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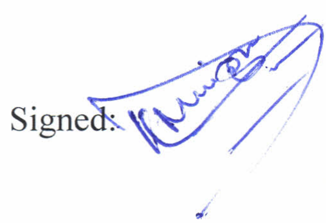
Signed:  Date: 11/11/05

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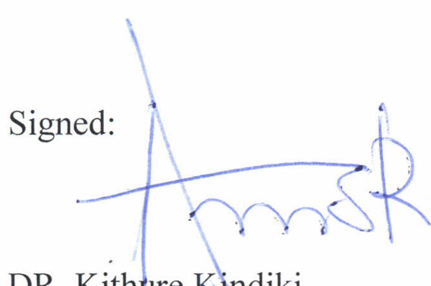
Signed: 

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FACULTY OF LAW

RESOLUTION OF NATURAL RESOURCE CONFLICTS THROUGH ARBITRATION AND MEDIATION

MUIGUA D. KARIUKI ©

G62/7839/03

A DISSERTATION SUBMITTED IN PARTIAL FULFILMENT OF THE REQUIREMENTS FOR THE DEGREE OF MASTER OF LAWS OF THE UNIVERSITY OF NAIROBI

SUPERVISOR: DR. KITHURE KINDIKI

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Dedication

This project is dedicated to my family

You have always been there for me

Acknowledgements

The author is grateful to the following persons who, individually or collectively, played a key role in the realization of this project:*

Dr. Kithure Kindiki, my supervisor who dedicated his time and energy into shaping this work and ensuring clarity.

My colleagues in the office Robert Kibugi, James Ndung'u, Risper Bosibori, Rose Karwitha, Japheth Malombe, Edwin Balongo and Judith Chogo who made it possible.

To all those persons who prefer to remain anonymous and who made the dream come true.

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* The views expressed in this research are those of the author and do not reflect the views of the persons named herein.

"...I'm...grateful to the people of Kenya who remained stubbornly hopeful that democracy could be realized and the environment managed sustainably.... Recognising that sustainable development, democracy and peace are indivisible is an idea whose time has come. Our work for over the past thirty (30) years has always appreciated and engaged these linkages. My inspiration partly comes from my childhood experiences and observations of nature in rural Kenya....i came to understand that when the environment is destroyed, plundered or mismanaged, we undermine our quality of life and that of our future generations...so together we have planted over thirty (30) million trees that provide fuel, food, shelter and income....initially, the work was difficult because historically our people have been persuaded to believe that because they are poor they lack not only capital but also the knowledge and skills to address their challenges...they have also been unaware that a degraded environment leads to a scramble for the scarce resources and may culminate in poverty and even conflicts..."

Excerpt from the acceptance speech by the 2004 Nobel Peace Laureate, Prof Wangari Maathai, Oslo (Norway), 10th December 2004.

Chapter One: Introduction to the study

> "Throughout the world, indigenous rural communities have had a symbiotic relationship with the natural environment from which they directly eke their living. Their cultural, social, economic and physical well-being has depended on their direct access to and exploitation of the natural resources, quite often, in a sustainable manner in order to cater for the needs of the present and future generations. Indeed, over the years, these communities have developed and strengthened their knowledge and practices of natural resource management to facilitate sustainable use of natural resources and the ecosystems. Yet, the optimum use of their knowledge and practices has not been realized in many countries due, *inter alia,* to lack of policy and legal frameworks that militates against their ability to participate fully and equally in decision making and national programmes aimed at the sustainable use of natural resources. The need for adaptation in formulation of policies, programmes and laws on natural resources management have not received full recognition and consideration."[*]

1.1 Background

This research project examines environmental conflicts source conflicts and their resolution through mediation and arbitration. The study looks at the use of mediation and arbitration in the international as well as the Kenyan context in dealing with conflicts or disputes arising out of tensions over the use, access to and distribution of natural resources. The background to this research analyses the conflicts over natural resources while appreciating their diversity in origins, causes and manifestations. It is intended to set the very foundation of the research by mapping out the theme out of which the ideals and prescription of the study shall arise. To this end, various aspects of natural resources and related conflicts shall be examined:

i) Natural Resources and their nexus with conflict

In recent years there has been a recognition of the linkage between conflict and natural resources and as such, a lot of conflicts can be linked to competition for scarce natural resources. Indeed in 1987 the UN World Commission on Environment and Development (UNCED) pointed to environmental stress as a possible cause as well as a result of conflict. Conflict may result from competition over scarce natural resources.[1] This then leads to even more scarcity of natural

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[*] Situma, F D P "Legislative and Institutional Framework for Community Based Natural Resource Managemer' in Kenya" in (2003, University of Nairobi Law Journal *Vol 1 P. 55*).

[1] Gizewski, P (1997) *Environmental Scarcity and Conflict*, Toronto, Canadian Security Intelligence Service p. 1.

resources and enhanced environmental stress. There is thus a causal link between resource scarcity and conflict as many case studies have shown.

Renewable and non-renewable resource scarcities have conflict generating potential. Renewable resources include for example cropland, fresh water, fuel wood and fish. Non-renewable resources include petroleum and minerals.[2] According to the University of Toronto's Thomas Homer-Dixon, scarcities of agricultural land, forests, fresh water and fish are those which contribute the most violence.[3] This has largely been attributed to the lack of attention to the process of involving local people and others who care about the area in the planning, management and decision making for the area. [4]

The deficiencies in the availability of natural resources can be demand induced, a function of population growth within a region, supply induced, resulting from the degradation of resources within the region, or structural, the result of unequal distribution of resources throughout the society. The three processes are not mutually exclusive and may and often do occur simultaneously, acting in tandem. The degradation and depletion of renewable resources can generate a range of social effects. It can work to encourage powerful groups within society to shift resource distribution in their favour. The process, known as 'resource – capture' generates profits for elites while intensifying the effects of scarcity among the poor or weak.[5]

A process of 'ecological marginalization' often follows with poorer groups forced to seek the means of survival in more ecologically fragile regions such as steep upland slopes areas at risk of desertification, tropical rain forests and low quality public lands within urban areas. The high

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[2] *Ibid* P.2

[3] *Ibid.*

[4] Thayer, D M (2003) *Nature of conflict and conflict over nature: Protected Areas, Transfrontier conservation and the meaning of Development*, Saratoga, Skidmore College-The School for International Training, P. 5. See also generally <www.sit-edu-geneva.ch/natureDaveThacone1.htm>.

[5] *Supra* note 1 P. 2.

population densities in these regions, combined with a lack of capital to protect the local ecosystem, breeds severe environmental scarcity and chronic poverty.[6]

Such scarcity may act to strengthen group identities based on ethnic, class or religious differences most notably by intensifying competition among groups for the ever-dwindling resources. At the same time they work to undermine the legitimacy of the state and its capacity to meet challenges. As the balance of power gradually shifts from the state to the challenging groups, the prospects for violence increases. Such violence tends to be sub national, diffuse and persistent.[7]

In Kenya we have a situation where National Parks and National Reserves are under great pressure from increasing human populations, land tenure and land use changes. This causes human/wildlife conflict. In the Maasai Mara National Reserve we find that:

> "While the land use within the national reserve is confined to wildlife tourism and pastoralism, land use in surrounding areas has changed to settled livestock keeping and crop farming... The rush for cultivable land has resulted in human occupation of fragile areas putting them under increased pressure and aggravating conflicts in land uses and between land users."[8]

The Nairobi National Park has had to grapple with the problem of the growing population of Nairobi, changing land uses and the establishment of an Export Processing Zone (EPZ) to the south of Athi River Town. The spill over effects of the EPZ development includes demand for housing for workers and the expansion of infrastructure such as warehouses, recreational facilities, sewerage works and water supply systems. The loss of this dispersal and migration area will lead to the deterioration of habitat and promote human wildlife conflict since animals

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[6] *Ibid.*

[7] *Ibid p. 3.*

[8] Mbote P K (2002) *Property Rights and Biodiversity Management in Kenya-A case of Land Tenure and Wildlife*, Nairobi, Acts Press p. 133.

will not be able to move to lower plains in the wet season and thus save the vegetation within the park for the dry season.[9]

This research project *inter alia* examines the existing mechanisms for the prevention, and resolution of conflicts over natural resources in the international and national arena. The question of the effectiveness of the said institutional mechanisms is also to be raised and analyzed.

(ii) The dynamics of Conflicts over Natural Resources

Natural Resource-based conflicts are disagreements and disputes over access to and control and use of natural resources. These conflicts often emerge because people have different uses for resources such as forests, water, pastures, land or want to manage them in different ways. They arise when those interests and needs are incompatible or when the priorities of some user groups are not considered in policies, programmes and projects.

In recent years the scope and magnitude of natural resource conflicts have increased and intensified. These conflicts, if not addressed can escalate into violence, cause environmental degradation and undermine livelihoods.[10] Buckles and Rusnak provide four causes of conflict related to natural resources. The authors contend that many of the factors at the root of these tensions overlap and interrelate but can be generalized as follows:[11]

- Natural resources are embedded in an environment or interconnected space where actions by one individual or group may generate effects far off – site. The deforestation of regional forests, for example, will impact on the health of the entire river system below it,

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[9] *Ibid.* P. 130.

[10] Matiru V (2000) *Conflict & Natural Resources Management*, Rome, Food and Agricultural Organisation (FAO), see generally.

[11] Buckles D and Rusnak D (1999) *Cultivating Peace: Conflict and collaboration in Natural Resource Management IDRC/World Bank* p. 3 & 4. Also see generally Thayer D M op *cit.*

therefore disrupting the livelihoods of those relying on the river for food, transportation etc; the "protection" of that forest under a conservation regime can similarly influence the way the river system functions for communities up and down its length.

