on various variables. It is a typology founded on the differentiation between a dispute and a conflict.<sup>35</sup> A dispute refers to issues which are not about values, and can therefore be negotiated and even bargained about. As such disputes are merely settled hence the phrase dispute settlement. On their part conflicts refer to issues about values which are non-negotiable and hence the phrase conflict resolution.

A conflict is about needs and values shared by the parties whereas a dispute is about interests or issues. Needs or values are inherent in all human beings and go to the root of the conflict while interests and issues are superficial and do not go to the root of the conflict.<sup>36</sup> Consequently conflict resolution is that approach which prescribes an out-come based on mutual problem-sharing in which the conflicting parties cooperate in order to redefine their conflict and their relationship whereas dispute settlement is an agreement over the issue(s) of the conflict which often involves a compromise and is power-based where the power relations keep changing turning the process into a contest of whose power will be dominant.<sup>37</sup>

---

<sup>34</sup> Ibid.

<sup>35</sup> J. Burton, *Conflict: Resolution and Prevention*, (London: Macmillan, 1990), pp. 2-12.

<sup>36</sup> David Bloomfield, “Towards Complementarity in Conflict Management: Resolution and Settlement in Northern Ireland”, *Journal of Peace Research*, Vol.32, No. 2 (May, 1995), pp.152-153

<sup>37</sup> Ibid

### 2.5.1 Mediation in the Political Process

Mediation in the political process is informed by resolution. According to Cloke resolution of a conflict is the mutual construction of a relationship which is legitimate because the needs of each party are satisfied. He further argues that since conflicts arise out of the non-fulfilment of the non-negotiable needs or values of the conflicting parties in the society, conflicts are well addressed through resolution where the role of mediation is to satisfy the mutual needs of the parties and removal of the underlying causes of the conflict.<sup>38</sup>

Mediation in the political process allows the parties to have autonomy over the choice of the mediator, the process and the outcome. What makes mediation in the political process to lead to a resolution is the fact that there is voluntariness, party autonomy over the process and of the outcome. Bercovitch argues that where the parties show a genuine desire to submit and commit themselves to mediation it is an indication that the parties are desirous of resolving the conflict. He further argues that when only one party is willing to submit to mediation the chances of resolving that conflict are slim.<sup>39</sup>

According to Bercovitch there is a resolution of a conflict when the root causes of a conflict are addressed, thus negating the threat of further conflict generating behaviour. He further argues that the political process does not rely on coercion or enforcement, but rather on the basis of a common ground upon which to build enduring and long lasting solutions, never to revisit the conflict in future.<sup>40</sup>

---

<sup>38</sup> Kenneth Cloke, "The Culture of Mediation: Settlement vs. Resolution", *The Conflict Resolution Information Source*, Version IV, December 2005

<sup>39</sup> J. Bercovitch, "Mediation Success or Failure: A Search for the Elusive Criteria", *Cardozo Journal of Conflict Resolution*, op.cit. p.300

<sup>40</sup> Ibid, pp.295-296

The attributes of mediation in the political process<sup>41</sup> are that: there is autonomy in the choice of the mediator, the outcome is enduring, it is flexible, it is speedy, non-coercive, mutually satisfying, it fosters relationships, its cost effective, addresses the root causes of the conflict, parties have autonomy about the forum and rejects power based out-comes.<sup>42</sup> These attributes are the ones that make mediation in the political process to lead to a resolution as opposed to a settlement.

## 2.5.2 Concepts of Mediation in the Political Process

As the above discussion reveals mediation in the political process leads to resolution because it has more attributes of mediation. Consequently mediation in the political process is the true mediation. It has the true character of mediation: voluntariness, party autonomy in the choice of the mediator, over the process and the outcome.

Mediation in the political process derives its legitimacy from the voluntariness to engage in the mediation process, fairness, and the autonomy exhibited by the parties over the choice of the mediator, the process and the outcome.<sup>43</sup> Voluntariness exists if both parties are making real and free choices based on effective participation in the mediation. Baylis and Carrol argue that in situations involving significant power differences a mediator must ensure that the participation of all parties is genuine and active and that the outcome is not based on coercion or pressure. This, they argue is one of the key elements that lends legitimacy to mediation.<sup>44</sup> On his part Galligan argues that the guiding principle in making informal agreements using

---

<sup>41</sup> See Fig. 1.0

<sup>42</sup> David Bloomfield, "Towards Complementarity in Conflict Management: Resolution and Settlement in Northern Ireland", *op. cit.*, p. 152-154.

<sup>43</sup> Claire Baylis and Robyn Carroll, "Power Issues in Mediation", *op.cit* , p.135

<sup>44</sup> *Ibid*

negotiation and mediation is that the agreement must be real and one that has been voluntarily entered into. Galligan identifies knowledge of the options, open willingness and the willingness to accept a compromise as the main factors contributing to a real and voluntary agreement.<sup>45</sup>

Autonomy is the other concept that informs the legitimacy of the political process of mediation. It refers to autonomy over the choice of the mediator, the process and the outcome of the mediation process. Baylis and Carroll argue that autonomy in reference to mediation involves the parties' ability to choose the mediation process and the arrival at an agreement which is agreeable or consensual to both parties. To this end Baylis and Carroll state that autonomy exists if both parties are able to make real and free choices based on effective participation in the mediation process and where the resulting outcome is not based on coercion or pressure.<sup>46</sup> Bercovitch contends that where there is party satisfaction with the process and the outcome, then that outcome is more likely to be stable, enduring, long-lasting, and, thus, more successful.<sup>47</sup>

There are other concepts that inform the political process enabling it to achieve better results than the legal process. These include participant satisfaction, effectiveness and efficiency of the process. The success of mediation is thus gauged by reference to such abstract concepts. Fairness suggests an even-handed procedure and equitable outcome that is indicative of some conception of 'success'.<sup>48</sup> Sheppard puts forth a number of concrete indicators of fairness in the political process of

---

<sup>45</sup> Galligan D.J, *Due Process and Fair Procedures: A Study of Administrative Procedures* [1996] p.383.

<sup>46</sup> Claire Baylis and Robyn Carroll, "Power Issues in Mediation", op.cit., p.135.

<sup>47</sup> J. Bercovitch, "Mediation Success or Failure: A Search for the Elusive Criteria", *Cardozo Journal of Conflict Resolution*, op.cit.p.291-294

<sup>48</sup> Ibid

mediation that serve to assuage concerns regarding the threat of abstraction including: levels of process neutrality, parties control, equitability, consistency of results and consistency with accepted norms. Fairness is evidenced in the political process of mediation as the parties have autonomy over the process and are thus convinced that the process will lead to equitable solutions that are acceptable to both of them.<sup>49</sup>

Closely connected to fairness is the question of power. As already stated elsewhere mediation is a continuation of negotiations and in order to reach an outcome the parties must negotiate with each other. As a result, the fairness of the outcome will be affected by the ability of the parties to negotiate effectively. If there is a significant power difference, the concern is that one party may dominate the mediation process and the outcome to the extent that the agreement reflects the needs and interests of one party only. This is the essence of a settlement which is power based. Since power can affect the legitimacy of the mediation process, the mediation process must be able to deal with such a conflict. This problem is well addressed by the political process of mediation which allows the parties' to choose the process and hence arrive at an outcome that is acceptable to both and not based on coercion or pressure.<sup>50</sup>

Mediation in the political process proffers party satisfaction. Parties are more committed to the mediation process if they are satisfied with the process and the outcome. Bercovitch identifies a number of measureable indicators of party satisfaction with the mediation process, both with regard to process [privacy and level of involvement] and the outcome [benefits and commitment]. The argument then is that, an outcome that satisfies both parties is more likely to be stable, long-lasting,

---

<sup>49</sup> Blair Sheppard, *Third Party Conflict Intervention: A Procedural Framework*, 6 RES. ORG. BEHAV, 226-275 [1984], p.226

<sup>50</sup> Claire Baylis and Robyn Carroll, "Power Issues in Mediation", op.cit., p.135

enduring and thus more successful.<sup>51</sup> Such an outcome is offered by mediation in the political process.

Mediation is a process of change. It changes the behaviour and attitudes of the parties, even in a violent situation. Therefore for mediation to be deemed successful it must have some positive impact or effect on the conflict. Positive impact means changes such as moving from violent to non-violent behaviour or even an agreement being entered into by the conflicting parties. Since mediation in the political process delves into the underlying causes of the conflict it follows that a change must occur as a result of that process. The change observed in the political process is due to the effectiveness of that process which arises when the negotiations transform from a dyadic to triadic structure. The mediator brings with him additional resources and expands relations through communication and hence making the process more effective in resolving the conflict.<sup>52</sup>

Efficiency is the other concept that informs the political process of mediation. Efficiency is primarily focused on the procedural and temporal or informal dimension of mediation in the political process. It addresses issues such as cost effectiveness, time, flexibility of the process, and disruptiveness of the undertaking. Susskind and Cruikshank give efficiency the most weight. They do suggest that fairness is not enough since a fair agreement may not be acceptable if it takes an inordinately long time to achieve or if it is too expensive.<sup>53</sup> Mediation in the political process is timely, speedy and cost effective and thus will impress the parties to the conflict. The above concepts provide the threshold for determining whether a mediation process is

---

<sup>51</sup> J. Bercovitch, "Mediation Success or Failure: A Search for the Elusive Criteria", *Cardozo Journal of Conflict Resolution*, op.cit.p.293-294.

<sup>52</sup> Ibid.

<sup>53</sup> Lawrence Susskind & Jeffrey Cruikshank, "*Breaking the Impasse: Consensual Approaches to Resolving Public Disputes*", [Basic Books, 1987].



successful. True mediation is the one that has all the above attributes. Mediation in the political process is such a process. Since the above attributes are interdependent the mediation process should have most of them in order to achieve an outcome that is enduring, long-lasting and acceptable to the parties.<sup>54</sup> Since mediation in the political process depicts the true character of mediation it is the one that should be adopted in Kenya in resolving environmental conflicts.

### 2.5.3 Mediation in the Legal Process

Mediation in the legal process arises where the conflicting parties come into arrangements which they have been coerced to live with while exercising little or no autonomy over the choice of the mediator, the process and the outcome of the process. In the legal context mediation is a settlement mechanism which is much linked to the court system. Since mediation in the legal process is a settlement mechanism the root causes of the conflict are not addressed as it relies on the power relations which keep changing.

Mediation in the legal process focuses on the interests or issues of the conflict. Conflicts arising out of the interests of the parties are as a result of the power-capacities between the parties.<sup>55</sup> As a legal process mediation is linked to judicial settlement and arbitration and thus leads to a settlement. Court annexed mediation is not really mediation. The voluntariness and the autonomy over the process and the outcome are not present in the legal process because it is mediation pursuant to an order of the court where the settlement has to be returned back to court for

---

<sup>54</sup> J. Bercovitch, "Mediation Success or Failure: A Search for the Elusive Criteria", *Cardozo Journal of Conflict Resolution*, op.cit.p.293-294

<sup>55</sup> David Bloomfield, "Towards Complementarity in Conflict Management: Resolution and Settlement in Northern Ireland", op. cit., p. 152.

ratification.<sup>56</sup> The notion that mediation in the legal sense is a settlement process has been restated in the international legal context where mediation has been seen to be linked to judicial settlement and arbitration such that, it is viewed as a process that supports the courts.<sup>57</sup>

It has been said that in some jurisdictions including Kenya, mediation is being sacrificed at the altar of legalism, despite the fact that the courts are encouraging parties to choose other methods such as mediation rather than litigation. The argument is that the legal environment is unable to comprehend the structure and epistemology of mediation such that even after parties have been encouraged to mediate their conflict, the results of the mediation have to be tabled in court for ratification.<sup>58</sup>

Some of the attributes of mediation in the legal process are that parties lack autonomy in the process, the decision is not mutually satisfying, the outcome is not enduring, parties cannot choose a judge (for example in judicial settlement) and does not address the root causes of the conflict. Mediation in the legal process is not true mediation as it lacks the attributes of mediation: voluntariness, autonomy over the forum, choice of the mediator, over the process and the outcome. It only leads to a settlement as opposed to a resolution. It is not true mediation but a legal process.

#### 2.5.4 Dispute Settlement

It has been argued that the intellectual and philosophical underpinning of settlement is power which is possessed by the parties to the conflict. In a conflict then a settlement implies that the parties have to come to accommodations which they are

---

<sup>56</sup> See Figure 2.0 in Chapter Four.

<sup>57</sup> John North, Court Annexed Mediation in Australia – an Overview, Law Council of Australia, 17<sup>th</sup> November, 2005. Sourced from [www.lawcouncil.asn.au](http://www.lawcouncil.asn.au), accessed on 7<sup>th</sup> July 2011.

<sup>58</sup> Makumi Mwangi, *Conflict in Africa: Theory, Processes and Institutions of Management*, op. cit., p. 119.

forced to live with due to the anarchical nature of society and the role of power in relationships. Since a settlement is power-based and power relations keep changing the process becomes a contest of whose power will be dominant. Power therefore defines both the process and the outcome in a settlement.<sup>59</sup>

According to Bloomfield a settlement is an agreement over the issue(s) of the conflict which often involves a compromise.<sup>60</sup> Cloke says that a settlement process, “seeks to mollify the opposition without discovering or rectifying the underlying causes of the dispute”. According to Cloke a settlement is power based and it is power that informs the results of mediation in the legal context and as such a settlement overlooks the causes of the dispute leading to a “sullen acceptance”<sup>61</sup>. Due to its superficial nature settlement is only reached over the issues of the conflict. As such a settlement may be an effective immediate solution to a violent situation and it will therefore not address the factors that instigated conflict in the first place.

Bloomfield says that a settlement is temporal and does not eliminate the underlying causes of the inter-disputant relationship, which can later flare up when new issues or renewed dissatisfaction over old issues or the third party’s guarantee runs out.<sup>62</sup> This argument is reinforced by Bercovitch who says that a settlement takes place when conflict-generating behaviour notably of the damaging, violent or destructive kind is neutralized, dampened, reduced or eliminated. A settlement is criticised since it is a damaging half-measure which leaves the causes of the conflicts

---

<sup>59</sup> Claire Baylis and Robyn Carroll, “Power Issues in Mediation”, op.cit , p.135

<sup>60</sup> David Bloomfield, “Towards Complementarity in Conflict Management: Resolution and Settlement in Northern Ireland”, op. cit. P. 152.

<sup>61</sup> Kenneth Cloke, “The Culture of Mediation: Settlement vs. Resolution”, *The Conflict Resolution Information Source*, Version IV, December 2005.

<sup>62</sup> David Bloomfield, “Towards Complementarity in Conflict Management: Resolution and Settlement in Northern Ireland”, op. cit., p. 153.

to smoulder beneath the surface before erupting again.<sup>63</sup> Mediation in the legal process leads to a settlement.

### 2.5.5 Conflict Resolution

Resolution of conflicts informs mediation in the political process. In the mediation discourse, resolution of conflicts prescribes an outcome based on mutual problem-sharing in which the conflicting parties cooperate in order to redefine their conflict and their relationship.<sup>64</sup> According to Cloke since resolution is non-power based and non-coercive it follows then that conflict resolution entails the mutual satisfaction of needs and does not rely on the power relationships between the parties.<sup>65</sup> Bloomfield observes that the outcome of conflict resolution is enduring, non-coercive, mutually satisfying, addresses the root cause of the conflict and rejects power based out-comes.<sup>66</sup> The outcome of conflict resolution is enduring because a resolution is not-zero-sum. The gain by one party does not entail a corresponding loss for the other party because each party's needs are fulfilled. These needs cannot be bargained or fulfilled through coercion and power. A resolution digs deeper in ascertaining the root causes of the conflict between the parties by aiming at a post-conflict relationship not founded on power.<sup>67</sup>

---

<sup>63</sup> J. Bercovitch, "Mediation Success or Failure: A Search for the Elusive Criteria", *Cardozo Journal of Conflict Resolution*, op.cit., p. 296.

<sup>64</sup> David Bloomfield, "Towards Complementarity in Conflict Management: Resolution and Settlement in Northern Ireland", op. cit., p. 153.

<sup>65</sup> Kenneth Cloke, "The Culture of Mediation: Settlement vs. Resolution", *The Conflict Resolution Information Source*, Version IV, December 2005

<sup>66</sup> Ibid

<sup>67</sup> Makumi Mwangi, *Conflict in Africa: Theory, Processes and Institutions of Management*, op. cit., p. 42.

Mwagiru<sup>68</sup> and Cloke<sup>69</sup> agree that resolution is based on the belief that the causes of conflicts in the society are needs of the parties which are non-negotiable and inherent to all human beings. Cloke observes that a resolution of conflicts brings about a deeper level of understanding and empowerment through honest communication about the causes of the dispute and allows the parties to decide how and whether to end the conflict between them.<sup>70</sup> Burton & Dukes hypothesize that whereas dispute settlement is enforced, for example by courts, and does not delve into the underlying causes of the conflict, conflict resolution delves into the underlying causes of the conflict and removes them altogether.

Bercovitch suggests that within conflict management literature resolution is often presented as being inherently superior to settlement as it deals with the root causes of the conflict and negates the need for future conflict or conflict management. He contrasts resolution with settlement by stating that the later is a potentially damaging half-measure which leaves the causes of the conflict unaddressed and hence the possibility of the conflict later flaring up while a resolution addresses the root causes of the conflict.<sup>71</sup> The mechanisms that resolve conflicts are negotiation, mediation and problem solving workshops.<sup>72</sup>

---

<sup>68</sup> Ibid., p. 41.

<sup>69</sup> Kenneth Cloke, "The Culture of Mediation: Settlement vs. Resolution" in, Guy Burgess and Heidi Burgess (eds.), "Beyond Intractability", *Conflict Research Consortium*, (University of Colorado, Boulder, 2005), p. 1.

<sup>70</sup> Ibid

<sup>71</sup> J. Bercovitch, "Mediation Success or Failure: A Search for the Elusive Criteria", *Cardozo Journal of Conflict Resolution*, op.cit.296

<sup>72</sup> John Burton & Frank Dukes, *Conflict: Practices in Management, Settlement and Resolution* (London: Macmillan, 1990), pp.3-4.

## 2.5.6 Commonalities between the Political and Legal Processes of Mediation

Certain attributes of mediation are common to both the legal process and the political process of mediation. The attributes of mediation that ran across the board are: the presence of a third party (imposed or chosen), flexibility, confidentiality, speed, and the fostering of relationships. However, the legal process is less autonomous as the parties may not choose the forum and the third party.

There are certain attributes of mediation that are peculiar to the political process. These are, cost effectiveness, informality, focuses on interests and not rights, allows for creative solutions, allows for personal empowerment, enhances party control, addresses the root cause of the conflict, non-coercive and the outcome is enduring. The summary of the commonalities and differences between the two processes of mediation is captured in the table here under:

**Fig: 1.0 Processes of Mediation**

Attributes	Political Process	Legal Process
1. Flexibility	Yes	Yes
2. Cost effectiveness	Yes	No
3. Party autonomy	Yes	No
4. Speedy	Yes	Yes
5. Confidentiality	Yes	Yes
6. Informality	Yes	No
7. Focus on interests and not rights	Yes	No
8. Voluntariness	Yes	No
9. Fosters relationships	Yes	Yes
10. Allows for creative solutions	Yes	No
11. Allows for personal empowerment	Yes	No
12. Enhances party control	Yes	No
13. Addresses root cause of conflicts	Yes	No
14. Non-coercive	Yes	No
15. Leads to a zero-sum situation	No	Yes
16. Outcome is enduring	Yes	No

\*Source: The author

It is evident from Figure 1.0 that mediation in the political process has more attributes of mediation and it is arguable then that, that is why it will lead to resolution of conflicts. The attributes of mediation in the political process such as voluntariness, informality, autonomy over the choice of the mediator, over the process and outcome are evident and as such the political process of mediation will lead to resolution as opposed to a settlement. This study thus adopts mediation in the political process since it will lead to resolution of environmental conflicts as opposed to merely settling the same.

## 2.6 Methods of Conflict Management

Article 33 of the Charter of the United Nations states that;

“The parties to any dispute ....shall, first of all seek a solution by negotiation, enquiry, mediation, conciliation, arbitration, judicial settlement, resort to regional agencies or arrangements, or other peaceful means of their own choice.”<sup>73</sup>

Litigation or judicial settlement and arbitration are the main mechanisms in dispute settlement. Mwagiru argues that dispute settlement mechanisms are coercive in that the parties in the dispute have little or no autonomy. The coerciveness of a settlement is achieved through legal tools such as courts, police, and the army among others. For example in judicial settlement when a matter is taken to court neither of the parties have a choice about either the judges or the court. The court gives a judgment which is binding on both parties but a dissatisfied party can appeal the decision when it becomes final. He argues that while this is the case the losing party may still be aggrieved, but has to live with that decision of fact sanctions or be in contempt of court.<sup>74</sup> Courts are therefore not best placed to address the causes of a

---

<sup>73</sup> United Nations, *Charter of the United Nations*, 24 October 1945, I UNTS XVI.

<sup>74</sup> Makumi Mwagiru, *The Water's Edge: Mediation of Violent Electoral Conflict in Kenya*, op.cit, pp.36-38

conflict and neither do they reach solutions that are enduring to both parties as they are merely settlement mechanisms.

In arbitration the parties have some autonomy in choosing the forum and the judges but when an award is given one party will be aggrieved notwithstanding the fact that the parties agree at the outset to be bound by the decision of the arbitrator. It thus ends up being coercive because the parties must obey it hence reducing its effectiveness as a conflict management method.<sup>75</sup> The coercive methods such as litigation and arbitration are however useful where the question is one about disputes which are about interests rather than interests.<sup>76</sup> Where it is a conflict which is about values, these methods are unsatisfactory as they do not address their root causes and leaves one party dissatisfied and the conflict may re-emerge in future.<sup>77</sup>

Conflict resolution mechanisms are negotiation, mediation and problem solving facilitation. These mechanisms are non-coercive in that the parties have autonomy about the forum, the process, the third parties involved and the outcome. The non-coercive methods allow parties to work through their conflict, address its underlying causes, and reach a resolution to that conflict. Resolution means that the conflict has been dealt with and cannot re-emerge later.<sup>78</sup> The effective method for conflict management is mediation in the political process which is non-directive, does not affect the autonomy of the parties and leads to enduring outcomes.

---

<sup>75</sup> Ibid

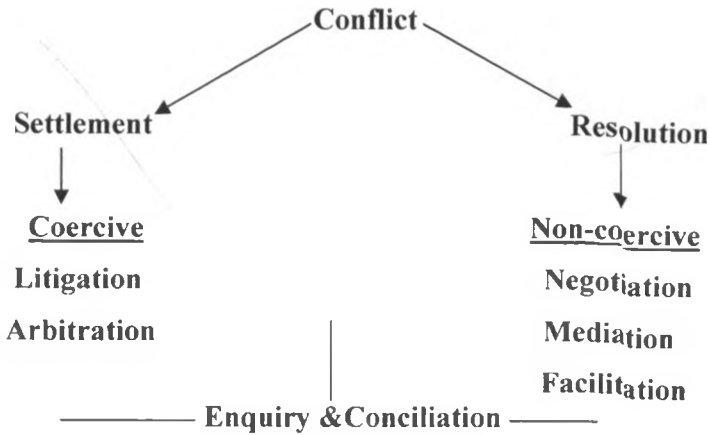
<sup>76</sup> Makumi Mwangi, *Conflict in Africa: Theory, Processes and Institutions of Management*, op. cit. pp. 109-114

<sup>77</sup> Kenneth Cloke, "The Culture of Mediation: Settlement vs. Resolution", *The Conflict Resolution Information Source*, Version IV, December 2005.

<sup>78</sup> Ibid.



**Fig.1.1 Methods of Conflict Management**



\*Source: The author

Figure 1.1 shows that there are certain methods of conflict management that can only lead to a settlement. Those that lead to a settlement fall into the category of coercive methods where parties have little or no autonomy over the forum, choice of the judges and the outcome. The coercive methods are litigation or judicial settlement and arbitration. It also shows the non-coercive methods (negotiation, mediation and facilitation) which lead to resolution. In the non-coercive conflict management methods the parties enjoy autonomy over the choice of the mediator or third party, the process and the outcome. Conciliation and enquiry can be classified as coercive (when the reports emanating from them are enforced) and non-coercive for example when the reports are used as the basis for negotiation between the parties.

## 2.7 A Critique of Mediation

Mediation in the legal process leads to a settlement. According to Bloomfield a settlement is an effective immediate solution to a difficult and possibly violent situation. It has been argued that mediation in the legal process is more pragmatic aiming at the achievable. Its efficacy is however temporal and fails to deal with the negative elements of the underlying inter-disputant relationship. These

causes of conflict remain to flare up again, either when feelings produce new issues or renewed dissatisfactions over the old issues or when the third party's guarantee runs out. In a settlement the third party pursues its own agenda as an 'outcome advocate' and legitimately employs leverage and coercion to achieve or impose a negotiated settlement.<sup>79</sup>

On the other hand the political process of mediation leads to a resolution. A resolution brings forth durable, enduring, even permanent solutions as it delves into the underlying causes of the conflicts. It is subjective, relationship-based, needs-based, comprehensive, aiming to remove or transform the roots of conflict through joint analysis and cooperative problem-solving. In resolution the mediator takes a merely non-directive, facilitative role to help the conflicting parties redraw their relationship agreeably around a mutual problem in order to generate a self-sustaining and integrative resolution. The major point of criticism of resolution is its focus on feasibility where it is argued that whereas it is a valid argument it is not pragmatic. The argument is that conflicting parties are least amenable to an approach which is deep rooted in close cooperation.<sup>80</sup>

Another problem associated with mediation whether it leads to a settlement or a resolution is the question of re-entry. The problem is that after the parties or their leaders have negotiated and even reached a solution to the conflict, they nevertheless have to go back and re-enter the conflict environment. Despite the fact that re-entry is an important issue, it may nullify the efforts dedicated in the negotiation process if the leaders cannot sell the agreement reached to their constituents who are the eventual consumers of the outcomes reached at. The re-entry problem is more serious in

---

<sup>79</sup> David Bloomfield, "Towards Complementarity in Conflict Management: Resolution and Settlement in Northern Ireland", *op. cit.*, p. 153.

<sup>80</sup> *Ibid.*, p. 152.

settlement than in resolutions and it has been said that it can be avoided through continuous consultations throughout the negotiation process. Resolution processes have more inbuilt checks against the problem of re-entry such as the problem solving workshop. Since the problem solving workshops have a consultative framework inbuilt into their structure they have in mitigating the problem of re-entry.<sup>81</sup>

Despite its many advantages mediation is said to suffer Party Choice and Control.<sup>82</sup> A major selling point of mediation is that parties get to choose the mediator to their dispute, the venue of the mediation, who is to attend and when the mediation is to be conducted.<sup>83</sup>

Further, there is the issue of power imbalance. A power differential may originate from a variety of sources which include those derived from financial resources, knowledge and skill in negotiating, access to decision makers, personal respect and friendships.<sup>84</sup> Rarely, if ever, will power be equally balanced between the parties to a dispute. Even if it were desirable, there is no way a mediator would be able to measure the distribution of power between parties, and then intervene to redistribute power more equally.<sup>85</sup> Power is a major concern in mediation. Where there is a significant power difference, the concern is that one party may dominate the process and the resulting outcome such that the agreement reflects largely only that

---

<sup>81</sup> Makumi Mwagiru, *Conflict in Africa; Theory, Processes and Institutions of Management*, op. cit., pp. 45-46

<sup>82</sup> Sourced from <http://resources.lawinfo.com/en/Articles/mediation/Federal/the-pros-and-cons-of-meditation.html>, accessed on 3<sup>rd</sup> June 2011.

<sup>83</sup> Charles P. Bauer, *NH Employment Mediation Best Practices; "Choice, Control and Conclusion"* February 2011. Sourced from <http://www.gcglaw.com/resources/adr>, accessed on 3<sup>rd</sup> June 2011.

<sup>84</sup> Carolyn Manning, *Power Imbalance in Mediation*, an unpublished paper sourced from [www.dialmformediation.com.au](http://www.dialmformediation.com.au), accessed on 2/06/2011.

<sup>85</sup> Power Imbalances in Mediation, SCMC Briefing Papers, *Scottish Community Mediation Centres*, Edinburgh, sourced from [www.scmc.sacro.org.uk](http://www.scmc.sacro.org.uk), accessed on 03/06/2011.

party's needs and interests. Power also has broader repercussions in mediation as it may affect the legitimacy of the process itself. As such for a mediation process to be legitimate, it must be able to deal fairly with disputes involving significant power differences.<sup>86</sup>

Another criticism is the non binding nature of mediation. This means that, even though parties have agreed to submit a dispute to mediation, they are not obliged to continue with the mediation process after the first meeting. In this sense, the parties remain always in control of the mediation process. The continuation of the process depends on their continuing acceptance of it.<sup>87</sup> The non-binding nature of mediation means also that a decision cannot be imposed on the parties.<sup>88</sup>

Mediation is a confidential procedure. Any admissions, proposals or offers for solutions will not have any consequences beyond the mediation process and cannot, as a general rule, be used in subsequent litigation or arbitration.<sup>89</sup> While confidentiality is likely a benefit to mediation, there may be other situations where one of the parties wants the information to be public as it would be in a court case. For example, an employee who was treated unfairly might want that information to come out in court and be accessible to the media in the hopes that it will help dissuade the company from acting that way again in the future.

Further, Carden<sup>90</sup> says that confidentiality founded on the 'without prejudice' privilege at common law is subject to a number of exceptions. According to Laddie J

---

<sup>86</sup> Claire Baylis and Robyn Carroll, "Power Issues in Mediation", op.cit , p.135

<sup>87</sup> Sourced from <http://resources.lawinfo.com/en/Articles/mediation/Federal/the-pros-and-cons-of-meditation.html>, op. cit.

<sup>88</sup> Ibid.

<sup>89</sup> Ibid.

<sup>90</sup> David M Carden, *Confidentiality in Mediation*, a Presentation to the Arbitrators' and Mediators' Institute of New Zealand Inc., 2005 Annual Conference, Queenstown, 30 July 2005, pp. 10 -11.

in *Unilever Plc v The Procter & Gamble*<sup>91</sup>, the first is where the entitlement to rely on the privilege has been waived. Secondly, a Court may come to the conclusion that the claim to without prejudice status is not bona fide.<sup>92</sup> Thirdly, Laddie J stated that there are occasions where, even though the parties treated the negotiations as being without prejudice, there are public policy considerations favouring disclosure which override those encouraging the settlement of disputes. It would seem therefore that confidentiality in mediation is guaranteed only to some extent and is not absolute as it has been said to be.

Time Saving is another attribute of mediation. According to the American Bar Association<sup>93</sup>, it is often possible to schedule mediation around work schedules or on the weekend. Mediations are thus often marketed as being both economically and time efficient. However, that marketing assumes that both parties are honestly willing to mediate the dispute. If one party (or both parties) do not enter the mediation with the intention to make concessions and reach a compromise then the mediation is likely to fail. While mediations are less expensive and take less time than court cases, they still cost money and can last anywhere from a few hours to a few days. The cost of the mediation, and obviously the time it took, are not refundable and the parties to a failed mediation typically need to incur the costs of litigation after the failed mediation is over.<sup>94</sup>

Another salient feature of mediation is neutrality of the process. According to Cobb and Rifkin, neutrality is a concept central to the theory and practice of

---

<sup>91</sup> [1999] 2 All ER 691.

<sup>92</sup> Hoffmann LJ in *Forster v Friedland* [1992], Court of Appeal of England and Wales, (unreported).

<sup>93</sup> "Beyond the Myths; Get the Facts about Dispute Resolution", *American Bar Association*, Washington DC, 2007, p. 8, sourced from [www.abanet.org/dispute](http://www.abanet.org/dispute), accessed on 7<sup>th</sup> May 2010.

<sup>94</sup> Sourced from <http://resources.lawinfo.com/en/Articles/mediation/Federal/the-pros-and-cons-of-meditation.html>, op. cit.

mediation as it functions to preserve a communication context in which grievances can be voiced, claims to justice made, and agreements mutually constructed.<sup>95</sup> Neutrality is often taken to include fairness and even-handedness by the mediator, although these characteristics are sometimes categorised as impartiality, where neutrality is used to describe a mediator's disinterest in the outcome of the conflict.

The argument is then that there is a difficulty both in the theory and practice of mediation where there is a contradiction between even-handedness and fairness. This is because if the parties are treated in the same way the power differences are not addressed, leading to a lack of fairness in the process and the outcome. What is needed is a redefinition of neutrality to ensure that what the mediator does is to ensure the parties control the process, the outcome of the process and that they act out of no coercion or pressure.<sup>96</sup>

Merry on the other part argues against the view that mediation is conciliatory and therapeutic, or, to put it more accurately, she holds that conciliation and therapy both involve coercion. She shows that, in widely divergent cultural settings, effective mediation involves coercion of the disputants by the third party. Mediation works not (or not only) because carefully nurtured disputants decide to be reasonable, but because they fear social censure and loss of support by important members of their networks, or because of other more direct threats on the part of the mediators themselves.<sup>97</sup> Another central criticism of mediation advanced by Colin Rule, more so community mediation programmes, is that it personalizes disputes to the exclusion

---

<sup>95</sup> Sara Cobb and Janet Rifkin, "Practice and Paradox: Deconstructing Neutrality in Mediation," *Law & Social Inquiry*, Vol. 16, No. 1, (Blackwell Publishing, Winter, 1991), pp. 35-62.

<sup>96</sup> Claire Baylis and Robyn Carroll, "Power Issues in Mediation", op.cit , p.135.

<sup>97</sup> Merry, S. E., "The social organisation of mediation in non-industrial societies", in R. Abel's (ed.), *The politics of Informal Justice*, (Academic Press, New York, 1982).

of broader issues. He says that if two neighbours are fighting over yard space, for instance, mediation encourages them to see the fight as being based on their individual issues and needs; the real issue might be that the zoning laws are unfair and they should direct their anger towards the city to change the laws.<sup>98</sup>

The author thus concludes that through personalizing disputes, mediation can blind people to the real source of their problems by focusing attention exclusively on the individual aspects. A second criticism by Rule is that mediation can lead to social control. He says that by personalizing problems to the individual level, mediation works against people getting angry and using that anger to effect systemic change.

Another selling point for mediation is that it is not expensive when compared to other forms of conflict resolution. This notion is discounted by Carson in her analysis of the economic effect of court mandated mediation in the state of South Carolina.<sup>99</sup> She says that although Court appointed mediators are limited to charging \$175 per hour, private mediators charge rates ranging from \$100 to \$300 per hour, or flat fees up to \$2000 per mediation. She argues that this is an unnecessary additional cost for parties that struggle financially. She concludes that that the situation is worsened further by the involvement of attorneys who drag out the process leaving little room for negotiated solutions and also increasing costs payable by the parties.

## 2.8 Challenges and Opportunities for Mediation

The political process as discussed offers numerous opportunities for mediation. It possesses all the attributes of mediation and that is why it leads to a resolution. Resolution goes into the root causes of the conflict and is not power based

---

<sup>98</sup> Colin Rule, "Collegiate Mediation Programs: A Critical Review, The Fourth R", *National Association for Mediation in Education*, Vol. 50, April/May 1994 issue, pp. 36-37.

<sup>99</sup> Patricia L. Carson, "Mandatory Mediation: A Burden or Benefit, Resolved", *Journal of Alternative Dispute Resolution*, Vol. 1, Issue 1, 2010, pp. 1 – 2.

and hence does not rely on enforcement by the state agencies such as the police. As outlined above the other selling point of mediation in the political sense is that since it addresses the root causes of the conflict it negates the threat of further conflicts flaring up.<sup>100</sup> Mediation in the political process offers the opportunities for conflict resolution in Kenya in environmental conflicts.

One of the challenges facing mediation in the political process in resolving conflicts is that resolution is only practicable in small scale, interpersonal, or group conflicts, than in large scale, complex and international conflicts and the fact that it is not useful in violent conflicts.<sup>101</sup> Mediation in the legal process leads to a settlement and thus is useful in violent situations, where it can be used to neutralize, reduce or cool off the situation before recourse is had to resolution.<sup>102</sup>

Since a settlement results from the legal process it takes place against a background of power politics and thus they can be rushed and hence their lack of longevity. But it should be noted that conflicts are normally protracted and complex and therefore their methodologies for management must be complex too. This is the reason it has been argued that just because a resolution takes time it is no reason why it should not be the preferred conflict management mechanism. Despite the longevity in managing conflicts through resolution there is a case to be made for preferring resolution processes. Africa gives many examples of conflicts that were settled but the settlements were not long lasting. Examples of such settlements are the Uganda

---

<sup>100</sup> J. Bercovitch, "Mediation Success or Failure: A Search for the Elusive Criteria", *Cardozo Journal of Conflict Resolution*, op.cit.296

<sup>101</sup> Ibid

<sup>102</sup> David Bloomfield, "Towards Complementarity in Conflict Management: Resolution and Settlement in Northern Ireland", op. cit., p. 153.



Peace Agreement (1985), the Addis Ababa Agreement (1972) and the Angolan Agreement.<sup>103</sup>

There are also opportunities that are salient to the African situation and its indigenous processes. Murithi and Murphy<sup>104</sup> state that the key strength of indigenous mediation processes is that they are familiar to the communities where they are utilised and appeal to local cultural norms and leadership structures. Further, indigenous processes inclusive, promote public participation and seek consensus in addressing the root causes of conflict.<sup>105</sup> Indigenous processes are also cost effective as they rely on a community's own internal resources, emphasise the nexus between mediation and reconciliation rather than viewing them as separate and also emphasise the importance of a sustained and continuous mediation effort.<sup>106</sup> Thus the outcomes they produce are more likely to be internalised by the parties.

These indigenous processes however have their challenges. Such process can be indefinite, time consuming and also do not encourage expediency.<sup>107</sup> There are also legitimacy issues when powerful and important actors are left out of the process for one reason or another. Other challenges are policy based and the lack of prioritisation of mediation by the African states, as a means of conflict resolution. Nathan<sup>108</sup>

---

<sup>103</sup> Makumi Mwagiru, *Conflict in Africa: Theory, Processes and Institutions of Management*, op. cit., p. 47

<sup>104</sup> Tim Murithi & Paula Murphy Ives, "Under the Acacia: Mediation and the dilemma of inclusion", op. cit., p. 84.

<sup>105</sup> Ibid. See also Thomas Schelling and Kenneth Arrow on merits of cultural norms and collective wisdom in, James Surowiecki (ed.), *The Wisdom of Crowds*, (Anchor Books, New York, 2005).

<sup>106</sup> Tim Murithi & Paula Murphy Ives, "Under the Acacia: Mediation and the dilemma of inclusion", op. cit., p. 84.

<sup>107</sup> Ibid.

<sup>108</sup> Laurie Nathan, "Mediating in African Conflicts: The gap between mandate and capacity", *Centre for Humanitarian Dialogue*, 2009, pg. 11; a paper presented at the Africa Mediator' Retreat held on 24 - 27<sup>th</sup> March 2009 at Zamani Kempinski Hotel in Zanzibar, Tanzania.

observes that whereas substantial time, effort and money are devoted to military training in order to ensure success, manage risk and prevent failure, little if any attention is paid to nurturing African mediators. The author further says that peace initiatives consequently suffer from a chronic lack of skill, capacity and support. Other problems that bedevil African peacemaking efforts are inadequate institutional support for mediators, lack of institutional memory and learning and lack of a viable concept of mediation.<sup>109</sup>

In summing up, the preceding discussion has laid out the essence of mediation and a conceptual understanding of mediation in the management, and resolution of environmental conflicts. The political and legal processes have been assessed and a case has been made for the proposition that the political process of mediation has more attributes of mediation and therefore leads to resolution of conflicts and enduring outcomes. On the other hand mediation in the legal process leads to settlement of some issues only and the causes of the conflict may ignite later on when the power balance changes or the third party guarantee runs out.<sup>110</sup>

In environmental conflict management the aim is to get solutions that are acceptable, durable, enduring, long lasting and futuristic. As such the conflict management method chosen should be as voluntary as possible and one that gives the parties autonomy over the process and the outcome of the mediation. The above discussion has shown that mediation in the political process is such a process as it has more attributes of mediation. It leads to resolution. Mediation in the political process is better or true mediation and that is why the thesis advances the argument that it should be adopted in the resolution of environmental conflicts in Kenya.

---

<sup>109</sup> Ibid., pp. 12 – 18.

<sup>110</sup> David Bloomfield, "Towards Complementarity in Conflict Management: Resolution and Settlement in Northern Ireland", *op. cit.*, 153.

# Chapter Three

## Institutional, Policy and Legal Mechanisms for Environmental Conflict Management in Kenya

### 3.1 Introduction

Chapter Two was a conceptual study of mediation and examined mediation as a continuation of negotiation with the assistance of a third party. Equally the chapter discussed the essence of mediation, the political and legal processes of mediation, the commonalities between them, and also the link between negotiation and mediation. It also focused on the practices and concepts of the political processes of mediation which leads to resolution and advanced the argument that mediation in the political process is the true mediation and should be adopted to resolve environmental conflicts in Kenya.

This chapter addresses the types and causes of environmental conflicts occurring in Kenya and what legal and institutional frameworks for the management of the conflicts exist. Environmental conflict resolution is discussed at a generic level. The chapter briefly considers the international regime on environmental conflict management and further examines the institutional, legal and policy mechanisms for environmental conflict management in Kenya, their advantages and disadvantages.

Environmental conflicts in Kenya occur at various levels and involve a range of actors. A lot of conflicts are characterized by the presence of multiple stakeholders who may have subgroups with varying interests.<sup>1</sup> They range from conflicts among

---

<sup>1</sup> Nancy Hart and Peter Castro, "Conflict & Natural Resource Management", *Food and Agriculture Organization of the United Nations (FAO)*, sourced from <http://www.fao.org/publications> (accessed on 19/03/2010).

local men and women over the use of trees, to conflicts among neighbouring communities over woodland, community based organisations, domestic and multinational businesses, and Non Governmental Organisations in conflict over the use and management of forests.

According to a United Nations Environment Programme report,<sup>2</sup> clashes between communities in Kenya have claimed the lives of thousands of individuals, and continue to date. The report concludes that demographic, environmental and social economical factors/stresses have often precipitated these episodes and further that, a growing population combined with unsustainable ecological practices have resulted in a significant depletion of available resources which, in turn, have led to impoverishment, migrations and clashes over access to remaining resources.

Environmental conflicts are types of conflicts with a causal relation to environmental resources, conditions or both. On their part, conflicts are part of human life,<sup>3</sup> endemic and inevitable, especially in today's society.<sup>4</sup> Conflict is present when two or more parties perceive their interests as incompatible, express hostile attitudes, or pursue their interests through actions that damage each other's interest(s). In other words, conflict is an expressed struggle between at least two interdependent parties who perceive incompatible goals, scarce resources, and interference from others in achieving their goals.<sup>5</sup> It has also been argued that a conflict exists when two people wish to carry out acts which are mutually inconsistent. A conflict is resolved

---

<sup>2</sup> Schwartz, Daniel and Singh, Ashbindu, *Environmental Conditions, Resources, and Conflicts: An Introductory Overview and Data Collection*, (UNEP, 1999).

<sup>3</sup> International Peace Research Association (IPRA), *Handbook Resource and Teaching Material in Conflict Resolution: Education for Human Rights Peace and Democracy*, (UNESCO, Paris, 1994), p.1.

<sup>4</sup> See Rex Mitchell, *Introduction to Conflict Management*, available at: <http://www.csun.edu/~hfmgt001/cm1>. (Accessed on 19/08/2009)

<sup>5</sup> Joyce Hocker and William Wilmot, *Interpersonal Conflict*, 2nd ed. rev. (C. Brown Publishers, Dubuque, Iowa, 1985), p. 9.

when some mutually agreeable solution is worked out by the parties, either on their own or with assistance of a third party. Depending of the type of third party, he or she may assist without making the decision for the parties or may impose a decision that either party is bound to comply with.

### 3.2 International Regime on Environmental Conflict Management

There exists treaties on diverse sectors of the environment, such as water resources, atmosphere, biodiversity, sea and ocean resources, fauna and flora, hazardous substances and effluent discharge, trans-boundary resource management, waste and pollution, polar regions, and sustainable development. Generally, each of these international environmental law instruments imposes obligations and requires compliance from the parties, ratification or accession.

The United Nations (UN) encourages pacific settlement of disputes. The Preamble to the UN Charter emphasises the need to resolve conflicts through pacific means so as to save succeeding generations from the ‘scourge of war, which twice [during the 1<sup>st</sup> and 2<sup>nd</sup> world wars] in our lifetime has brought untold sorrow to mankind.’<sup>6</sup> Article 33 provides that parties to any dispute whose continuance is likely to endanger international peace and security seek a solution by “negotiation, enquiry, mediation, conciliation, arbitration, judicial settlement, resort to regional agencies or arrangements or other peaceful means of their choice.” In that regard, the Security Council is given the discretion to call on parties to settle their disputes by such means.<sup>7</sup>

In addition, there exist many institutions for dealing with international disputes, including those of an environmental nature; such as the International Court

---

<sup>6</sup> *Charter of the United Nations*, 59 Stat. 1031. See also Article 2 (iii) of the UN Charter.

<sup>7</sup> *Ibid.*, Article 33.

of Justice (ICJ) (This is the 'principal judicial organ' of the United Nations) which has handled notable cases such as *Gabcikovo-Nagymaros*,<sup>8</sup> *Nuclear Tests* cases<sup>9</sup> and the *Fisheries Jurisdiction* cases.<sup>10</sup> Another institution is the International Tribunal for the Law of the Sea (ITLOS)<sup>11</sup> which was created at the Third United Nations Conference on the Law of the Sea pursuant to the 1982 United Nations Convention on the Law of the Sea (UNCLOS), signed at Montego Bay, Jamaica on 10<sup>th</sup> December 1982. It has entertained four cases of provisional measures under article 290, paragraph 5 to wit; the *Southern Bluefin Tuna Cases*,<sup>12</sup> the *MOX Plant Case*<sup>13</sup> and the *Case Concerning Land Reclamation by Singapore in and around the Straits of Johor*.<sup>14</sup>

Other institutions include the WTO Appellate Body, governed by the Marrakesh Agreement of 1994,<sup>15</sup> which has dealt with cases such as the *Beef Hormones Case*<sup>16</sup> (precautionary principle) and the *Shrimp Turtle Case*,<sup>17</sup> and the International Court of Environmental Arbitration and Conciliation, established in

---

<sup>8</sup> (1997) ICJ Reports 7.

<sup>9</sup> *Australia v. France* (Interim Protection) (1973) ICJ Reports 99; judgment (1974) ICJ Reports 253; *New Zealand v. France* (Interim Protection) (1973) ICJ Reports 135; judgment (1974) ICJ Reports 457.

<sup>10</sup> *United Kingdom v. Iceland* (Order for Interim Measures) (1972) ICJ Rep. 12; *Federal Republic of Germany v. Iceland*, (1972) ICJ Reports 30 and the *Corfu Channel Case* (United Kingdom v. Albania) (1949) ICJ Reports 4. See also the *Anglo-Norwegian case* (1951) I. C. J. Reports, p. 116

<sup>11</sup> See the official ITLOS site, [www.itlos.org](http://www.itlos.org); see also Adede A. O, *The System for Settlement of Disputes under the United Nations Convention on the Law of the Sea: A Drafting History and a Commentary*, (Martinus Nijhoff Publishers, 1987)

<sup>12</sup> *Southern Bluefin Tuna Cases* (New Zealand v. Japan; Australia v. Japan), Provisional Measures, 38 ILM 1624 (1999).

<sup>13</sup> *The MOX Plant Case* (Ireland v. United Kingdom) (Provisional Measures), 41 ILM 405 (2002).

<sup>14</sup> *Malaysia v. Singapore* [2003] ITLOS I.

<sup>15</sup> Agreement Establishing the World Trade Organisation, Marrakesh, 15<sup>th</sup> April 1994, which entered into force on January 1995; 33 ILM 1125 (1994)

<sup>16</sup> *EC – Measures Concerning Meat and Meat products* (Hormones) WT/DS48/AB/R, 16<sup>th</sup> January 1998.

<sup>17</sup> *US – Import Prohibition of Certain Shrimps and Shrimp Products* 12<sup>th</sup> October 1998; 38 ILM 118 (1999).

Mexico in November 1994 by 28 lawyers from 22 different countries.<sup>18</sup> The Court is not part of the UN structure and facilitates, through conciliation and arbitration, the settlement of international environmental disputes submitted by states, natural or legal “parties”.<sup>19</sup> Another body is the European Court of Justice (ECJ) which is the judicial institution of the European Commission,<sup>20</sup> and is required to ensure that in the interpretation and application of the EC Treaty, the law is observed.

### 3.3 Mechanisms for Managing Environmental Conflicts in Kenya

In Kenya, the national legal regime governing environmental resources is based on legislation, policy statements and judicial pronouncements.<sup>21</sup> The Kenyan legal and policy frameworks are scattered over a multiplicity of resource and sector specific laws and policy papers. This legal and policy framework can be traced to the Constitution of Kenya, 2010, the Environmental Management and Coordination Act<sup>22</sup> (EMCA) and other sectoral laws on the environment.<sup>23</sup> It has been argued that EMCA created an overall and all embracing agency for the protection of the environment as opposed to previously existing legislation that had created sectoral agencies leading to

<sup>18</sup> The International Court of Environmental Arbitration and Conciliation, Statutes 2002; Available at the website of the International Court of Environmental Arbitration and Conciliation [www.icea.sarenet.es](http://www.icea.sarenet.es) (accessed on 17/5/11).

<sup>19</sup> *Ibid.*, Article 2

<sup>20</sup> R. Macrory, “The Enforcement of Community Environmental Laws: Some Critical Issues”, 29 *Common Market Law Review* 347, (1992) and Philippe Sands, “European Community Environmental Law: Legislation, the Environmental Court of Justice and Common Interest Groups”, 53 *MLR* 685 (1990). See also, The European Commission Sourced from [www.ec.europa.eu](http://www.ec.europa.eu) last accessed on 24/4/2009.

<sup>21</sup> Charles O. Okidi, “Reflections on Teaching and Research on Environmental Law in African Universities,” 18 *Journal of Eastern African Research and Development* 128, (1988), p. 128 – 129.

<sup>22</sup> Act Number 8 of 1999, *Government Printer*, Nairobi.

<sup>23</sup> Public Health Act Cap 242, the Forest Act No. 7 of 2005 and the Water Act No. 8 of 2002. Other statutes include those dealing with land like the Government Lands Act (Cap 280), Registration of Titles Act (Cap 281), Land Titles Act (Cap 282), Land Consolidation Act (Cap 283), Land Adjudication Act (Cap 284), Land Acquisition Act (Cap 295), Registered Land Act (Cap 300) and the Land Control Act (Cap 302).

regulatory competition.<sup>24</sup> There is however a counter argument that the sectoral institutions are still legally maintained under Kenyan law as EMCA did not repeal any laws nor did NEMA replace any institutions, save for the National Environment Secretariat and the Permanent Presidential Commission on Soil Conservation and Afforestation.<sup>25</sup>

Kenya does not have a harmonised environmental policy as such and the closest it ever came to having such a policy was through Sessional Paper No. 6 of 1999, on the Environment and Development. The Sessional Paper outlines one of the challenges of environmental legislation as the absence of a comprehensive policy for the resolution of conflicts between wildlife, pastoralism and other land uses. Sector specific policy papers regarding the environment include the Wildlife Policy (2007), Forestry Policy (2005), Fisheries Policy (2005), Draft Wetlands Policy (2008), Integrated Coastal Zone Management Policy (2007) and the Kenya Environmental Information Network policy (2009).<sup>26</sup>

Administrative conflict management mechanisms, litigation and arbitration are the main strategies for addressing conflicts over environmental resources under Kenyan law. Other mechanisms for instance, alternative conflict resolution methods, informal measures such as peace committees and deliberations by councils of elders are used in resolving environmental conflicts.<sup>27</sup> Conflict avoidance is also available as

---

<sup>24</sup> Patricia Kameri-Mbote, "Towards Greater Access to Justice in Environmental Conflicts in Kenya: Opportunities for Intervention," *IELRC Working Paper 2005-1*, p. 3, available at <http://www.ielrc.org> (accessed on 01/05/2010).

<sup>25</sup> Anne N. Angwenyi, "An Overview of the Environmental Management and Co-ordination Act", in C.O Okidi, P. Kameri - Mbote and Migai Aketch (eds.), *Environmental Governance in Kenya: Implementing the Framework Law*, (East African Educational Publishers, 2008), pp. 142-182: 146.

<sup>26</sup> Accessed from [www.nema.go.ke/downloads](http://www.nema.go.ke/downloads), on 21<sup>st</sup> July 2011.

<sup>27</sup> Patricia Kameri-Mbote, "Towards Greater Access to Justice in Environmental Conflicts in Kenya: Opportunities for Intervention, op. cit., pp. 6 - 9.



a means of addressing potential conflicts. This involves systematic monitoring and evaluation of natural resource management activities so as to identify, pre-empt or address conflicts.

### **3.4 Efficacy of Environmental Conflict Management Mechanisms in Kenya**

Environmental conflicts are unique in many ways. They occur within the space that human beings live in. Indeed, they may involve livelihoods and go to the very core of human survival. It is imperative, then, that the mechanisms that are employed to deal with environmental conflicts take into account the unique nature of environmental conflicts, and aim at resolving them effectively, expeditiously and at minimal cost. It is against this background that the utility and efficiency of the current mechanisms for resolving environmental conflict discussed earlier are assessed.

#### **3.4.1 Institutions Established under the EMCA**

The Environmental Management and Coordination Act (EMCA)<sup>28</sup> lays a framework of administrative measures for the resolution of environmental conflicts. EMCA also establishes an elaborate institutional framework to deal with environmental management in Kenya. The main environmental management institutions in Kenya established under EMCA include National Environment Council (NEC), The National Environment Management Authority (NEMA), the Provincial and District Environment Committees, Standards and Enforcement Review Committee and the National Environmental Action Plan Committee. However, the main conflict resolution institutions under EMCA are the National Environment Tribunal (NET) and the Public Complaints Committee (PCC).

---

<sup>28</sup> Act Number 8 of 1999, op. cit.

EMCA marked a big step in harmonizing the work of the various institutions involved in managing the environment, public participation in the management of the environment and natural resources through the interpretation of *locus standi* and the devolution of environmental management responsibilities to the district and provincial environmental committees.<sup>29</sup>

This position has been reiterated by the courts which have held that EMCA prevails over all other sectoral laws where there is a conflict in environmental matters.<sup>30</sup> However, there are many inadequacies in the Act in that it only addresses issues of environmental management in a sectional spectrum. As Kenya's principal legal instrument on the environment, the EMCA is expected to address all aspects of the procedural and substantive process in relation to environment and development, including law enforcement and the monitoring of compliance.<sup>31</sup>

The institutions established under EMCA have the advantage of freedom with regard to choice of procedure. This allows for blending of procedures entailed in the available conflict resolution mechanisms. However, these quasi-judicial institutions are not independent from the government. This is their main drawback because the members to all these institutions are appointed by the executive. It has been argued that with government officials and domination comes the element of red tape and, with it, goes the efficiency of the conflict resolution framework it entails in.<sup>32</sup>

---

<sup>29</sup> Benson Ochieng, Institutional Arrangements for Environmental Management in Kenya, in C.O Okidi, P. Kameri - Mbote and Migai Aketch (eds.), *Environmental Governance in Kenya: Implementing the Framework Law*, (East African Educational Publishers, 2008), pp. 183–207: 204.

<sup>30</sup> See *Rodgers Muema Nzioka & Others v. Tiomin Kenya Ltd, Mombasa High Court Civil Suit No.97 of 2001* (unreported).

<sup>31</sup> Sourced from <http://kenvironews.wordpress.com/2009/01/27>, accessed on 21/07/2011.

<sup>32</sup> Interview with David Njoroge, a practicing advocate of the High Court of Kenya and a law lecturer, on 13<sup>th</sup> December 2009 at Embu.

Further, the mechanisms as set out by EMCA provide for settlement procedures as opposed to resolution of conflicts which, as assessed in Chapter Two, go to the root causes of the conflict hence preventing its recurrence. It has been suggested that the existing mechanisms had perennially failed to address the causes of environmental conflicts as they were merely settling procedures as opposed to resolution mechanisms. Hence the argument that processes such as negotiation and mediation should be integrated in the existing mechanisms.<sup>33</sup>

The National Environment Council (NEC) is at the top of the organizational hierarchy of the institutions charged with environmental management in Kenya and is in charge of policy formulation and determining priorities for the protection of the environment that promote cooperation among public departments, local authorities, the private sector, non-governmental organisations and other organisations and institutions engaged in environmental protection programmes. The council should meet at least four times every year, but this has not been the case so far.<sup>34</sup>

The National Environment Management Authority (NEMA) exercises supervisory and coordination functions over all the lead agencies under EMCA in matters and policies related to the environment.<sup>35</sup> In relation to resolution of environmental conflicts, NEMA is charged with making policies for environmental audit and environmental monitoring under the Act.<sup>36</sup> This role is generally typified by the practice of environmental impact assessment (EIA) under the Act. Environmental impact assessment offers the public an avenue for vetting projects that impact on the

---

<sup>33</sup> Interview with Francis Kariuki, a Nairobi lawyer on 30<sup>th</sup> August 2009 at Nairobi.

<sup>34</sup> Environmental Programme Support, 2006-2011 Kenya, available at <http://www.cdtkkenya.org> (accessed on 22/7/2011)

<sup>35</sup> See, section 9 of Act Number 8 of 1999, *op. cit.*

<sup>36</sup> *Ibid.*, section 9(2)(j).

environment before their implementation. The lack of a comprehensive policy has also been cited as a major factor that hampers the efficacy of the institutions under EMCA and compromises NEMA's ability to guide lead agencies and other institutions concerned with the environment on the basis of specific agenda and targets.<sup>37</sup>

The institution of NEMA is still in its formative stages and still requires a critical mass of expertise not only to cover its vast array of functions, but also to build up credibility and blaze the trail in the enforcement of the law for sound environmental management in Kenya.<sup>38</sup> The capacity of environmental institutions demands that they retain a critical mass of well-trained specialists to handle the challenges that come with the jurisdiction. A majority of the people interviewed during a survey conducted by the International Commission of Jurists, Kenya were of the view that the conflict resolution institutions lack the essential physical and financial resources to improve efficiency and effectiveness.<sup>39</sup> On her part Angwenyi states that EMCA provides the framework legislation whose implementation is reliant on the promulgation of enabling regulations by NEMA and cites Okoth Ogendo in arguing that framework law such as EMCA is the least efficacious as an instrument for managing the environment.<sup>40</sup>

---

<sup>37</sup> Benson Ochieng, Institutional Arrangements for Environmental Management in Kenya, in C.O Okidi, P. Kameri - Mbote and Migai Aketch (eds.), *Environmental Governance in Kenya; Implementing the Framework Law*, op. cit., pp. 183-207: 206.

<sup>38</sup> Elizabeth Mwangi-Gachau, 'Legal Requirements for Geothermal Development in Kenya', A Paper presented at Short Course IV on Exploration for Geothermal Resources at Lake Naivasha, November 1-22, 2009.

<sup>39</sup> *Strengthening Judicial Reform in Kenya; Public Perceptions and Proposals on the Judiciary in the new Constitution*, ICJ Kenya, Vol.III, May, 2002, pp. 1 -20.

<sup>40</sup> Anne N. Angwenyi, An Overview of the Environmental Management and Co-ordination Act, in C.O Okidi, P. Kameri - Mbote and Migai Aketch (eds.), *Environmental Governance in Kenya; Implementing the Framework Law*, op. cit., pp. 142-182: 180.

Ochieng' cites the perennial budgetary shortfalls experienced by NEMA as another major factor that undermines the ability of the EMCA agencies to perform their functions and achieve their stated objectives.<sup>41</sup> The inability and by a large extent the unprofessional way NEMA conducts its mandate was subject to a parliamentary debate and several legislators expressed the fear that many Kenyans harbour: that NEMA lacks the competence and seriousness that environmental conservation, protection and conflict resolution in Kenya deserves. In that debate, David Musila, said that NEMA had approved various projects in water catchment areas and expressed doubt whether professionalism is being applied in NEMA. William ole Ntimama echoed these sentiments and stated that Kenyans were unhappy with NEMA since it disregarded advice not to approve the building of a lodge in a rhinoceros breeding grounds in the Mara. Due to NEMA's conduct, 15 black rhinos were lost as they escaped to Tanzania.<sup>42</sup>

The Kenyan framework can be contrasted with Uganda's National Environment Act, which explicitly provides for the role of lead agencies to work in partnership with NEMA-Uganda.<sup>43</sup> NEMA-Uganda has managed to ensure a harmonized approach to management of environment of Uganda without suspicions or hostility from these agencies.<sup>44</sup>

---

<sup>41</sup> Benson Ochieng, Institutional Arrangements for Environmental Management in Kenya, in C.O Okidi, P. Kameri - Mbote and Migai Aketch (eds.), *Environmental Governance in Kenya: Implementing the Framework Law*, op. cit, pp. 183-207: 207.

<sup>42</sup> Kenya National Assembly Official Record (Hansard) of 17<sup>th</sup> August 2010, at [www.parliament.go.ke](http://www.parliament.go.ke) (accessed on 22/7/2011).

<sup>43</sup> Chapter 153 of the Laws of Uganda.

<sup>44</sup> Anne N. Angwenyi, An Overview of the Environmental Management and Co-ordination Act, in C.O Okidi, P. Kameri - Mbote and Migai Aketch (eds.), *Environmental Governance in Kenya: Implementing the Framework Law*, op. cit., pp. 142-182: 181.

The Provincial and District Environment Committees are established under section 29 of the EMCA. The Provincial and District Environment Committees are responsible for the proper management of environment within their respective jurisdictions and, as such, their mandate includes receiving and dealing with reports and complaints on the state of the environment within their jurisdictions and overseeing implementation of and adherence to environmental laws and regulations at the provincial and district levels.<sup>45</sup> There will be a need to review the Act to take into account the reality that provinces and districts have been abolished under the new constitution and such institutions shall be rendered ineffective.<sup>46</sup>

Kameri-Mbote argues that these structures are critical in ensuring access to justice in environmental matters as they act as a link between the formal and informal structures. She maintains that operating at such levels they are closer to the communities who can easily access the formal and informal structures and hence be able to pick the best from both structures.<sup>47</sup> The chiefs continue to wield considerable powers in relation to environmental management under the Chief's Authority Act, where for example it empowers Chiefs to issue orders restraining the cutting of timber, wasteful destruction of vegetation and the control of grass fires. A majority of the respondents who filled the questionnaires submitted that most environmental conflicts were being handled by the Chiefs and the village elders. This has been

---

<sup>45</sup> Patricia Kameri-Mbote, "Towards Greater Access to Justice in Environmental Conflicts in Kenya: Opportunities for Intervention," op. cit., p.5.

<sup>46</sup> See Chapter 11 of the Constitution of Kenya, *Government Printer*, Nairobi, 2010.

<sup>47</sup> Patricia Kameri-Mbote, "Towards Greater Access to Justice in Environmental Conflicts in Kenya: Opportunities for Intervention," op. cit., p.9.

attributed to the fact that the formal court system was inaccessible due to high legal fees and complex procedures in the courts.<sup>48</sup>

The Standards and Enforcement Review Committee is the body charged with setting, enforcement, and review of environmental standards in Kenya. The roles of the committee entail advising, documenting, analysing and making recommendations on matters to do with, *inter alia*, water quality, effluents, preservation of fishing areas, aquatic areas, water sources and reservoirs and pollution.<sup>49</sup> The importance of the committee in the resolution of environmental conflicts cannot be gainsaid given the connection between standards and environmental degradation and pollution and, by extension, conflicts arising from the latter. The committee has been very active unlike some of the EMCA institutions and has to date come up with regulations regarding Noise and Excessive Vibration pollution (L/N No.61/2009), Water Quality Standards (L/N No.120) Waste Management L/N No.121) Fossil Fuel Emission Standards (L/N No.131/2006).<sup>50</sup>

The National Environment Action Plan Committee is the organ which prepares the national environment action plan every five (5) years. The environment action plan is designed to be the main tool in environmental planning in Kenya. It is binding on all persons and government departments, agencies, state corporations or other organs of government once adopted by the national assembly.<sup>51</sup> NEAP being the main environmental planning tool should envisage environmental conflicts and the

---

<sup>48</sup> Interview with James Ndungu, a Professional manager and lawyer, conducted at Nairobi on 30<sup>th</sup> August 2009.

<sup>49</sup> Section 71 of Act Number 8 of 1999, Op. cit.

<sup>50</sup> Act Number 8 of 1999, Op. cit.

<sup>51</sup> See Section 38 of Act Number 8 of 1999, Op. cit.

mechanisms of managing them. In this sense, the NEAP Committee's role in environmental conflict resolution, though indirect, is immensely important.

The Public Complaints Committee (PCC) is established under section 31 of EMCA. Angwenyi has observed that the discussions leading to the establishment of the Public Complaints Committee envisaged an Environmental Ombudsman to receive complaints and petitions of a technical and non-technical character.<sup>52</sup> The PCC is required to file its recommendations with the NEC and it lacks the mandate to see the recommendations it makes carried through. The effectiveness of PCC is doubtful as NEC is not expected to act on the recommendations of PCC and its reports. In the case of *R v. National Environment Management Authority Ex-parte Sound Equipment Limited*<sup>53</sup>, the court found that the function of PCC as being limited and stated that:

“...it seems from the provisions of EMCA the role of the Public Complaints Committee is simply to investigate complaints and make a report of its findings to the National Environment Council which is responsible for policy formulation and directions for the purpose of the Act...”

Kameri-Mbote is of the view that the limitation on the use of the reports of the PCC denies the country an opportunity to deal with environmental matters.<sup>54</sup> There have been arguments that section 31 of EMCA envisages a situation where the Public Complaints Committee is subordinate to the administrative structures of the Authority, which is against the concept and theory of this institution.<sup>55</sup> The rationale

---

<sup>52</sup> Anne N. Angwenyi, An Overview of the Environmental Management and Co-ordination Act, in C.O Okidi, P. Kameri - Mbote and Migai Aketch (eds.), *Environmental Governance in Kenya: Implementing the Framework Law*, op. cit., pp. 142-182: 181.