- Natural resources are embedded in a shared social space where complex and unequal relations are established among a wide range of social actors. Local, regional, transnational and increasingly global actors, from governments to NGO's, to the private sector and intergovernmental organizations all have interests and influence upon the condition of ecosystems and natural resources; moreover these groups are rarely homogenous in their interests needs or power.
- Natural resources are subject to increasing scarcity due to rapid environmental change, increasing demand and their unequal distribution. Whether it is increased local population, the effects of regional pollution or ambiguous land tenure laws that lead to foreign exploitation, ecosystems are being abused; Their resources depleted, many are losing the natural ability to renew over time and provide for species big and small.
- Natural resources are used by people in ways that are defined symbolically. Symbolic association to the physical environment is of great importance to subsistence cultures. The deterioration of the surroundings they are tied to undermines the stability of these societies; the management of space signifies an imposition against the ways in which local communities relate with and depend on their immediate environment.

The dawning environmental crises, intensified by over-exploitation of natural resources to feed the 'modernizing world', highlights the relationship between natural resources and conflict. Conflict is thus directly connected to contests over resources and access to them and is tied into the forces that make such competition increasingly widespread. Thus natural resources should not be seen as causes of conflict *per se*, but rather as sources of tension and competition that can lead to clashes when triggered by other events. In essence, environment is at the base of all social conflict.

iii) The use and misuse of natural resources as sources of conflict

Ann H. Erlich, Peter Gleick and Ken Conca advance the view that in today's world, human pressures on natural resources are increasing, while many resource bases are deteriorating or

being depleted, creating an increased potential for competition and conflict between nations or groups within societies.[12] Among the resources that have been sources of contention leading or contributing to conflict in the distant or recent past are fresh water, productive land, fisheries, mineral deposits and fossil fuels.

The inevitable consequence is the ever-increasing pressure on natural resources as populations grow. Forest lands as forests for example have been removed for timber and pulp, to clear land for agriculture, others replanted in even age tree monocultures (with many of the same drawbacks of food-crop monocultures).

Grazing lands too have been extensively modified and in many areas desertified, under grazing pressure. As a consequence significant losses of productivity in agricultural and forest lands from over-cultivation, overgrazing, desertification and deforestation are occurring around the world.[13]

Thus, as the human population continues to grow rapidly on entering of the 21st century, much of the environmental resource base on which it depends is being depleted and degraded creating potential conflict situations. Indeed population growth combined with land degradation and other environmental changes as well as economic factors can lead to mass migrations which can themselves engender tensions between groups.[14]

Poverty and marginalization interact with these problems and often contribute to further environmental degradation and the related and resultant conflicts.[15] Marginalization and competition for resources may also either be mitigated or exacerbated by trade and financial

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[12] Ann H E, Gleick P and Conca K (2000) *Resources and Environmental degradation as sources of conflict,* 50th Pugwash Conference on Science and World Affairs 3-8 August 2000, P. 1 of 17.

[13] *Ibid* P. 2 of 17.

[14] *Ibid.*

[15] *ibid.*

arrangements. Marginalized groups who are also denied access to resources may resort to conflict if their needs are not adequately addressed by their society and such dissention may be intensified by ethnic differences. The development of such situations indicates a failure of social institutions to cope with underlying resource problems.[16]

In Kenya, this has been dramatically experienced through the ever recurring 'tribal clashes' in Molo and other areas. This research takes the view that the so-called tribal clashes were mainly a manifestation of underlying natural resource problems connected with land use and land tenure. The conflicts can be viewed partly as resulting from perceived unequal distribution of resources within the context of a growing population and the resultant pressure on farming and grazing lands. It may well be that given that there will be further population growth and humanity's resource base is under rising pressure worldwide we might see an increase in conflicts whose origins are traceable to a local or regional loss of sustainability.

iv) The manifestation of conflicts over natural resources

Over the course of time since the civilisation of mankind began, natural resources have been used as weapons of war. Resources and systems for managing or using resources have been targets and causes of war. In addition, inequities in the distribution, use and consequences of resource management and use have been sources of tension and dispute.[17]

Where resources are scarce, competition for limited supplies can lead groups, communities and even nations to seek access to resources as a matter of highest concern. This aspect falls into the most traditional cold war *real politik* framework where resources can be a defining factor in wealth and power and in the economic and political strength of a nation. Energy resources and mineral resources are potential and actual sources of tensions and disputes. Access to resources may serve as a focus of dispute or provide a justification for actual conflict. While it may rarely

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[16] *ibid.*

[17] *Supra* note 12. See also generally Gleick P (1993) Water and conflict. *International security* 18 n 1 pp 79-112 (summer).

be the sole reason for conflict, history suggests that it has at times proven to be an important factor.[18]

Around the world, conflicts over natural resources have manifested themselves differently, either leading to outright civil strife or altogether destabilizing natural resource based industry or production. In this part of the background to this study, we shall look at diverse instances of such conflicts in the East Africa region:

The East Africa land and pasture based conflicts

There are many conflicts that have arisen within the East African region over access to natural resources. Human/wildlife conflict is common in the areas that border game parks and national parks. The Nairobi National Park, for instance, borders an area to the North that is owned by private individuals who have developed it into residential, industrial hotel establishments or other small businesses. Towards the south, however, where the Maasai have traditionally shared their land with wildlife, land is divided into group ranches, a process which transformed the land tenure system from land as common property to land as private property vested in groups. There is increasing pressure for more land for a growing city`s population and for industrialization.[19]

In the Karamoja area of Uganda, the historical conflicts over grazing land and resource access have changed and been intensified by the infusion of light arms in the region, by the decay of traditional pastoral livelihood activities, and by the intra-national events affecting each part of the cluster separately.[20]

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[18] *Supra* note 12 P. 4 of 17.

[19] *Supra* note 8. P. 130.

[20] United States Agency for International Development (USAID) Greater Horn of Africa Peace Building Project, *Assessment and Programming Recommendations-Addressing Pastoral Conflicts in the Karamoja cluster of Kenya, Uganda, & Sudan*. Conflict Strategy Team (March 2002) USAID.

The Maasai of Kenya are demanding the lands taken from them by the British. They have gone ahead to invade some farms now privately owned. Police have responded by breaking up demonstrations by the Maasai and shooting dead at least two of them. The community allegedly claims that;

> "The land in Kajiado, Narok, Laikipia and Isiolo districts should revert to them following expiry of agreements signed between their tribal chief Laibon Olonana and the colonial Government in 1904 and 1911....".[21]

For a while, Kenya has suffered 'tribal clashes' that rocked parts of the Rift Valley and Western province. While politics may have played a role in the said clashes it is arguable that what was in contention were land rights. The underlying cause of the conflict can be traced to scarcity and competition over natural resources exacerbated by political tensions and long-term ethnic differences.

v) An overview of the natural resource conflict situation in the Kenyan context and the possible use of locally customized non-litigious mechanisms for their resolution.

Conflicts over natural resources are essentially disagreements and disputes that arise over questions of access to, control and use of natural resources. Natural resources are both renewable and non-renewable. Some natural resources such as land, fresh water, forests, pasture, lakes are so important in that they constitute the very foundation of people's livelihoods. People and communities need fresh water to survive. They use forests in many different ways e.g. for fuel, building materials and as hunting grounds. The lakes provide water and fish. Pastures support animals, which are utilized by human beings, for *inter alia,* food and transport. Land is used for cultivation of crops. Houses are built on land. Whole communities base their entire existence on the land on which they live.

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[21] The East African Standard Newspaper, August 25, 2004 p 2 'Tears as Police Break up Protest'.

Conflicts arising out of tensions over these resources need to be addressed swiftly and expeditiously. Unlike commercial and other disputes, conflicts over natural resources have a potential of being extremely explosive. History is full of examples of communities that have gone to war over the use of and access to natural resources.

Natural resource conflicts in Kenya occur at various levels and involve a range of actors. They range from conflicts among local men and women over the use of trees, to conflicts among neighbouring communities disputing control over woodland, to villages, community based organizations, domestic and multinational businesses, government, international development agencies and NGO's in conflict over the use and management of large forest tracts. Most conflicts are characterized by the presence of multiple stakeholders who themselves may have subgroups with varying interests.[22]

Conflicts have also occurred where there are contradictions between local and introduced management systems, misunderstandings and lack of information about policy and programme objectives, contradictions and lack of clarity in laws and policies, inequity in resource distribution or over policy programme implementation.

The mechanisms for dealing with conflicts have ranged from informal, formal, peaceful, equitable to outright violence. Legal procedures have also been used to resolve conflicts over natural resources. At the peaceful end of dispute resolution there has been the use of mediation, adjudication, negotiation and arbitration.

In Kenya the national legal regime governing natural resources is based on legislation and policy statements, including regulatory and judicial pronouncements. Adjudication, litigation and arbitration are the main strategies for addressing conflicts over natural resources.

Kenya has laws meant to regulate the access to use and management of natural resources. The populace at least in theory can have their conflicts addressed by courts on the basis of the existing laws. Courts are however often inaccessible to the poor, marginalized groups and

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[22] *Supra* note 10.

communities living in remote areas owing to cost, distance, language barriers, political obstacles and illiteracy.

The efficacy of the dispute resolution mechanism is thus compromised. There is need to enhance the dispute resolution methods already existing and in use in order to realize sustainable use of and equitable access to natural resources.

This research subscribes to the view that there is need to improve communication and information-sharing among interest groups; the causes of conflicts need to be addressed in a collaborative manner. Conflict management processes need to be turned and transformed into forces promoting positive social change. Communities need to be empowered to build capacity geared towards managing their resource-based conflicts.

Potential conflict needs to be addressed early and resolved. Public participation in the use and management of natural resources and resolution of conflicts is vital. There is further need to come up with consensus building strategies based on the existing formal and informal conflict management mechanisms within local communities.

The capacities of local institutions and communities need to be strengthened so as to be able to optimize their dispute resolution capabilities and their ability to manage conflict so as to promote sustainable resource management. The use of mediation and arbitration needs to be streamlined enhanced and customized in order to enable Kenyans to have easier access to justice.