<sup>53</sup> [2010] eKLR

<sup>54</sup> Patricia Kameri-Mbote, “Towards Greater Access to Justice in Environmental Conflicts in Kenya: Opportunities for Intervention,” op. cit., p. 8.

<sup>55</sup> Anne N. Angwenyi, “An Overview of the Environmental Management and Co-ordination Act”, in C.O Okidi, P. Kameri - Mbote and Migai Aketch (eds.), *Environmental Governance in Kenya: Implementing the Framework Law*, op. cit., pp. 142-182: 154.



behind this reasoning is that since the PCC has the mandate to investigate the actions of the Director-General of NEMA, it is improper to place it under the supervision of the Authority despite the fact that the PCC reports directly to the Council and it is on these reports that the Council acts on the recommendations of the PCC.

It has been argued that notwithstanding the legislative shortcomings surrounding the efficacy of the PCC as an environmental ombudsman, the PCC will be an effective body within the framework under the Act as long as its investigations remain impartial and above board and it protects the interests of the individual complainant, protects access to and dispensation of speedy environmental justice and the procedure for lodging complaints is clear and uncomplicated to the aggrieved persons.<sup>56</sup>

The National Environment Tribunal (NET) it is established under section 125 of EMCA. The tribunal is deemed to be the most appropriate forum for the settlement of environmental disputes in Kenya for the reason that courts are weighed down by many cases and are also ill-equipped to handle all the aspects of environmental disputes. Further, tribunals are invariably cheaper than the courts, are informal hence accessible, free of legalese and procedural technicalities, and are more expeditious while at the same time ensuring high quality decisions.<sup>57</sup> According to section 126 (2) of EMCA the tribunal was set up to entertain appeals with regard to matters related to licences under the Act and the imposition of environmental restoration orders and decisions of NEMA and its committees. The limited mandate of the tribunal is discernible from the case of *R v. The National Environment Tribunal & 2 others*<sup>58</sup> where the court found that under section 129 (2) of EMCA the tribunal had no

---

<sup>56</sup> Ibid.

<sup>57</sup> Ibid.

<sup>58</sup> [2010] Eklr.

jurisdiction to revoke the ex-parte Applicant's Environmental Impact Assessment license. Kameri-Mbote has argued that the upshot of this is that it has limited the mandate and effectiveness of the tribunal.<sup>59</sup>

It has been argued further that having heard and sieved a matter an appeal would, after having the benefit of a review by experts at the NET level, be a "final" appeal to the High Court following the procedure outlined in section 130 of EMCA. However, had the matter been heard by the High Court in the first instance and a party was dissatisfied, that party could proceed to the Court of Appeal. If this procedure were adopted then no party would wish to go through the mandate established and provided in EMCA Part XII, which has, as the final appeal, the decision of the High Court.<sup>60</sup>

EMCA is silent on the enforcement of the orders made by NET. It should thus be empowered to enforce its orders rather than rely on formal courts for enforcement. According to Kameri-Mbote, access to justice can be improved by giving the tribunal original jurisdiction which denies people the right to go directly to it whenever they have environmental issues to be resolved. The tribunal is supposed to be independent but continues to rely on the ministry of environment for personnel and it has inadequate resources to carry out its duties.<sup>61</sup>

Angwenyi suggests that the tribunal stands no chance of success without the taxpayers or state support, both in human and physical resources and the political

---

<sup>59</sup> Patricia Kameri-Mbote, "Towards Greater Access to Justice in Environmental Conflicts in Kenya: Opportunities for Intervention," op. cit., pp. 7-9.

<sup>60</sup> Amy Mehta, "Commentary on the National Environmental Tribunal Procedure Established in Kenya", May 18, 2001. Sourced from [www.pace.edu/school-of-law/sites/pace.edu.school-of-law/files/IJIEA](http://www.pace.edu/school-of-law/sites/pace.edu.school-of-law/files/IJIEA) (accessed on 25/07/2011).

<sup>61</sup> Patricia Kameri-Mbote, "Towards Greater Access to Justice in Environmental Conflicts in Kenya: Opportunities for Intervention," op. cit., p. 7.

goodwill.<sup>62</sup> She argues that considering the important role played by the tribunal in access to environmental justice, it should not be bogged down by the bureaucratic indecisions with regard to its financial budget lines and provision of sufficient staffing. Despite these challenges, NET has ably handled the matters brought before it and helped in settling environmental conflicts. Examples of matters successfully presided over by NET include *Jamii Bora Charitable Trust & another v Director General National Environment Management Authority & another*<sup>63</sup> and *Gitiriku Wainaina & Another V. Kenafric Industries and Another*.<sup>64</sup>

Some of the key institutions as outlined under EMCA are yet to be established. These include the Environmental Inspectors under section 117 of EMCA, who stand out as some of the most important mechanisms for enforcing the Act. Further, the challenge of the Act and guidelines is to critically link the implementation framework with the other statutory bodies charged with environmental conservation and management namely, the National Environmental Management Authority (NEMA), Kenya Wildlife Service (KWS), Kenya Forestry Service (KFS); the Public Complaints Committee (PCC) and the National Environmental Tribunal (NET).<sup>65</sup>

### 3.4.2 The Use of Litigation in Managing Environmental Conflicts

The judiciary is a constitutional creation charged with the responsibility of dispensing justice, even in environmental matters. Being the third arm of the government, its main role is interpretation of statutes, including environmental laws

---

<sup>62</sup> Anne N. Angwenyi, "An Overview of the Environmental Management and Co-ordination Act", in C.O Okidi, P. Kameri - Mbote and Migai Aketch (eds.), *Environmental Governance in Kenya: Implementing the Framework Law*, op. cit., pp. 155 – 160.

<sup>63</sup> [2006] eKLR.

<sup>64</sup> [2007] eKLR.

<sup>65</sup> Benson Ochieng, "Institutional Arrangements for Environmental Management in Kenya", in C.O Okidi, P. Kameri - Mbote and Migai Aketch (eds.), *Environmental Governance in Kenya: Implementing the Framework Law*, op. cit., pp. 183-207: 199.

and regulations. Our court system is adversarial and, like in arbitration, the parties have a duty to establish their case without intervention or assistance from the court. Courts in Kenya have encountered many problems related to access to justice for instance high court fees, geographical location, complexity of rules and procedure and the use of legalese.<sup>66</sup> The court's role is also 'dependent on the limitations of civil procedure, and on the litigious courses taken by the parties themselves.'<sup>67</sup> These reasons make justice in environmental issues to be inaccessible to many people.

These undesirable elements of litigation as a means of resolving environmental conflict have manifested themselves, in one way or another, in the case of the Endorois people. The last suit the community filed in the Kenyan High court was *William Yatich Sitetalia & 72001 Others V Baringo Country Council & 2 Others*<sup>68</sup> which was dismissed on 19<sup>th</sup> April 2002 by Rimita and Rawal JJ. The court stated that it did not believe that Kenyan law should address any special protection to a people's land based on historical occupation and cultural rights. It was not until the community filed a complaint with the African Commission on Human and Peoples' Rights in 2003,<sup>69</sup> that eventually the conflict was settled. The Commission made its decision in May 2009. The decision was approved by the African Union Assembly of the Heads of State on January 3, 2010 in Addis Ababa. It was signed by the President of the African Union on February 4th, 2010.

---

<sup>66</sup> *Strengthening Judicial Reform in Kenya; Public Perceptions and Proposals on the Judiciary in the new Constitution*, ICJ Kenya, Vol.III, May, 2002.

<sup>67</sup> Jackton B. Ojwang, "The Role of the Judiciary in Promoting Environmental Compliance and Sustainable Development," 1 *Kenya Law Review Journal* 19 (2007), pp. 19-29: 29.

<sup>68</sup> [2002] eKLR.

<sup>69</sup> African Commission on Human and Peoples' Rights Communication No. 276 of 2003 - *Centre for Minority Rights Development (Kenya) and Minority Rights Group International on behalf of Endorois Welfare Council v Kenya*.

Courts in exercising judicial authority are required to promote alternative forms of dispute resolution including reconciliation, mediation, arbitration and traditional dispute resolution mechanisms.<sup>70</sup> Further, the High Court in deciding environmental matters is guided by principles of sustainable development, including public participation in the development of policies, plans and process in management of environment.<sup>71</sup> In addition, the court must apply cultural and social principles applied in Kenya, principles of international cooperation, principles of inter-generational and intra-generational equity, polluter-pays principle, and pre-cautionary principle.<sup>72</sup>

Litigation has its advantages. Precedent is created and issues of law are interpreted. In some instances, courts have acted speedily to safeguard the environmental rights of a litigant in a dispute of an environmental nature, but this is the exception rather than the norm. An example of this is where the court in *Park View Shopping Arcade v Kangethe & 2 others*<sup>73</sup> made a decision within 5 months of filing the suit and upheld the rights of a person to a clean and healthy environment and also the right to safeguard and enhance the environment. Equally in *Peter K. Waweru V. R.*<sup>74</sup> the court upheld the right to a clean and healthy environment by ordering the Nairobi Water Services Board and Olkejuado County Council to construct sewerage treatment works in Kiserian, Kajiado District and ordered the termination of criminal charges against the applicant for discharging raw sewage into a public water source.

---

<sup>70</sup> Article 159 (2) (c) of the Constitution of Kenya, *Government Printer*, Nairobi.

<sup>71</sup> Jackton B. Ojwang, "The Role of the Judiciary in Promoting Environmental Compliance and Sustainable Development," *op.cit.*, p. 29.

<sup>72</sup> Section 3(5), of Act Number 8 of 1999, *op. cit.*

<sup>73</sup> KLR (E&L) 1, 592.

<sup>74</sup> [2006] Eklr.

In other cases, parties can agree on some issues and record a consent, thus reducing the time and costs associated with litigation. This is, indeed, the focus of the court annexed mediation, where the parties agree on some or all of the issues and reach a consensus. Kenyan judges have become aware of the importance of sustainable use of the environment and the need to expeditiously resolve environmental conflicts.

The EMCA has also brought in some useful changes in the way environmental matters are handled by the courts in Kenya. In the high court today, environmental matters are listed before specific courts in the Environment and Land Division, for their proper management. The benefits accruing from utilisation of the provision on the environment in the new constitution by the courts are expected to be evident sooner or later. Equally the EMCA laid to rest the stringent requirement as to standing which had been a prime constraint to environmental litigation in Kenya. Now, environmental conflicts are finding their way to the high court of Kenya without litigants having to establish that the action or omission complained of caused or is likely to cause a personal injury or loss to them.<sup>75</sup>

### 3.4.3 Efficacy of ADR and Informal Methods

Arbitration is a process subject to statutory controls, where formal conflicts are determined by a private tribunal of the parties' choosing. According to Stephenson, Lord Justice Raymond provided a definition of an arbitrator some 250 years ago when he said that :<sup>76</sup>

“An arbitrator is a private extraordinary judge between party and party, chosen by their mutual consent to determine controversies between them, and arbitrators are so called because they have arbitrary power; for if they observe

---

<sup>75</sup> Section 3(3) of Act Number 8 of 1999, op. cit.

<sup>76</sup> R. Stephenson, *Arbitration Practice in Construction Disputes*, (Butterworths, London, 1998), p. 123.

the submission and keep within their due bonds, their sentences are definite from which there lies no appeal.”

According to Barnstein the concept of arbitration is also captured as a mechanism for the settlement of disputes which takes place, usually in private, pursuant to an agreement between two or more parties under which the parties agree to be bound by the decision to be given by the arbitrator.<sup>77</sup> Barnstein further suggests that this decision has to be in accordance with the law or, if so agreed, other considerations after a full hearing and such decision being enforceable at law.

Arbitration in Kenya is recognized under the Arbitration Act 1995. The Act contains provisions relating to arbitral proceedings and the enforcement of the ultimate awards by the court. Arbitration is defined under section 3 (1) of the Act to mean any arbitration whether or not administered by a permanent arbitral institution.<sup>78</sup> The definition thus includes all types of arbitration that can be envisaged in society. The Act further deals with the recognition and enforcement of arbitral awards irrespective of the state in which it was made subject to certain limitations.<sup>79</sup> It can, thus, be seen that arbitration has a vast potential as a conflict management mechanism.

Arbitration has the advantage that it is binding in nature ensuring compliance with the findings and award of the arbitral tribunal. The use of mediation and other ADR methods in Kenya remains largely informal and dependent on parties' exercise of their autonomy to choose the suitable forum for resolution of their conflict. It has been argued that the utility of the ADR methods as stand-alone methods of conflict

---

<sup>77</sup> R. Barnstein, *The Handbook of Arbitration Practice: General Principles (Part 2)* (Sweet & Maxwell, London, 1998), p. 313.

<sup>78</sup> The Arbitration Act, 1995, Act No. 8 of 1995, Government Printer, Nairobi.

<sup>79</sup> *Ibid.*, sections 36 and 37.

resolution is limited by their non-binding nature.<sup>80</sup> Mediation is not handicapped in this regard as the parties can enter a formal contract incorporating the final agreement, which is enforceable and binding against the parties.

Arbitration, as practised in Kenya, is increasingly becoming more formal and cumbersome as lawyers enter the practice of arbitration. The fact of representation of parties by lawyers has seen delay tactics and importation of complex legal arguments and procedures into the arbitral process. It has been argued for example that the Act does not help matters as it leaves much leeway for parties bent on frustrating the arbitral process to make numerous applications in court.<sup>81</sup> It is hardly feasible to describe arbitration in Kenya as cost effective, informal and expeditious; and arbitration in Kenya cannot be glorified as a mechanism for resolving environmental conflicts, which are complex and involve people's livelihood.

As discussed in Chapter Four & Chapter Five, mediation has been used to resolve conflicts of an environmental nature in Kenya, though not in a formalised manner. The policy in Kenya on conflict resolution has always supported the use of judicial settlements and other means of dispute management that aim at settling rather than resolving conflicts.<sup>82</sup> With article 159 (2) (c) of the Constitution, the policy on resolution of conflict is bound to shift to encourage ADR and other traditional means of conflict management. Mediation therefore will have a major role to play in resolving environmental conflicts in Kenya.

---

<sup>80</sup> Interview with Samuel Nderitu, a lawyer and associate Member of the Chartered Institute of Arbitrators, on 16<sup>th</sup> August 2008 at Nairobi.

<sup>81</sup> Interview with Jackie Kamau, Vice-Chair of the Chartered Institute of Arbitrators and an ADR practitioner, on 2<sup>nd</sup> June, 2008 at Nairobi.

<sup>82</sup> Ibid.



The merits of mediation over arbitration and especially flexibility, informality and non-technical nature and the fact that it can be customised to meet the needs of the parties to a conflict, make it a potent alternative to arbitration. Mediation is able to look at the interests of the parties and ignore strict legal rights. In environmental conflicts, mediation has the potential to give the parties a chance to engage in democratic environmental governance. The environment emerges the winner since the parties are able to agree on how best to meet the needs of the present and future generations. It has indeed been suggested that mediation is able to bring on board the views of the parties who would otherwise not be heard in an arbitral tribunal.<sup>83</sup>

There are informal home-grown mechanisms at community level for the resolution of conflicts, including environmental conflicts. These mechanisms are highly accessible and recognised at the grassroots and often compete with the formal mechanisms, even though they are not incorporated in the national environmental legal and institutional framework. These mechanisms are highly dynamic and tend to adapt in structure to meet the demands of the conflict at hand and their description is therefore not easy.<sup>84</sup>

The informal fora for resolving environmental conflicts include council of elders, provincial administration, peace committees, land adjudication committees and local environmental committees. In addition, alternative conflict resolution methods such as negotiation are utilised in resolving conflicts though not consistently and sometimes as a hybrid of the other informal methods.<sup>85</sup> In most communities, the first

---

<sup>83</sup> Interview with James Mangerere, a practising advocate of the High Court of Kenya and a director at Mediation Training Institute (Kenya), on 30<sup>th</sup> March 2010 at Nairobi.

<sup>84</sup> Patricia Kameri-Mbote, "Towards Greater Access to Justice in Environmental Conflicts in Kenya: Opportunities for Intervention," *op. cit.*, p. 8.

<sup>85</sup> *Ibid.*

port of call whenever a conflict arises is the council of elders. The vibrancy of the elders, even in modern times, goes back to colonial times when the native judicial council was key to conflict resolution among locals and conflicts tended to be concluded without recourse to the formal system.<sup>86</sup>

Most of the conflicts referred to the provincial administration have environmental dimensions or are in themselves environmental conflicts.<sup>87</sup> Among pastoral communities, rivalry between neighbours often results in vicious fights, combats, kidnappings, stock theft and banditry. Such rivalry usually has its roots, directly or indirectly, in environmental factors, such as competition for water points, grazing land and ancestral landmarks. In the event of such souring of relationships, the neighbours intending to reach a settlement typically establish representative committees to discuss and negotiate peace and co-existing modalities in the post-rivalry period. The mandate of such committees often includes resolving environmental conflicts given that their decisions will touch on sharing of the natural resources that are the bone of contention, including grazing lands and water.<sup>88</sup>

As regards the informal methods of conflict resolution, there is a need for a legal framework recognizing and legitimating their role in the resolution of environmental conflicts. Such a framework would help avoid the duplication of roles by recognising the progress made in conflict resolution using the informal methods. However, these methods cannot be expected to be the dominant methods of resolving environmental conflicts nor can they be supported as stand-alone methods and

---

<sup>86</sup> Paul Obo Idornigie, "Overview of ADR in Nigeria", 73(1) *Arbitration* 73 (2007), p. 73.

<sup>87</sup> Patricia Kameri-Mbote, "Towards Greater Access to Justice in Environmental Conflicts in Kenya: Opportunities for Intervention," *op. cit.*, pp. 9 – 10.

<sup>88</sup> *Ibid.*

primary mechanisms will still remain outstanding.<sup>89</sup> The review of the international environmental conflict resolution regime has revealed a leaning towards alternative dispute resolution (ADR) mechanisms such as negotiation, conciliation, mediation, arbitration, adjudication and inquiry. However, that is not the case in Kenya as there is essentially no legal framework incorporating mediation and the other methods of alternative dispute resolution within the framework of environmental conflict resolution. This position has been slightly remedied by section 159 (2) (c) of the Constitution and Order 46 rule 1 and 20 of the Civil Procedure Rules, 2010. EMCA and other sectoral laws are yet to be amended to reflect this change in policy.

### **3.5 Conflict Management Mechanisms under Sectoral Laws and Institutions in Kenya**

Various ministries, departments, and agencies continue to perform important natural resource management functions in their respective sectors: fisheries, water, energy, agriculture, wildlife, physical planning and industry among others. Ochieng' argues that some of these agencies, among them the Fisheries Department and the Kenya Wildlife Service continue to use limited provisions in the old sectoral laws at their discretion, to introduce elaborate schemes for involving local communities in the management of natural resources.<sup>90</sup>

#### **3.5.1 Wildlife Sector**

The Wildlife (Conservation and Management) (Amendment) Act contains provisions dealing with compensation for personal injury, death, damage or loss

---

<sup>89</sup> James Mangerere, a practising advocate of the High Court of Kenya and a director at Mediation Training Institute (Kenya), op. cit.

<sup>90</sup> Benson Ochieng, Institutional Arrangements for Environmental Management in Kenya, in C.O Okidi, P. Kameri - Mbote and Migai Aketch (eds.), *Environmental Governance in Kenya: Implementing the Framework Law*, op. cit., pp. 189 – 190.

caused by wild animals.<sup>91</sup> The application for compensation is made to a district committee established under this section. Section 65 establishes an appeals tribunal known as the Wildlife Conservation and Management Service Appeal Tribunal. It is supposed to consider appeals from any decision in any matter where any person is aggrieved by a refusal of the grant of, renewal or issue of any licence, permit or authorisation under the Act. The tribunal may administer oaths and summon any person to give evidence and to produce any relevant document. The Tribunal's power to summon witnesses is buttressed by a penal provision which criminalizes failure to attend the tribunal to give evidence or produce any document.<sup>92</sup> It has been argued in this respect that the tribunal thus adopts a conflict settlement mechanism as opposed to a resolution mechanism.<sup>93</sup>

Looking at the Wildlife Policy (2007),<sup>94</sup> there is a big shift in policy from the provisions in the Wildlife (Conservation and Management) (Amendment) Act. The policy states that the need for a new wildlife policy was necessitated by the increased human-wildlife conflicts and inadequate compensation, the bureaucratic process followed before payment of compensation, the amount payable being too low and relating only to human injury and death and that damage to crops, livestock and property was not covered in law.

The policy adopts an approach akin to mediation in its political process in that it *inter alia* entails building the capacity of local communities, regional and district wildlife conservation committees and constituency wildlife associations to manage

---

<sup>91</sup> Section 62 of Cap 376, Laws of Kenya (Revised Edition, 2003).

<sup>92</sup> *Ibid.* section 62 (2), 65(3), (8) and (10).

<sup>93</sup> Interview with Mueni Mutung'a, Kenya Wildlife Service Corporate Secretary (as she then was), on 3<sup>rd</sup> May 2006 at Nairobi.

<sup>94</sup> Wildlife Policy 2007, Ministry of Tourism and Wildlife, *Government Printer*, Nairobi.

problem animals and minimize damage to crops, livestock, property and loss of human life. It also involves the translocation of problem animals from conflict areas to non-conflict areas subject to verified data, prior informed consent of the communities, mutually agreed terms and approval by the relevant authority. The policy seeks also to strengthen the National Environment Tribunal to enable it to hear wildlife related disputes in harmony with EMCA and other related sectoral laws.<sup>95</sup>

### 3.5.2 Mining Sector

The Mining Act<sup>96</sup> provides that appeals against decisions of the Commissioner of Minerals shall be to the minister.<sup>97</sup> The matters which a person may appeal include refusal to grant a special licence, refusal to grant an exclusive prospecting licence, refusal to consent the transfer of an exclusive prospecting license, refusal to grant a lease among others. The decision or determination by the Minister is final and not subject to appeal or review in any court.<sup>98</sup> However, recent jurisprudence in the area of judicial review points to the fact that every tribunal in Kenya is subject to review by the High Court and the jurisdiction of the High Court cannot be ousted by this provision.<sup>99</sup> In essence, the Mining Act advocates for an adversarial system in the settlement of conflicts-those envisaged in section 93 involve the rights of licences, traders and lessees of mining areas. The Act fails to envisage conflicts arising from the perception, real or otherwise, that certain persons or communities have been

---

<sup>95</sup> Mueni Mutung'a, op. cit.

<sup>96</sup> Mining Act, Chapter 306 (Revised edition, 1982).

<sup>97</sup> Ibid., section 93.

<sup>98</sup> Ibid.

<sup>99</sup> *Republic v. Minister of Co-operative Development and Marketing & 3 Others Ex parte 3GS Coffee Growers Co-operative Society Limited & 2 Others*, H. C. Misc Application No. 1700 of 2004 & 5 of 2005.

denied access to and equitable use and sharing of benefits arising from mineral resources.

On the other hand, the conflict management mechanism in the petroleum and oil sector is catered for in the Petroleum (Exploration and Production) Act.<sup>100</sup> Clause 41 of Appendix A to the Act, is a model production sharing agreement between the Government of Kenya and a licensee and provides for amicable settlement of disputes and where no settlement is reached within thirty (30) days from the date of the dispute or such other period as may be agreed on by the parties, the dispute shall be referred to arbitration in accordance with the UNCITRAL arbitration rules adopted by the United Nations Commission on International Trade Law. However, this mechanism is only available to persons who have a contract with the government (either a production sharing agreement or a participation agreement).<sup>101</sup>

### **3.5.3 Land Sector**

Each of the various land regimes in Kenya provides for its own unique conflict management mechanism and institutions. The Government Lands Act envisages settlement using the formal court system in Kenya and by arbitration. The appeal process to the High Court under section 123 of the Government Lands Act relates to issues of withdrawal of cancellation or entries to the register.<sup>102</sup> Section 146 provides for arbitration in respect of all claims arising under the GLA. The arbitration envisaged is between the Commissioner and a person claiming.

The Trust Land Act contains detailed provisions on resolving conflicts relating to trust land. Under section 8 of the Act, where land is set apart by the government

---

<sup>100</sup> Petroleum (Exploration and Production) Act, Chapter 308, Laws of Kenya (Revised Edition, 1982).

<sup>101</sup> See Appendix C of the Petroleum (Exploration and Production) Act clause 15 "Arbitration"

<sup>102</sup> Section 121, Government Lands Act, Cap 280, Laws of Kenya (Revised Edition, 2003).

“full compensation” is supposed to be paid to persons who have a right to occupation under African customary law. The District Commissioner under section 9 and in consultation with the Divisional Board is required to award compensation.<sup>103</sup> The Board consists of the chairman appointed by the minister, four to fifteen members appointed by the council and two persons appointed by the Council from its members.

Persons aggrieved by the rejection of a compensation application or the amount of the award may appeal in writing through the District Commissioner to the Provincial Agricultural Board of the province in which the land to be set apart is situated. Appeals from the Provincial Agricultural Board are to be heard by a Resident Magistrate’s Court.<sup>104</sup> Section 5 provides that any party to an appeal to the Resident Magistrate’s Court who is dissatisfied with the decision may appeal to the High Court whose decision is final.

Section 12 gives parties the right to direct access to High Court if they are claiming a right or interest in land set apart under this Act for the determination of the legality of setting apart and for the purpose of obtaining prompt payment of any compensation awarded. The Registered Land Act<sup>105</sup> envisages the settlement of disputes through the litigation process. Under section 143, the Court may order rectification of the register and may direct that any registration be cancelled or amended. In the case of *Pentecostal Assemblies of God (Bahati P.A.G Church) & 2 others v. Peter Gathungu & 9 others*<sup>106</sup> the court directed that a title that had been issued without regard to earlier overriding interests be cancelled.

---

<sup>103</sup> Section 5, Trust Land Act, Cap 288 Laws of Kenya (Revised Edition, 2003).

<sup>104</sup> *Ibid.*, section 10 (1-4).

<sup>105</sup> Registered Land Act, Cap. 300, Laws of Kenya (Revised Edition, 2003).

<sup>106</sup> [2011] eKLR

Section 150 prescribes the procedure to be followed by a person dissatisfied with the refusal of the Deputy Registrar or Land Registrar or Assistant Land Registrar to effect or cancel any registration. Any person aggrieved by a decision of the Chief Land Registrar may, further, appeal to the High Court against the decision, direction, order, determination or award.<sup>107</sup> However, The Registrar of Lands has recently arrogated himself the power to cancel title deeds vide gazette notices.<sup>108</sup> Aggrieved parties have successfully obtained Judicial Review orders in various cases such as *Kuria Greens Ltd v. Registrar of Titles & another*<sup>109</sup> and *Republic v. Kisumu District Lands Officer & another*<sup>110</sup>. The clear position of the law is that it is only the court that can order cancellation of a title or amendment of the Register.

With regard to the Registration of Titles Act,<sup>111</sup> section 62 provides that the Registrar General or Registrar may be compelled by the court to act through an order of mandamus. Thus, the envisaged conflict management mechanism is recourse to the courts (in this case through judicial review). The Registrar is entitled, under section 63, to refer matters to court for the interpretation of legal points. Section 64 provides that the court may by order direct the registrar to cancel, correct, substitute or issue any memorial or entry in the register or, otherwise do such acts or make such entries as may be necessary to give effect to the judgment or order of the court.<sup>112</sup>

---

<sup>107</sup> *Ibid.*, section 150.

<sup>108</sup> Gazette No. No. 15580 dated 26<sup>th</sup> November 2010 and Gazette Notice No. 3460 of 1<sup>st</sup> April 2010.

<sup>109</sup> [2011] eKLR.

<sup>110</sup> [2010] eKLR.

<sup>111</sup> Cap. 281, Laws of Kenya (Revised Edition, 2003).

<sup>112</sup> *Ibid.*, section 64.



The Land Disputes Tribunals established under the Land Disputes Tribunal Act<sup>113</sup> are to be used in the settlement of disputes involving the division of or the determination of boundaries to land including land held in common, a claim to occupy and work land and trespass to land.<sup>114</sup> The tribunals are supposed to adjudicate claims and reach decisions in accordance with recognized customary law after hearing the parties to the dispute.<sup>115</sup> Section 8 provides that any person who is aggrieved by the decision of the tribunal may within thirty days of the decision appeal to the Appeals Committee constituted for the province in which the land which is the subject matter of the conflict is situated. A decision of the Appeals Committee is subject to appeal to the High Court on an issue of law (other than customary law). For instance the case of *Rebo Karari-v-Chairman, Gatundu North Land Disputes Tribunal*,<sup>116</sup> where the decision of Land Disputes Tribunal was quashed as they had exceeded their jurisdiction and decided on ownership and Title to the land.

Essentially the tribunal is supposed to operate like an arbitration panel. It adjudicates on the claim, calls witnesses, hears parties and draws an award.<sup>117</sup> The operation of the Land Disputes Tribunal Act has been plagued with difficulties such as the inability to deal with the question of unregistered communal customary land-holding in the face of individualised land tenure.<sup>118</sup> The Tribunals have been prone to manipulation by the provincial administration. The elders do ultimately sit in them

---

<sup>113</sup> Land Disputes Tribunal Act, Act No. 18 of 1990.

<sup>114</sup> Ibid., section 3(1)(a)(b) and (c).

<sup>115</sup> Ibid., section 3(7).

<sup>116</sup> H.C Misc. Civil Application No. 270/2005 (2006) eKLR.

<sup>117</sup> Land Disputes Tribunal Act, op. cit.

<sup>118</sup> Odwuor Ong'wen, *The Land Question in Kenya: The Place of Land Tribunals in the Land Reform Process in Kambewa Division*, a paper presented at the Codestric Assembly in Kampala, Uganda, 8<sup>th</sup> December 2002.

are not those who are recognised by custom as being competent to resolve the issues between parties. The credibility of the Land Conflicts Tribunals is thus at stake.<sup>119</sup>

The Land Control Act<sup>120</sup> seeks to control transactions in agricultural land and has to consent to any sale, transfer, lease, mortgage, partition, or other disposal or dealing with agricultural land in its locality. Unless such consent has been given the transaction is void.<sup>121</sup> The dispute settlement procedure envisaged under the Act is found in section 10, which sets up a Provincial Land Control Appeals Board to hear appeals against refusal to grant consent. The Provincial Land Control Appeals Board is final and conclusive and is not “questionable by any court.”<sup>122</sup> The Central Land Control Appeals Board<sup>123</sup> hears appeals by any persons whose appeal has been dismissed by a Provincial Land Control Appeals Board. It is evident that the conflict management mechanism aims at settlement and not resolution of conflicts.

A major policy shift in conflict resolution in the land sector could be developing soon following the launch of the National Land Policy of Kenya.<sup>124</sup> Article 68 (e) of the policy enjoins the government to incorporate customary mechanisms for land management and conflict resolution in the overall national framework for harnessing land and land based resources for development, in order to secure community tenure to land. Equally article 172 of the policy provides that there is a need to ensure access to timely, efficient and affordable conflict resolution mechanisms.

---

<sup>119</sup> *Ibid.*

<sup>120</sup> Land Control Act, Cap 302, Laws of Kenya (Revised edition, 2003).

<sup>121</sup> *Ibid.*, section 6(1).

<sup>122</sup> *Ibid.*, Section 11.

<sup>123</sup> See generally Section 13 (1) & (2) the composition of the Board.

<sup>124</sup> Sessional Paper No. 3 of 2009, National Land Policy, *Government Printer*, Nairobi, 2009.

### 3.5.4 Forestry Sector

The Forests Act of 2005<sup>125</sup> establishes the Kenya Forest Service which is manned by a Board<sup>126</sup> to spearhead matters touching on forest resources in Kenya. However, neither the Forest Service nor the Board is expressly given the task of conflict resolution in relation to forest land. However the Act provides for criminal prosecution for the offence of damaging produce from any forest.<sup>127</sup> This means that the mechanism envisaged by the Act to deal with conflicts in this sector is adversarial in nature and thus cannot be efficient in dealing with environmental conflicts in this sector.

For example in the case of *R v. Samuel Murimi Karanja & 2 others*,<sup>128</sup> where the accused were charged with trespass in land that was deemed to be a forest. They argued that they worked for Wibeso Ltd which had a title to the land. The argument was upheld in HCCC 112 of 2003 and the charges were quashed.

### 3.5.5 Water Sector

The Water Act<sup>129</sup> creates an institutional framework that is pyramidal. At the top of the pyramid is the Water Appeals Board and the Ministry of Water and Irrigation which are mainly given policy making functions. The Water Services Regulatory Board (WSRB) and Water Appeals Board (WAB) are created as independent institutions to regulate and deal with conflicts, respectively. The Water Act establishes the Water Resources Management Authority (WRMA) to manage

---

<sup>125</sup> Act No. 7 of 2005.

<sup>126</sup> *Ibid.*, section 3-19.

<sup>127</sup> *Ibid.*, section 56.

<sup>128</sup> Kiambu Senior Principal Magistrate's Court Case No. 1139 of 2003 (unreported).

<sup>129</sup> Act No. 8 of 2002.

water resources in Kenya. In this regard, WRMA is charged with managing, regulating, protecting, apportioning and conserving water resources naturally, including trans-boundary waters.<sup>130</sup> On the other hand, matters touching on water distribution and sewerage are the responsibility of Water Services Boards established under the Act. However, these Boards are, in turn, regulated by the Water Services Regulatory Board.

The establishment of the Water Services Regulatory Board (WSRB) and the Water Appeals Board (WAB) has ensured that conflicts relating to water are adequately addressed by specialized institutions with little or no regard for procedural matters as is the case in formal courts. Conflicts handled by the boards include, *inter alia*, licence related conflicts.<sup>131</sup> The water Appeals Board has now been set up and is operational at the Milimani area next to the law courts. It has handled various conflicts involving licencing of boreholes, use of water among other issues.<sup>132</sup> However, there are numerous conflicts between institutions established under EMCA and those established under the Water Act. For instance the mandate of NET, which has overall dispute settlement authority in relation to environmental resources in Kenya, in relation to water and given the presence and powers of the WAB, is not clear.

### 3.6 Critique of the Sectoral Laws and Institutions

There are notions that the evolution of Kenya's 'environmental policy' and institutional arrangements for managing the environment are a classic study of how a sectoral perspective to environmental management and the use of administrative

---

<sup>130</sup> *Ibid.*, Section 7-8, 46-54 and 83-88.

<sup>131</sup> *Ibid.*, section 53.

<sup>132</sup> See the case of *Daniel Mwangi Nganga v Athi Water Services Board & Anor.*, Appeal No. 2 (WS) of 2008 (unreported).

fiat can undermine the legitimacy and efficacy of institutions. Ochieng' argues that since these sectoral institutions were inherited from the colonial era and were ill-equipped to deal with systematic environmental concerns, they were unable to reorient their *modus operandi* even after environmental management shifted from the protectionist agenda of the post-Stockholm era, to the sustainable development agenda of the period after the Rio Earth Summit.<sup>133</sup> He thus says that all sectoral legislation needs to be revised to bring them into conformity with EMCA, which would include harmonizing the functions and responsibilities of the lead agencies with NEMA's oversight and co-ordination mandate.

Some writers have argued that the existence of several institutions with environmental management functions at various levels of governance may mislead a casual observer to assume that environmental management in Kenya is decentralized which is not true.<sup>134</sup> Another concern with the sectoral laws is that they only provide for access to formal courts as the dispute management mechanism.<sup>135</sup> This is different from South Africa where mediation has been blended in the court system in resolving environmental conflicts.<sup>136</sup> South Africa has mediation and conflict resolution in its environmental policy which gives its system room for investigative ways to settle intergovernmental disputes and establish appropriate mechanisms and structures and provide a route for appeals against decisions in all spheres of government.

---

<sup>133</sup> Benson Ochieng, 'Institutional Arrangements for Environmental Management in Kenya', in C.O. Okidi, P. Kameri - Mbote and Migai Aketch (eds.), *Environmental Governance in Kenya: Implementing the Framework Law*, op. cit., pp. 183-207: 199.

<sup>134</sup> Benson Ochieng, 'Institutional Arrangements for Environmental Management in Kenya', in C.O. Okidi, P. Kameri - Mbote and Migai Aketch (eds.), *Environmental Governance in Kenya: Implementing the Framework Law*, op. cit., pp. 183-207: 200.

<sup>135</sup> Patricia Kameri-Mbote, "Towards Greater Access to Justice in Environmental Conflicts in Kenya: Opportunities for Intervention," op. cit., pp. 9-12.

<sup>136</sup> White Paper on Environmental Management Policy-Department of Environment Affairs and Tourism, July 1997. Sourced from [www.environment.gov.za](http://www.environment.gov.za), accessed on 4<sup>th</sup> August 2011.

Kenya should learn from the South African approach where a harmonized institutional framework, an integrated legislative system that builds institutional capacity and specifically providing for mediation and conflict resolution in its environmental policy, has been adopted.<sup>137</sup> However, even though mediation is one of the mechanisms for conflict management, it has adopted the legal perspective where instead of resolving conflicts it merely settles them. It has been suggested that the court system takes several years before the dispute is settled. Court annexed mediation will still need the court for enforcement of the mediation agreement. The end result is litigation and the attendant problems associated with it.<sup>138</sup>

### 3.7 Community-Based Natural Resource Management

The concept of *Community-Based Natural Resource Management* (CBNRM) relates to approaches where the focal unit for joint natural resource management is the local community. Often, it is applied to designate approaches where local communities play a central, but not exclusive, role in natural resource management.<sup>139</sup>

In Kenya, the current legal policy and institutional mechanisms for natural resource management remains a key hindrance to the development of an effective community-based natural resource programme. This is because the current arrangements alienate the resource users from not only access to and use of the resources, but also from the decision making process regarding their management.<sup>140</sup>

This is evident on examination of the laws and policies on access to and use of these

---

<sup>137</sup> Ibid.

<sup>138</sup> Interview with Samuel Nderitu, a lawyer and associate Member of the Chartered Institute of Arbitrators, on 16<sup>th</sup> August 2008 at Nairobi.

<sup>139</sup> Thorsten Treue and Iben Nathan, *Community Based Natural Resource Management*, (Copenhagen, Ministry of Foreign Affairs of Denmark, 2004), p. 2.

<sup>140</sup> Francis D. P. Situma, "Legislative and Institutional Framework for Community Based Natural Resource Management in Kenya" 1 *University of Nairobi Law Journal* 55 (2003) pp. 55 – 68: 55.

resources which are crucial to conservation and/or management of natural resources by the communities.<sup>141</sup>

Kenya can borrow from South Africa which has developed its national environmental policy through a consultative process known as the *Consultative National Environmental Policy Process (CONNEPP)*. The process is designed to give all stakeholders in South Africa an opportunity to contribute to the development of a new environmental policy.<sup>142</sup>

This need of involving all stakeholders in the development of national environmental policy has been noted in Kenya in that in order to create lasting social and environmental improvements, environmental management initiatives on the ground need to be supported by overall policy and planning efforts at both local and national level, while at the same time national policies and planning efforts at different levels need to have the support and understanding of the people on the ground.<sup>143</sup> The need for public participation in environmental issues has been noticed in Kenya as captured in section 59 of the EMCA which recognizes the application of principle 10 of the Rio Declaration.

In terms of institutions, the law should allow for the setting up of communal governance systems that would use the known methods of conflict management, such as mediation and arbitration. As part of implementing community-based resource management, the state should take steps towards implementing conflict resolution mechanisms that allow participation of communities in environmental management and governance. The way to go is through the institutionalization of customised

---

<sup>141</sup> Ibid.

<sup>142</sup> White Paper on Environmental Management Policy-Department of Environment Affairs and Tourism, op. cit.

<sup>143</sup> Environmental Programme Support, 2006-2011, op. cit.

mediation for environmental conflicts to ensure an element of effectiveness in the enforcement of the agreed positions/decisions regarding sustainable access to and use of environmental resources, conservation of the environment and the protection of the rights of present and future generations.<sup>144</sup>

An assessment of the mechanisms has shown that the current framework is not adequate and there is a need to explore the opportunities offered by the use of mediation in resolving environmental conflicts. South Africa has created an effective, adequately resourced and harmonized institutional framework, an integrated legislative system that builds institutional capacity. The system in South Africa specifically provides for mediation and conflict resolution in its environmental policy. The system gives room for investigative ways to settle intergovernmental disputes and establish appropriate mechanisms and structures and provide a route for appeals against decisions in all spheres of government.

In a nutshell, there is a need to enhance the conflict resolution mechanisms and institutional capacity already existing, for the sake of better environmental governance and sustainable development. The challenges facing the current mechanisms and institutions and the opportunities for positive change should be examined.

---

<sup>144</sup> An interview with James Mangerere, a practising advocate of the High Court of Kenya and a director at Mediation Training Institute (Kenya), Op. cit.



# Chapter Four

## Mediating Environmental Conflicts in Kenya

### 4.1 Introduction

Chapter Three addressed the types and causes of environmental conflicts occurring in Kenya and what legal and institutional frameworks for the management of the conflicts exist. Environmental conflict resolution was also discussed at a generic level. The chapter briefly considered the international regime on environmental conflict management and further examined the institutional, legal and policy mechanisms for environmental conflict management in Kenya, their advantages and disadvantages.

This chapter deals with mediating environmental conflicts in Kenya. It discusses mediation in the context of the Kenyan legal framework. An assessment of the proposed amendments to the Kenyan law to entrench court mandated mediation is undertaken and the efficaciousness and expected challenges discussed. The chapter examines at the legal, institutional and other supportive frameworks that facilitate mediation in Kenya and also discusses the process of mediation and the use of mediation in resolving environmental conflicts. It also discusses the proposed rules relating to court annexed mediation and an analysis of whether court annexed mediation is really mediation.

### 4.2 Mediation in the Context of the Kenyan Legal Framework

Kenya does not as yet have a comprehensive and integrated legal framework to govern the application of mediation in the resolution of conflicts.<sup>1</sup> The mediation

---

<sup>1</sup> Interview with Jackie Kamau, advocate, Vice-Chair of the Chartered Institute of Arbitrators and an ADR practitioner, on 2<sup>nd</sup> June, 2008 at Nairobi.

framework in existence has largely been derived from international law and practice and reduced into guidelines by institutions undertaking mediation in Kenya such as the Dispute Resolution Centre-Nairobi and the Chartered Institute of Arbitrators.<sup>2</sup> As seen in Chapter Two mediation depicts both a legal and political process. The mediation framework in place provides for court annexed mediation which in the long run leads to a settlement as opposed to resolution of conflicts.

In any event, the Constitution of Kenya actually has always promoted litigation at the expense of non-litigious conflict resolution. Litigation is not necessarily improper, but the procedure required and the costs of such civil suits are usually prohibitive to the majority of the Kenyan population. For instance, it is the Constitution that establishes the judicial structure of the country, which is adversarial in nature.<sup>3</sup> The Constitution also has always guaranteed as a matter of right, direct access to the High Court through a constitutional reference, for any Kenyan who feels that their fundamental rights have been or will be infringed even in mediation and arbitration.<sup>4</sup>

However, the Constitution of Kenya 2010 under article 159 now provides that alternative forms of dispute resolution including reconciliation, mediation, arbitration and traditional dispute resolution mechanisms shall all be promoted as long as they do not contravene the Bill of Rights and are not repugnant to justice or inconsistent with the Constitution or any written law. It also contains a bill of rights under Chapter Four and environmental rights are enforceable under Art. 70.

---

<sup>2</sup> Dispute Resolution Centre, *A lawyer's role in Alternative Dispute Resolution*, a one-day workshop, held on 16<sup>th</sup> September 2004, at Nairobi, Kenya.

<sup>3</sup> Chapter Four, sections 60-69, (Revised edition, 2007), *Government Printer*, Nairobi.

<sup>4</sup> Previously under Sections 67, 75 and 84 of the former Constitution of Kenya, Revised Edition, 2007.; see also the case of *Epcu Builders Limited-v-Adam S. Marjan-Arbitrator & Another*, Civil Appeal No. 248 of 2005 (unreported).

Sometimes, parties in litigation can engage in mediation outside the court process and then move the court to record a consent judgment.<sup>5</sup> This procedure exists as a remote form of court-annexed mediation. On the other hand, parties in a conflict that is not before a court may undergo a mediation process and conclude the mediation agreement as a contract *inter partes* enforceable and binding as between them, so long as it abides by the provisions of the Law of Contract Act.<sup>6</sup>

On a more practical level, mediation is applied to the resolution of environmental conflicts, like land boundary conflicts, at a very informal level. Parties with such a conflict will bring it, for instance, to a panel of elders who are respected members of the society. They will listen to the parties and encourage them to come to a consensus on those issues. This ensures access to justice for the aggrieved parties, as the consensus reached is binding and the society has widely accepted internal enforcement mechanisms. This process has been widely applied in many Kenyan communities. It is a safe method as it preserves the relationship of the parties as it was before the conflict.

Previously, there were efforts by the legal fraternity in Kenya and other parties to enhance the legal and institutional frameworks governing mediation in general. This covered the whole range of what is known as alternative dispute resolution mechanisms (ADR), which include arbitration and negotiation. Arbitration is already provided for under the Arbitration Act. The proposal for court-annexed mediation has already been implemented into law and is now provided for under section 81 (2) (ff) of the Civil Procedure Act, as amended by the Statute Law (Miscellaneous

---

<sup>5</sup> Civil Procedure Rules, former Order XXIV Rule 6 (now order 25 rule 5(1) and section 3A of the Act; See also "The Rules Committee, The Proposed Amendments to Civil Procedure and Court of Appeal Rules", *Secretariat of the Rules Committee*, (Nairobi, 2008), p. 6.

<sup>6</sup> Cap 14, Laws of Kenya (Revised Edition, 2007), Government Printer, Nairobi.

Amendment) Act No. 6 of 2009. Thus, parties who have presented their cases to court may have their matter referred to mediation by the court for resolution.

The problem being addressed here is the issue of a massive backlog of cases in the courts and recurrence of conflicts even after a court has decided the matter. Mediation, with its flexibility and expeditious nature may be able to bring down the level of backlog in the courts. The Rules Committee, which is a creation of Section 81 of the Civil Procedure Act,<sup>7</sup> conducted a national exercise aimed at soliciting views from the members of the public and various professional bodies on the steps required to bring about changes to the Civil Procedure Act and Rules incorporating mediation among other modes of ADR.<sup>8</sup>

The Chartered Institute of Arbitrators was approached to spearhead the task of creating the draft Court Alternative Dispute Resolution Rules due to its experience in mediation.<sup>9</sup> With collaboration of other stakeholders in various professional organisations a draft of Court Mandated Mediation Rules was formulated. The rules provided for establishment of Mediation Accreditation Committee, reference of cases to mediation by the court on its own motion or at the request of the parties and the nature of matters that could be referred for mediation. This rules later found their way into the Statute Law (Miscellaneous Amendment) Act, No. 6 of 2009.

The ADR Taskforce included membership from the Law Society of Kenya, The International Commission of Jurists, The Dispute Resolution Centre, The University of Nairobi School of Law, the International Federation of Women Lawyers (FIDA), and the Family Mediation Centre (FAMEC). In drafting the mediation rules,

---

<sup>7</sup> Chapter 21 of the Laws of Kenya (Revised edition, 2008), *Government Printer*, Nairobi.

<sup>8</sup> A.V. Gichuhi, "Court Mandated Mediation: The final solution to expeditious disposal of cases" 1(2) *The Law Society of Kenya Journal*, 106 (2005).

<sup>9</sup> *Ibid.*

the task force took into account the experiences of other jurisdictions within the Commonwealth like Canada, Zambia and the United States of America.<sup>10</sup>

### 4.3 The Law Providing for Mediation

In July 2009, the Parliament passed part of the proposals for amendment to introduce ADR and abandoned others. In essence, the amendments proposed to sections 1 and 81 of the Civil Procedure Act were enacted into law.<sup>11</sup> The upshot of the laws passed by the Parliament is that, on issue of necessary practice notes and/or directions, the practice of court-annexed mediation may take off in Kenya.

Section 1A (1) of the Civil Procedure Act had the effect of introducing the overriding objective to civil procedure in Kenya as being to facilitate the just, expeditious, proportionate and affordable resolution of civil disputes governed by the Act. The judiciary is enjoined to exercise its powers and interpretation of the civil procedure to give the overriding objective effect.<sup>12</sup> In effect, this implies that the court in its interpretation and orders will ensure that the civil procedure, as far as possible, is not used to inflict injustice or delay the proceedings and minimizes the litigation costs the parties. This provision can also serve as a basis for the court to employ the rules of procedure that provide for use of Alternative Dispute Resolution mechanisms to ensure that they serve the ends of the overriding objective.

Further, the Civil Procedure Act was amended to foist new duties on the parties to civil disputes and their advocates. Thus, it is the duty of every party to a civil dispute and the advocate acting for that party to assist the court in furthering the

---

<sup>10</sup> Florida Statutes Chapter 44 on Mediation Alternatives to Judicial Action: *The Florida Rules of Civil Procedure*; Administrative Order 3.110 (C) of the County Mediation in Alachua County Rule 24.1 on Mandatory Mediation under Regulation 194 of the Revised Regulations of Ontario of 1990 made under the courts of Justice Act.

<sup>11</sup> Section 1A(1) and section 81 (2) (ff) of Civil Procedure Act, *Government Printer*, Nairobi.

<sup>12</sup> Section 1A(2) of Civil Procedure Act, *op. cit.*

overriding objective of the Act. In particular, the parties and their advocates are bound to participate in the processes of the court and to comply with the directions of the court in ways that promote just, expeditious, proportionate and affordable resolution of civil disputes.<sup>13</sup>

The amendments are especially specific on the duty of the court to further the overriding objective of the civil procedure and lay out in detail the aims which courts shall pursue in handling civil disputes. Courts are bound in the adjudication and application of the civil procedure to ensure just determination of proceedings and efficient disposal of the business of the court. The courts are also required to ensure the efficient use of available judicial and administrative resources and ensure the use of suitable technology in civil litigation. Further, it is the duty of the courts to ensure timely disposal of the proceedings before them at a cost affordable by the parties.<sup>14</sup>

The law was also amended in section 81 of the Civil Procedure Act to lay the framework for reference to mediation of cases lodged under the Act. This can be inferred from the amendment to section 81(2) (ff) introducing a clause providing for the promulgation of rules for facilitating selection of mediators and the hearing of matters referred to mediation under the Act. This new clause gives the Rules Committee powers to promulgate rules of procedure for matters referred to mediation and the selection of mediators.<sup>15</sup> Thus, the amendments to the Act relating to reference to mediation will have to await the promulgation of the rules to be operational. The rules are ready and only pending enactment. A new subsection (3) was also introduced to section 81 giving the Chief Justice power to issue practice

---

<sup>13</sup> Civil Procedure Act, Section 1A (3), *op. cit.*

<sup>14</sup> Civil Procedure Act, Section 1B (1), *op. cit.*

<sup>15</sup> Civil Procedure Act, Section 81(2) (ff), *op. cit.*

notes or directions to resolve procedural difficulties arising under the Act in attaining the overriding objectives of the Act.

Order 46 rule 20 of the Civil Procedure Rules provides that;

"Nothing under this Order may be construed as precluding the court from adopting and implementing, of its own motion or at the request of the parties, any other appropriate means of dispute resolution (including mediation) for the attainment of the overriding objective envisaged under sections 1A and 1B of the Act."

This demonstrates that mediation is to be practiced in Kenya in the legal process and as part of the court process. It envisages a situation where litigants are ordered by court to continue negotiation or mediation and then to record a consent in court. This way the mediation process becomes plagued by the shortcomings of the court process discussed in Chapter Two and the end result is a settlement. It has been argued that the court system takes several years before the dispute is settled. Court annexed mediation still needs the court for enforcement of the settlement. The end result is litigation and the attendant problems associated with it.<sup>16</sup> The study argues for the political approach to mediation and that the amendments to the law are not the ideal for mediation, which is expected to resolve conflicts as opposed to settling.<sup>17</sup>

Most environmental conflicts in Kenya are resolved using the mechanisms stipulated under sections 30–34 of the Environment Management and Coordination Act (EMCA), which provides for the establishment and roles of the District and Provincial Environment Committees, and sections 125–129 which deal with the National Environment Tribunal. Such conflicts only reach the mainstream court system as appeals under section 130 of the EMCA. The proposed amendments to the Civil Procedure Act to introduce mediation of disputes before the court are not

---

<sup>16</sup> Interview with Samuel Nderitu, a lawyer and member of the Chartered Institute of Arbitrators at Nairobi on 16<sup>th</sup> August 2008.

<sup>17</sup> See discussion in chapter Two.

binding on the institutions or parties before institutions created under EMCA. The only possible way the amendments will facilitate the mediation of environmental conflicts is if the Public Complaints Committee (PCC) and the National Environmental Tribunal opt to adopt the amendments as part of their procedures. Even then, it is likely that the process will not work smoothly, as the proposed amendments deal with directing parties to go for mediation of their matter and not with the process and procedure of mediation of conflicts.

Apart from the formal mediation provided for by the Civil Procedure Act and Rules, there are informal home-grown mechanisms at community level for the resolution of conflicts, including environmental conflicts. These mechanisms are highly accessible and recognized at the grassroots and often compete with the formal mechanisms, even though they are not incorporated in the national environmental legal and institutional framework. These mechanisms are highly dynamic and tend to adapt in structure to meet the demands of the conflict at hand and their description is therefore not easy.<sup>18</sup> The informal systems such as the council of elders possess some attributes of the political process of mediation in that parties have a choice of the mediator, the outcome is enduring, they are flexible, speedy, non-coercive, mutually satisfying, fosters relationships, cost effective, addresses the root causes of the conflict, the parties have autonomy about the forum and rejects power-based outcomes.

The informal fora for resolving environmental conflicts include council of elders, provincial administration, peace committees, land adjudication committees and local environmental committees. It has been stated that informal mediation which may

---

<sup>18</sup> Patricia Kameri-Mbote, "Towards Greater Access to Justice in Environmental Conflicts in Kenya: Opportunities for Intervention," *International Environmental Law Research Center (IELRC) Working Paper 2005-1*, available at <http://www.ielrc.org/content/w0501.pdf> (accessed on 12/08/2011).



not require writing should be provided for as parties have autonomy over the process and the outcome and not subjected to the formalities of the court process.<sup>19</sup> It has been suggested in this context that conflicts that were voluntarily taken to the council of elders could be expeditiously solved as compared to those taken to the courts and the outcome could be agreeable to both parties.<sup>20</sup>

#### 4.4 Amendments on the Law in Kenya

In addition to the proposals which were enacted into law, there were other proposed constitutional and statutory amendments in relation to ADR and case management that were overlooked by parliament. These as a whole embody radical proposals meant to fully entrench mediation and the other ADR methods into the Kenyan legal system.

An amendment had been proposed enjoining the courts and other adjudicating fora to promote and encourage reconciliation, mediation, arbitration and other alternative dispute resolution mechanisms in resolution of disputes.<sup>21</sup> However, the courts' duty to promote and encourage ADR did not extend to constitutional matters, judicial review, matters exempted by any written law, matters of public policy and matters exempted by the court for any reason.<sup>22</sup> This has partly been actualised through Art. 159 (2) (c) of the Constitution of Kenya 2010, which encourages the use of alternative means of dispute resolution such as reconciliation, mediation, arbitration and traditional dispute resolution mechanisms. The rationale of this

---

<sup>19</sup> Sourced from [http://lawyer-kenya.blogspot.com/2008\\_05\\_15\\_archive.html](http://lawyer-kenya.blogspot.com/2008_05_15_archive.html), accessed on 12/08/2011.

<sup>20</sup> Interview with James Njuguna, an Associate Member of the Chartered Institute of Arbitrators, a professional manager and a lawyer, at Nairobi on 30<sup>th</sup> August 2009.

<sup>21</sup> See "The Rules Committee. The Proposed Amendments to Civil Procedure and Court of Appeal Rules", (2008), op. cit.

<sup>22</sup> Ibid.; See also the proposed amendment to the Constitution, section 77(9) (b).

proposed amendment to the Constitution was said to be 'to introduce ADR as an alternative to civil litigation'.<sup>23</sup>

While this was well intentioned, it offered ample fodder for parties seeking to resist the application of ADR in their matters. For instance, the amendments proposed provided for exception of application of ADR in 'constitutional matters', 'judicial review matters', and 'matters of public policy'. Matters of public policy cover virtually all matters that are administrative and touch on actions of the government agencies. These include matters touching on government procurement, environmental matters and decisions, immigration decisions and taxation disputes, among others.<sup>24</sup>

Natural resource conflicts with a constitutional dimension, for instance, the right to property in land which was protected under section 75 of the Constitution of Kenya, is also excluded from court ordered mediation. In addition, the proposed amendment excluded any matter exempted by any written law from application of court mandated mediation.<sup>25</sup> What amounts to an exemption and whether a provision of an alternative remedy amounts to an exemption is not clear. This ambiguity made the proposed constitutional amendments susceptible to several interpretations which could result in a very limited application of court mandated mediation. The courts were also given wide discretion to exempt any matter from application of court-mandated mediation.<sup>26</sup> There was no equivalent provision giving the court the positive

---

<sup>23</sup> "The Rules Committee, The Proposed Amendments to Civil Procedure and Court of Appeal Rules" (2008), op. cit., p. 6.

<sup>24</sup> Bettina Knotzl & Evelyn Zach, "Taking the Best from Mediation Regulation-The EC Mediation Directive and the Austrian Mediation Act", 23(4) *Arbitration International* 666 (2007), p. 681.

<sup>25</sup> "The Rules Committee, The Proposed Amendments to Civil Procedure and Court of Appeal Rules", (2008), op. cit.

<sup>26</sup> *Ibid.*

power to determine what is amenable to court mandated mediation or ADR especially where it is not expressly limited by the law.

These shortcomings were cured by the promulgation of the Constitution of Kenya 2010, on 27<sup>th</sup> August 2010. Article 159(2) provides that in exercising judicial authority, the courts and tribunals shall be guided by certain principles. Alternative forms of dispute resolution including reconciliation, mediation, arbitration and traditional dispute resolution mechanisms shall be promoted subject to the proviso that traditional dispute resolution mechanisms shall not be used in a way that contravenes the bill of rights, is repugnant to justice and morality or results in outcomes that are repugnant to justice and morality or is inconsistent with the constitution or any written law.<sup>27</sup> The new Constitution has enhanced the proposals on ADR contained in the proposed amendments to the previous constitution, by removing the proviso on the matters to which ADR would not apply. This broadens the applicability of ADR and is a clear display of the acceptance of ADR means of conflict resolution in all fields, including the environment.

Further a Statute Law (Miscellaneous Amendments) Bill proposed to enact a new Part XA of the Civil Procedure Act to provide for mediation of disputes.<sup>28</sup> Mediation under this part was to be conducted in accordance with such procedure as may be agreed on by the parties or as the court referring the matter to mediation may direct.<sup>29</sup> Sub clause (4) provided that an agreement between the parties to a dispute as a result of mediation under this part shall be recorded in writing and registered with the court giving direction under sub clause (1), and shall be enforceable as if it were a

---

<sup>27</sup> Ibid., Article 159 (3).

<sup>28</sup> The Statute Law (Miscellaneous Amendments) Bill No. 6 of 2009. *Government Printer*, Nairobi, 2009, at pp.204-205.

<sup>29</sup> Ibid., subclause 3.

judgment of that court and no appeal shall lie against an agreement referred to in sub clause (4).<sup>30</sup>

So as to entrench court-mandated mediation and facilitate enforcement of mediated agreements, amendments had been proposed to section 59 of the Civil Procedure Act by introduction of three new sections, though these recommendations were not included in the Bill. The effect was that the law required reference of all suits, which in the courts opinion are not among those exempted by law and are suitable for mediation.<sup>31</sup> Such reference is, however, subject to the availability of mediation services and is to be conducted in accordance with the proposed mediation rules.<sup>32</sup> Mediated agreements entered into with the assistance of qualified mediators are to be in written form and as such, may be registered and enforced by the court.<sup>33</sup>

As far as the Civil Procedure Rules are concerned, the proposed amendments on mediation were found in the proposed Order 45A which aimed at incorporating mediation in the Civil Procedure Code. The new Civil Procedure Rules became operative from 10th December 2010, three months after their gazettelement and just like in the Act, the proposed amendments to the Rules were omitted from the new rules. The proposed Order provided for mediation rules according to which any reference by the court to mediation was to be conducted. The rules anticipated court mandated mediation only after the filing of the suit and close of pleadings.<sup>34</sup> This

---

<sup>30</sup> Ibid., subclause 5.

<sup>31</sup> Ibid., proposed clause 59A of the Civil Procedure Act

<sup>32</sup> "The Rules Committee, The Proposed Amendments to Civil Procedure and Court of Appeal Rules", op. cit.

<sup>33</sup> The Statute Law (Miscellaneous Amendments) Bill No. 6 of 2009, op. Cit., proposed clause 59D of the Civil Procedure Act.

<sup>34</sup> "The Rules Committee, The Proposed Amendments to Civil Procedure and Court of Appeal Rules", op. cit., proposed Order 45A Rule 1.

implied an extra expense for parties wishing to utilize court mandated mediation in filing a suit in a court of law.

What had been proposed by the amendments bill was not really mediation but a legal process where a court could coerce parties to mediate and the outcome of the mediation had to be taken back to court for ratification. These amendments have been criticized for proposing a mediation process which is too formal and annexed to the procedures governing the conduct of cases in the high court and that informal mediation which may not require the use of writing is not provided for. The codification of mediation rules in the constitution and the civil procedure Act has been said to merely reflect the concept of mediation as viewed from a western paradigm.<sup>35</sup>

Mwagiru has stated that the legal environment is unable to comprehend the structure and epistemology of mediation such that even after parties have been encouraged to mediate their conflict, the results of the mediation have to be tabled in court for ratification and that the effect of court annexed mediation is that mediation is sacrificed at the altar of legalism, despite the fact that the courts are encouraging parties to choose mediation rather than litigation.<sup>36</sup>

As shown in Chapter Two, the political process is what can lead to acceptable outcomes for the Kenyan context as it has more attributes of mediation and it is also arguable that that is why it will lead to resolution of conflicts. The study adopts the political process and argues that mediation in the context of the Kenyan framework should have all the attributes of the political process as the aim is to resolve

---

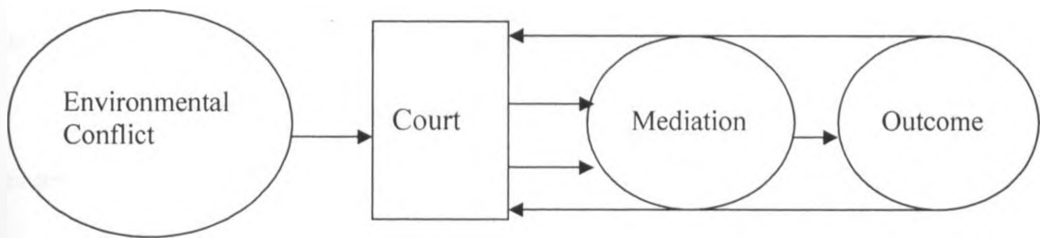
<sup>35</sup>Sourced from [http://lawyer-kenya.blogspot.com/2008\\_05\\_15\\_archive.html](http://lawyer-kenya.blogspot.com/2008_05_15_archive.html), op. cit.

<sup>36</sup> Makumi Mwagiru, *Conflict in Africa: Theory, Processes and Institutions of Management*, (Centre for Conflict Research, Nairobi, 2006), pp. 115-118.

environmental conflicts and not merely to settle them. The Kenyan framework currently advocates for settlement rather than resolution.

It has been said that resolution is enduring, non-coercive, mutually satisfying, addresses the root cause of the conflict and rejects power based out-comes.<sup>37</sup> Court mandated mediation is in fact not mediation but an adjunct to litigation that can only lead to settlement of the dispute and not a resolution of the conflict. It has further been argued that mediation is able to bring on board the views of the parties who would otherwise not be heard in an arbitral tribunal.<sup>38</sup> The court process therefore can best handle disputes and not conflicts. Disputes are about interests or issues and do not go to the root of the conflict whereas conflicts are about needs and values shared by the parties and go to the underlying causes of the conflict.<sup>39</sup> The settlement by the court will thus be based on power structures and as soon as the power balance changes it gets upset.<sup>40</sup> As Figure 2.0 illustrates, mediation that is made subject to the court process is a settlement and can never resolve environmental conflicts.

**Fig. 2.0 Mediation in the Court Process**



\*Source: The author.

<sup>37</sup> Ibid.

<sup>38</sup> Interview with James Mangerere a practising advocate of the High Court of Kenya and a director at Mediation Training Institute (Kenya), on 30<sup>th</sup> March 2010 at Nairobi.

<sup>39</sup> J. Burton, *Conflict: Resolution and Prevention*, (London: Macmillan, 1990), pp. 2-12. See also David Bloomfield, "Towards Complementarity in Conflict Management: Resolution and Settlement in Northern Ireland", *Journal of Peace Research*, Vol.32, No. 2 (May, 1995), pp.152-153

<sup>40</sup> Makumi Mwangi, *Conflict in Africa: Theory, Processes and Institutions of Management*, op. cit., p. 42.

Fig. 2.0 illustrates that a court mandated mediation as envisaged in the Kenyan legal framework arises where after parties have lodged a dispute in court, the court encourages them to have their dispute mediated after which the outcome of that mediation is tabled in court for ratification. Consequently, since the parties will have to go back to court, the negotiations become part of the court process, and subject to the bureaucracy and all the undesirable aspects of the court process.

#### 4.5 Assessment of the Amendments – Critique

The analysis in chapter Three showed that the Kenyan courts are inefficient, bureaucratic and riddled with corruption. A majority of the people interviewed during the Public Perception and Proposals on the Judiciary-III, took the view that the conflict resolution institutions lack the essential physical and financial resources to improve efficiency and effectiveness of the courts.<sup>41</sup> A party has to engage all manner of technicalities to delay and frustrate the other. The adversarial procedure adopted by the courts is thus not the most suitable if the aim is to resolve environmental conflicts.<sup>42</sup> The proposed court mandated mediation as seen above is so much linked to the court process and is bound to be met with challenges.