This study takes the view that natural resource conflicts are intrinsically unique and ought to be resolved using mediation and arbitration for the reason that these methods have the comparative advantage of being flexible, fast and expedient.

Mediation and arbitration in a customized community setting can work to effectively extinguish potential conflicts before they occasion loss of life. Mediation and arbitration in this context incorporate elements of good environmental governance such as public awareness, and effective public participation.

It is the view of this study that mediation and arbitration are the more effective ways of achieving the access to justice that the existing modes of dispute resolution such as litigation, which is laden with bureaucratic delays and pervaded by corruption, inefficiency and high cost, have consistently denied them.

Conflicts over natural resources are becoming more and more common in Kenya. This study takes the view that to the extent that they have been known to cause loss of life, such disputes should be treated with the imperativeness they deserve and an efficient means of resolving them found.

Conflicts over natural resources touch on the livelihood of millions of people. They affect the current and future generations. This study takes the view that inter generational and intra generational equity can only be achieved in an atmosphere of peace and not the kind of violence that disputes and conflicts over natural resources have been known to cause.

vi) Conceptual clarifications

In this section of the study, we shall seek to clarify and expound on a number of concepts, terms and techniques to which the study makes in-depth reference. They include:

a) Natural resources

Natural resources can be defined as those materials or conditions occurring in nature and which are capable of exploitation for economic benefit.

b) The concept of conflicts and disputes over natural resources.

It is important to look at the concept of conflict over natural resources from a wide perspective in order to understand the background against which this study is undertaken.

Conflict has been understood to mean 'the situation that exists between two persons or groups of persons who perceive that they have competing interests relative to a single issue, thing or situation'. Each party wants to pursue its own interest to the full, and in so doing ends up contradicting, compromising or even defeating the interest of another. As such, with regard to natural resources, conflict is inevitable given the disparity between the availability of resources and the demands for them.[23]

Conflict is viewed as inevitable by a certain school of thought.[24] Dispute on the other hand only develops when conflict is not (or cannot be) managed. Dispute is thus the unnecessary or dysfunctional element and logically there should be two different but related concepts:

i) Conflict management
ii) Dispute resolution.

i) Conflict management

Here the emphasis should be on the axiom that it must be in all parties interests to avoid disputes by managing conflict in such a way that disputes do not arise. This is sometimes referred to as dispute avoidance.

ii) Dispute Resolution

Notwithstanding the emphasis on the desire to avoid dispute there must be occasions where parties have legitimate disputes and that the techniques of dispute resolution are employed to bring about the conclusion or resolution of the dispute.

c) Conflict Management and Dispute Resolution Techniques

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[23] Odhiambo M O (2003) *The Karamoja Conflict; Origins, Impacts and Solutions*, Oxfam P. 16.

[24] De Bono (1985) Conflicts.

The range of conflict management and dispute resolution techniques include conflict avoidance; negotiation; mediation; conciliation; mediation-arbitration (med arb); Dispute Resolution Adviser (DRA); Dispute Review Boards (and Dispute Review Panel); neutral evaluation; expert determination mini trial or executive tribunal; adjudication; arbitration; litigation.[25]

The stages of conflict management and dispute Resolution form a continuum and can be summarized as follows:

Stage 1 – negotiation

State 2 – Non-binding techniques and processes

Stage 3 – Binding techniques and processes.

d) Existing internationally recognized non-litigious and other mechanisms of dispute resolution.

Where negotiations and consultations fail a number of environmental treaties endorse mediation[26] and conciliation[27] (or the establishment of a committee of experts)[28] to resolve disputes all of which revolve the intervention of a third person):

- **Mediation**

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[25]Totterdil B (2004) *Course materials for the Construction Adjudication course,* Nairobi, Chartered Institute of Arbitrators, 25th February.

[26] 1968 African Nature Convention Art XVIII (referring disputes to the commission of Mediation, Conciliation and Arbitration of the OAU).

[27] 1963 Vienna Convention and the Optional Protocol Concerning the compulsory settlement of disputes; Permanent Court of Arbitration, optional Rules for conciliation of disputes Relating to Natural resources and the Environment 16th April 2002.

[28] 1949 FAO Mediterranean Fisheries Agreement Art XIII; 1951 International Plant Protection Convention Art IX; 1952 North Pacific Fisheries Convention, Protocol Par 4 & 5 (special committee of scientists).

In the case of mediation the third person is involved as an active participant in the interchange of proposals between parties to a dispute and may even offer informal proposals. Of recent note is the outcome of a mediation conducted under the auspices of the organization of American States (OAS), relating to a longstanding territorial dispute between Guatemala and Belize in September 2002, the two facilitators appointed by the OAS put forward proposals approved by the two States and Honduras for a resolution of the dispute, including the establishment of an ecological park and a tri-state sub-regional fisheries commission.[29]

- **Arbitration**

International Arbitration has been described as having for its objects the settlement of disputes between States by judges of their own choice on the basis of respect for law. Recourse to Arbitration implies an agreement to submit in good faith to the award.[30] In recent years states negotiating environmental treaties have favoured the inclusion of specific provisions for the establishment of an arbitration tribunal with the power to adopt binding and final decisions.

Early examples providing for the establishment of a body to take binding decisions include the "Special Commission" to be established at the request of any of the parties to disputes relating to high seas fishing and conservation[31] and the detailed provisions on the establishment of an arbitral tribunal in the Annex to the 1969 Oil Pollution Intervention Convention.[32] Other environmental treaties include provisions including annexes and protocols, for the submission of disputes to arbitration at the instigation of one party to a dispute[33] or both parties.[34] Certain

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[29] See generally <www.caricom.org/Belize-guatemala>.

[30] 1907 Hague Convention on the Pacific Settlement of International Dispute, Art 9-12.

[31] 1958 High Seas Conservation Convention, Art 9-12.

[32] Art VIII and Annex, Chapter II.

[33] Protocol Relating to the Convention for the Prevention of pollution from ships (London 17th Feb 1978, in force 2nd October 1983, (MARPOL 73/78).

environmental treaties provide for the submission of disputes to arbitration by mutual consent of the relevant parties.[35]

1.2 Statement of the problem

Conflicts over natural resources have become very common in Kenyan society. It is a trend that continues to vitiate any viable attempts to achieve maximum sustainable use of our natural resources. The conflicts and disputes over natural resources have kept off long-term development or capital investments in natural resources. The existing mechanisms for resolving such disputes are either based on our adversarial legal system or the political will of the executive arm of the government. Either way, many of the affected parties end up disillusioned with the whole process(es) as they are either ridden with corruption, bureaucracy or just too expensive.

It is evident that there does not exist any widely viable non-litigious or other effective mechanisms for the resolution of such conflicts. Indeed little or no regard has been had to the available mechanisms of solving these conflicts, for example, mediation and arbitration. It is therefore imperative to observe that such non-litigation methods as envisaged in this study should embrace the traditional, customary and societal norms of the Kenyan society.

Besides, if the conflicts over natural resources are left unchecked, they have the extreme potential of tearing our already fragile society and Kenyan nation apart.

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[34] 1976 Barcelona Convention Art 22, 1983 Cartagena Convention Art 23 and Annex and 1986 Neumea Convention.

[35] CITES (1973) Art VIII (To the Permanent Court of Arbitration at the Hague) and the 1989 Basel Convention Art 20 Annex VI.

1.3 Justification for the Study

Conflicts over natural resources have become a constant reality in the lives of human beings all over the world. There is uneven distribution of limited resources in the world. Access by various contesting groups is neither guaranteed, nor equitable. Kenya has experienced many conflicts over the diverse categories of natural resources found in various parts of the country to wit:

- Land as a natural resource
- Access to water resources
- Land use in wildlife conservation areas
- Use of forests and forest produce
- Benefits accruing from non-renewable resources such as minerals
- Grazing land.

Many livelihoods have been adversely affected and a lot of lives have been lost in these conflicts. The existing dispute resolution and conflict avoidance mechanisms do not seem to be effective in resolving these natural resource conflicts. The legal and institutional framework governing mediation and arbitration appears to be inadequate at the moment.

Natural resource conflicts have the potential of leading the country to strife. This study takes the view that the notorious 'tribal clashes' experienced in some parts of Kenya were partly occasioned by tensions over access and use of agricultural and grazing land. These clashes could have been avoided if effective mechanisms dealing with conflicts over natural resources had been put into effect. The research seeks to find out if the enhanced use of mediation and arbitration would lead to an effective management or a reduction of natural resource conflicts in Kenya. Mediation and arbitration have the demonstrated advantages of cost effectiveness, efficacy and speed. Kenyans need access to justice. The court system is slow, costly and inefficient and pervaded by corruption.

1.4 Literature Review

The focus of this study is to examine the conflicts over natural resources. It is intended to analyse the existing framework for the resolution of such conflicts, and to evaluate its effectiveness in this regard. In particular, the study shall explore the effectiveness of Alternative Dispute Resolution mechanisms as an alternative mechanism to litigation. It is also intended to propose an institutional and structural framework for the resolution of these conflicts through application of arbitration and mediation.

Indeed conflicts and disputes over natural resources are not novel in Kenya. These conflicts and disputes have been in existence for as long as the communities have appreciated the significance and importance of the natural resources to their existence. Much of the past or present of these conflicts and disputes has been captured by scholars in their writings and even more factually by the media and investigative research. In this part of the study, we shall highlight some of the most significant literature on this subject.

- In their book, 'Mediation: Principles, Process and Practice', Boulle, L. and Nesic, M.,[36] address the definitions, theories and principles of mediation, putting it into context with other dispute resolution systems. Here, attention is given to process, looking at the phases involved in a mediation, the roles of the participants and the essential skills and techniques. Further, in their write-up, ' The Handbook on Arbitration Practice", author Bernstein R., gives the whole concept of arbitration clarity in a broad context with a comparison being drawn with litigation, judicial proceedings and also an analysis of its application in commercial arbitration.[37] The authors have however structured their views on the application of alternative dispute resolution as to be operational in a modern/urban setting. The authors, it is apparent, did not anticipate the application of mediation and arbitration in a more localised rural setting and more so for the resolution of natural

[36] (2001) Butterworths.