The court process leads to a settlement which has been defined by Bloomfield as an agreement over the issue(s) of the conflict and often involves a compromise.<sup>43</sup> In a settlement parties lack autonomy in the process, the decision is not mutually satisfying, the outcome is not enduring, parties cannot choose a judge and does not address the root causes of the conflict. A resolution on the other hand is informed by

---

<sup>41</sup> “Public Perceptions and Proposals on the Judiciary in the new constitution”, vol.III, *ICJ Kenya*, May 2002. pp. 1-25.

<sup>42</sup> See the arguments in Chapter Three.

<sup>43</sup> David Bloomfield, Towards Complementarity in Conflict Management: Resolution and Settlement in Northern Ireland, *Journal of Peace Research*, Vol.32, No. 2 (May, 1995), pp. 151-164: 152.

the political process of mediation and its outcome is enduring, non-coercive, mutually satisfying, addressing the root cause of the conflict and rejecting power based outcomes.<sup>44</sup>

As seen in chapter Two mediation can be seen both as a legal and political process. In the legal process mediation leads to a settlement whereas in the political process it leads to the resolution of conflicts. The proposed law on mediation was totally skewed towards the legal process. Any other form of mediation whereby mediation would be conducted under its own law and rules of procedure, akin to those of arbitration, was never envisaged. The end result is that mediations conducted under the proposed law would be in the legal process and would only settle and not resolve the conflict. While moving the motion in the house for the second reading of the Statute Law (Miscellaneous Amendments) Bill on 26<sup>th</sup> May 2009, Attorney General Amos Wako had this to say:

“...What will happen is that this Committee will accredit mediators who will then be registered, so that *when we have a civil case, it would be referred to a particular mediator, who will try to mediate. If he fails in the mediation, only then does the case proceed...*”<sup>45</sup> (emphasis mine).

The Minister for Justice, National Cohesion and Constitutional Affairs Mutula Kilonzo supported the motion by stating that the government was introducing the concept of mediation in our civil cases to deal with the backlog in courts.<sup>46</sup> These sentiments were expressed by top government legal advisers who are very clear in their minds that mediation is intended to aid the courts deal with the backlog of the cases and that mediation is a secondary mechanism compared to litigation. Thus

---

<sup>44</sup> Ibid

<sup>45</sup> Kenya National Assembly Official Report (Hansard) pg. 753 – 754, 26<sup>th</sup> May 2009; sourced from [www.parliament.go.ke](http://www.parliament.go.ke), (accessed on 11<sup>th</sup> August 2011).

<sup>46</sup> Ibid., p. 764



government policy still encourages litigation and the capabilities of ADR mechanisms in resolving conflicts are still are not fully appreciated. This supposition is buttressed by the sentiments of one Member of Parliament during the debate of the amendments bill when he said that:

“...Mr. Deputy Speaker, Sir, the other power that the Chief Justice has been given is to make rules. Recently, we passed the Arbitration Bill. We have now given him rules for mediation, so that even before a case is taken to court, there can be evidence of mediation efforts that have been made to resolve it. *Currently, we refer some very petty and useless cases to court, because there has been no provision for mediation...*”<sup>47</sup> (emphasis mine).

There is a need for sensitisation among citizens and the leaders so that the opinions they voice about mediation change. The public is led by what leaders say and since parliamentary debates are now in the public domain, the public will embrace what the leaders say and shun mediation and ADR generally as conflict resolution mechanisms. If any form of mediation is to take root in the Kenyan conflict resolution systems, there is a need to embrace and accept it. The following sections assess the expected challenges of the proposed amendments to entrench mediation in Kenya.

### **Voluntariness of the Mediation Process**

Negotiation is the fundamental basis of mediation. This is reflected in the definition of mediation as a continuation of negotiation in the presence of a third party. Since mediation is a continuation of negotiation, it is a voluntary process, and thus when a court orders parties to mediate, it asks them in essence to continue negotiating.<sup>48</sup> As such a court should have no role in mediation, it should keep off totally or in the alternative the matter be withdrawn from the court.

---

<sup>47</sup> Ibid., p. 775

<sup>48</sup> Makumi Mwagiru, *Conflict in Africa: Theory, Processes and Institutions of Management*, op. cit., pp.115-118.

Mediation laws are generally based on either the voluntary or compulsory approach. Mediation may either be dependent on a party's unfettered will possibly with suggestion by the court or it may be imposed compulsorily by a court.<sup>49</sup> Both approaches have their advantages and reasons why they are attractive to parties. For instance, parties' voluntary submission to mediation impacts on the success of mediation as they are, in such a case, willing to find a win-win solution for all of them. If parties fail to submit to mediation voluntarily and it is imposed on them, the mediator will find it hard to get the parties to contribute to the resolution process and the result may not be a solution generated by the parties themselves.

Parties also tend to highly identify with mediated agreements reached voluntarily and which invariably enjoy unprecedented durability. But when the aim is to decongest the court system, as is the case with the proposed amendments, compulsory mediation offers the advantage that it can be implemented immediately and does not depend on unpredictable factors such as parties' interests.<sup>50</sup>

According to Cornes, there has been a long debate as to whether mediation should be compulsory. He says that those against compulsion say that mediation is a voluntary process; that compulsion is anathema and that some cases are unsuitable for mediation. Those in favour of compulsion say that mediation has a good success rate; that it should be compulsory subject to an opt-out; that nothing is lost by attempting it; that, subjectively, mediators feel the rate of success is no different where cases have been vigorously pushed (but not ordered) by judges into mediation.<sup>51</sup>

---

<sup>49</sup> Bettina Knotzl & Evelyn Zach, "Taking the Best from Mediation Regulation-The EC Mediation Directive and the Austrian Mediation Act", op. cit., p. 665.

<sup>50</sup> Ibid.

<sup>51</sup> David Cornes, "Commercial Mediation: the Impact of the Courts", 73 (1) *Arbitration* 12, (2007), p. 13.

On the debate as to whether courts should apply a cost sanction against a party who simply refuses to participate in a mediation, Colman argues that there was a perceived inconsistency between the imposition of the sanctions for failing to take part in a mediation and the essentially voluntary nature of the whole exercise.<sup>52</sup> Further, he argues that the imposition of costs sanctions would be a derogation from the availability of the courts for the correct resolution of civil litigation. The current practice in England and Wales is that courts cannot compel parties into mediation. This was not always the case until the Court of Appeal decision in *Halsey v Milton Keynes NHS Trust*<sup>53</sup> where Dyson L.J. observed that courts should encourage the use of mediation in appropriate cases.

The proposed rules shun voluntary mediation in favour of compulsory mediation which depends on the discretion of the court in determining, after close of pleadings, whether any given suit is suitable for mediation.<sup>54</sup> As such the very essence of the mediation - party autonomy in the process and the outcome - is lost. This is the nature of mediation in the Kenyan context. The fact that voluntariness is lost in court mandated mediation means that the process cannot resolve conflicts. Mediation then becomes a court process leading to settlement of the dispute rather than a resolution of the conflict.<sup>55</sup> A resolution is a more permanent process which gets to the root of the conflict addressing the underlying psychological issues.<sup>56</sup>

Since the aim is to resolve environmental conflicts, mediation in the Kenyan context should have all the attributes of the political process as outlined in chapter

---

<sup>52</sup> Sir Anthony Colman, "Mediation and ADR: A judicial Perspective" (73) (4) *Arbitration* 403, (2007), pp. 403-406.

<sup>53</sup> [2004] EWCA Civ 576.

<sup>54</sup> The Proposed Amendments to Civil Procedure and Court of Appeal Rules, Order 45A Rule 1, op. cit.

<sup>55</sup> See Chapter Two.

<sup>56</sup> *Ibid.*

Two. What is needed in Kenya is a framework that allows parties to make the decision to negotiate, to progress with the process by inviting a third party to continue with the negotiations and the outcome to be their own.<sup>57</sup> This is because the order by the court calling for mediation interferes with a fundamental quality of mediation - its voluntary nature. With the legal framework in place and even with the proposed amendments discussed earlier, Kenya is not going to achieve resolution of environmental conflicts using the legal process of mediation.

### **Scope of Application of the Law**

There are mainly two options that applicability of mediation can assume. Mediation could be given wide application so that the law provides that it applies to every dispute in commercial and civil law. The other approach is to institute mediation procedures connected to competence of particular courts. The proposed mediation seems to adopt the first approach with some variations.

The proposed amendment to the Civil Procedure Act defined mediation and mediator very precisely and also defined the role of the mediator. The definition of mediation was narrow and restricted the proposed mediation only to a facilitative approach. The Act was, however, silent on whether or not mediation carried informally and conducted by unqualified mediators was included in the definition. But nothing seems to exclude such mediation as the definitions of mediator and mediation are wide and all encompassing. However, even then, registration of mediated agreements and enforcement by the court is restricted to only those entered with assistance of qualified mediators.<sup>58</sup>

---

<sup>57</sup> James Mangerere, a practising advocate of the High Court of Kenya and a director at Mediation Training Institute (Kenya), *op. cit.*

<sup>58</sup> *Ibid.*, proposed section 59D.

The proposed amendments to the Civil Procedure Act also defined impartiality to mean being or being seen to be unbiased towards parties to a dispute, their interest and options they present in mediation.<sup>59</sup> The procedural rules under the proposed Order 45A included protection of confidentiality in subsequent court proceedings, immunity of the mediator and procedure for expeditious referral of cases to mediation. The proposed mediation procedure rules provided that mediation must be held within three months of reference to mediation subject to a two months extension by the court for a good reason.<sup>60</sup>

### **Extent of Confidentiality in Mediation**

Confidentiality entails the aspect of scope of admissibility and the adducing of evidence on matters dealt with in mediation. Essentially, two options are available when it comes to confidentiality of the deliberations and of the information exchanged in mediation; one is to impose absolute confidentiality and the other provides that only specific aspects enjoy confidentiality.<sup>61</sup> Confidentiality under the proposed amendments is only dealt with under the rules where all communications at mediation, mediator's notes and records are declared confidential and 'without prejudice.' This effectively implies that the 'absolute confidentiality approach' is taken. Regards admissibility of proceedings in mediation in a court of law, the rules declare them to be inadmissible and bar the mediator from testifying. The recording and transcribing of mediation proceedings is also prohibited.<sup>62</sup>

---

<sup>59</sup> Ibid.

<sup>60</sup> Ibid., proposed Order 45A.

<sup>61</sup> Bettina Knotzl & Evelyn Zach, "Taking the Best from Mediation Regulation-The EC Mediation Directive and the Austrian Mediation Act", op. cit., p. 666.

<sup>62</sup> See, The Proposed Amendments to Civil Procedure and Court of Appeal Rules, op. cit., proposed Order 45A r. 10 and 15.

Admissibility of the record of what transpired in mediation as evidence in court of law is only permissible on written agreement of the parties. However, the law excludes application of the rules of admissibility with regard to mediated agreements. In addition, the inadmissibility of mediation proceedings does not exclude admission of factual evidence relating to the cause of action that would otherwise be admissible.<sup>63</sup> This last exemption is susceptible to wide interpretation leading to loosening of the provisions securing confidentiality in mediation. Such an eventuality would be devastating as the guarantee of confidentiality frees parties to participate uninhibited and to volunteer prejudicial information for the benefit of resolution of the conflict, without stopping to consider the effect of such confidence if the mediator is called as a witness.

### **Enforcement of Mediated Agreements**

There is a need for the guarantee of enforceability of the mediated agreement to ensure that mediation competes meaningfully with formal and binding dispute settlement methods, like litigation and arbitration. It has been argued that enforcement of the mediated agreement should not be left to the goodwill of the parties, but should be conferred on a public authority and be de-linked from requirements of form or process.<sup>64</sup> The proposed amendments provide for registration and enforcement of mediated agreements resulting from mediations presided over by qualified mediators.<sup>65</sup> In effect, the proposed law excludes enforcement of mediated agreements entered into without the assistance of qualified mediators. Indeed, this exclusion

---

<sup>63</sup> *Ibid.*, Order 45A r. 15.

<sup>64</sup> Bettina Knotzl & Evelyn Zach, "Taking the Best from Mediation Regulation-The EC Mediation Directive and the Austrian Mediation Act", *op. cit.*, p. 683.

<sup>65</sup> The Proposed Amendments to Civil Procedure and Court of Appeal Rules, Section 59D of the Civil Procedure Code, *op. cit.*

would also affect enforcement of mediated agreements entered into with assistance of unqualified mediators appointed by the registrar following consent by the parties as provided for under proposed Order 45A.<sup>66</sup>

### **Maintenance of Quality Standards in Mediation**

The need for quality in any proposed mediation exercise cannot be gainsaid. Ann Brandy has expressed concern on the lack of quality control and uniformity of practice in relation to the rapidly expanding number of commercial and voluntary organisations who are nurturing mediators and offering mediation services to the public and to the courts in England and Wales.<sup>67</sup> While discussing court – annexed mediation, Judge Kirkham observes that some judges have expressed concerns over the arrangement in place in England and Wales, where some court centres offer a court – annexed mediation service and trained lay mediators provide the service. The parties pay a nominal sum to the court and it is the court that provides the administration and the accommodation.<sup>68</sup>

She argues that some judges express concern that this proximity gives rise to the perception on the part of the parties that the court in some way exercises control over the process. If a mediator is incompetent or if the process goes off the rails, the reputation of the court will suffer, yet the judges have no control at all over the process.<sup>69</sup> Hence, though courts are equipped with powerful weapons to help persuade

---

<sup>66</sup> *Ibid.*, Order 45A rule 2.

<sup>67</sup> Ann Brandy, *Alternative Dispute Resolution (Mediation) Development for Non-Family Civil Disputes in England and Wales*, a paper presented at the World Jurist Association's 21<sup>st</sup> Biannual Conference on Law of the World (Sydney/ Adelaide: WJA Publication, August 17 – 23<sup>rd</sup> 2003).

<sup>68</sup> Frances Kirkham, "Judicial Support for Arbitration and ADR in the Courts in England and Wales", 72 (1) *Arbitration* 53, (2006).

<sup>69</sup> *Ibid.*, p. 56.

parties to mediate, the concerns raised by the judge should be addressed if the benefits mediation has to offer are to be ripped.

The proposed rules provide for the establishment of an accreditation committee to regulate the quality and accreditation of mediation and mediators in Kenya.<sup>70</sup> The proposal for listing registered mediators promises to ensure the implementation of the quality standards by the accreditation committee. The proposed Code of Ethics for Mediators addresses substantively matters of quality of mediation practice.<sup>71</sup> There is, however, a need to introduce elements of self-regulatory processes for mediators and to further promote the proliferation of mediation centres and institutions in Kenya.

### **Costs of Mediation**

The establishment of mediation requires an incentive scheme to encourage the parties to engage in mediation even where there are viable alternatives.<sup>72</sup> The proposed framework for mediation anticipates referral to mediation only after close of pleadings after parties have incurred legal fees in drawing the pleadings and court fees in filling their pleadings.<sup>73</sup> The lack of a reimbursement system for legal fees and other expenses is likely to make litigants resistant to mediation as it implies extra costs to the parties and there is no provision for taxation of costs even where a mediated agreement is reached. The best starting point would have been to allow parties to reclaim court fees or part of it. The proposed mediation rules also provide

---

<sup>70</sup> The Proposed Amendments to Civil Procedure and Court of Appeal Rules, *op. cit.*, proposed Section 59B of the Civil Procedure Act, proposed Order 45A and proposed Code of Ethics for Mediators (Appendix 1).

<sup>71</sup> *Ibid.*, Appendix 1: proposed Code of Ethics for Mediators.

<sup>72</sup> Bettina Knotzl & Evelyn Zach, "Taking the Best from Mediation Regulation-The EC Mediation Directive and the Austrian Mediation Act", *op. cit.* p. 683.

<sup>73</sup> The Proposed Amendments to Civil Procedure and Court of Appeal Rules, Order 45A r. 1, *op. cit.*



for legal aid in mediation by exempting a person who has instituted a suit as a pauper not to pay mediation fees. However, it is not stipulated who is responsible to pay such fees.<sup>74</sup>

This is the best shot made towards case management using ADR methods and more so mediation, in the history of the Kenya legal system. However, the proposals contained in the Rules Committee Report and in the draft Bill do not adequately cater for mediation as a conflict resolution mechanism as seen in the discussion above. Much more needs to be done to seal the loopholes identified so that all the positive attributes of mediation can be enjoyed.

#### **4.6 Impact of the Mediation Law on the Resolution of Environmental Conflicts**

The overall impact of the proposed mediation law is mainly underpinned by its scope as defined under the proposed amendment to the Constitution. The proposed amendment to the Constitution enjoins Courts to promote, *inter alia*, mediation and other alternative dispute resolution methods in settlement of disputes.<sup>75</sup> However, the proposed amendment limits the duty of the courts' to promoting and encouraging mediation except with regard to such matters as constitutional and judicial review matters, matters exempted by any written law, matters of public policy and matters exempted by the court for any reason.<sup>76</sup>

This limitation may serve to frustrate efforts to foster mediation of environmental conflicts in Kenya. In any case, many environmental conflicts are of a

---

<sup>74</sup> *Ibid.*, Order 45A r. 3(9).

<sup>75</sup> Civil Procedure Rules, former Order XXIV Rule 6 (now Order 25 rule 5(1) and section 3A of the Act; See also "The Rules Committee. The Proposed Amendments to Civil Procedure and Court of Appeal Rules", *op. cit.*, p. 6.

<sup>76</sup> *Ibid.*, proposed Amendment to the Constitution, section 7(9) (b).

constitutional nature or involve judicial review. For instance, the proposal implies that challenges to the decisions of NEMA cannot be referred to mediation especially where they seek orders that ordinarily issue in judicial review matters. Further, natural resource conflicts with constitutional dimensions are limited especially where property rights are at stake as that would qualify them as constitutional. The courts also are given wide discretion to exempt any matter from the application of court-mandated mediation.<sup>77</sup>

Other concerns raised by Brady in her paper concerned the salient features of ADR processes such as ADR clauses in contracts, limitation periods, the validity of consents given and the effectiveness of agreement generated by ADR processes, the training of third parties, their accreditation and the rules governing their liability.<sup>78</sup> All the challenges have faced other countries, like those in the European Union and Hong Kong, in their drive to inculcate mediation as a conflict resolution mechanism, in their jurisdictions. These fundamental challenges must be addressed if mediation is to gain wide acceptability and succeed as a mechanism for environmental conflict resolution in Kenya.

#### **4.7 Use of Mediation in Resolving Environmental Conflicts**

The process of mediating environmental conflicts can take a number of different approaches depending on the nature of environmental issue(s) at stake.<sup>79</sup> There are three broad categories of natural resource issues which tend to degenerate into an environmental conflict, namely, technical and practical problems; value-laden

---

<sup>77</sup>Ibid.

<sup>78</sup> Ann Brandy, *Alternative Dispute Resolution (Mediation) Development for Non-Family Civil Disputes in England and Wales*, op. cit.

<sup>79</sup> Michael Stone-Molloy, "Mediating Environmental Conflicts: A Practical Manual", available at <http://www.law.ufl.edu/conservation/pdf/mediating.pdf> (accessed on 20/10/2009).

problems in which people agree on the basic nature of the problem, but not on how to resolve it; and value-laden problems in which people disagree on both the nature of the problem and how to resolve it.<sup>80</sup>

The technical and practical environmental problems are essentially 'how to' questions that can be answered by reasoning and the application of existing knowledge. People are likely to agree on the nature of such problems and on a short list of potential solutions. These problems are susceptible to expert solutions without much consideration of values, and they may not require high levels of involvement by those the problems affect.<sup>81</sup> An example of a technical and practical environmental problem could be infestation of noxious weeds on different parts of the country.

As regards value-laden environmental problems, the people generally agree on the nature of a problem, but they disagree over the basic direction to take in responding to it. In this type of problem, values and interests begin to pull people in different directions. An example of value-laden environmental problem is the issue of pollution of the Nairobi River. Everyone acknowledged that there was a problem in the continued pollution of the Nairobi River especially due to its pollution of Athi River water catchments and the fact that it poses a grave health hazard. However, the issue of how to resolve the problem has divided the stakeholders. Some of the people who have an interest in the agents polluting the Nairobi River oppose the various options suggested to clean the river in the belief that they affect their economic interest.

---

<sup>80</sup> Matthew McKinney and Will Harmon, "Governing Nature, Governing Ourselves: Engaging Citizens in Natural Resource Decisions," available at <http://www.cnrep.org/documents/GoverningNature.pdf> (accessed on 18/5/2010)

<sup>81</sup> *Ibid.*

The third category of natural resource issues consists of conflicts that are often described as ‘intractable’ (some researchers and practitioners refer to them as ‘wicked’ problems)<sup>82</sup> because they are so difficult to resolve, warrant a deeper analysis and require more-robust tools for responding to them. In contrast to issues that are more readily resolved, issues arising from intractable problems tend to involve many stakeholders with different—often divergent—interests; revolve around complex, sometimes confounding information; and occur in a broad patch of governmental jurisdictions with overlapping and conflicting mandates, laws, policies, and decision-making protocols. In such issues, the power to address the problem is scattered among a host of players. A good example of an intractable problem is the Amboseli conflict discussed in Chapter Five of the study.

If the issue involved is value-laden and there are other underlying issues besides the environmental and continuing relationship which will survive the resolution, the mediator must be sensitive and focus on uncovering whatever underlying interests and values the parties have hidden within them, and uncovering whatever interests the parties share between them. In so doing, the mediator would best engage strategies of mediation that aid the parties to gradually reach a solution to the problem at hand as well as facilitate the transformation of their relationship in the mediation process.<sup>83</sup>

Where the environmental conflict for mediation is ‘intractable’ as described above, the skills and intuition of the mediator are required in deciding the working combination of all the four methods of mediation namely, facilitative, evaluative, settlement and transformative mediation. This is because it is impossible to know

---

<sup>82</sup> See Lawrence Susskind and Patrick Field, *Dealing with an Angry Public: The Mutual Gains Approach to Resolving Disputes*, (The Free Press, 1996), pp. 152-197.

<sup>83</sup> Ibid.

beforehand which method among the four will best resolve the pronounced variance of needs, interests, values and points of view that usually characterize intractable environmental conflicts. In addition, the mediator should be able to use the various mediation tools at his disposal.<sup>84</sup> These are mediator's introduction, facilitating inter-party communication in helping the parties design and shape the process of resolution, summarize the parties' positions from time to time, reality-checking and active listening, encourage joint meetings, calling a caucus, using open and closed questions, reframing issues and answers by the parties and assessment of the parties' Best Alternative to a Negotiated Agreement (BATNA).

Lately, focus has shifted towards the utility of mediation as a means of peaceful management of conflicts resulting from the interpretation or implementation of international law. On 23 September 2008, the UN Security Council convened a meeting on mediation and settlement of disputes and reaffirmed the UN's role in mediation efforts. During this meeting, Council members stressed the importance of mediation for the peaceful settlement of disputes and also focused on the role of the UN, the Security Council and the Secretary-General in working in cohesion to promote the mediation of problem situations and thematic areas such as the environment.<sup>85</sup> The Security Council requested for a report from the Secretary-General in six months on the role of UN in mediation of conflicts and the possible ways to improve it and on 8 April 2009, the Secretary-General submitted his report on enhancing mediation and its support activities to the Security Council.<sup>86</sup>

---

<sup>84</sup> Mordehai Mironi, "From Mediation to Settlement and from Settlement to Final Offer Arbitration: an Analysis of Transnational Business Dispute Mediation", 73(1) *Arbitration* 52, (2007), p 54. See also the discussion in chapter 2 of this study.

<sup>85</sup> United Nations Security Council, September 2008, Presidential Statement reaffirming the UN's role in mediation efforts, S/PRST/2008/36.

<sup>86</sup> Report of the Secretary General on Enhancing Mediation and its Support Activities; S/2009/189:8), sourced from <http://www.un.org/Docs/sc/sgrep09.htm>, (accessed on 05/12/2009).

The Secretary General's report was in consonance with a UNEP Report which recommended that priority in international environmental law be given to "capacity building for dispute resolution, environmental governance and land administration in states that are vulnerable to conflicts over natural resources and the environment."<sup>87</sup> The report of the Secretary-General sums the emerging international approach towards mediation of conflicts:

Since one of the most promising approaches to peaceful settlement of disputes is skilful third-party mediation, we, the United Nations, have a responsibility to "we the peoples" to professionalize our efforts to resolve conflicts constructively rather than destructively and to save succeeding generations from the scourge of war.<sup>88</sup>

Mediation has been used in one form or another as an active part of peaceful conflict resolution for thousands of years in a variety of societies around the world.<sup>89</sup> Research has confirmed the effectiveness of environmental mediation in reaching high quality agreement and building cooperative working relationships among parties at the international level.<sup>90</sup> Mediation has been used successfully, though infrequently, in negotiating and implementing international environmental conventions and treaties<sup>91</sup> and its attributes should be exploited to aid the local framework.

It is evident from the discussion in this chapter that very little has been done to inculcate the practice of environmental mediation within the framework of the Kenya

---

<sup>87</sup> United Nations Environment Programme, "From Conflict to Peace Building: The Role of Natural Resources and the Environment", *UNEP*, February 2009; available at [http://postconflict.unep.ch/publications/pcdmb\\_policy\\_01.pdf](http://postconflict.unep.ch/publications/pcdmb_policy_01.pdf), (accessed on 05/12/2009).

<sup>88</sup> United Nations Security Council, September 2008. Presidential Statement, op. cit.

<sup>89</sup> Mediators without Borders, "Supporting Statement on the Importance of Mediation to Climate Change", 19<sup>th</sup> August 2009, Available at: [http://www.worldpulse.com/files/upload/581/supporting\\_statement\\_on\\_mediation.pdf](http://www.worldpulse.com/files/upload/581/supporting_statement_on_mediation.pdf) (accessed on 05/12/2009).

<sup>90</sup> Institute for Environmental Conflict Resolution (2009), *Environmental Conflict Resolution: Performance Evidence from the Field*; Available at: [www.ecr.gov](http://www.ecr.gov) (accessed on 05/12/2009).

<sup>91</sup> Deborah Schueli and Ariella Vranesky, "Environmental Mediation in International Relations", In Jacob Bercovitch (ed.), *Resolving International Conflicts: The Theory and Practice of Mediation*, (Boulder, Colorado: Lynne Rienner Publishers, 1996), pp. 33-59.

legal system. Approximately 76% of the respondents interviewed by the researcher were of the view that even though the current resolution mechanisms had helped in tackling environmental conflicts they had not done enough in ensuring amicable resolution of environmental conflicts, since some of them were not affordable while others such as the court had many procedural requirements to be met before justice is seen to be done. Thus they recommended the adoption of simpler mechanisms that were traditionally used in the African setting such as conciliation and mediation by the elders.

One of the key resource persons interviewed was of the view that the Kenyan legal system has always preferred litigation as a mechanism for conflict resolution yet courts of law are often inaccessible to the poor, marginalised groups and communities living in remote areas.<sup>92</sup> This is due to the cost of litigation, distance to the courts, language barriers, political obstacles, among other factors. He argued that cases could run for years without a possible solution in sight and that as a mediation trainer and practitioner for many years, he can attest to the fact that mediation as a conflict resolution and management mechanism can be utilised to address most of the environmental conflicts occurring in Kenya.<sup>93</sup>

According to Kaplan, the political and strategic impact of surging populations, spreading disease, deforestation and soil erosion, water depletion, air pollution, and possibly, rising sea levels - developments that will prompt mass migration and, in turn, incite group conflicts - will be the core foreign-policy challenge [in the twenty-first century].<sup>94</sup> There is thus an urgent need to deal with environmental conflicts if

---

<sup>92</sup> Interview with James Mangerere, a practising advocate of the High Court of Kenya and a director at Mediation Training Institute (Kenya), op.cit.

<sup>93</sup> Ibid.

<sup>94</sup> Robert Kaplan, "The Coming Anarchy", *Atlantic Monthly*, 1994.

peace and stability is to be maintained nationally and internationally. This study has discussed and indeed highlighted why mediation, in its various forms, may be the mechanism that is best suited to resolve and manage environmental conflicts.

Mediation should be recognized and mainstreamed as a conflict resolution mechanism. Communities have used it for centuries - only it was not known as mediation. It was the familiar way of sitting down informally and agreeing on certain issues, such as the allocation of resources and therefore they are more familiar with it than they are with the courts. For instance, the *Kiama* or Council of Elders among the Kikuyu community used to act both as an arbitral forum and as a mediator. These elders and institutions were accessible to the populace and their decisions were respected.<sup>95</sup>

It has been suggested that there were few environmental conflicts among the Maasai community because land, forest and water resources in the olden days were communally owned. The grazing lands, watering points, hunting grounds and the forests were accessed equally by the members of the particular clans that possessed them. Thus the scarcity or abundance of a resource was never a source of conflict as such. However, in times of draught communal resources, such as water and grass, would become depleted and this was a major source of conflict. Watering livestock was a challenge and, thus, a few hardworking families would come together and build a dam to harvest water which they would use when the community dam and rivers ran dry. Often, those who did not prepare for the dry season would encroach on the 'private dams' and disagreements would emerge.<sup>96</sup>

---

<sup>95</sup> Interview with Ndungu Mwaura, an 82 year old Kikuyu elder on 16<sup>th</sup> August 2008, at Kahuhia, Murang'a District.

<sup>96</sup> Interview with William Ole Munyere, a 97 year old Maasai elder on 6<sup>th</sup> June, 2009, at Oloirien Inkarusa village, Ngong Division, Kajiado District.



The Maasai community had a unique system of community mediation which they used to deal with conflicts. It was unique because the panel to mediate the matter comprised mainly leaders of the offender's age set, who were chosen in their youth and led that particular age group for their life time. The aggrieved party would lodge a complaint with the offender's age group leader who would then call upon the offender to appear before his/her peers. These age group leaders were known as *Oloibor-enkene* (loosely translated to mean 'holder of the white rope' or leader) and the venue for conflict resolution, known as *Orkiu loo Ilpayiani* (meaning 'a tree for the elders') would usually be in the forest under a tree which was viewed as neutral ground.<sup>97</sup>

Each party would then state its case and the age group members would try and have the parties resolve the conflict. The offender, if found guilty, would be asked to apologise and told to desist from encroaching on the complainant's watering hole unless it was with his permission. If the offender failed to obey this reprimand, he would be taken away by his peers and made to stand trial where an appropriate punishment was meted out on him/her. Punishment ranged from canning, penalties or a fine to the offender's family or his clan. This form of conflict resolution is admirable in that it was premised on the need to maintain relations within the community and the decisions reached were respected. This system had worked for generations and still exists in some form within the community.<sup>98</sup>

The assertions by the interviewees on customary conflict resolution are rendered credible by Kameri-Mbote who says that the institution of *Wazee* exists in almost all communities in Kenya.<sup>99</sup> She says that this is ordinarily the first point of

---

<sup>97</sup> Ibid.

<sup>98</sup> Ibid.

<sup>99</sup> Patricia Kameri-Mbote, "Towards Greater Access to Justice in Environmental Conflicts in Kenya: Opportunities for Intervention," op. cit. p. 8.

call when any dispute arises in the community and since most Kenyans' lives are closely linked to environmental resources, it is not surprising that most of the issues the elders deal with touch on the environment.<sup>100</sup>

Mediation also allows more members of the community to take part in environmental conflict resolution and, by extension, environmental resources management. There exists an interesting view that mediation, with its many advantages, may just address some of the challenges facing the current conflict management mechanisms.<sup>101</sup> There is hence an urgent need to promulgate the mediation rules if there is to be any semblance of utilising mediation to resolve conflicts over natural resources in Kenya.

What is being proposed as court mandated mediation suffers the challenges discussed above and may not assist Kenya in the resolution of environmental conflicts. It is a mixture of the court process and the arbitral process hence not true mediation. The political process of mediation is what can lead to acceptable outcomes for the Kenyan context since the main aim is to resolve environmental conflicts and not merely to settle them. Mediation should be delinked as much as possible from the court process such that once parties decide to mediate the matter it should be withdrawn from the court.

Mediation in the political process is the true mediation. However, mediation in the legal process is not to be entirely shunned as it comes in handy in settling disputes where interests or issues are involved and where the conflict is violent in nature. All the same, Kenya should aim for political mediation since there is autonomy in the choice of the mediator, the outcome is enduring, it is flexible, speedy, non-coercive,

---

<sup>100</sup> Ibid.

<sup>101</sup> Interview with Jackie Kamau, advocate, Vice-Chair of the Chartered Institute of Arbitrators and an ADR practitioner, Op. cit.

mutually satisfying, it fosters relationships, its cost effective, addresses the root causes of the conflict, parties have autonomy about the forum and rejects power based outcomes.

# Chapter Five

## Resolving Environmental Conflicts through Mediation in Kenya - Case Studies

### 5.1 Introduction

Chapter Four dealt with mediating environmental conflicts in Kenya. It discussed the legal, institutional and other supportive frameworks that facilitate mediation in Kenya and also discussed the process of mediation and the use of mediation in resolving environmental conflicts. The chapter also contained a discussion of the proposed rules relating to court annexed mediation and an analysis of whether court annexed mediation is really mediation.

This chapter analyses local case studies showing successes of the use of mediation and the opportunities offered by mediation in resolving environmental conflicts in Kenya. The chapter also discusses an example of an intractable environmental conflict occurring in Kenya. It also contains the findings and conclusions of the study.