[37] (1998) Sweet and Maxwell, London.

resource conflicts, for instance conflicts over water and pasture. This study seeks to, *inter alia*, fill that gap.

- There are instances in other jurisdictions where mandatory mediation has been adopted with the primary intention of reducing cost and delay in litigation and facilitate the early and fair resolution of disputes. A clear example of this is the case in Canada in the city of Toronto, the Regional Municipality of Ottawa Carleton and the City of Ottawa adopted regulations that introduced mandatory mediation to resolve disputes.[38] A mediation session is to take place within 90 days after the first defence has been filed unless the Court orders otherwise.[39] Even though these regulations are applied generally in Canada, it is the view of this study that they can as well, in principle, be applied in Kenya. This however has to be in appreciation of the circumstances of the natural resource based disputes arising in Kenya and the pressing need to adopt a non-litigious and effective mechanism for the resolution of such conflicts. This is very imperative because the Canadian setting as per the normative legislation demands the involvement of the Attorney General and the Chief Justice in the formation of the local mediation committees. Furthermore, the procedure to be followed is very much similar to the procedure followed in the course of civil litigation.

- Kenya has actually had to go through tumultuous times as far as natural resources are concerned. In the very recent past and even currently there are many such conflicts in the Likia area of Molo , Nguruman and Mulot in Narok and also the Gucha-Transmara border. The Kenyan media has prominently reported the widespread instances of these conflicts. The exploitation of renewable and non-renewable natural resources in Kenya has been chaotic. The Endorois community in Baringo District has been up in arms demanding equitable sharing of the revenue from the mining of Ruby in their land, the money being for educating their children. The Titanium project being carried out by Tiomin Incorporated of Canada in Kwale District, Coast Province has been equally

[38] Government of Ontario, Regulation 194 of the Revised Regulations of Ontario, 1990 made under The Courts of Justice Act.

[39] *Ibid*, Rule 24.1.09.

conflict ridden – questions being raised about compensation for land given up by communities, jobs for the community and equitable sharing of revenue. Other such factual situations will be highlighted later in the study.

Principally, this is just intended to highlight the primary and fundamental basis of the information used in this research. More literature will be unveiled as the study progresses on.

1.5 Important Assumptions

The theme of this research has been set and programmed by the appreciation of several important assumptions:

a) That the government of Kenya continues to appreciate the utmost essence of the concept of sustainable development in the process of policy and law making especially with regard to natural resources.

b) That there is appreciation of the fact that conflicts over natural resources have become extensively widespread in Kenya and are a primal hindrance to the realization of sustainable development for the concerned communities.

c) That the Kenyan Nation appreciates that the current model of using civil litigation and other judicial and extra judicial mechanisms for the resolution of natural resource based conflicts has proved unworkable and is to a larger extent actually fuelling more conflicts instead.

d) That it is realized and accepted in terms of official policy that the local communities which are affected by conflicts over natural resources must actually own and actively participate in the process of resolving those conflicts.

1.6 Objectives

The study has the following objectives:

- To critically evaluate the existing legal and institutional framework for mediation and arbitration in Kenya.
- To analyse how the said legal and institutional framework has been applied to the resolution of natural resource conflicts in Kenya.
- To determine what challenges the framework faces and recommend improvements, especially with regard to application of traditional Kenyan values in this regard.
- To propose an agenda for reform with regard to the enhancing the use of mediation and arbitration in the resolution of natural resource based conflicts.

1.7 Hypotheses

The study is based upon two hypotheses:

- There is no effective legal mechanism for the resolution of natural resource conflicts in Kenya.
- The continuing instances of natural resource conflicts have become the primary hindrance to the realization of sustainable development in Kenya.

1.8 Research Questions

The research questions revolve around the objectives and can be stated as follows;

- How effective is the legal and institutional framework for mediation and arbitration?
- To what extent is the framework appropriately applicable to the resolution of natural resource conflicts in Kenya?

- What challenges exist and what improvements can address those challenges?

1.9 Methodology

The study utilizes both primary and secondary sources of information. The primary sources include *inter alia*:

a) The Constitution of Kenya and other Acts of Parliament.

b) International Conventions.

The secondary sources of information include *inter alia:*

a) The internet, including on-line libraries
b) Journal articles
c) Newspapers and other media reports
d) Conference papers
e) Text Books
f) Interviews with people conversant with mediation and arbitration
g) Visits to the Dispute Resolution Centre Nairobi and the Chartered Institute of Arbitrators (Kenya Branch).

The study also employs the descriptive, prescriptive and analytical modes of research.

1.10 Chapter Outline

Chapter One explains the basis of the study. It includes the introduction to the study, background to the study, objectives of the study, justification for the study, and research questions. The chapter also elucidates a general factual base on the use of natural resources in Kenya and in the world generally while simultaneously highlighting some selected case studies. Some conceptual clarifications are dealt with in this chapter.

Chapter Two analyses the legal framework for mediation and arbitration in the Kenyan and international context. It critically looks at the existing national and international institutions

dealing with arbitration and the judicial or quasi-judicial decisions of such bodies. This is done in a context meant to analyse the effectiveness of such institutions with regard to the resolution of disputes and conflicts over natural resources.

Chapter Three of the study analyses the existence, prevalence, causes and the mode of managing natural resource conflicts in Kenya. It critically examines the existing mechanisms for resolving natural resource oriented disputes and conflicts. The context of this chapter is to highlight the common areas of natural resource based conflicts and disputes in Kenya from a real and factual perspective, analyse the effects of natural resource conflicts and prescribe possible and viable solutions to the problem.

Chapter Four of the study seeks to propose an agenda for reform with respect to the management of conflicts and the resolution of dispute with arising from the use of natural resources. In line with the objectives of the study, due regard shall be had, as a priority, to the circumstances, values, culture and societal norms of the diverse Kenyan communities in matters concerning natural resource management.

In the next chapter of the study, we shall analyse the legal framework for mediation and arbitration in the international and Kenyan context. This shall be in a context intended to succinctly bring out salient issues pertaining to the effectiveness of such a framework and highlighting the general weaknesses of the same, especially with regard to conflicts over natural resources.

Chapter Two: Mediation and Arbitration in the International and Kenyan Context

2.1.1 The Concepts of Mediation and Arbitration

a) Mediation

Mediation is a voluntary, non binding private dispute resolution process in which a third party neutral helps the parties to reach a negotiated settlement which, when reduced to writing and signed by all the parties becomes binding. It has been observed that:

> "The third party may simply encourage the disputing [parties] to resume or do nothing more than provide them with an additional channel of communication".[1]

Mediation is essentially an adjunct of negotiation but with the mediator as an active participant, authorized and indeed expected to advance his own proposals and to interpret, as well as to transmit each party's proposal to the other.[2] Mediation is related to other dispute resolution mechanisms such as negotiation.

Parties can be engaged in ongoing negotiations relating to an issue. The process becomes definable as mediation when a third party neutral steps in. The mediator's tasks include the setting up of a confidential environment within which to explore issues. He is supposed to see and listen to the parties together and separately. A mediator is supposed to facilitate communication between the parties to the dispute. He is required to review the party's risk in not settling and to test each party's priorities values, needs, feelings and hopes.

In mediation, parties retain control. A mediator should be able to confer control on the parties themselves and help the parties negotiate flexible and forward-looking outcomes.[3]

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[1] Merrills JG (1991 *International Dispute settlement*, Cambridge, Cambridge University Press p. 27.

[2] *Ibid* p. 27.

[3] Dispute Resolution Centre, *Landscape of Dispute Resolution*, a one day workshop held on 16th September 2004 at Nairobi, Nairobi, August 2004

Mediation builds up on negotiations and tries to avoid the pitfalls that work together to contribute to the failure of negotiations between parties. Negotiations have been known to fail for a myriad of reasons which include lack of information, failure to identify real issues, wrong negotiations, cross cultural differences, poor negotiation skills manifested by anger, emotion, pride, distrust and unrealistic expectations.

A mediator is required to identify the Best Alternative to a Negotiated Settlement (commonly referred to as BATNA). He should also identify the Worst Alternative to a Negotiated Settlement (WATNA). The Mediator seeks to get to the bottom of the issues.[4] The question to be asked is, "What is the bottom line?" Parties are encouraged to look at the issues from different standpoints.

The mediator may hold caucus meetings with the parties. Caucuses are confidential and explorative giving the parties the opportunity to explore non-binding options. Parties may reconsider and identify real interests and needs and examine creative possibilities for settlement.

In Mediation, the parties themselves must create the settlement. It must be comprehensive, clear, unambiguous, practical, workable, documented and signed.[5] A Mediation settlement must be REAL -Realistic, Effective, Acceptable and Lasting.

Mediation does not always bring out positive outcomes. The purpose of mediation is to assist the parties to arrive at an informed decision as to their options and not to achieve settlement at any cost.

There are certain general characteristics that a mediator should have:

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[4] *Ibid.*

[5] Interview with Antony Okulo, Advocate, of the Dispute Resolution Centre on 16th September 2004 on his experiences as a mediator.

1) A mediator should be a respected member of the community
2) He should be a person of high integrity who is familiar with the practice of mediation, cultural sensitivities of the parties and other factors relevant to a particular dispute.
3) Above all, he must be impartial to all parties to the dispute.

b) Arbitration

Arbitration is a process, subject to statutory controls, whereby formal disputes are determined by a private tribunal of the parties' choosing. According to Stephenson[6] Lord Justice Raymond provided a definition some 250 years ago which is still considered valid today:

> "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 the submission and keep within their due bonds their sentences are definite from which there lies no appeal".[7]

The concept of arbitration is also captured as a:

> "Mechanism for the resolution 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 according to law or if so agreed other considerations after a full hearing, such decision being enforceable at law".[8]

The International Law Commission has defined arbitration as:

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[6] Stephenson, R (1998) *Arbitration practice in Construction disputes*, London, Butterwoths.

[7] Totterdil B (2003) *An introduction to construction adjudication*: Comparison of Dispute Resolution Techniques. Chapter One.

[8] Barnstein R., (1998) *The Handbook of Arbitration Practice*, London, Sweet & Maxwell, Gen. Principles part 2.

"A procedure for the settlement of disputes between states by a binding award on the basis of law and as a result of an undertaking voluntarily accepted."[9]

An arbitrator is defined as: a legal arbitrator; a person appointed by two parties to settle a dispute, arbitrate, decide by arbitration, judge between two parties to a dispute (usually at the request of the two parties).[10]

2.1.2 The merits and de-merits of Mediation and Arbitration

a) Mediation

When applied in the resolution of disputes between parties, mediation does have certain advantages:

- Mediations are able to reach outcomes that courts and other tribunals are unlikely to order. Parties retain control of their own case and it is not binding until parties reach mutual settlement. It is interest based. It looks to the future. It is confidential, without prejudice, flexible, informal and non-technical. Mediation reduces management and personal cost in time and money. There is minimal legal cost to all sides and ensures that relationships are preserved and often enhanced.
- Mediation is enforced through litigation or arbitration following the normal rules of contract. Parties reduce the terms of agreement into writing and this can be recorded as a consent judgment or consent arbitral award.
- The experience in Kenya is that mediation has a high success rate. Parties are free to mediate at any time and come to a consensus on issues. If they had already filed a case in court then a consent is recorded as between them. If arbitration is ongoing then a consent arbitral award is put in place.

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[9] Wallace RMM (1997) *International Law. A student Introduction*, London, Sweet & Maxwell p. 282.

[10] Oxford Advanced Learners Dictionary (1995) London, Oxford University Press, 5th Ed.

- Mediations may also result in the drafting of a 'Memorandum of Understanding', which forms the basis of the future legal obligations between the parties.
- In the realm of the environment and natural resources such as land and water rights, mediation has been in place in traditional communities for years. Respected members of the society would listen to the parties and encourage them to come to a consensus on those issues. In the rural areas, 'access to justice' may not be seen as having the meaning of 'access to the court'. Access to justice may as well mean access to a mediator or mediation panel that is widely accepted by that society.
- Mediation's advantages can be reviewed against the characteristics of litigation. Litigation is adversarial, adjudicative compulsory/binding and adheres to strict rules of procedure. It addresses rights, it is retrospective in outlook as well as public and lawyer centred. Litigation destroys relationships, is expensive and lengthy. On the other hand, mediation is conciliatory, consentual, voluntary and follows models rather than rules. It addresses interests rather than rights, is future oriented, confidential, client centred, preserves relationships, cost effective and is quick.
- In the international arena, mediation may be sought by the parties or offered spontaneously by outsiders. Once under way, it provides the parties in dispute with the possibility of a solution but without any prior commitment to accept the mediator's suggestions. Consequently, it has the advantage of allowing them to retain control of the dispute, probably an essential requirement if negotiations are deadlocked on a matter of vital interest.[11]
- Mediation is likely to be particularly relevant when a dispute has progressed to a stage, which compels the parties to re-think their policies, for instance, when parties come to recognize that the risks of continuing a dispute outweigh the costs of trying to extend it.[12] The mediator facilitates contact between the

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[11] *supra* note 1, p.28.

[12] *Supra* note 1, p.32.

parties whereupon the mediator can be useful in loosening the tension which may have developed in the course of the dispute and creating an atmosphere conducive to negotiation.

Like any other practical mechanism of dispute resolution, mediation does have its limitations:[13]

- Once Mediation has begun its prospects for success rests on the party's willingness to make the necessary concessions. Although this can be encouraged by a skillful mediator, the chances of a successful mediation often hinges on its timing.[14] Sometimes mediation is only able to achieve a partial solution.
- Mediation can only be as effective as the parties wish it to be and this is governed largely by their immediate situation.[15] The mediation guidelines issued by the Dispute Resolution Centre, Nairobi make it clear that a mediator cannot impose a settlement and will only help parties to achieve their own.[16] The rules emphasize the principle of 'self determination' of the parties in mediation. Guideline no. 6 provides "self determination is the fundamental principle of mediation". It requires that the mediation process relies upon the ability of the parties to reach a voluntary, uncoerced agreement. Any party may withdraw from a mediation at any time. The mediator may provide information about the process, raise issues and help parties explore options. The primary role of the mediator is to facilitate a voluntary resolution of a

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[13] *Ibid* p 35. See also Darwin HG, *Mediation and good offices* (Waldrock Legal Aspects) p 83 at. P 85.

[14] *Supra* note 1 p.39.

[15] *Supra* note 1 p.42.

[16] Dispute Resolution Centre, Nairobi issued, July 2004.

dispute. The guidelines emphasize confidentiality and impartiality of a mediator.

- Mediation is not binding and parties have sometimes used it to delay the negotiation process or to obtain more information about the other party's case. The non-binding nature of mediation is a limitation since parties often have to resort to other binding mechanisms to resolve their disputes.

b) Arbitration

Being a practical mechanism of dispute resolution that has been tested over the years, arbitration has a number of advantages:

- Confidentiality: Arbitration is a private process. Parties select an arbitrator privately and proceedings are held privately. No onlookers or busy bodies are allowed. This aspect of confidentiality is highly priced by individuals/disputants as there is no "washing dirty linen in public." The confidential nature of the proceedings prevents the award or deliberation being published in the press without approval of the parties.
- The Tribunal: The panel or the individual will be chosen directly by the parties. They will therefore select a person of integrity who is knowledgeable and experienced in the matter at hand. Parties therefore have maximum confidence in him. This is unlike court litigation where parties cannot choose their own judge and where judges are experts at law only and not in specialized issues the type, which often end up in arbitration.
- Speed: Since the system is private and by consent it is possible to select an arbitrator who can devote all the time needed to it and thereby dispose of the case with expedition. Similarly the parties should be able to make themselves available at short notice and do whatever they are ordered to do.
- Cost: With speed and flexibility it can be argued that the overall costs in arbitration are less than those of comparable litigation. Otherwise arbitral tribunals or arbitrators require to be paid for their services. Lawyers and party

representatives also have to be paid for. Arbitration can end up being quite expensive.

- Flexibility: By private and by consent arbitration can be very flexible. There are no formal or unchangeable rules like one finds in the courts. Parties and arbitrators are free to adopt flexible procedures and rules which suit everybody. After confidentiality, flexibility is perhaps the most attractive attribute of arbitration.
- Representation: in the courts one needs a lawyer to represent him. Lawyers are expensive. In arbitration one may appear in person or send a lawyer or representative or indeed anyone one chooses. It is part of flexibility.
- Limited Appeals – expediency: Except in the most blatant cases of bad arbitrating the arbitrator's award will be final and binding on the parties. Where the law allows appeals it will usually be in cases of disregard for the principle of natural justice or the express agreement of the parties.
- Minimum formality and expeditious disposal of matters: Procedure in courts is founded on rules of practice some of which are of great antiquity. Many others are very detailed, written in archaic language and quite technical from a legal standpoint. It enquires an experienced lawyer to apply them correctly. In arbitration these rules do not apply. The rules to apply will be either those agreed by the parties or some institutional procedural rules like those of the Chartered Institute of Arbitrators (UK) or the London Court of International Arbitration.

The overriding rules of arbitration may simply be paraphrased as the rules which will enable justice to be rendered between the parties with a minimum of formality and with expedition. These rules will be found in what is called "rules of natural justice." The application of the rules of natural justice as a minimum starting point ensures that justice is done and seen to be done.

Despite all the advantages that it possesses, arbitration has practicability restrictions. Internationally though, it is probably the most acceptable and effective method of resolving

disputes, and more so those arising over natural resources. However, at the national level in Kenya, the process of arbitration is governed by a statute, The Arbitration Act, 1995. The Act does not envisage the application of the arbitration process in an informal setting, for instance in a rural area, with the intention of applying the same to local problems e.g. disputes over land etc. The Act requires an Arbitration clause to be in writing and in essence to be signed by the parties.[17] Basically, the Act envisaged the application of arbitration in the context of commercial dispute resolution. As such, with regard to community based natural resource conflicts, the Act is a non-starter. By requiring that an arbitration agreement must be in writing either as a clause in a contract or as a separate agreement, the Act is exclusively *euro-centric* and *elitist* and not suitable for application in local community disputes over natural resources as they mostly arise in Kenya.

2.1.3 The international legal framework for mediation and arbitration

a) Mediation

Basically, the techniques of conflict management through pacific methods under international law largely embrace the process of mediation. This involves an attempt to resolve the dispute by the contending parties themselves or with the aid of other entities by the use of discussion and other fact finding methods.[18]

The Charter of the United Nations (UN) does recognize this fact and requires:

> "All member states to settle the international disputes by peaceful means in such a manner that international peace, security and justice are not endangered." [19]

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[17] Section 4.

[18] Shaw MN (1997) *International law*, Cambridge, Cambridge University Press P. 717, 4th ed.

[19] Article 2(3).

Further the UN General Assembly (UNGA) may discuss any question or matter within the scope of the charter, including the maintenance of international peace and security, and may make recommendations to the members of the UN or the Security Council.[20] The UNGA may also recommend measures for the peaceful adjustment of any situation regardless of origin, which it deems likely to impair the general welfare or friendly relations between nations.[21]

In an attempt to resolve such dispute as may arise as between members of the UN, the UN Security council may call upon the parties to seek a solution through pacific methods among them, mediation.[22]

The concept of mediation is very much founded on the principles of international law. States are more often than not bound by the law to apply pacific settlement of disputes except where the use of force is authorized. Disputes over natural resources can also be resolved using mediation. For instance, several environmental treaties allow for the possibility of mediation, for example, Article 18(1) of the 1979 Berne Convention on the Conservation of European Wildlife and Natural Habitats.[23]

Also, there are other important mechanisms that promote resolution of disputes through pacific methods. For instance, the Briand-Kellog Pact bound state parties to the renunciation of war as a national policy to ensure that the peaceful and friendly relations existing between their peoples may be perpetuated. It emphasizes the fact that all changes in the inter parties relations should be sought only by pacific means and be the result of a peaceful and orderly process.[24]

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[20] *Ibid*, Art. 10.