According to Shwartz and Ashbindu, a growing trend in environmental conflicts in Kenya appears to be linked to deteriorating environmental conditions and resources. Conflicts over water resources appear to be a major source of direct conflict. The most common environmental elements around which conflicts can erupt are water flow, diversion, salinization, floods and pollution. Resource depletion issues like deforestation, soil erosion, desertification, flooding and pollution are also a major cause of environmental conflicts.<sup>1</sup>

---

<sup>1</sup> Daniel Shwartz and Ashbindu Singh, *Environmental Conditions, Resources and Conflicts: An Introductory Overview and Data Collection*, (UNEP, New York, 1999), p. 12.

These trends point to different avenues for conflict resolution and avoidance. These are sound management of environmental and natural resource, mitigation of environmental degradation by national and international institutions, use of technical ingenuity and capacity to overcome deteriorating environmental conditions and use of alternative means of conflict resolution like conciliation, arbitration and mediation.

As discussed in Chapter Three, litigation has been utilized as an environmental conflicts management mechanism in Kenya. This has not been effective because, whereas courts have issued orders of all kinds in these matters, the conflicts have not been fully resolved and parties are still wrangling over use and access to the said resources.<sup>2</sup> This study argues that alternative means of conflict resolution, especially mediation, with all its positive aspects discussed earlier, could be better utilized in managing or resolving these intractable conflicts.

The main issue that comes into focus is whether mediation has been successfully used in the resolution of environmental conflicts in Kenya – it has. Though it has not been widely used especially for resolution of environmental conflicts, it has led to successful outcomes where used. On that front the study examines some case studies to illustrate that mediation has been successfully used in Kenya to resolve environmental conflicts and is an ideal mechanism for resolving environmental conflicts.

### **5.2.1 Pan African Paper Mills Case**

The complaint regarding the Pan African Paper Mills is a classic example of how mediation in the political process can be used to resolve environmental conflicts in Kenya and achieve acceptable and enduring outcomes. The Pan African Paper Mills (East Africa) Limited based in Webuye, Kenya, produces more than 80% of the

---

<sup>2</sup> See for example the Amboseli conflict discussed elsewhere in this chapter.

country's paper and is one of the largest employers in Kenya. The International Finance Corporation (IFC) first invested in the company in 1974 and since then, it has supported the company with nine loans and equity investments. The Office of the Compliance Advisor/Ombudsman (CAO) is the independent recourse mechanism for IFC and Multilateral Investment Guarantee Agency (MIGA), the private sector lending arms of the World Bank Group.<sup>3</sup>

On 25<sup>th</sup> February 2008, two Kenyan based NGOs – Resource Conflict Institute (RECONCILE) and Centre for Environmental and Development Education Programs (CEDEP) – lodged a complaint dated 21<sup>st</sup> January 2008 with Compliance Advisor/Ombudsman (CAO) on behalf of residents of Webuye. The complaint raised a number of concerns such as the periodic release of foul smell into the air and the release of untreated effluent directly into River Nzoia, which is the principle source of water used for domestic purposes by the local residents. As a result of this conduct complained of, the complaint stated that the residents had suffered and continued to suffer from health complications, reduced productivity of the land, loss of fisheries in River Nzoia and its tributaries, contravention of the right to a clean and healthy and clean environment and poor health and productivity among livestock.<sup>4</sup>

The complaint also listed the social economic impacts of the conduct complained of to include destruction of iron roofs and walls of houses leading to increased costs of maintaining the houses, increased cost of living occasioned by the constant poor health among members of the community, high levels of school

---

<sup>3</sup> Kenya/ Pan African Paper/- 01 Webuye. Sourced from, <http://www.cao-ombudsman.org>, accessed on 15/5/10.

<sup>4</sup> Complaint regarding Pan African Paper Mills, Webuye, Kenya, pp. 1-2. Sourced from <http://www.cao-ombudsman.org/cases/documents> accessed on 24/09/2011.

dropouts, increased food and livelihoods insecurity, high costs of managing the human and environmental impacts of the pollution, among others.

Following an ombudsman assessment report dated 15<sup>th</sup> October 2008 and subsequent negotiations between stakeholders, the parties reached an agreement to pursue a negotiated approach and undertake a stakeholders' forum to discuss the specific complaints, regarding social and environmental impacts of the project, and broader issues of community and economic development.<sup>5</sup> However, shortly after this agreement was reached, the company's power was cut due to its inability to pay wages and utility bills, and it temporarily ceased operations. After six months of negotiations, PPM and the government were unable to agree on a plan to re-structure the company, and PPM closed permanently. Senior management representatives, who previously agreed to work together with the complainants in the facilitated stakeholders' forum, left Webuye and the company was shut down in April 2009. In essence the negotiation process had hit a deadlock.

Following the company's closure, the IFC notified PPM that it had formally relinquished its \$36 million debt claim against PPM. According to the IFC, after several failed attempts at turning around and restructuring PPM over the past five years, IFC considered its debt to be both irrecoverable and an unsustainable burden for any turn-around plan. Along with relinquishment of its debt, IFC committed to fund a general environmental audit, regardless of whether PPM remains closed or re-opened under new ownership. If it re-opened, the IFC audit would ensure a safe and proper start-up. If it closed permanently, the audit would ensure a safe and proper de-commissioning of the facility. The audit was completed in August 2009.

---

<sup>5</sup> Agreement to Negotiate dated 1<sup>st</sup> December 2008 sourced from <http://www.cao-ombudsman.org/cases/documents>, op. cit.

Both the IFC and the complainants realised that shutting down the paper mill would affect both of them adversely and the negotiations between the parties having been unfruitful, they opted to continue these negotiations with the assistance of the ombudsman [the mediator]. The IFC agreed to send a representative from the Nairobi office to present the audit findings at a CAO-facilitated workshop in Webuye. The complainants and CAO organized the two-day workshop, which took place in November 2009 and whose agenda was presentation of the IFC-funded environmental audit of PPM; a presentation about IFC's other small and medium enterprise projects in Kenya, and the types of projects IFC and its partners support throughout the country and region; a half-day training in community-based participatory research and monitoring and a half-day training in mediation and environmental conflict resolution.<sup>6</sup>

The workshop was attended by the CEDEP membership and other community members and, as agreed by the complainants, constituted final closure of CEDEP's complaint to CAO. The complaint was closed in December 2009. As the above discussion illustrates the decision to mediate was agreed by the complainants themselves. The parties voluntarily agreed to continue with the negotiations under the auspices of the ombudsman with a view of re-developing Webuye and consider any potential dangers of any planned star-up of the mill or de-commissioning initiatives. This was realized through a Stakeholders Forum where the parties discussed the specific complaints regarding social and environmental impacts of the project, as well as broader issues of community and economic development. The conflict has never

---

<sup>6</sup> Pan African Paper Mills Project, Kenya: Complaint Conclusion Report, The Compliance Advisor/Ombudsman, May 2010. Sourced from <http://www.cao-ombudsman.org/cases/documents>, op. cit.



re-emerged since the outcome was acceptable to all the parties involved including the local community.<sup>7</sup>

This case is a success story in the area of environmental conflict resolution through mediation in Kenya because even though there was a bad loan owed to the IFC, through the ombudsman mediation, it agreed to fund a number of projects that were beneficial to the community in Webuye and the matter amicably resolved to the benefit of all involved including, the NGO's, IFC, PPM and the surrounding community.

### **5.2.2 Peace Committees - North Eastern & North Rift Kenya**

A peace committee has been defined as “a group of people whose broad job is to define parameters for peace.”<sup>8</sup> The North Eastern and North Rift Kenya areas are predominantly occupied by pastoralist communities and conflicts arising there are mainly over grazing lands and water.

The increasing frequency, severity and cumulative consequences of conflicts in Arid and Semi-arid Land (ASAL) areas in Kenya, particularly in the late 1980s and a better part of the 1990s due to scarcity of resources, caused by environmental hardships, surrogated a number of community based concerted initiatives to ameliorate the impacts of the then raging conflicts, which are regrettably until now causing untold sufferings to the affected communities.<sup>9</sup> Very weak government presence in those districts and an environment characterized by aridity, frequent

---

<sup>7</sup> Interview with Margaret Chogo, a resident of Webuye, on 31<sup>st</sup> March 2010, at Webuye.

<sup>8</sup> At workshop organized by National Steering Committee (NSC) on Peace Building and Conflict Management and Oxfam GB that was held in Nanyuki in June 2005.

<sup>9</sup> Mohamud Adan and Ruto Pkalya. “*The Concept Peace Committee; A Snapshot Analysis of the Concept Peace Committee in Relation to Peacebuilding Initiatives in Kenya*”, (Practical Action, Nairobi, 2006), p. 6.

droughts and insufficient natural resources to sustain the population are also cited as major causes of the conflict.<sup>10</sup>

Of particular interest is the emergence of local level peace building processes amongst the pastoralists and agro-pastoralists communities in Northern Kenya in mid to late 1990s. Peace dialogues, reconciliation meetings and sharing of grazing resources started to take a more convincing shape, resulting in prolonged periods of ceasefire and adherence to inter-community agreed measures, declarations and agreements to end hostilities. The most noticeable of these emerging local level attempts to manage pastoralists conflicts was in Wajir district, in the so called Wajir Peace Process which was started in 1993 with an initiative by a group of women in Wajir district. At the time, a highly destructive cycle of violent conflict raged in the district between different clans of Kenya Somalis leading to 1, 213 deaths over a period of 4 years.<sup>11</sup>

The local people peace dialogues, negotiations and reconciliation meetings often resulted in prolonged periods of ceasefire.<sup>12</sup> These negotiations by the local people could not lead to long lasting solutions. Moreover, several NGOs withdrew from the district necessitating the Wajir initiative. However, their running away became a blessing in disguise as their absence gave the communities the opportunity to take charge and begin their own peace initiatives.<sup>13</sup> The Wajir clan conflict had

---

<sup>10</sup> Andries Odendaal, "Local and Peace and Development Committees in Kenya", an unpublished paper forming part of a study commissioned by the United Nations Development Programme's Bureau for Crisis Prevention and Recovery (BCPR) titled, *Local Peacebuilding and National Peace Architectures: Lessons Learned from Local Peace Forums; a Working Paper*.

<sup>11</sup> Ibid.

<sup>12</sup> Ibid., pp. 6 -7.

<sup>13</sup> Juma, M.K, "*Unveiling Women as Pillars of Peace: Peacebuilding in Communities Fractured by Conflict in Kenya*", (New York: UNDP 2000), sourced from <http://www.onlinewomeninpolitics.org>, accessed on 03/06/2011.

degenerated to include fighting between women in market places in the district. Sensing danger posed by the continued clan fighting, a group of women (initially two in number) initiated peace meetings with women in Wajir town market with the express purpose of addressing the root causes of the confrontations. As a result, the Wajir Women for Peace Group was formed.

The initial fruits of the women led peace initiative in Wajir saw a group of educated professionals drawn from all clans in the district form Wajir Peace Group. The peace group teamed up with women for peace in facilitating peace dialogues in the district. The Wajir Peace Group was to help the parties to continue with the stalled negotiations. The autonomy over the process and outcome was exercised by the parties themselves. Other groups also began to coalesce into peace groups in the district (elders for peace, youth for peace etc) culminating to the formation of Wajir Peace and Development Committee (WPDC) in 1995.

Elsewhere in the North Rift Kenya, the Concept Peace Committee started tackling a clan conflict that had gone out of control of the relevant state authorities.<sup>14</sup> The National Council of Churches of Kenya (NCCCK) concentrated its peace building efforts in the Rift Valley and Western provinces and led facilitating the development of Village Peace and Development Committees (VPDCs) in the two provinces. These are perhaps, the earliest models of peace committees used in the North Rift and Western Regions. Later, Peace Committees borrowing heavily from NCCCK model were formed by POKATUSA (Pokot, Karamojong, Turkana and Sabiny), a World Vision's cross-border peace building Project.<sup>15</sup>

---

<sup>14</sup> Oxfam, "*Funding Peace Building Initiatives in the Arid Districts of Kenya: Lessons and Challenges*", (Oxfam GB, Nairobi, 2003).

<sup>15</sup> Mohamud Adan and Ruto Pkalya, "*The Concept Peace Committee; A Snapshot Analysis of the Concept Peace Committee in Relation to Peacebuilding Initiatives in Kenya*", op. cit., pg. 7.

The Moroto Cross Boarder Meeting held on 6<sup>th</sup> and 7<sup>th</sup> June 2003 in Moroto, Uganda is an example of an achievement by the POKATUSA peace committee, with the aid of other actors like the Intermediate Technology Development Group-East Africa (ITDG-EA), Oxfam, United States Agency for International Development (USAID) among others. The pastoralist communities of the Karamonja Cluster (which spreads over Kenya, Uganda, Ethiopia and Sudan and is composed of the Jie, Teso, Nyakwai, Toposa, Turkana, Karamojong, Merille, Pokot and Nyang'atom) are among the poorest in their respective countries. These areas lack vital services and infrastructure and suffer from a harsh climate and insecurity. Inter-community conflicts in the area over the scarce environmental resources have lead to loss of life and property and have also decreased mobility and access to vital social services.<sup>16</sup>

The objective of the meeting were to review the progress in implementing the decisions made during an earlier meeting in Lodwar, Kenya in 2002, to give elders the opportunity to map out a date for returning animals stolen from both sides, strengthen the peace between the Turkana, Pokot, Tepes and the Karamojong through further dialogue between key community leaders and to discuss how to utilize the Moroto-Lokiriama road to bring peace and development. Some of the key decisions of the Lodwar meeting included pursuing a disarmament programme in Kenya similar to that implemented in Uganda, protection of Turkana herdsmen when grazing in Uganda and provision of water sources along the border using food for work schemes.<sup>17</sup>

---

<sup>16</sup> Report of the Moroto Cross-Border Peace Meeting held on 6<sup>th</sup>-7<sup>th</sup> June, 2003, *The Institutional and Policy Support Team (IPST), African Union*, (Nairobi, 2003), pp. 1-29: 1. Sourced from <http://www.eldis.org/fulltext/morotomeetingreport6-7june2003.pdf>, accessed on 24/09/2011.

<sup>17</sup> Ibid., p. 3.

The meeting came up with resolutions which were to be implemented immediately, others in the medium and long term. Some of the resolutions passed included recovery and return of stolen animals, establishment of cross-border trade and commerce, formation of a border peace committee, joint peace meetings of various peace committees, boosting of security arrangements by the governments of Kenya and Uganda within the communities and along the border, among others.<sup>18</sup>

Out of these initial local level peace building initiatives, Wajir Peace and Development Committee is the best functioning local-level peace structure and largely remains a model, which inspired formation and strengthening of peace committees in various parts of the country notably Garissa, Mandera, Isiolo, Samburu, the POKATUSA cluster among others.<sup>19</sup> The main attractive feature of the Wajir Peace and Development Committee is that the local people owned the process of mediation and the outcome of the process has been enduring. This is the main essence of resolution as opposed to mere settlement of the issues in the conflict.

Informed by the development of the Peace Committees and civil society efforts on peace and security, the National Steering Committee (NSC) on Peace building and Conflict Management (PB&CM) was constituted in 2001, to coordinate peace building and conflict mitigation efforts undertaken by the government, civil society organizations and peace committees. Although still at its infancy and dogged by perennial lack of resources and legal backing, NSC has embarked on a nation-wide programme of coordinating peace building activities and harmonizing the different peace committee's structures.<sup>20</sup>

---

<sup>18</sup> Ibid.; pp. 16-20.

<sup>19</sup> Mohamud Adan and Ruto Pkalya, "*The Concept Peace Committee; A Snapshot Analysis of the Concept Peace Committee in Relation to Peacebuilding Initiatives in Kenya*", op. cit., pg. 7.

<sup>20</sup> Ibid., p. 8

A policy framework and structure linking peace committees with NSC is being developed. Many peace building actors, including the government, are beginning to appreciate and recognize the role played by local level led peace building structures. Peace committees are largely modelled and or anchored on the respective communities' traditional conflict resolution mechanisms and approaches. A larger proportion of the memberships of the respective peace committees are drawn from the council of elders.

Many people in Northern Kenya are happy with the peace committees as they helped resolve conflicts that had been re-emerging over the years causing a lot of suffering and loss of life in Wajir and other bordering Districts. Such outcomes could not have been realized through the coercive force of the state or courts of law, as they could only settle the conflicts and not resolve them.<sup>21</sup>

### **5.2.3 The Amboseli Conflict**

Mediation is a mechanism that has been used successfully to manage and resolve environmental conflicts in Kenya. The Amboseli National Park conflict is one example of an intractable environmental conflict, which has applied litigation and the coercive force of law and state and yet no tangible and amicable result has been achieved.

The Amboseli conflict involves tensions between various groups with competing interests relative to wildlife conservation and land use within the National Park. These are the local communities, Olkejuado County Council, Conservation Groups and the Government of Kenya through the Kenya Wildlife Service. On 14 December 1909, the British colonial powers officially declared the Southern Game

---

<sup>21</sup> Interview with Farah Ahmed Shire, a 64 years old Somali elder, on 3<sup>rd</sup> May 2010 at Eastleigh Community Centre, Nairobi.

Reserve, which had been created in 1906. This allowed the Maasai to remain in the area and co-exist with wildlife on the 27,700 km<sup>2</sup> reserve as they had been doing for so long. In 1948, the Amboseli National Reserve measuring approximately 3,260 km<sup>2</sup> was created but the boundaries did not prohibit movement by the Maasai.

In 1961 the Amboseli was declared a County Council game reserve under the administration of the Kajiado County Council. In 1968 a plan was launched by Kajiado County Council to carve out slightly over 500 km<sup>2</sup> from the Maasai Amboseli Game Reserve for the exclusive use of wildlife. According to Talbot and Olindo, the Maasai in protest and frustration began to kill rhinos and other wildlife. To appease the Maasai the area was subsequently reduced from 518 km<sup>2</sup> to 388 km<sup>2</sup>, leaving 160 ha of land surrounding the Ol Tukai tourist lodge in the hands of the Council, and guaranteeing the Council a portion of the gate receipts.<sup>22</sup>

In 1971, a Presidential decree was issued declaring that an area of 390 square kilometres of the Amboseli would be set aside exclusively for wildlife and tourism. In 1972 the boundaries of the reserve were demarcated and the area ceased to be Trust Land having been gazetted as Government land.<sup>23</sup> In October 1974 Amboseli National Park was officially gazetted as a National Park<sup>24</sup>. The alternative water sources for the Maasai cattle were only completed by 1977, although they proved to be defective in design and not cost-effective, thus forcing the Maasai to frequently re-enter the park for water. The most essential improvements made in order to gain local support failed. Hunting fees were only paid until 1977 when a nationwide ban on hunting was issued,

---

<sup>22</sup> Talbot, L. & P. Olindo, 'The Maasai Mara and Amboseli Reserves.' In: Kiss, A. (ed.) *Living with Wildlife – Wildlife Resource Management with Local Participation in Africa*, World Bank Technical Paper 130, ((1990, Nairobi), pp. 67-74.

<sup>23</sup> Kenya Gazette Notice Number 2641 of 1<sup>st</sup> September 1972.

<sup>24</sup> Kenya Gazette Notice Number 267 of 12<sup>th</sup> October 1974.

wildlife cropping was never seriously conducted and grazing fee compensation payments were stopped after 1979.<sup>25</sup>

The government of Kenya in August 1984 launched the Wildlife Extension Project (WEP), which recorded that wildlife problems were paramount on the group ranches bordering Amboseli National Park. These included injuries to game, difficulties in getting compensation and collecting hunting fees, and disputes over grazing and watering in the park.<sup>26</sup> In 1989 the management of Kenya's wildlife heritage was transferred to the newly established independent Kenya Wildlife Service (KWS). Its first Director, Richard Leakey was in favour of local participation by the community in conserving the wildlife, announcing that approximately 25 per cent of KWS's funds should go to the neighbouring rural communities to improve schools, clinics and water supplies.<sup>27</sup>

According to Gakahu and Goode, the goals of traditional revenue-sharing, besides being mostly inadequate, were an obstacle to government, private-sector and local-community collaboration in wildlife conservation because the practice encouraged communities to participate in conservation but did not stress the need to improve their socio-economic welfare.<sup>28</sup> The communities surrounding the conservation area have thus been left without adequate grazing lands and watering areas for their animal and without the revenue or amenities promised in return for the

---

<sup>25</sup> Rutten, M.E.M., *Partnerships in Community-based Ecotourism Projects: Experiences from the Maasai Region, Kenya, Volume 1*, African Studies Centre Leiden, ASC Working Paper 57/2004, (The Netherlands, 2004), pp 1-32: 9.

<sup>26</sup> Berger, D., *Wildlife Extension: Participatory Conservation by the Maasai of Kenya*, ACTS Environmental Policy Series No. 4. (1993), pp. 5-45:

<sup>27</sup> Rutten, M.E.M., *Partnerships in Community-based Ecotourism Projects: Experiences from the Maasai Region, Kenya, Volume 1*, Op. cit. pp 1-32: 9.

<sup>28</sup> Gakahu, C., & Goode, B., (eds), 'Ecotourism and Sustainable Development in Kenya', The Proceedings of the Kenya Ecotourism Workshop, held on 13-17 September 1992, Wildlife Conservation International, Nairobi (1992), p179.



land. The inadequacies of these policies have over the years manifested themselves in conflicts between the Maasai, the conservationists who want as much land set aside for the animals and the Kenya Wildlife Society. The conservationist and KWS have had to deal with instances of animals being killed by the Maasai and the community has lost animals to draught when they are prevented from accessing some areas while searching for fodder and water for their animals during the dry seasons.

Each of these parties wants to pursue their interest in the use of Amboseli National Park and the resources found in the park.<sup>29</sup> In so doing they have ended up contradicting, compromising or attempting to defeat the interests of one another. Conflicts that arose out of these tensions have found their way into the courts of law.<sup>30</sup> On the 23<sup>rd</sup> of October 1997 the Olkejuado County Council moved to court against the Commissioner of Lands and the Kenya Wildlife Service (KWS)<sup>31</sup> to challenge the decision by the Commissioner of Lands to allocate an area of land measuring 39,206 hectares to Kenya Wildlife Service. The purported allocation was vide a letter of allotment issued by the Commissioner of Lands on 27<sup>th</sup> August 1997. The case was still pending before the courts at the time of writing the study.

In 2005, the conflict manifested itself yet again in court<sup>32</sup> following a “purported” change of Amboseli from a National Park to a Game Reserve by the Minister for Tourism and Wildlife. The move to degazette Amboseli National Park and gazette it as a National Reserve vested in the Olkejuado County Council on 29<sup>th</sup>

---

<sup>29</sup> Interview with Mueni Mutunga, the Kenya Wildlife Service Company Secretary, as she then was, on 3<sup>rd</sup> May 2006, at Nairobi.

<sup>30</sup> Ibid.

<sup>31</sup> *Olkejuado County Council-v-Commissioner of Lands & Kenya Wildlife Service* Nairobi High Court Miscellaneous Civil Application 962 of 1997 (Unreported).

<sup>32</sup> *Youth For conservation & Others-v-Minister for Tourism and Wildlife, Kenya Wildlife Service and Another*, Nairobi High Court Miscellaneous Civil Application No. 1478/2005(Unreported).

September 2005 also attracted at least one other case by the Kenya Tourism Federation, 'Eastern African Network' and 'Nature Kenya'.<sup>33</sup>

### 5.3 Critical Analysis of the Case Studies

The Pan Paper Mills case is an illustration of a successful mediation. The key to the success of the mediation is to be found in the process. The parties were not coerced into the mediation and they went into it voluntarily. They had been negotiating and when the negotiation hit a deadlock they invited the ombudsman to assist them to continue with the negotiations. The ombudsman in this mediation merely acted to assist the various interested parties to continue with the negotiation process. The parties maintained autonomy over the process and the outcome of the process. The autonomy over the process was exercised through the fact that the parties themselves decided to undertake a stakeholders' forum to discuss the specific complaints, regarding social and environmental impacts of the project and broader issues of community and economic development.

The mediation was successful as it had all the attributes of the political process of mediation as illustrated in Chapter Two. There was autonomy in choice of the mediator, the outcome was enduring, it was flexible, speedy, non-coercive, mutually satisfying, fostered relationship between the parties, it addressed the root causes of the conflict, parties had autonomy about the forum and it rejected power based outcomes. Further, the Pan Paper Mills case study emphatically illustrates that mediation in the political process leads to a resolution as opposed to a settlement as discussed in chapter Two. It has been argued that all the stakeholders involved including the NGO's and the surrounding community were happy with the outcome of the

---

<sup>33</sup> *R-v-The Minister for Tourism and Wildlife & Kenya Wildlife Service Olkejuado County Council exparte Kenya Tourism Federation, Eastern Africa Environmental Network and Nature Kenya*, Nairobi High Court Miscellaneous Application No. 1564 of 2005, (Unreported).

mediation which has been enduring and thus legitimate. The process was fast and led to a long lasting solution which could not be feasible if the complaint had been lodged in court.<sup>34</sup>

The Peace Committees of the North Eastern Province and the North Rift of Kenya have been a success story in environmental mediation. The parties in those mediations were not coerced into the process; there was autonomy in the processes and the outcomes. The parties owned the process and the mediators merely assisted them to continue with the negotiations and come up with enduring solutions. They are not power based and are not arrived at through coercion. The mediations illustrated by the peace committees have the attributes of flexibility, cost effectiveness, party autonomy, voluntariness, party control, addressed the root causes of the conflicts and came out with enduring outcomes. The peace committees did not ignore traditional approaches to conflict resolution.

Traditional approaches use conflict management methodologies that are indigenous to the particular community involved in the conflict. Traditional approaches emphasize local values and customs, and are more accessible to local communities because they cost less than the formal methods such as using the courts. They are also more flexible in terms of their scheduling and procedures; and they are more accessible because they use local languages and symbols.<sup>35</sup>

It has been argued by a number of peace actors that the philosophy behind the establishment of peace committees was derived from the need to institutionalise and legitimise traditional conflict resolution mechanisms and to widen the constituency of

---

<sup>34</sup> Interview with Patrick Abachi, a participant at the two day workshop, on 31<sup>st</sup> March 2010, at Webuye.

<sup>35</sup> Ruto Pkalya, Mohamud Adan and Isabella Masinde, "*Indigenous Democracy: Traditional Conflict Resolution mechanisms. The Case of Pokot, Turkana, Samburu and Marakwet communities*", ITDG, Nairobi, (2004).

traditional institutions that were construed as insensitive to gender age relations in modern conflict management systems.<sup>36</sup> It is clear from these peace committees' processes that they utilise basic forms of mediation, whose attributes are flexibility, autonomy over the process, and the outcome, and addresses the root causes of the conflict. These basic forms of mediation are only present in mediations conducted in the political process as discussed in Chapter Two. All that is needed is capacity enhancement through training of the committee members in mediation skills, educating the community on conflict resolution mechanisms and availing funds for these initiatives by the government.

The fact that mediation has been applied by the peace committees to resolve environmental conflicts shows the crucial role it can play to prevent escalation or occurrence of conflicts in Kenya. Were it not for those peace committees, communities in Northern Kenya, parts of the Rift Valley and Lower Eastern, would constantly be disputing over environmental resources. The positive outcomes in Northern Kenya, parts of the Rift Valley and Lower Eastern were as a result of the processes that enabled the conflicting parties to maintain party autonomy, autonomy over the process and outcome.

Mediation in the cases illustrated above (Pan Paper Mills and Peace Committees) illustrates cases where there was a conflict that was resolved as opposed to merely being settled. The outcomes of such mediations have been enduring and legitimate. The process of mediation was legitimate as parties owned the process and the outcome and have been able to live with the decisions that they made. This is the essence of resolution. The *raison d'être* behind the success of the mediations in the case studies illustrated above is that they had all the attributes of the political process

---

<sup>36</sup> Mohamud Adan and Ruto Pkalya, "The Concept Peace Committee; A Snapshot Analysis of the Concept Peace Committee in Relation to Peacebuilding Initiatives in Kenya", op. cit., p. 8.

of mediation as demonstrated in Chapter Two. The case studies also show that it is indeed possible to resolve environmental conflicts through mediation.

The Amboseli case study is an illustration of an intractable conflict where parties decided to go to court. The fact that the various groups decided to go to court means that the outcome they are likely to reach will only be a settlement and not a resolution of the issues. The court process leads to a settlement which is power-based and power relations keep changing and as such the process becomes a contest of whose power will be dominant.<sup>37</sup> Since a settlement is temporal and does not eliminate the underlying causes of the inter-disputant relationship, the conflict can later re-emerge when new issues or renewed dissatisfaction over old issues or the third party's guarantee runs out, the Amboseli conflict will always be coming up.

If the parties in the Amboseli conflict had referred the matter to mediation the story could have been different. This is because mediation, and more so, mediation in the political process affords the parties autonomy over the process, choice of the mediator and a choice in the outcome. Mediation in the political process is also voluntary and thus the outcome of the conflict is acceptable and enduring to all the parties. Such a process would have led to a resolution of the Amboseli conflict as opposed to mere settlement over the issues in dispute by the court.

As illustrated in Chapter Four, even if the parties are referred to mediation by the court they will still have to report the outcome back to court for ratification and the outcome will still be a settlement. This is because when the court orders the parties to mediate the negotiations become part of the court process, and subject to the bureaucracy and all the undesirable aspects of the court process. The way forward would be to have all the cases withdrawn and mediation carried out voluntarily. Such

---

<sup>37</sup> Makumi Mwangi, *Conflict in Africa: Theory, Processes and Institutions of Management*. (Centre for Conflict Research, Nairobi, 2006), pp. 115-118.

mediation would have to be of the political kind where parties will have autonomy over the process and the outcome. It is arguable that the parties in the Amboseli conflict lost the opportunity for resolution the moment they went to court. This case study illustrates the unsatisfactory nature of the court process as the cases are still pending in court and even if they get finalized the outcome will still be a settlement and not a resolution.

#### **5.4 Resolving Environmental Conflicts through Mediation in Kenya - Conclusions**

It is evident from the views of the respondents interviewed that Alternative Dispute Resolution mechanisms, especially mediation, are suitable in resolving conflicts of an environmental nature in Kenya. The case studies shore up the arguments in Chapter Two that mediation in the political process is the way to go if resolution of environmental conflicts as opposed to settlement is to be realised in Kenya. The case studies have also shown that so long as courts are involved in the mediation any outcome will be a settlement. In the Pan Paper Mills and the Peace Committees case studies there was a conflict in each case which was resolved as opposed to being settled. The outcomes were enduring and legitimate to the disputants. The rationale behind the successes in these two case studies is that the parties to the conflict owned the process and the outcome and were thus able to live with the decisions that they made.

The objectives of the study were:

1. To evaluate critically the legal and institutional mechanisms for resolution of environmental conflicts.
2. To examine the extent to which the mechanisms are suitable or adequate for resolving the kind of environmental conflicts occurring in Kenya.

3. To evaluate critically whether mediation is an effective method for resolving environmental conflicts in Kenya.

Objective 1:

The study has evaluated critically the legal and institutional mechanisms for the resolution of environmental conflicts. The discussion in Chapters Three and Four examined these mechanisms and concludes that they suffer certain challenges that make them ineffective in resolving environmental conflicts. The opportunities afforded by the use of mediation in the political process are highlighted in chapter 4. This objective has therefore been met.

Objective 2:

The thesis has examined the extent to which the existing mechanisms are suitable or adequate for resolving the kind of environmental conflicts occurring in Kenya. Methods of conflict management have been discussed. It has been found that mechanisms such as litigation and arbitration are coercive and lead to settlement whereas negotiation and mediation as conflict management methods are non-coercive and thus lead to resolution.<sup>38</sup> This objective has therefore been met.

Objective 3:

This study has evaluated whether mediation is an effective method of resolving environmental conflicts. In chapter 4 the use of mediation in the Kenyan context and the proposed amendments to the law to provide for court annexed mediation were also discussed. The study has shown that mediation in the political process is an effective method for resolving environmental conflicts as opposed to merely settling the same.

---

<sup>38</sup> Chapter Two of the Study.

To attain these objectives and also investigate the statement of the research problem, the study examined the sources, nature and scope of environmental conflicts occurring in Kenya and the institutional, policy and legal mechanisms available for environmental conflict management in Kenya.<sup>39</sup> The study in Chapter Four also explored critically whether mediation is an effective method for resolving environmental conflicts in Kenya. It is evident from the examination that the mechanisms currently utilised in managing environmental conflicts in Kenya are not effective and there is thus a need to explore the opportunities afforded by the use of mediation in resolving environmental conflicts. This is because by their character environmental conflicts have multiple causes, some proximate, others underlying or merely contributing and hence the existing mechanisms may not be suitable in addressing them.

Tied to the objectives of the study was the statement of the research problem which was that despite the existence of these various institutional and legal mechanisms for their management, environmental conflicts have persisted in Kenya. The study has adequately dealt with the research problem. The study has examined the weaknesses the mechanisms face. Courts and tribunals are essentially coercive and their processes can only lead to settlements as opposed to resolution of conflicts. The study has discussed the opportunities offered by mediation in the resolution of environmental conflicts. The case studies attest that mediation offers a solution that can address the persistence of environmental conflicts in Kenya.