[21] *Ibid*, Art. 14.

[22] *ibid*, Art 33(1 and 2).

[23] See also the 1974 Helsinki Convention on the Protection of the Marine Environment of the Baltic Sea Area.

[24] Signed on 27 August 1928 at Paris between the United States and other powers.

The 1970 Declaration on the Principles of International Law concerning friendly relations and co-operation among states elucidates this principle and notes that:

> "States shall accordingly seek early and just settlement of other international disputes by ...mediation...arbitration...and resort to regional agencies or arrangements or other peaceful means of their choice." [25]

The Constitutive Treaty of the African Union[26] recognizes the urgent need to promote peace, security and stability as a pre-requisite for the implementation of the development and integration agenda.[27] Further, the treaty has as one of its fundamental operational principles, the peaceful resolution of conflicts among member states of the Union through such appropriat means as may be decided upon by the Assembly.[28]

Mediations are sometimes administered by internationally renowned institutions all over the globe.[29] These institutions publish mediation rules that guide the mediators and the parties in mediations and are also sources of skilled mediators. Indeed, mediation is used widely in many

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[25] UNGA RES 2625(XXV), see also Manila Declaration on the peaceful settlement of international disputes, UNGA RES 2627(XXV); 2734(XXV); 40/9 the Declaration on the prevention and removal of disputes and situations which may threaten international peace and security, UNGA RES43/51 and the Declaration on fact finding, UNGA RES 46/59.

[26] Adopted by the Assembly of Heads of States and Governments at Lome, Togo on the 11th day of July 2000.

[27] *Ibid*, Para 8.

[28] *Ibid*, Art. 4(e).

[29] Such as the Center for Dispute Resolution in London (CEDR), Chartered Institute of Arbitrators (Kenya Branch), London Court of International Arbitration, United Nations Commission for International Trade Law (UNCITRAL) and the World Intellectual Property Organisation (WIPO).

jurisdictions, where, however, mediation and arbitration are carried out with necessary variations under national law.[30]

b) Arbitration

Arbitration is available for the settlement of both national and international disputes. In the international arena arbitration is employed when what is wanted is a binding decision, usually on the basis of international law. It is usually referred to as one of the "legal" means of settlement of disputes.

Arbitration requires the parties themselves to set up the machinery to handle a dispute, or a series of disputes between them. Historically arbitration was the first to develop and provided the inspiration for the creation of permanent judicial institutions.[31]

Arbitration is moving towards standardization internationally largely due to the impact of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York convention) of 1958, the United Nations Commission On International Trade Law (UNCITRAL) model Law and the UNCITRAL Rules.[32]

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[30] For instance, USA, Canada, Asia, China, HongKong, India, Singapore, and Australia. It is also available in European and African countries including Egypt, Namibia, Nigeria, South Africa, Kenya, Tanzania, Tunisia, Uganda, Zambia & Zimbabwe.

[31] *Supra* note 1, p. 89.

[32] Over 130 states have ratified the New York Convention, which came into force on 10th June 1958. Kenya has ratified the New York convention.

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for this purpose. The Hague Convention for the Pacific Settlement of International Disputes of 1899[36] that establishes the Permanent Court of Arbitration (PCA) consists not of a court but of machinery for the calling into being of tribunals.

There is the Permanent Administrative Council and the International Bureau, which acts as a Secretariat or registry for the tribunal set up. The basis of the court is a panel of arbitrators to which parties may nominate a maximum of four persons. When parties to the convention agree to submit a dispute to the Permanent Court of Arbitration, each appoints two arbitrators from the panel and the four arbitrators select an umpire. Thus a tribunal is constituted only to hear a particular case.

Consent to the reference of a dispute to arbitration with regard to matters that have already arisen is usually expressed in the form of a *compromis*, or special agreement whichever happens to be the relevant document in the particular case. However in general, the tribunal may determine its competence in interpreting the *compromis* and other documents concerned in the case.[37] The law to be applied in international arbitration proceedings is international law but the parties may agree upon certain principles to be taken into account by the tribunal and specify this in the *compromis*.

Once an arbitral award has been made it is final and binding upon the parties subject to certain exceptions such as where a tribunal exceeds its jurisdiction. Arbitration depends for its success on a certain amount of goodwill between the parties in drawing up the *compromis* and consulting the tribunal as well as actually enforcing the award made.

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[36] *Ibid*, p. 705, Most states supporting the court became parties to the Convention of 1899. The convention of 1902, which received few ratifications was not radically different. See generally, Hudson, *Permanent court of International Justice*, 120-1942 (1943).

[37] *Supra* note 18, p. 739.

A large part depends on the negotiating process. On the other hand, arbitration is an adjudicative technique in that the award is final and binding and the arbitrators are required to base their decision on law.[38]

However, the Permanent Court of Arbitration has had a useful but hardly spectacular existence. Between 1900 and 1932, twenty cases were heard but no cases have been dealt with since then.[39]

The International Center for Settlement of Investment Disputes (ICSID) is an example of a tribunal established under the auspices of the International Bank for Reconstruction and Development (World Bank) and by the 1965 Convention on the Settlement of Investment Disputes between States and Nationals of other States.

ICSID administers *ad hoc* arbitrations. It provides an autonomous system free from municipal law, while state parties to the convention undertake to recognize awards made by arbitral tribunals acting under the auspices of the Center as final and binding in their territories and enforce them as if they were final judgments of national courts.[40]

The jurisdiction of the center extends to:

> "Any legal dispute deriving directly out of an investment, between a contracting state.... and a national of another contracting state which the parties to the dispute consent in writing to submit to the center".[41]

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[38] *Ibid*, p 741.

[39] *Ibid*, p 705. In recent years attempts have been made to revive interest in the PCA.

[40] *Ibid* p 742; see also Wetter, *Arbitral process* Vol II p 139.

[41] Art 25 of the convention.

Bilateral investment treaties between state parties to the convention frequently provide for recourse to arbitration under the auspices of the Center in the event of an investment dispute.

Kenya is a signatory to the Convention on the Settlement of Investment Disputes between States and Nationals of other states, 1965. There is currently an ongoing case at ICSID where a businessman Ibrahim Ali has sued the Kenya government regarding matters relating to his investment in the Kenya Duty free complex.

Another procedure of growing importance is the Court of Arbitration of the International Chamber of Commerce. A number of agreements provide for the settlement of disputes by arbitration under rules of the International Chamber of Commerce (ICC).[42]

Arbitration may be the appropriate mechanism to utilize as between States and International Institutions or between States and individuals since only states may appear before the ICJ in contentious proceedings. The establishment of arbitral tribunals has often been undertaken in order to deal relatively quietly and cheaply with a series of problems within certain categories.[43]

In any event, an arbitration may also be effectively undertaken under the auspices of an arbitral institution. Arbitral institutions provide a comprehensive set of terms and conditions upon which parties agree to rely on thus minimizing the scope for uncertainty and the opportunity for delaying and wrecking the process. The incorporation of a set of established rules takes care of fundamentals including:

- The mechanism and timeframe for the appointment of an arbitrator.
- Determining challenges to arbitrators.
- Default provisions for the seat and language of arbitration.

[42] *Supra* note 18. *p.* 744.

[43] *Ibid*, p. 742.

- Interim and conservatory measures.
- Control of the costs of arbitration.

The procedural law applicable at the seat of arbitration may also provide for those matters. However it can be cumbersome, time-consuming and costly to invoke the jurisdiction of national courts at every procedural impasse. Court intervention may also jeopardize the confidentiality of the process.

An established arbitral institution provides a professional administrative service while an *ad hoc* tribunal with or without the cooperation of the parties cannot ensure the same. Arbitral institutions have detailed knowledge of and ready access to the most eminent and most appropriately qualified arbitrators. Institutions also keep up to date with developments and individual progress within the pool of arbitrators and have tried and tested procedures for checking conflicts and availability. Institutional rules can act effectively to safeguard due process and thereby, the quality and enforceability of awards and the reputation of the arbitral process.[44]

Some of the arbitral tribunals concerned have actually made very earthmoving decisions in the realm of international environmental law, while at the same time resolving long standing disputes over natural resources or the environment. An example of such a

[44] Some of the internationally renowned arbitral institutions are: The London Court of International Arbitration (LCIA), International Centre for Dispute Resolution (a Division of the American Arbitration Association, - New York, Permanent Court of Arbitration – The Hague, London Maritime Arbitrators Association, - London, Center for Dispute Resolution (CEDR) - London, Dispute Resolution Centre - Nairobi, Kenya, ICC International Court of Arbitration - Paris (International Chamber of Commerce), WIPO Arbitration and Mediation Centre Geneva, Switzerland (Mediation and arbitration), Chartered Institute of Arbitrators (UK) & Kenyan Branch (Mediation and arbitration), Western Circuit Arbitration (WCA) United States, North Arbitration Association (NAA), United States of America, American Arbitration Association (AAA), United States of America, Indian Council of Arbitration, Kuala Lumpar Regional Centre for Arbitration, Kuala Lumpar, Malaysia, Hongkong International Arbitration Center, Hongkong, China, International Center for Dispute Resolution, (IRELAND), International Centre for the Settlement of Investment Disputes (ICSID), Rio Arbitration Centre, Rio de Janeiro, Brazil.

decision is the Trail Smelter Arbitration, which arose out of a dispute between the United States and Canada over the emission of Sulphur fumes from a smelter situated in Canada, which caused damage in the State of Washington.[45] The arbitral tribunal applied the principle that under international law, no state has the right to use or permit the use of its territory in such a manner as to cause injury by fumes in or to the territory of another or the properties or persons therein when the case is of serious consequence and the injury is established by clear and convincing evidence.

The award of the tribunal and its finding on the state of international law on air pollution in the 1930's has come to represent a crystallizing moment for international environmental law (and dispute resolution) which has influenced subsequent developments in a manner which undoubtedly exceeds its true value as an authoritative legal determination. These two arbitral awards together with the treaties and organizations which were brought into being established early foundations of principles and mechanisms dealing with the management of environmental conflicts.[46]

Also in SD Myers Inc -vs- Canada the United States investor challenged a Canadian legislative order banning exports of polychlorinated biphenyl (PCB's) and PCB wastes on the ground *inter alia* of violations of article 1102, 1105, 1106 and 1110 of NAFTA. The Canadian ban had been adopted in November 1995 purportedly on the ground of "a significant danger to the environment" and to human life and health; government views supporting the ban included a statement to the effect that Canada was obliged by the terms of the 1999 Basel convention to dispose of its own PCB's.

The ban was lifted in 1997 while the proceedings were pending. The arbitral tribunal found that the ban was intended primarily to protect the Canadian PCB disposal industry

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[45] Sands P (2003) *Principles of International Environmental Law*, Cambridge. Cambridge University Press, chapter 11 p 30. & Chapter 8; 3. See also RIAA 1905 (1941).

[46] *Ibid* p 30.

from U.S competition and that there was no legitimate environmental reason for introducing the ban.[17]

2.1.4 Mediation and Arbitration in the context of Kenyan law

a) Mediation

Kenya does not as yet have a legislated legal framework to govern the application of mediation in the resolution of disputes. The framework in existence has largely been derived from international law and practice and reduced into guidelines by the Dispute Resolution Centre-Nairobi, the Chartered Institute of Arbitrators and other organizations that offer mediation services.[18]

In any event, the Constitution of Kenya actually promotes litigation at the expense of non-litigious dispute resolution. In the view of this study, litigation is not necessarily improper but the procedure required and the costs of such a civil suit are usually largely 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.[49] The constitution also guarantees as a matter of fundamental rights, 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.[50]

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[17] Partial Award par 194 5 (noting that there were other equally effective means of encouraging the development and maintenance of a Canadian based PCB's remediation industry); Sands, Philippe *op cit* p. 1065.

[18] Dispute Resolution Centre, A lawyers role in ADR- a one day workshop, Thursday, 16th September 2004, The Stanley, Nairobi (most of the course materials provided then included the said guidelines).

[49] Chapter Four, Sections 60-69.

[50] *Ibid*, Sections 67, 75 and 84.

However, parties in a litigation can engage in mediation outside the court process, then move the court to record a consent judgment.[51] This procedure exists as a remote form of court-annexed mediation.

On the other hand, parties in a dispute that is not before a court may undergo a mediation process and conclude the mediation agreement as a contract *inter partes* or consent arbitral award enforceable and binding as between them, so long as it abides by the provisions of the Law of Contract Act.[52]

On a lesser and more practical level, mediation is applied to the resolution of natural resource disputes, like land boundary conflicts, at a very informal level, and rather more effectively than arbitration. Parties with such a dispute 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 serves to ensure access to justice for the aggrieved parties, as the consensus reached is binding, and the society has internal enforcement mechanisms widely accepted by that society.[53]

b) Arbitration

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 by the Act to mean:

> "Any arbitration whether or not administered by a permanent arbitral institution".[54]

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[51] Civil Procedure Rules, Order XXIV Rule 6 and section 3A of the Act.

[52] Cap 14 Laws of Kenya.

[53] This process has been widely applied in many Kenyan communities. It is a safe method as it endeavours to preserve the relationship of the parties as it was before the dispute.

[54] Section 3 (1).

The definition thus includes all types of arbitrations that can be envisaged in society. Traditional institutions dealing with issues brought before them can still carry out arbitrations. Persons appointed by parties to be arbitrators need not be affiliated to any formal organization.

It can thus be clearly seen that arbitration has a vast potential as a dispute resolution mechanism as it can be applied widely (within Kenya at least). The formalities associated with filing and prosecuting matters in court can be avoided in arbitration since the Act ensures that parties retain their autonomy in most matters including venue, language of arbitration and procedures.

The Kenyan Arbitration Act deals with domestic and international arbitration.[55] It is similar in many respects to the Arbitration Act 1996 of the United Kingdom (UK). In section one, the UK Act states that the provisions of the part shall be founded on the following principles and shall be construed accordingly:

(a) The object of arbitration is to obtain the fair resolution of disputes by an impartial tribunal without unnecessary delay or expense.
(b) The parties should be free to agree on how their disputes are resolved subject only to such safeguards are necessary in the public interest.

The Kenyan Arbitration Act provides that an arbitration is international if:

(a) The parties to an arbitration agreement have, at the time of the conclusion of that agreement, their places of business in different states;
(b) One of the following places is situated outside the state in which the parties have their places of business;
    (i) The place of arbitration if determined or pursuant, to the arbitration agreement; or

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[55] Section 3(2).

(ii) Any place where a substantial part of the obligations of the commercial relationship is to be performed or the place with which the subject matter of the dispute is mostly closely connected.

(c) The parties have expressly agreed that the subject matter of the arbitration agreement relates to more than one state.

(d) For the purposes of subsection (3) --

(a) if a party has more than one place of business, the place of business is that which has the closest relationship to the arbitration agreement; and

(b) if a party does not have a place of business reference is made, to his habitual residence.[56]

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[57] (as outlined under section 37). The refusal to enforce can be on the grounds of incapacity, lack of jurisdiction and public policy.

The distinction between local, private and public international arbitration becomes somewhat blurred, however in cases involving a private party and a state. Here we find processes that combine features of both public and private arbitration or which shift uncertainly between the two (Arbitrations under ICSID are good examples of arbitrations of this kind).

In the next chapter of this study, we shall look critically into the current modes of environmental and natural resource conflict management in Kenya. We shall enumerate the challenges arising therefrom and the existence (or lack) of mediation and arbitration as expressly recognized modes of dispute settlement with regard to natural resource and related conflict management in Kenya. The research will then analyse the effects of natural resource conflicts and prescribe possible and viable solutions to the problem.

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[56] Section 5(3).

[57] Sections 36 and 37.

Chapter Three: Natural Resource conflicts in Kenya and the applicability of mediation and arbitration

> "The Government yesterday dispatched a team of armed security personnel to keep off invaders from occupying land belonging to the late Ukambani politician Mulu Mutisya and a former commissioner of prisons, Mr. James Mutua. A group of people claiming to be squatters on Friday invaded the huge tracts of land adjacent to each other near Sultan Hamud trading Centre claiming they had a right to occupy the parcels. ...Yesterday the Makueni District Deputy Police boss...instructed his officers on the ground not to allow invaders to interfere with private property. ...When the mob defied orders to disperse, police fired teargas canisters..."[1]

3.1 Analysis of the types of natural resource conflicts in Kenya

Many conflicts have flared up in the last decade and a half or so around Kenya. Most of them arise from disputes over natural resource management and/or over land. In this section of the study we shall succinctly analyse the different types of conflicts while simultaneously highlighting the challenges, shortcomings and successes of the applicable control mechanisms and prescribing possible solutions to the same.

a) Conflicts over mineral resources

i) The proposed Baringo Ruby mining project

Violent conflicts over the access to and use of mineral resources have become a daily occurrence in Kenya. For example, according to media reports:

> "...a multi-million ruby mining project hangs in the balance after residents of Sandie location in Baringo District barred a company from exploring for deposits in the area. The residents who are members of the minority Endorois community accused the government of sanctioning the exploration without consulting them. They turned way officials of Corby Ltd... and demanded to be told how the mining would help improve their living standards and have on several occasions demanded to be told how the locals will benefit from the exploration work and the mining itself but the Baringo County Council and the government have not said anything. The Endorois value their culture and would want to preserve that for future generations...The community further said the

[1] Sunday Nation, November 21 2004 p 40.

land in question belongs to clans and there was need for them to be consulted before any exploration is undertaken.........."[2]

This case raises several issues. It is the opinion of this research that there clearly is an absence of public participation in respect of the whole project. The community was not consulted and as a result it does not see how the project will benefit community members. The state is in charge of licensing mining operations following the statutory position that minerals vest in the state. Customary law and customary law practices relating to resource utilization and sharing of benefits have been ignored by the current normative framework. The people are not recognized formally as a community. Only individuals or persons exist in law. Yet the community has owned the resources for hundreds of years.

The Baringo County Council and the Government have not found it necessary to consult the people on the question of the exploitation of the natural resources and equitable sharing of benefits. The community is not provided with the institutional framework that would support mediation or arbitration of the dispute. The members thus resort to what they think is appropriate: violence, demonstrations and confrontations.

The Arbitration Act was passed in 1995 and is already in force. There are a number of institutions dedicated to providing arbitration such as the Chartered Institute of Arbitrators Kenya Branch.

However the Arbitration Act was not enacted with the local populace in mind. It presupposes the existence of written contracts that contain arbitration clauses. Arbitration as envisaged by the Arbitration Act 1995 is very different from the arbitrations carried out under customary law within various communities in Kenya. The award has to be filed in the High Court. Arbitration for communities such as the Endorois is an expensive and complicated process. In any event, there is no High Court in Baringo district.