The study was premised on the hypotheses that:

1. The existing legal mechanisms are not suitable for the resolution of environmental conflicts.

---

<sup>39</sup> Chapter One and Three of the study.



2. Environmental conflicts in Kenya result from lack of effective mechanisms for their resolution.
3. Mediation is the most suitable mechanism for environmental conflict resolution.

#### Hypothesis 1:

The study has tested and proved this hypothesis by showing that environmental conflicts in Kenya occur and escalate due to the lack of suitable and effective mechanisms for their management. It has also been shown that since the existing mechanisms such as litigation and arbitration are coercive they can only lead to a settlement as opposed to resolution of the conflicts.

#### Hypothesis 2:

This hypothesis has been proved in that environmental conflicts in Kenya result from lack of effective mechanisms for their resolution. The mechanisms discussed in Chapter 3 such as litigation, arbitration and the institutional frameworks supporting the same have been unable to effectively deal with environmental conflicts as they only lead to settlement as opposed to resolution.

#### Hypothesis 3:

This hypothesis has been proved. It has been shown that mediation especially in the political process is the most suitable mechanism for resolving environmental conflicts in Kenya. Mediation is able to resolve the conflicts. Resolution means the conflict does not emerge again.<sup>40</sup> The case studies in chapter five show that where mediation was used to resolve environmental conflicts the outcomes were enduring as parties had autonomy in the process and the outcome.

---

<sup>40</sup> Chapter 2 of the study.

In the theoretical framework<sup>41</sup> the idea of public participation in decision making was advanced. The analysis of the case studies has shown that resolution of environmental conflicts was possible in instances where interested parties participated fully in decision making through the mediation process. There was no coercion in the process and the outcomes reached at such mediations were enduring. Decisions made during mediation in the political process enhance environmental democracy as it does not arise out of coercion and the parties participate fully in the mediation process.

The study came up with the findings discussed below which disclose the strengths and weaknesses in the institutional and legal framework for the resolution of environmental conflicts. It is evident that Kenya lacks a harmonized institutional framework; an integrated legislative system that builds institutional capacity and specifically providing for mediation and conflict resolution in its environmental policy. The study in Chapter Three analysed the existing legal and institutional framework for the resolution of environmental conflicts in Kenya, highlighting the challenges facing them. It is evident from that analysis that the mechanism that are presently being utilised to manage environmental conflicts in Kenya are inadequate and only lead to settlement as opposed to resolution of the conflicts. The study, therefore, examined whether mediation is the ideal conflict resolution mechanism for resolving environmental conflicts.<sup>42</sup>

Environmental conflicts occurring in Kenya are intricate and have been caused by a number of variables such as grazing lands scarcity, socio-cultural factors, economic and political marginalization of rangelands, unresponsive governance policy on the environment, diminishing role of traditional conflict resolution mechanisms, drought, narrow livelihood base and the emerging acts of environmental

---

<sup>41</sup> Chapter 1 of the study.

<sup>42</sup> Chapter 4 of the study.

criminal profiteering like log felling. As discussed in Chapter One of the study, they have also occurred due to issues of access to and management of natural resources which are used by people in their daily lives. Environmental resources in Kenya such as land, water, forests and minerals play a central role in the lives of the Kenyan people and as such conflicts arising from environmental resources demand special attention in their redress.

The resolution of environmental conflicts is important in that it facilitates development and interpretation of environmental laws, regulations and policies that are otherwise a very resource-intensive area.<sup>43</sup> The resolution of environmental conflicts is justified in that it ensures growth, development, interpretation and improvement of environmental laws, regulations, guidelines and policies in line with the obtaining environmental situations.

Equally, the process of resolution of environmental conflicts helps in early identification and confrontation of environmental problems.<sup>44</sup> The environmental conflicts finding their way into the conflict resolution framework are critical pointers to the areas that need attention in environmental management and coordination hence the need for their adequate documentation and statistical analysis.<sup>45</sup> Kenya has been faced with conflicts over natural resources and the existing legal and institutional mechanisms dealing with environmental conflicts have not offered much in stemming their prevalence.

---

<sup>43</sup> Carl Bruch, *Regional Opportunities for improving Environmental Governance Through access Information, Public Participation, and Access to Justice*, A paper presented at the 8<sup>th</sup> Session of the African Ministerial Conference on Environment (AMCEN), Held at Abuja, Nigeria, April 3<sup>rd</sup> - 6<sup>th</sup> April, 2000.

<sup>44</sup> Ibid.

<sup>45</sup> Ibid.

The recurrent environmental conflicts in Kenya are attributable to the absence of effective and suitable mechanisms for their resolution. The existing legal, policy and institutional mechanisms for resolution of environmental conflicts have weaknesses and do not adequately deal with these conflicts. It has also been noted that the policy, legal and institutional mechanisms in Kenya are merely settlement procedures dealing with issues only and not the underlying causes of the conflicts.<sup>46</sup> There is little recognition of the people concerned and affected by decisions made and if there is to be an improvement in public participation in environmental decision making, the roles of different actors in environmental matters should be recognised and embraced. There is a need to reform the institutions in order to promote access to environmental justice for all concerned. The reforms required are broad based, contextual and not just structural in nature.

Environmental mediation has found some success as a mechanism for conflict resolution and problem solving in domestic settings and is suitable to be applied in all forms of environmental conflicts. The success story of the Pan Paper mediation and Peace Committee activities clearly portray the efficiency of mediation in the political process which leads to a resolution. They are a clear indicator of the need to embrace mediation as a mechanism for the resolution of environmental conflicts. Indeed, mediation is one of the few methods for coping with environmental problems that retains the essentially decentralized character of the contemporary international political system.

There is a need to adopt an approach that gives the parties to an environmental conflict autonomy over the process and the outcome in decision making in environmental matters so as to reach decisions that are acceptable to them without

---

<sup>46</sup> Chapter Three of the study.

harming the environment. Mediation in the political process offers such an opportunity.

Environmental conflicts are unique since they involve people's livelihoods. A lot of resources in Kenya such as land, water, forests and minerals are located where communities live and the mechanisms employed to resolve them must involve those that are affected. Therefore, there is a need to respond to them in a manner best suited to address them, such as mediation, which has succeeded in numerous instances in Kenya and other jurisdictions.

Mediation does not ruin relationships. In a setting where all the stakeholders intend to live and work together for many years, non-adversarial conflict management processes like mediation are more suitable. Mediation encourages dialogue, negotiation, bargaining and exploring the interests of all concerned. Litigation kills dialogue and brews acrimony among the contestants. The view has been expressed that at the end of the day the judgment handed down by the court is an imposition of the judge's or tribunal's view. It can never be fully acceptable to all the parties.<sup>47</sup>

Fora for mediation can serve as good 'boardrooms' in which to plan and agree on the best way to make use of environmental resources such as land, water and forests. Parties can speak out and air their grievances in an informal forum. The government needs to have the political will to empower the poor farmer or herdsman and educate him on sustainable use of resources. Powerful parties will have to humble themselves and co-manage resources with the weak. Putting in place a framework that encourages parties to resolve conflicts through negotiation, may have the effect of humbling the powerful and bringing them to the negotiating table.<sup>48</sup> Thus mediation

---

<sup>47</sup> Interview with James Ndungu, an Associate Member of the Chartered Institute of Arbitrators, a professional manager and a lawyer, on 30<sup>th</sup> August 2009 at Nairobi.

<sup>48</sup> Ibid.

in the political process should be recognized and mainstreamed as a conflict resolution mechanism in Kenya.<sup>49</sup>

Indeed the constitution of Kenya recognises mediation as a mode of conflict management.<sup>50</sup> Mediation advocates for peaceful resolution of disputes, not violence, and taking on board the views of all stakeholders. The way forward would then be agreed on through the parties sitting in mediation and negotiating. That way, solutions to the problems afflicting environmental resources in Kenya can be reached by consensus. Such decisions have more chances of success as they have the stamp of approval and input of all stakeholders rather than mere orders from the Government. Environmental mediation if applied would safeguard the parties environmental and human rights. The flora, fauna and the rest of the environment would also have their rights upheld and safeguarded.

The mediation to be undertaken as has been seen in this study matters a lot. Mediation in the Kenyan framework is greatly linked to the court and the arbitral processes such that it is a legal process and thus bound to suffer the challenges associated with the court system. The study has shown that mediation in the political process has more attributes of mediation and thus would lead to resolution of conflicts and enduring outcomes. If the resolution of environmental conflicts is to be achieved in Kenyan through mediation, then the latter should be delinked as much as possible from the court process such that once parties decide to mediate, it should be withdrawn from the court.

Environmental conflicts impact on the use of, access to and management of natural resources. Environmental conflicts are also connected to and on impact on

---

<sup>49</sup> See discussion in Chapter Two and Four of the study.

<sup>50</sup> Article 159 of the Constitution of Kenya, Government Printer, Nairobi, 2010.

human development factors and especially the quest for social-economic development. Most environmental conflicts therefore are as a result of unsustainable use of natural resources in social-economic development activities of human populations. Given the imperative nature of social-economic development and its dependency on use and access to natural resources, environmental conflicts resulting from unsustainable use and inequitable access to environmental resources need to be resolved, in the interest of attaining sustainable development.

Mediation whether used as a stand-alone mechanism or customised together with customary methods of environmental conflict resolution, is a more effective mechanism, in that it results from negotiated solutions that involve the affected parties. It has gained acceptability as opposed to court orders and the state's police power because the public plays a part in reaching the outcome. The form of mediation to be used will depend on the nature of each particular case and the surrounding circumstances.

The history of the conflict in Amboseli and other conservation areas is evident. It is clear from the study that the approaches used to resolve the conflicts in these instances have not managed or resolved them at all, thus calling for a rethinking of the approaches.<sup>51</sup> It is also evident from the case studies that where peaceable mechanisms like mediations by the peace committees have been applied to address natural resource conflicts, the outcomes have been good for all the parties concerned. An assessment of the case studies reveals that mediation can be employed in the Kenyan context to achieve enduring outcomes and foster relationships among the various interested parties in the conflict.

---

<sup>51</sup> See discussion in Chapter Three and the case studies in Chapter Five.

The most outstanding lesson from these experiences is that natural resource conflicts are unique and therefore their management and resolution should have an approach that is different from the common mechanisms like litigation and coercive power of the state. Another important lesson learnt is that where environmental mediation has been utilised, it has worked. Serious regard therefore should be had to the possibility of utilising mediation in managing environmental conflicts.

From the study it is evident that one of the chief impediments to economic growth in Kenya are the recurring environmental resource conflicts that are exacerbated by the chronic weakness of our judicial system and institutions. Mediation as a form of environmental conflict resolution is key to social, economic and judicial reform.<sup>52</sup> Providing justice to our communities through ADR mechanisms, and especially mediation, will play a critical role in regenerating our economies and relieving poverty.

It is not underestimated that such a dramatic change in mind-set is challenging for the judiciary and lawyers. However, it is acknowledged that legal systems need to devise strategies and reforms that will expedite justice while reducing the cost of litigation. It is proposed by this study that, judges and magistrates, paralegals, lawyers and advisers should encourage conflicting parties to use mediation in the resolution environmental conflicts. The benefits to the civil society speak for themselves: everyone can be a winner; the costs can be small; an outcome can be achieved quickly and personal relations salvaged.

Courts in Kenya have been characterized by many problems related to access to justice for instance high court fees, geographical location, complexity of rules and

---

<sup>52</sup> Brenda Brainch, *ADR in the World: An African Perspective on Community Mediation*, a paper presented at the CDRC Regional Conference 2006 – 2007, on 5<sup>th</sup> January 2007, at Fordham Law School, New York.



procedure and the use of legalese. The court's role is also 'dependent on the limitations of civil procedure, and on the litigious courses taken by the parties themselves.'<sup>53</sup> These reasons make justice in environmental issues inaccessible to many people. Conflict management mechanisms under the sectoral laws have been criticised as they only provide for access to formal courts as the only mechanism.

It has also been shown in this chapter that mediation is an effective method for resolving environmental conflicts in Kenya. However, even though mediation is an effective method of conflict resolution, Kenya has adopted mediation in the legal process, in the form of court-annexed mediation and thus it will not be effective in resolving environmental conflicts.

The study has thus succinctly shown that mediation in the political process has more attributes of mediation and that it should be adopted in resolving environmental conflicts. Kenya should aim for the political process of mediation since there is autonomy in the choice of the mediator, the outcome is enduring, it is flexible, speedy, non-coercive, mutually satisfying, it fosters relationships, it is cost effective, addresses the root causes of the conflict, parties have autonomy about the forum and rejects power based out-comes.

The study concludes that customised mediation conducted in the political process is the mechanism best suited to resolve environmental conflict in Kenya. Mediation has its weaknesses and it is not a panacea for all environmental conflicts occurring in Kenya today. However, the many advantages that it has, when compared with other mechanisms of conflict resolution, greatly outweigh its shortfalls.

---

<sup>53</sup> Ibid .

# Chapter Six

## Conclusions

### 6.1 Introduction

This Chapter contains reflections on the theme of the thesis: Resolving Environmental Conflicts through Mediation in Kenya. The author looks at what was there before the formal laws came in, where we are now and the prospects for the future. The prospects for the future include recommendations and further areas of study.

### 6.2 Reflections on the Theme

Before the advent of colonialism and the introduction of formal laws and institutions to govern the environment, mediation existed in traditional societies in Kenya as a stand alone mechanism. It was not annexed to the courts and parties were not coerced into it. Party autonomy existed. Autonomy of the process and autonomy of the outcome were key ingredients that ensured that solutions reached at mediations were enduring. Mediation is thus not a new concept in Kenya as it has been used by traditional societies in resolving environmental conflicts.

The thesis dealt with the theme of Resolving Environmental Conflicts through Mediation in Kenya. Environmental conflicts affect the livelihood of people. They need to be resolved in the interest of sustainable development. Conflicts involving natural resources occur where people live and thus they should be resolved as opposed to merely being settled. Resolving environmental conflicts through Mediation can yield results that are enduring and which benefit the environment. Resolution goes to the root of the

problem and addresses the psychological dimensions of the conflict.<sup>1</sup> It is not possible to attain sustainable development in an environment of unresolved conflicts. Conflicts that remain unresolved impact negatively on socio-economic development and the environment itself.

Mediation in the political process if carried out correctly leads to outcomes that are enduring since the parties have autonomy over the process and the outcome. Parties who have a conflict may decide to negotiate. When negotiations hit a deadlock they get a third party to help them continue with the negotiations. The mediator's role in such a process is to assist the parties in the negotiations. He cannot dictate the outcomes of the negotiations. Parties must have the autonomy of the process and of the outcome.<sup>2</sup> Mediation in the political process offers an opportunity that should be harnessed to resolve environmental conflicts for the sake of the present and future generations and for the sake of the environment. Resolution of environmental conflicts will contribute positively to sustainable use of environmental resources such as water, forests, land etc.

The formal legal system classifies mediation as part of the Alternative Dispute Resolution mechanisms. It views mediation as an alternative to litigation. This view of mediation is flawed as it gives mediation a second place in the conflict settlement framework. Mediation can stand alone as a method of resolving environmental conflicts. However, since mediation is a voluntary process and care has to be taken to ensure that

---

<sup>1</sup> David Bloomfield, "Towards Complementarity in Conflict Management: Resolution and Settlement in Northern Ireland", *Journal of Peace Research*, Vol.32, No. 2 (May, 1995), pp.152-153

<sup>2</sup> Makumi Mwangi, *Conflict in Africa: Theory, Processes and Institutions of Management*, (Centre for Conflict Research, Nairobi, 2006), pp. 39-43.

the parties enter mediation voluntarily, the outcome of the process is respected and the solutions reached are acceptable and enduring. Since mediation as a concept has been misapprehended Kenya is on the verge of introducing court mandated mediation.<sup>3</sup> Court mandated mediation cannot be true mediation. Once the voluntariness to go for mediation is lost then the process of mediation is negatively affected. It may not lead to outcomes that are enduring, since the parties will always feel they were coerced into a negotiation.

In any event and as has been argued elsewhere in the thesis court mandated mediation can only lead to a settlement rather than a resolution of the conflict.<sup>4</sup> The parties will be expected to report back the outcome of their negotiations to court. The court will have to endorse it. As such the process then becomes exposed to the vagaries that bedevil the court system such as delays, bureaucracy and inefficiency. The time has come for mediation to reclaim its rightful place in the environmental conflict resolution discourse in Kenya. The law and institutions dealing with environmental conflicts in Kenya mainly use the “top bottom” approach. There is a need to involve the people in decision making in the use and management of environmental resources. Mediation offers such an opportunity and should thus be harnessed for the sake of peace and a prosperous Kenya.

Sustainable development, democracy and peace are indivisible.<sup>5</sup> It is not possible to attain these goals in an environment of unresolved conflicts. Conflicts that remain unresolved impact negatively on the socio-economic development and the environment

---

<sup>3</sup> See generally the discussion in Chapter 4.

<sup>4</sup> See generally the discussion in Chapter 4 and illustration in *Fig.3*.

<sup>5</sup> Prof. Wangari Maathai, excerpt from the acceptance speech by the 2004 Nobel peace Laureate, Oslo (Norway), 10<sup>th</sup> December 2004, available at, [www.oppapers.com/essays/442511](http://www.oppapers.com/essays/442511).

itself. In a nutshell, there is a need to enhance the conflict resolution mechanisms and institutional capacity already existing, for the sake of better environmental governance and sustainable development. This is not the time to procrastinate. The time to search for and adopt an effective conflict resolution mechanism is now.

Mediation is essentially negotiation with the assistance of a third party<sup>6</sup>. Human beings have not lost the capacity to negotiate. Resolution as opposed to settlement of environmental conflict can assist in healing the wounds caused by conflicts. Mediation can deal with the psychological dimensions of the conflicts. As president Nelson Mandela said: "The time for healing of wounds has come. The time to bridge the chasms that divide us has come. The time to build is upon us".<sup>7</sup> Resolving environmental conflicts through mediation in Kenya as has been demonstrated in this thesis is possible. It is indeed an imperative.

Mediation has been used successfully to manage and resolve environmental conflicts in Kenya.<sup>8</sup> An attempt can for instance be made to resolve the current intractable conflicts involving access and use of natural resources. The case of the Mau Forest Complex in Kenya is a classic example of such a conflict. This conflict involves several key players.<sup>9</sup> There is on one hand the government which has evicted squatters from the Mau Forest. There is on the other hand the displaced persons who formerly used to live in the forest. Also the original inhabitants of the Mau Forest Ndorobo and the

---

<sup>6</sup> Makumi Mwangi, *Conflict in Africa; Theory, Processes and Institutions of Management*, (Centre for Conflict Research, Nairobi, 2006), pp. 115-116

<sup>7</sup> Excerpt from acceptance Speech by the 1993 Nobel Peace Laureate, Inaugural Celebration address 1994, sources from, <http://www.goote.htm>, accessed on 5/08/2011.

<sup>8</sup> See generally the discussion in Chapter 5.

<sup>9</sup> Sourced from, <http://flamingonet.org./index.php>, accessed on 19/05/2010.

Ogiek are crying foul as they watch their habitat deforested and as they get evicted as well.

Since the existing legal and institutional mechanisms provide for settlement only there should be ongoing efforts to identify and use mediation in ways that create a bridge between traditional conflict resolution mechanisms and the more formal mechanisms like the courts. In the traditional setting mediation existed as a stand alone mechanism where parties had autonomy over the process and the outcome. It was a voluntary process.

The traditional communities developed and refined, over time, their own mechanisms for resolving local level disputes, both within their communities and with others. These were based on solid traditional institutions such as mediation through a Council of Elders. These institutions were respected by community members and hence those affected generally complied with their decisions.<sup>10</sup>

Development in order to be authentic, must respond to the traditions, attitudes, organisations and goals of the people whose society is under consideration.<sup>11</sup> Elders are traditionally regarded as experienced, expert custodians of knowledge, diplomacy and the judicial system of their specific society grouping. At independence in many African countries (including Kenya) most disputes were resolved using traditional/informal justice. Despite their popularity, these justice systems were regarded as obstacles to development. The current land mediation system in East Timor for example, creates a

---

<sup>10</sup> Chris Chapman and Alexander Kagaha, "Resolving Conflicts Using Traditional Mechanisms in The Karamoja and Teso Regions of Uganda", Northern Uganda Rehabilitation Programme (NUREP) Briefing, *Minority Rights Group International*, August 2009, p.1.

<sup>11</sup> *Ibid.*

bridge between traditional dispute-resolution mechanisms and the courts.<sup>12</sup> The need for greater connectivity between the traditional and formal systems has been widely acknowledged and to this end, we must consider the social and economic benefits of incorporating traditional institutions and mediation mechanisms, within the formal mechanisms, to bridge the gap in environmental conflict resolution.

Environmental conflict mediation should be embedded in environmental administration. Mediation systems should reduce burdens on the court system and broaden the options available to deal with environmental conflicts. Where necessary, systems should incorporate provisions for interim environmental agreements.<sup>13</sup> The mediation of environmental conflicts should be embedded in both environmental administration and judicial administration. This allows remedies unavailable in the courts and also alleviates problems associated with a lack of capacity in the court system, including minimal facilities in rural areas.<sup>14</sup> Multi-Door Courtrooms like those in Lagos, Nigeria, which provides a comprehensive approach to dispute resolution within the administrative structure of the court offering a range of options other than litigation should also be considered.

Parties should take advantage of no-violence agreements. Due to their very nature environmental conflicts usually have multiple causes, some proximate, others underlying or merely contributing. As already elaborated elsewhere in this thesis, the policy, legal and institutional mechanisms in Kenya are merely settlement procedures dealing with

---

<sup>12</sup> Daniel Fitzpatrick, "Dispute Resolution; Mediating Land Conflict in East Timor", in AusAID's *Making Land Work Vol 2; Case Studies on Customary Land and Development in the Pacific*, (2008), Case Study No. 9, p. 175. Sourced from <http://www.ausaid.gov.au/publications/pdf>, accessed on 24/5/2010.

<sup>13</sup> Ibid.

<sup>14</sup> Ibid.

issues only and not the underlying causes of the conflicts and can thus not be suitable in resolving environmental conflicts. Mediation is better suited to deal with conflicts involving groups or individuals from different groups than traditional conflict settlement mechanisms. Where mediation involves interim no-violence and resource-use agreements, it can successfully manage a number of potentially violent conflicts, pending resolution through agreement.<sup>15</sup>

The mediation of environmental conflicts should be backed by an appropriately comprehensive and effective legislative and administrative infrastructure capable of resolving more stubborn cases and cases that fall outside the jurisdiction of the mediation process. The current institutional and legal framework for the resolution of environmental conflicts in Kenya, which mainly consists of tribunals and courts, has not been very effective in resolving environmental conflicts in Kenya. It should be overhauled after careful scrutiny and after extensive consultation with all stakeholders including communities involved, to provide for mediation.

The Environmental Management and Co-ordination Act (EMCA) should be amended so as to provide for mediation in the resolution of environmental conflicts. This study recommends the drafting of a policy to inform the contents of a legal and institutional framework for mediation. The framework should not be “top-down”. It should be a framework that recognizes traditional norms, laws, customs and institutions that deal with mediation and grants them an equal place. The way to go is institutionalization of mediation in the political process for resolution of environmental conflicts, to ensure an element of effectiveness in enforcement of the agreed

---

<sup>15</sup> Ibid.



positions/decisions regarding sustainable access to and use of environmental resources, conservation of the environment and the protection of the rights of present and future generations.

A Mediation Act would provide for the setting up of an institutional framework within which mediation would be carried out. Care has to be taken however to ensure that parties engage in mediation voluntarily, the autonomy of the process is respected and the solutions reached are acceptable and enduring. The needs of the environment also need to be taken into consideration through extensive environmental impact assessments and audits. Reforms to the current system of conflict resolution would effectively address weaknesses such as delays, costs, backlog of cases and bureaucracy.

The future for mediation in Kenya in the resolution of environmental conflicts in Kenya is also pegged on the establishment of mediation boards and the nurturing of mediators. Judges and courts are used to presiding over disputes and rendering verdicts on the disputes brought before them. Equally, lawyers are trained to argue out cases with the best interest of their client at heart and to the best of their ability. These institutions are not best suited to mediate environmental conflicts and thus the thesis does not advocate for court annexed mediation as is suggested in the Civil Procedure Act. Mediation that is annexed to the process of the court loses the very essence of voluntariness, which is the hallmark of mediation and ADR in general.<sup>16</sup>

All the sectoral laws on the environment should provide recourse to Mediation Boards whenever an environmental conflict arises. These boards should be autonomous and with unfettered mandate to oversee resolution of environmental conflicts. A balance

---

<sup>16</sup> See discussion in Chapter 4.

needs to be struck between using mediators with local expertise and ensuring objectivity in resolution of environmental conflicts. In striking this balance, important issues need to be addressed such as building capacity, transparency and accountability into the mediation system.<sup>17</sup> Local administration officials involved in peace committees for example, have local knowledge and expertise but they are more susceptible than outsiders to allegations of bias and partisanship, thus the need to have independent members of the public as commissioners in the mediation boards.

A code of conduct to regulate the mediation practice should be put in place. The code should set out principles relating to competence, appointment, independence, neutrality and impartiality, mediation agreements, fairness of the process, the end of the process, fees and confidentiality, which mediators should commit to.<sup>18</sup> The Mediation boards and community mediators as well, should have a feedback mechanism on the measures they take to support respect for the code through training, evaluation and monitoring of the mediators. Standards of practice and codes of ethics should be set and mediators should be developed through a strategy of participation. Capacity-building requires the transfer of quality skills and knowledge tailored to the needs of a specific group, which is adapted to local practice and benefits from existing capacity, for instance an established NGO network of community-based paralegals.<sup>19</sup>

In order to achieve resolution of environmental conflicts through mediation the role of women in mediating the said conflicts should not be ignored. In fact it needs to be

---

<sup>17</sup> Daniel Fitzpatrick, "Dispute Resolution; Mediating Land Conflict in East Timor", *op. cit.*, p. 196.

<sup>18</sup> See generally, The European Code of Conduct for Mediators and Directive 2008/52 [2008] *OJL* 136/3.

<sup>19</sup> See Brenda Brainch, *ADR/Customary Law*, *op. cit.*

institutionalized. The place of women in our society puts them in the most proximate contact with the environment and natural resources. Their everyday lives are affected and ordered according to the prevailing environmental issues and it is only prudent that they are involved in management of the environmental resources and resolution of conflicts arising from utilisation of the resources. Environmental conflict mediation systems should require specifically that gender issues are given adequate weight and should include some requirement for inclusion of female mediators when appropriate, like when land rights are involved.<sup>20</sup>

There is need for maintenance of political support in the long term. For the proposed mediation boards and other measures to be effective there is a need to have political support for them. This shall require monitoring at the local level and goodwill from all state actors to maintain it. The government should for example, pledge use of mediation clauses in all government environmental contracts and to resort to mediation in the first instance.<sup>21</sup>

Further, facilitation of more international links, particularly Pan African and those of jurisdictions with successful environmental mediation regimes, to exchange ideas and experiences will help further the growth of mediation as an environmental conflict resolution mechanism. Such links and collaborations will support and conduct research and disseminate information to maintain development of mediation.

Further to the above, there is a need to create awareness and sensitize members of the public on how to resolve environmental conflicts using amicable means. Until Koffi

---

<sup>20</sup> Daniel Fitzpatrick, "Dispute Resolution; Mediating Land Conflict in East Timor", op. cit., p. 196.

<sup>21</sup> Brenda Brainch, *ADR/Customary Law*, op. cit.

Annan appeared on the scene to mediate over the post election crises in Kenya, most Kenyans had no clue what mediation was and to date, very few are aware of how it works. Yet, mediation is not alien in Kenya or Africa for that matter as it has been practised for generations, albeit in a different manner. There is a need therefore to create mediation awareness through public education. This can be achieved if there is dedicated funding by development partners and public-private sector partnerships.

Mediation is essentially negotiation with the assistance of a third party. The mediator's role in such a process is to assist the parties in the negotiations and he cannot dictate the outcomes of the negotiation. Resolution as opposed to settlement of environmental conflicts can assist in healing the wounds caused by conflict.<sup>22</sup>

Fifteen years from now the population of Kenya will have increased tremendously. There will be massive pressure over access to and use of the ever diminishing natural resources upon which so many livelihoods depend. Conflicts over natural resources will be numerous. The current systems of dealing with the said conflicts have been shown to be ineffective owing to the many challenges they face. The settlements emanating from courts and tribunals can only last as long as the power balance between parties does not shift. There is a need to embrace a conflict resolution mechanism that does not suffer the shortcomings of the existing ones. Mediation in the political process offers such a mechanism since it is autonomous; it is easy to deal with conflicts and is more efficient. Resolving environmental conflicts through mediation in Kenya will be the way to go in the future.

---

<sup>22</sup> Makumi Mwangi, *Conflict in Africa; Theory, Processes and Institutions of Management*, op. cit. pp. 39-43.

There are efforts to streamline our institutions such as the courts to make them more efficient and for them to serve the needs of the populace since what emanates from the courts are judgments that are imposed on the parties. It is essentially a settlement process. What is really needed is a mechanism that can truly resolve environmental conflicts in Kenya. Mediation is such a mechanism. The mediation envisaged is in the political process. It should be free from the coercive power of the courts and the parties should have autonomy over the process and the outcome. It should also be totally delinked from the court system so as to give the process the legitimacy, autonomy and acceptance that it requires. Enduring outcomes reached through successful mediations will see Kenya achieve sustainable development, democracy, peace and better management of the environment.

Resolving environmental conflicts through mediation in Kenya will lead to conflict prevention. In the event of a conflict a true mediation that bears the traits of autonomy in the process and outcome can be used to provide lasting solutions at the conflict stage to ensure that Kenyans live in peace and harmony and also take part in the management of natural resources in the long term. The time to go back to mediation that is unhindered and unfettered is now. Kenya can no longer afford to relegate mediation to the periphery or to annex it to the court processes where the outcomes can only lead to settlements.

With the promulgation of the new Constitution in 2010<sup>23</sup> Kenyans have acquired many rights which include the right to take part in environmental governance. Mediation in the political process offers such an opportunity for citizen`s participation in issues that affect them such as conflicts over natural resources. Resolving environmental conflicts

---

<sup>23</sup> The Constitution of Kenya, *Government Printer*, Nairobi, 2010.

through mediation in Kenya will go a long way in enriching the dream of Kenyans to live in a prosperous country that will attain its goals of sustainable development. The future will be about resolving environmental conflicts and not merely settling the same. Environmental conflicts impact negatively on human development and need to be resolved in the interest of sustainable development.

Mediation in the political process is no longer on trial as an environmental conflict resolution mechanism. It has come of age and its full potential ought to be harnessed to resolve conflicts over environmental resources and attain the goals of sustainable development, inter-generational and intra-generational equity. Resolving environmental conflicts through mediation is indeed possible and necessary.

### **6.3 Further Areas of Research**

The researcher acknowledges the fact that a lot has happened in the field of environmental law in the course of writing this thesis and there are new developments that need to be researched on, with regard to the topic of this thesis. First of all, the draft Constitution of Kenya alluded to in the earlier chapters of this thesis was promulgated on 27<sup>th</sup> August 2010 and it is now law. Article 42 of therein entrenches the right of every person to a clean and healthy environment and also captures the principles on intergenerational equity. The whole of Part 2 of Chapter 5 of the Constitution is dedicated to the environment. It sets out the obligations of the state in respect of the environment and the correlating duty of every person towards the environment,<sup>24</sup> enforcement of

---

<sup>24</sup> See Article 69 - 72

environmental rights, agreements relating to natural resources and legislation relating to the environment.

In particular Article 69 1 (d) provides that the State shall encourage public participation in the management, protection and conservation of the environment. Since environmental rights have now been constitutionalised what remains is for all concerned to research into ways of ensuring that these rights are realised, to achieve sustainable development. This will entail putting in place relevant legal, policy and institutional frameworks to ensure resource users have a say and are not exploited. This will be an interesting research and development initiative owing to the central role environmental resources play in the livelihood of Kenyans and the nature of conflicts arising from these resources.

Equally, Article 159 (2) (c) provides that in exercising judicial authority, the courts and tribunals shall promote alternative forms of dispute resolution including reconciliation, mediation, arbitration and traditional dispute resolution mechanisms. In line with the theme of the thesis and so as to attain the resolution in environmental conflicts research should be geared towards giving parties in mediation autonomy over the process and the outcome. This will be achieved through the enactment of legislation that provides for mediation in the political process, which according to the writer is the true mediation. Such legislation should not kill mediation by annexing it to the court system as envisaged in Article 159 (2) (c) of the Constitution.

## Bibliography

### (a) Articles

- Akech M., *Land, the Environment and the Courts in Kenya*, A background paper for The Environment and Land Law Reports, February 2006, 1 KLR (E&L) pp. xiv-xxxiv.
- Anderson T. G., et. al, *Levelling the Playing Field: Promoting authentic and equitable dialogue under inequitable conditions*, A paper presented at the Global e-conference on addressing natural resource conflict through community forests, January - April 1996. [Unpublished Report]
- Anerson J., Gauthier M., Thomas G., and Wondslek J., *Setting the Stage*, A paper presented at the Global E-conference on Addressing Natural Resource Conflict Through Community Forests held at Rome, Italy, January – April, 1996. [Unpublished Report]
- Auty R. M., Resource Abundance and Economic Development: Improving the Performance of Resource Rich Countries, *Research for Action* 44 (1998), pp. 1-62.
- ..... "The Political Economy of Resource-Driven Growth", 45 *European Economic Review*, issue 40333, (May 2001), pp. 839-846.
- Bar-Tal D., "Psychological Dynamics of Intractable Conflicts" in Guy Burgess and Heidi Burgess (eds.), *Beyond Intractability, Conflict Research Consortium*, (University of Colorado, Boulder, 2004), sourced from <http://www.beyondintractability.org>, accessed on 03/06/2010.
- Baruch Bush R.A., "Efficiency and Protection, or Empowerment and Recognition?: The Mediator's Role and Ethical Standards in Mediation", 41 *Florida Law Review* 253, (1989), pp. 253-286.
- Bloomfield D, Towards Complementarity in Conflict Management: Resolution and Settlement in Northern Ireland, *Journal of Peace Research*, Vol.32, No. 2, (May, 1995), pp. 151-164.
- Bruch C., *Regional Opportunities for improving Environmental Governance Through access Information, Public Participation, and Access to Justice*, A paper presented at the 8<sup>th</sup> Session of the African Ministerial Conference on Environment (AMCEN), held at Abuja, Nigeria, April 3<sup>rd</sup> - 6<sup>th</sup> April, 2000.
- Bucklow A., "The "Everywhen" Mediator: the Virtues of Inconsistency and Paradox: the Strengths, Skills, Attributes and Behaviours of Excellent and Effective Mediators", 73(1) *Arbitration* 40 (2007), pp. 40-48.
- Carden D., *Confidentiality in Mediation*, a Presentation to the Arbitrators' and Mediators' Institute of New Zealand Inc., 2005 Annual Conference, Queenstown, 30 July 2005.
- Chambers R., "Paradigm Shifts and the Practice of Participatory Research and Development", in Nelson Nici and Susan Wright (eds.), *Power and Participatory Development: Theory and Practice* (Intermediate Technology Publications, London, 1994), pp. 30 - 42.
- Chew P. K., "The Pervasiveness of Culture in Conflict", 54(1) *Journal of Legal Education* 60, (2004), pp. 60 - 71.
- Cloke K., "The Culture of Mediation: Settlement vs. Resolution" in, Guy Burgess and Heidi Burgess (eds.), *Beyond Intractability, Conflict Research Consortium*, (University of Colorado, Boulder, December 2005). Sourced from <http://www.beyondintractability.org>, accessed on 03/06/2010.



- Cobb S. and Rifkin J., *Practice and Paradox: Deconstructing Neutrality in Mediation, Law & Social Inquiry*, Vol. 16, No. 1, (Blackwell Publishing, winter, 1991), pp. 35 – 62.
- Dispute Resolution Centre, *Landscape of Dispute Resolution*, A compilation for a one day workshop, on 16<sup>th</sup> September 2004, held at Nairobi, Kenya, sourced from <http://www.disputeresolutionkenya.org>, accessed on 27/05/2011.
- ..... *A lawyer's role in ADR*, A presentations at a one day Workshop held on Thursday, 16<sup>th</sup> September 2004 at Nairobi, sourced from <http://www.disputeresolutionkenya.org>, accessed on 27/05/2011.
- Doelle M., "The Canadian Environmental Assessment Act: New Uncertainties but a Step in the Right Direction", 4 *Journal of Environmental Law and Policy* 59, (1994), pp. 59 – 91.
- Edith M., "Using Mediation to Resolve Land Use Disputes", 15(4) *Zoning and Planning Law Report* 25, (1992) pp. 25 - 27.
- Ehrlich A. H., P. Gleick & Conca K., *Resources and Environmental Degradation as a Source of Conflict*, A paper presented at the 50<sup>th</sup> Pugwash Conference on Science and World Affairs: Eliminating the Causes of War, 3<sup>rd</sup> -8<sup>th</sup> August 2000, Held at Queens' College, Cambridge, UK.
- Fiss O., 'Against Settlement', 93 *Yale Law Journal* 1073, (1984) pp. 1073-1090.
- Georgiadis N., "A Strategy to Alleviate Human Wildlife Conflict in Laikipia", A project concept prepared by Mpala Research Centre (unpublished and undated).
- ..... *Another Fencing Strategy for Laikipia*, (Unpublished and undated paper authored under the auspices of Mpala Research Centre.
- Gichuhi A.V., "Court Mandated Mediation: The Final Solution to Expeditious Disposal of Cases", 1(2) *The Law Society of Kenya Journal*, (2005), pp. 97 - 106.
- Gleick P., "Water and Conflict", 18(1) *International Security* 79, (1993), pp. 79-112.
- Government of Kenya, Sessional Paper No. 3 of 2009, National Land Policy, *Government Printer*, Nairobi, 2009.
- Graham A. "Tackling Poverty in Nairobi's Informal Settlements: Developing an Institutional Strategy" 7(2) *Environment & Urbanization* 85, (1995) pp. 85-107.
- Greenhouse C., *Mediation; A Comparative Approach*, Man, New Series, Vol. 20, No. 1, *Royal Anthropological Institute of Great Britain and Ireland*, (Mar., 1985), pp. 90 – 114.
- Griffiths M. & Whitfield T., "Mediation Ten Years On; Challenges and Opportunities for Peacemaking", *Centre for Humanitarian Dialogue*, (March 2010), pp. 1 – 20.
- Gross A.F., 'Alternative Dispute Resolution', A paper presented at the Chartered Institute of Arbitrators (Kenya Branch) Advanced Arbitration Course held at Nairobi, 8<sup>th</sup> and 9<sup>th</sup> March 2007.
- Idornigie P. O., "Overview of ADR in Nigeria", 73(1) *Arbitration* 73, (2007) pp. 73 – 76.
- Jesus J. L., *A Statement on International Tribunal on the Law of the Sea*, A paper delivered to the Informal Meeting of Legal Advisers of Ministries of Foreign Affairs held in New York, 29 October 2009.
- Kamau J., *Introduction to Arbitration*, A paper prepared for presentation at the Chartered Institute of Arbitrators-Kenya Branch Entry Course held at Nairobi, August 25-27, 2008.

- Kameri-Mbote P., "Gender, Conflict and Regional Security", in Makumi Mwagiru (ed.), *Africa Regional Security in the Age of Globalisation*, (Heinrich Boll Foundation, 2004), pp. 83-94.
- ..... "Towards greater Access to Justice in Environmental Disputes in Kenya: Opportunities for Intervention", *IELRC Working Paper 2005-1*, pp. 1 – 14.
- Kameri-Mbote P. & Lind J., "Improving Tools and Technique Sources of Conflicts Experiences from Eastern Africa", 1(2) *Romania Journal of Political Science* 134, (2001), pp. 134-155.
- Kesteren G. V., "Protect Forests and Indigenous Peoples/Kenya", *Indigo Magazine on Indigenous Peoples* (2006) pp. 9-11.
- Khan F., 'Alternative Dispute Resolution', A paper presented Chartered Institute of Arbitrators-Kenya Branch Advanced Arbitration Course held at Nairobi, 8-9<sup>th</sup> March, 2008.
- Kibugi R. M., *The Management of Wildlife outside Protected Areas: A Case Study of Laikipia District*; (Unpublished Bachelor of Laws (LL. B) Dissertation, University of Nairobi School of Law, 2004).
- Knotzl B. & Zach E., "Taking the best from Mediation regulation-The EC Mediation Directive and the Austrian Mediation Act", 23(4) *Arbitration International* 666, (2007).
- Kumudini S., 'The importance of Autonomy: Women and the Sri Lankan Peace Negotiations', *Centre for Humanitarian Dialogue*, (November 2010), pp. 1-12.
- Lang C., "Environmental Degradation in Kenya as a Cause of Political Conflict, Social Stress, and Ethnic Tensions", *ENCOP Occasional Paper No. 12*, in Spillmann K. & Bachler G. (eds.) *Environment and Conflicts Project*, (Center for Security Studies, Zurich 1992 – 1995), pp. 1–42.
- LeBaron M., "Culture and Conflict", *Conflict Research Consortium*, (University of Colorado, Boulder, 2003), Sourced from <http://www.beyondintractability.org>, accessed on 03/06/2010.
- Libiszewski S., 'What is an Environmental Conflict?', A paper presented at the first coordination meeting of the Environment and Conflicts Project (ENCOP) in Berne/Zurich, April 30-May 1, 1992.
- Limbury A. L., "An Australian Perspective on Some Topical Issues in Mediation", 73(1) *Arbitration* 64, (2007), pp. 64-72.
- Macrory R., "The Enforcement of Community Environmental Laws: Some Critical Issues", 29 *Common Market Law Review* 347, (1992), pp. 347–369.
- McKinney M. and Harmon W., "Governing Nature, Governing Ourselves: Engaging Citizens in Natural Resource Decisions (Part 2)," 2(1) *International Journal of Public Participation*, (2008), pp. 55-71.
- Mediators without Borders, "Supporting Statement on the Importance of Mediation to Climate Change", 19<sup>th</sup> August 2009, Available at: <http://www.worldpulse.com> (accessed on 05/12/2009).
- Mehta A., "Resolving Environmental Disputes in the Hush-hush World of Mediation: A Guideline for Confidentiality", 10(3) *Georgetown Journal of Legal Ethics* 521 (1997), pp. 521 -
- Modavi N., "Mediation of Environmental Conflicts in Hawaii: Win-Win or Co-Optation?", 39(2) *Sociological Perspectives* 301, (1996), pp. 301-316.
- Mordehai Mironi, "From Mediation to Settlement and from Settlement to Final Offer Arbitration: An Analysis of Transnational Business Dispute Mediation", 73(1) *Arbitration* 52, (2007), pp. 52 - 59.

- Mumma A., *Environmental Law in Kenya*, A paper presented at the ICJ (K) Members conference on “New Frontiers in the Law”, held at Nyali Beach Hotel, March 11<sup>th</sup> to 14<sup>th</sup>, 1999.
- ..... *Foundations of Environmental Law*, A paper presented for the IUCN-Rosa Regional Environmental Litigation and Advocacy training held at Johannesburg, South Africa, 2001.
- ..... *The role of Administrative Dispute Resolution Institutions and Processes in Sustainable Land Use Management: The Case of the National Environment Tribunal and the Public complaints Committee of Kenya*, A Paper presented at the IUCN Conference held at Nairobi, 2004.
- Nathan L., *Mediating in African Conflicts: The gap between mandate and capacity*, Centre for Humanitarian Dialogue, 2009, pg. 11; a paper presented at the Africa Mediator’ Retreat held on 24 – 27<sup>th</sup> March 2009 at Zamani Kempinski Hotel in Zanzibar, Tanzania.
- Ojwang J. B., “The Role of the Judiciary in Promoting Environmental Compliance and Sustainable Development,” 1 *Kenya Law Review Journal* 19, (2007), pp. 19 - 29.
- Okidi C., “Reflections on Teaching and Research on Environmental Law in African Universities,” 18 *Journal of Eastern African Research and Development* 128, (1988), pp. 128 - 144.
- Okoth-Ogendo H.W.O., “The Tragic African Commons: A Century of Exploration, Suppression and Submersion” 1 *University of Nairobi Law Journal* 107 – 17, 2003.
- Ong’wen O.S., *The land question in Kenya: the place of land Tribunals in the land reform process in Kombewa Division*, A paper presented to the Codestria Tenth General Assembly, Kampala Uganda, 8<sup>th</sup> December 2002.
- Petersmann Ernst-U., “International Trade Law and International Environmental Law – Prevention and Settlement of International Disputes in GATT”, 27 *Journal of World Trade* 43 (1993).
- ..... “The Dispute Settlement System of the World Trade Organisation and the Evolution of the GATT Dispute Settlement System Since 1948”, 31 *Common Markets Law Reports* 1157 (1994).
- Pollack C., “The Role of the Mediation Advocate: a User’s Guide to Mediation”, 73(1) *Arbitration* 20, (2007) pp. 20 -23.
- Rehbinder E. & Loperena D., “Legal Protection of Environmental Rights: The Role and Experience of the International Court of Environmental Arbitration and Conciliation”, 31(6) *Environmental Policy and Policy* 282, (2002), pp. 282 - 293.
- Republic of Kenya, *Laikipia District Development Plan* (Ministry of Planning and Development, Nairobi, 1994-1996).
- Richbell D., “Evaluative Mediation”, 73(1) *Arbitration* 38, (2007) pp. 38 - 39.
- Routhwaite H., “Alternative Dispute Resolution in Environmental Law: Uses Limitations and Potentials” in E.L Hughes, A.R Lucas & W.A. Tilleman (eds), *Environmental Law and Policy*, (Edmond Montgomery Publications Ltd, Toronto, 1998).
- Rule C., Collegiate Mediation Programs: A Critical Review, The Fourth R, *National Association for Mediation in Education*, (April/May 1994 Vol. 50), pp. 36 – 37.
- Sachs J. D. & Warner A. M., “The Big Push, Natural Resource Booms and Growth”, 59 *Journal of Development and Economics* 48, (1999), pp.43 - 76.

- Sanders F., "The Future of ADR", 1 *Journal of Dispute Resolution* 3, (2000), pp. 3 - 4.
- Sands P., 'European Community Environmental Law; Legislation, the Environmental Court of Justice and Common Interest Groups', 53 *MLR* 685 (1990), pp. 685 - 698.
- Schueli D. and Vranesky A., "Environmental Mediation in International Relations", in Jacob Bercovitch (ed.), *Resolving International Conflicts: The Theory and Practice of Mediation*, (Boulder, Colorado: Lynne Rienner Publishers, 1996), pp. 33-59.
- Situma F. D. P., "Legislative and Institutional Framework for Community Based Natural Resource Management in Kenya", 1 *University of Nairobi Law Journal* 55 (2003) pp. 55 – 68.
- Smith E., "Danger-Inequalities of Resources Present: Can the Environmental Mediation Provide the Answer?" 2 *Journal of Dispute Resolution* 379, (1996), pp. 379 - 392.
- Stukenborg C., "The Proper Role of Alternative Dispute Resolution in Environmental Conflicts", 19 *Dayton Law Review* 1305 (1994).
- Susskind L., "Environmental Mediation and the Accountability Problem" 6 (1) *Vermont Law Review*, 1 (Spring 1981) pp. 1 - 47.
- Swallow B., "Forests, Flowers or Flamingos: What Drives the Water Balance of Lake Nakuru in Kenya", *European Tropical Forest Research Network (ETFRN) News* 45-46/2005/06, pp. 52 – 53.
- Tarrazon M., "The Pursuit of Harmony: the Art of Mediating, the Art of Singing", 73 (1) *Arbitration* 49 (2007), pp. 49 - 51.
- Thayer D.M., "The Nature of Conflict over nature: Protected Areas, Transfrontier Conservation and the meaning of development" *Saratoga Skidmore College-The School of International Training*, (2003).
- The Rules Committee, "The Proposed Amendments to Civil Procedure and Court of Appeal Rules", (Secretariat of the Rules Committee, Nairobi, 2008).
- Timsit J., "Mediation: An Alternative to Judgment, not an Alternative Judgment", 69(3) *Arbitration* 161 (2003), pp. 161 - 176.
- United Nations Environment Programme, "From Conflict to Peace Building: The Role of Natural Resources and the Environment", *UNEP*, February 2009.
- Wall J. Jr., Stark J, Standifer R., Mediation: A Current Review and Theory Development, *Journal of Conflict Resolution*, Vol. 45 No. 3, (June 2001), pp. 370-391.
- Wamicha W., Mwanje J. I., Keraga R. G.M., and Wairagi M. M., *A Study of Environmental Impact Assessment of Titanium Mining in Kwale District: Executive Summary and Conclusions*, (Unpublished study conducted at the Faculty of Environmental studies Kenyatta University, Nairobi, May 2000).
- Waqo H. D., *Peace Building and Small Arms Experiences from Northern Kenya*, A paper presented to a workshop on field experiences in UN Biennial Conference of States on Small arms Programmes of Action held at UN Centre, New York USA, 7-11<sup>th</sup> July, 2003.

**(b) Books**

- Adede A. O, *The System for Settlement of Disputes under the United Nations Convention on the Law of the Sea; A Drafting History and a Commentary*, (Martinus Nijhoff Publishers, 1987).

- Angwenyi, A. N., "An Overview of the Environmental Management and Co-ordination Act", pp. 142 – 182, in C.O Okidi, P. Kameri - Mbote and Migai Aketch (eds.), *Environmental Governance in Kenya; Implementing the Framework Law*, (East African Educational Publishers, 2008).
- Auty R. M., *Patterns of Development: Resources, Policy and Economic Growth*, (Edward Arnold, London, 1995).
- Barnstein R., *The Handbook of Arbitration Practice: General Principles* (Part 2) (Sweet & Maxwell, London, 1998).
- Beierle T. C. and Cayford J., *Democracy in Practice: Public Participation in Environmental Decisions* (Resources for the Future, Washington, DC, 2002).
- Birnie P. & Boyle A., *International Law & the Environment*, 3<sup>rd</sup> ed. (Oxford University Press, Oxford, 2009).
- Blackburn J. W. and Bruce W. M., (eds.), *Mediating Environmental Conflicts* (Quorum Books, Westport, Connecticut, 1995).
- Borrini-Feyerabend G., Pimbert M., Farvar M.T., Kothari A., and Renard Y., *Sharing Power: Learning-by-Doing in Co-management of Natural Resources Throughout the World*, (IIED and IUCN/ CEESP/CMWG, Cenesta, Teheran, 2004).
- Boulle L. and Nestic M., *Mediation: Principles, Process and Practice*, (Butterworths, London, 2001).
- Brownlie I., *Principles of Public International Law*, 7<sup>th</sup> Ed (Oxford University Press, Oxford, 2003).
- Buckles D. And Rusnak D., *Cultivating Peace: Conflict and Collaboration in Natural Resource Management*, (International Development Research Center IDRC/World Bank, 1999).
- Burton J., *Conflict: Resolution & Prevention*, (St. Martin's Press, New York, 1990).
- Chevalier J., & Buckles D., *A Land Without Gods: Process Theory, Mal-development and the Mexican Natives*, (Zed books, London UK, 1995).
- Conca K. & Dalboko G. D. (eds), *Environmental Peacemaking*, (The Woodrow Wilson Centre press, Washington, 2002).
- Costantino C.A. & C.S. Merchant, *Designing Conflict Management Systems: A Guide to Creating Productive and Healthy Organizations*, (Jossey-Bass, San Francisco, 1996).
- Cotterrel R., *The Politics of Jurisprudence. A Critical Introduction to Legal Philosophy*, (Butterworths, London, 1989).
- Cullet P., *Differential Treatment in International Environmental Law and its Contribution to the evolution of International Law*, (Ashgate, Burlington Vermont, 2003).
- Dias R.W.M., *Jurisprudence*, 5<sup>th</sup> Revised ed. (Butterworths, London, 1985).
- Douglas A., *Politics of Environmental Mediation*, (Columbia University Press, New York, 1987).
- Fenn P., *Introduction to Civil and Commercial Mediation*, (Chartered Institute of Arbitrators, London, 2002).
- Fisher, R. & Ury, W., *Getting to Yes: Negotiating Agreement Without Giving In*, (Penguin Books, New York, 1981).
- Freeman M.D.A., *Lloyd's Introduction to Jurisprudence*, 7<sup>th</sup> ed. (Sweet & Maxwell, London, 2001).
- Fuller L. L., *The Morality of Law* (Yale University Press, New Haven, 1969).
- Gizewski P., *Environmental Scarcity and Conflict*, (Canadian Security Intelligence Service, Toronto, 1997).

- Goldstone J. A., *Revolution in the Early Modern World*, (University of California Berkeley Press, Berkeley, California, 1991).
- Government of Kenya, *Kenya Vision 2030: A Globally Competitive and Prosperous Kenya*, (Government Printer, Nairobi, 2007).
- Hocker J. and Wilmot W., *Interpersonal Conflict*, 2<sup>nd</sup> ed. (C. Brown Publishers, Dubuque, Iowa, 1985).
- Homer-Dixon T. & Blit J., *Eco-violence: Links among Environment, Population and Security*, (Rowman & Littlefield, Lanham MD., 1998).
- International Peace Research Association (IPRA), *Handbook on Resource and Teaching Material in Conflict Resolution: Education for Human Rights Peace and Democracy*, (UNESCO, Paris, 1994).
- Kahl C. H., *States Scarcity and Civil Strife in the Developing World*, (Princeton University Press, Princeton: New Jersey, 2006).
- Kameri-Mbote P., *Property Rights and Biodiversity Management in Kenya: A case of Land Tenure and Wildlife*, (ACTS Press, Nairobi, 2002).
- Karl T. L., *The Paradox of Plenty: Oil Booms and Petrol States*, (University of California Press, Berkeley, California, 1997).
- Leary R.O. & Blackburn J., *Mediating Environmental Conflicts: Theory and Practice*, (Quorum Books, Westport CT, 1995).
- Mactarlane J., "Mediation" in Mactarlane J., (ed.) *Dispute Resolution* (Edmond Montgomery Publications Ltd, Toronto 1999).
- Merrills J.G., *International Dispute Settlement*, 4<sup>th</sup> ed. (Cambridge University Press, Cambridge, 2005).
- Moore R., *The Mediation Process: Practical Strategies for Resolving Conflict*, Jossey-Bass Publishers, San Francisco, (1996).
- Mwagiru M., (ed.) *Africa Regional Security in the Age of Globalisation*, Heinrich Boll Foundation, Nairobi, (2004).
- .....*Conflict in Africa; Theory, Processes and Institutions of Management*, Centre for Conflict Research, Nairobi, (2006).
- .....*The Water's Edge: Mediation of Violent Electoral Conflict in Kenya*, (Institute of Diplomacy and International Studies), July 2008.
- Nicholson M., *Rationality and the Analysis of International Conflict*, (Cambridge University Press, Cambridge, 1992).
- Ochieng B., "Institutional Arrangements for Environmental Management in Kenya", pp. 183 – 207, in C.O Okidi, P. Kameri - Mbote and Migai Aketch (eds.), *Environmental Governance in Kenya; Implementing the Framework Law*, (East African Educational Publishers, 2008)
- Ogola B. & Mugabe J., "Land Tenure Systems and Natural Resource Management", in Calestous Juma and J.B. Ojwang (eds), *In Land We Trust: Environment, Private Property and Constitutional Change* (Initiative Publishers and Zed Books Ltd, Nairobi and London, 1996).
- Okidi C.O., Kameri-Mbote P. and Akech M. (eds.), *Environmental Governance in Kenya*, East African Educational Publishers Ltd., (Nairobi, 2008).
- Okoth-Ogendo H.W.O., *Tenants of the Crown: Evolution of Agrarian Law and Institutions in Kenya*, (ACTS Press, Nairobi, 1991).
- Okoth-Ogendo H.W.O., and Tumushabe G. W., (eds.), *Environmental Governance: Conceptual and Emerging issues*, (ACTS Press, Nairobi, 1999).
- O'Leary R. and Bingham L., *The Promise and Performance of Environmental Conflict Resolution* (Resources for the Future, Washington, DC, 2003).

- Omosa K. E., *The Impact of Water Conflicts on Pastoral Livelihoods: The Case for Wajir District in Kenya*, (International Institute for Sustainable Development (IISD) Winnipeg, Minnesota, Canada, 2005).
- Peet R. & Natts M., *Liberation Ecologies: Environment, Development and Social Movements*, (Routledge, London, 1996).
- Reiss C., “Environmental Contamination Disputes” in Dwight Golann (ed.), *Mediating Legal Disputes*, (Little, Brown and Company, 1996).
- Reno W., *Warlord Politics and African States*, (Lynne Rienner Boulder, Colorado, 1998).
- Riddal J.G., *Jurisprudence*, (Butterworths, London, 1980).
- Sands P., *Principles of International Environmental Law*, 2<sup>nd</sup> ed. (Cambridge University Press, Cambridge, 2003).
- Schwartz D. & Singh A., *Environmental Conditions, Resources and Conflicts: An Introductory Overview and Data Collection*, (UNEP, New York, 1999).
- Scott J., *Weapons of the Weak: Everyday Forms of Present Resistance*, (Yale University Press, New Haven, 1987).
- Seligemen A., *The Problem of Trust*, (Princeton University Press, Princeton, 1997).
- Shaw M.N., *International Law*, 4<sup>th</sup> ed., (Cambridge University Press, Cambridge, 1997).
- Smith A. and Smock D., “Managing a Mediation Process”, in A. Heather Coyne and Nigel Quinney’s (eds.) *The Peacemaker’s Toolkit Series*, United States Institute of Peace, 2008.
- Stephenson R., *Arbitration Practice in Construction Disputes*, (Butterworths, London, 1998).
- Susskind L. and Field P., “When Values Collide”, in Patrick Field (ed.), *Dealing With an Angry Public: The Mutual Gains Approach to Resolving Disputes*, (The Free Press, 1996), pp. 152-197.
- Sutcliffe B., “Development after Ecology” in V. Bhaskar and A.Glyn (eds.), *The North, the South and the Environment: Ecological Constraints and the Global Economy* (St. Martin's Press, London, 1995).
- Totterdill B., *An Introduction to Construction Adjudication: Comparison of Dispute Resolution Techniques*. (Sweet & Maxwell, London, 2003).
- ..... *Course Materials for the Construction Adjudication Course*, (Chartered Institute of Arbitrators, Nairobi, 2004).
- Treue T. and Iben N., *Community Based Natural Resource Management*, (Ministry of Foreign Affairs of Denmark, Copenhagen, 2004).
- United Nations Environment Programme, *Compendium of Judicial Decisions on Matters Related to the Environment: International Decisions*, (Vol. 1) (UNEP, Nairobi, 1998).
- Wallace R.M.M, *International Law*, 3<sup>rd</sup> ed. (Sweet & Maxwell, London, 1997).
- Weiss B., *In fairness to future generations: International Law, Common Patrimony and Intergenerational Equity*, (Dobbs Ferry, New York, 1989).
- Western D. and Waithaka J., “Policies for Reducing Human-wildlife Conflict”, A Kenya Case Study and General Implications,” pp. 357 – 372, in Woodroffe R., S. Thirgood and Rabinowitz A., (eds.), *People and Wildlife: Conflict or Coexistence* (Cambridge University Press, Cambridge, 2005).
- Yarn D. H., (ed.), *Dictionary of Conflict Resolution*, (Jossey-Bass, San Francisco, 1999).

### (c) Reports

- Bernard A. and Armstrong G., *Learning and Integration: Learning Theory and Policy Integration*, (Unpublished report, International Development Research Centre Ottawa, Canada, 1997).
- Kenya National Assembly Official Report (Hansard), pp. 753 – 754, 26<sup>th</sup> May 2009; sourced from [www.parliament.go.ke](http://www.parliament.go.ke), (accessed on 11<sup>th</sup> August 2011).
- Lawrance J.C.D., “Report of the Mission on Land Consolidation and Registration in Kenya, 1965-1966”, *Government Printer*, 1966.
- Report of the Commission of Inquiry into the land system of Kenya on principles of National Land Policy Framework, Constitutional Position of Land and the New Institutional framework for Land Administration, *Government Printer*, (Nairobi, 2002).
- Report of the Judicial Commission Appointed to Inquire into Tribal Clashes in Kenya, *Government Printer*, (Nairobi, 31<sup>st</sup> July, 1999).
- Security Council Report, “Update Report on Mediation and Settlement of Disputes”, 13<sup>th</sup> April 2009, No. 2; available at [securitycouncilreport.org](http://securitycouncilreport.org) (accessed on 05/12/2009).
- World Commission on Environment and Development (WCED), *Our Common Future*, (Oxford, Oxford University Press, 1987).
- International Commission of Jurists (Kenya Chapter), *State of the Rule of Law in Kenya Report*, (ICJ (K), Nairobi, 2006).
- ..... *Strengthening Judicial Reforms: Performance Indicator*, (ICJ (K), Nairobi, 2003).



# Appendix A – Questionnaire

## Respondents Background

Hallo, my name is ..... We are conducting research on environmental conflicts, that is, conflicts arising out of the right over, access to, use and control of resources within the environment. We would very much appreciate your participation in this research. Do you have any questions on the research before we begin?

May I begin this interview?

Respondent agrees to be interviewed.

Respondent declines to be interviewed. END.

**Tick where appropriate in the space provided.**

1. Gender

- Male
- Female

2. What is your age bracket? Note: All the ages below are in terms of years

- 18 to 25
- 26 to 33
- 34 to 41
- 42 to 49
- 50 to 57
- 58 to 65
- Above 66, state age .....
- Below 18, state age .....

3. Where do you live? State as follows:-

Province .....

District .....

Village/Location .....

4. How long have you lived here?

Less than a year

Yes

No

More than a year

Yes

No

If more than a year, please state the number of complete years you have lived here

5. Do you own any property?

Yes

No

6. If no, did you own any property in the past?

Yes

No

7. What environmental resources are there in this area e.g. water, land, minerals, livestock, building, forests etc?

8. How are the environmental resources listed above utilized in your village/location?

(Tick where appropriate)

Water:

Communal Ownership (collective usage by the village at no costs either from Government or the private sector)

- Private Ownership (individual usage of water with the costs of consumption payable either to the Government or to Kenya.
- Both of the above

Land:

- Equitable rights in land (land vested in the community that has no proper title to the land)
- Legal rights in land (land vested in which individual or community has proper title to the land.
- Both of the above

List down in the space provided hereunder how the other resources in your village are utilised.

9. Are there any environmental conflicts generated from the use of these resources?

- Yes
- No

10. If yes, are these environmental conflicts resolved?

- Yes
- No

11. What do you think are the sources of these environmental conflicts?

12. How far back do these environmental conflicts date? (Stipulate in terms of approximated rounded off time e.g. “Four months” instead of “Three and a half months”)

13. How were these environmental conflicts resolved back then? (Give your answer according to the time frame you have given as an answer in question 12 above.)

14. If your answer is Yes to question 10 above what mechanism (s) did you use to resolve these environmental conflicts? List it/ them down.

15. If your answer is No to question 10 above what mechanisms do you propose should be used in the resolution of these environmental conflicts?

16. Is there any loss to your community that has been occasioned by these environmental conflicts?

Yes

No

17. If yes, what is the nature of this loss? (Postulated examples include, loss of lives, property, livestock and injury to persons).

18. Has your community been compensated for the loss that you have enumerated in question 13 above?

Yes

No

19. If yes, what compensation did you receive?

20. If no, what compensation would you propose if any for your community to be given?

21. Do you envisage any benefits accruing to your community as a result of a resolution of these environmental conflicts?

Yes

No

22. If yes, what are the benefits you envisage accruing to your community?

23. If no, state and explain your reasons thereof.

## Appendix B

### List of Interviewees and Respondents

<b>Name</b>	<b>Location/Particulars</b>
1. Mueni Mutunga	Nairobi, KWS Legal officer (as she then was)
2. Jacqueline Kamau	Nairobi, Advocate, Arbitrator and mediator.
3. Farook Khan	Nairobi, Lawyer.
4. Irene Kamunge	Nairobi, Legal Officer at NEMA.
5. Maurice Mbegeza	Nairobi, EIA Expert, NEMA.
6. James Ndungu	Nairobi, Lawyer
7. Ann Wairimu Kiramba	Nyeri, Mediator and member of CIArb.
8. Rose Kamunya	Nyahururu, Arbitrator
9. Samuel Nderitu	Nairobi, advocate, mediator and arbitrator
10. Annette Njeri	Nyahururu, paralegal.
11. Odhiambo Michael	Nakuru, Lawyer
12. Kelvin Kasyoka	Machakos, paralegal.
13. Paul Githinji	Nyeri, paralegal.
14. Irene Gathoni	Kabete, Mediator
15. Catherine Waweru	Nairobi, EIA Expert, NEMA
16. Eliud Warui	Kerugoya, retired chief and elder
17. George Ngotho	Kabete, Arbitrator.
18. Nancy Kariuki	Kirinyaga, mediator.
19. Njunge Ngotho	Kabete, arbitrator and area elder.

20. Nelson Nyamu Kirinyaga, Arbitrator
21. George Karimi Kajiando, Mediator and businessman.
22. Judith Atadi Nairobi, EIA Expert, NEMA.
23. Jonathan Mule Makueni, Mediator.
24. Onindo Dominic Nairobi, Advocate
25. Muthoni Mburu Kitale, Farmer, litigant.
26. William Ole Munyere Kajiado, Maasai elder.
27. James Mangerere Nairobi, Advocate, Mediator and arbitrator.
28. Margaret Chogo Webuye, Mediation fora participant
29. Patrick Abachi Webuye, Mediation fora participant.
30. Farah Ahmed Shire Nairobi, Somali elder and mediator
31. Kennedy Nyakundi Kisii, Advocate
32. Polycarp Matoroki Kajiado, Advocate.
33. Ian Maina Nyeri, Advocate
34. David Njuguna Embu, Advocate
35. Joshua Kiarie Nairobi, Magistrate.
36. Mburu Mbugua Nairobi, Advocate
37. Francis Kariuki Thika, Lawyer
38. Ndungu Mwaura Murang'a, Kikuyu elder