The study takes the view that this kind of conflict could easily be resolved if all the stakeholders are given a chance in an arbitral forum. The community would have to be

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[2] The Standard Newspaper, November 17, 2004 p 18.

consulted on the project. An Environmental Impact Assessment (EIA) would have to be carried out so as to assess the impact of the project on the present and future generations. Sustainable utilization of natural resources is only possible where the community is actively involved in the process. They will understand the project aims, and minimal, if any conflict will result. In any event, a negotiated settlement/outcome would, in the opinion of this study lead to fewer conflicts and would enhance the sustainable use of natural resources across the divide for all the concerned communities.

ii) Conflicts over Titanium Mining in Kilifi

The proposed titanium mining project in Kenya has raised controversy and generated conflicts between the various contesting and interest groups. There has been attempts to resolve the conflicts through negotiations, court interventions, Non governmental Organizations (NGO) involvement and government involvement. These attempts have not borne fruit and the controversy continues to rage and escalate. Mediation and arbitration have not played a key role in the resolution of this natural resource related conflict. The parties have dealt with the contested issues in an atmosphere of acrimony, anger and high handedness (especially on the part of the government).

Media reports on the conflict paint a grim picture of the project:

> "The long running controversy over a multimillion dollar mining project in Kenya's coastal district of Kwale has taken a new direction with land owners now insisting that the Canadian mining company Tiomin running the project execute a huge bond to the effect that they will restore the land to its original state at the end of the project. 'We want an undertaking that our land will be rehabilitated well enough to support agriculture' the landowners representative told Environment and Natural Resources Minister in a tense meeting at the proposed mining site. But from the tone of ....the [government Minster] the government is determined to go ahead with the project despite the opposition of the residents over compensation levels. '...be informed that all minerals in this country belong to the government and therefore we want this project to continue' Minister Jackson Kalweo told the communities at the meeting.[3]

At the time of this report an Environmental Impact Assessment (EIA) had not been carried out and was eagerly being awaited. Besides, the issue of compensation to the

[3] The East African, Monday February 28 2000.

affected farmers had not also been resolved. The residents argued that the compensation levels proposed by the mining company were inequitable and unacceptable.

The firm Tiomin Inc. on the other hand was all set to develop the project after discovering "that the deposits in Kenya constitute at least 10% of the global total". The project has been embroiled in controversy over bribery allegations and accusations that the company was trying to undercut the landowners by using arm-twisting tactics.

The issue of compensation for crops is still unresolved with farmers asking for Kshs. 50,000/= per acre as compensation and Kshs. 10,000/= annually per acre for the lease. The company on the other hand is reportedly willing to part with Kshs. 9,000 per acre for compensation and Kshs. 2000 annually for the lease.[4]

In another development, the Canadian mining company's subsidiary, Tiomin (K) Ltd is on a collision course with tourism stakeholders over its intention of using of Shimoni as the loading zone of the rebound cargo:

> "An industry source told the East Africa that tourism stakeholders were totally opposed to the siting of the port at Shimoni because it would not only interfere with the rich mineral reserves of Mpunguti and Kisite but would also affect the lush tropical forest in the neighbourhood"[5]

The matter found its way to court and on September 21, 2001 the High Court of Kenya in Mombasa made an order stopping the controversial titanium mining project at the Kenyan coast. The judge in his milestone ruling said that "by granting the injunction, this court will be saving the public from possible environmental degradation."[6] The company, Tiomin Resources Inc of Canada did not take this injunction kindly and challenged it.

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[4] *Ibid.*

[5] *Ibid.*

[6] *Ibid*

A clean bill of health for the project came from the Environmental Impact Assessment (EIA) carried out for Tiomin by the South African based Coastal Environmental Services. Action Aid (Kenya) commissioned experts from Kenyatta University to carry out a parallel EIA. Led by geologist and the chairman of the Environmental studies Department. Dr. Wellington Wamincha. The study established that the project could destroy the local landscape, expose the residents to such radioactive elements such as thorium and uranium and totally eliminate local marine biodiversity.[7]

It is the view of this study that the project should have been preceded by public awareness campaigns. Facts about the proposed project and its impact of the environment and peoples' lives should have been freely available. The people should have been free to participate in decision making in a forum free of intimidation from the stronger parties. As such, a mediation forum would have ensured that the parties' long-term interests are taken into account. Environmental concerns would have been addressed through the use of Environmental Impact Assessment EIA. An agreement incorporating the views and protecting the interest of the parties would then have been drafted and parties would be duly bound to abide by it.

Arbitration was not been attempted either. The kind of arbitration envisaged here should be one that addresses the concerns of the all the parties whether they amount to legal rights or not. Local communities were, for instance, concerned about the desecration of the graves of their ancestors and the fate of their sacred forests.[8] Community norms, beliefs and culture should be taken into account in any mediation or arbitration. Western models of Arbitration and mediation would have to be modified to fit the local circumstances.

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[7] A study of Environmental Impact Assessment of Titanium mining in Kwale District: Executive summary and conclusions by Wellington. Wamicha, Justus Inonda mwanje, Regina G.M Keraga Michael M. Wairagi may 2000, presented by the faculty of Environmental studies Kenyatta University.

[8] BBC News <http://news.bbc.co.uk/go/pr/fr/-/z/hi/business htm.> published 6/7/04 1650.GMT.

The Kenya government through the Ministry of Environment Natural Resources and Wildlife seems to have finally decided to issue the mining license to Tiomin Resources Inc.[9]

The decision to issue the license had been opposed by the Council of NGO's in a press release dated 10th July 2003, expressing concern that the license has been issued without the government conclusively responding to the objections lodged by the council and other interested parties and in particular, the local communities who are significantly affected by the project. The council of NGO's noted that the issuance of the license was inconsistent with the proclaimed policy of the new government to consult widely before decisions on major governance issues are made.[10]

In March 2002 the High Court in Mombasa dismissed a lawsuit filed by three farmers against Tiomin Resource Inc. over compensation issues and lifted an earlier injunction preventing fieldwork.[11]

The picture that is emerging is one of chaotic management of a crisis. Obviously the decisions emanating from the courts over the titanium project `are unacceptable to one or both of the parties. They are not the 'win-win' solutions propagated by the project proponents and which could have been realized through the application of mediation and/or arbitration in resolving the differences between the parties.

b) Conflicts over the water resources in Lake Naivasha

This conflict revolves around the use access and management of lake Naivasha. According to media reports:

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[9] see generally <www.nationaudio.com> (accessed on 3/2/05).

[10] Press release by National Council of NGO's, Gichira Kibara, 10th July 2003.

[11] *Supra* note 8.

"Sharp divisions have emerged among members of the pastoral community residing in Naivasha over the implementation of the lake Naivasha Management Plan. A group of community leaders yesterday defended the plan saying it is all-inclusive and is the only way to conserve the endangered lake. This came in the wake of complaints by some members of the community that some white farmers residing around lake Naivasha want to privatize the lake yet it is a natural resource, if the management plan is implemented. Community leaders...dismissed those opposing the plan as people who have failed to grasp the idea behind it. They said that the views of the community are well represented in the management committee. They said animals would not be barred from drinking water from the lake and members of the public would have unfettered access to it. According to them, by establishing watering points, we just intend to discourage the herdsmen from bringing their livestock to the lake as they destroy natural vegetation. The plan was recently gazzetted and will pave way for the management of the lake by fifteen stakeholders under the National Environmental Management Authority (NEMA). A proposal in the plan that calls for the establishment of watering points outside the lake has elicited sharp reaction from the herders. The lake is a vital asset for farmers in the lucrative horticultural industry who use its water for irrigation and pastoralists who use its as a watering point for their animals."[12]

Notably, it is the interests of these two groups i.e. the horticultural industry and the pastoralists, over the lake that are in serious conflict in this case.

A group of pastoralists have been up in arms over the lake Naivasha management plan, which they claim is oppressive, and have vowed to resist its implementation. The pastoralists, who allege they were sidelined when the management plan was being formulated are now demanding that it be shelved to give room for more consultations:

"...they (whites) want to curtail the movement of our livestock yet they found the lake here". They vowed to go to court if the management plan is implemented and accused the National Environmental Management Authority (NEMA) of colluding with flower farmers around the lake to frustrate them. Andrew Korinko of the Keekonyoike Pastoralists Council (Depaco) said NEMA should first order for the re-opening of access corridors around the lake. He said flower farmers have converted the access roads for private use and pastoralists have on numerous occasions been arrested on trumped up trespassing charges. 'If it is about conservation we are best placed as our ancestors have protected this lake for ages and we are surprised the plan was don (sic) without our input', he said"[13]

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[12] The People Daily Wednesday November 17 2004.

[13] *Ibid.*

This research take the view that this case illustrates the problems created by the absence of an institutional framework that would enable parties to effectively put across their concerns before implementation of such programmes.

It is neither clear whether NEMA has consulted widely with the stakeholders in this matter nor whether the prescribed procedure was followed.[14] It seems likely that public participation has been limited to a few people who do not necessarily represent the views of the community.

According to the report, the pastoralists claim that the scheme is oppressive and have vowed to resist its implementation. That resistance is likely to lead to violent confrontation between various groups as well as between certain groups and the administration. The various contesting groups could however be brought together under a mediation aimed at reaching a negotiated solution. What cannot be resolved at the mediation forum may proceed for arbitration. Unfortunately none of the parties seems to be considering mediation.

It is the view of this research that it is also not clear whether the person who claims to be the community spokesperson has the mandate of the community to speak on their behalf. Communities' governance mechanisms and institutions have degenerated in the face of "development" and the operation of formal laws that they are unrecognizable in many cases and are largely ineffective.

Further, this research proposes that there is a need to come up with criteria for the determination of what constitutes a community. The writer subscribes to the view that communities should be defined in relation to their reliance on a resource and not on the basis of ethnicity. Communal governance structures deserve recognition in the law. It is within these structures that mediation and arbitration once thrived. Such structures should

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[14] Part V of The Environmental Management and Coordination Act 1999 {see particularly Section 43} and Part VI and Part VII.

have been applied locally in Naivasha to facilitate mediation and/or arbitration between the conflicting groups.

c) Conflicts over pasture in the Narok/Nguruman area

The case arose out of a suit filed in the High Court of Kenya by Nguruman Limited, the purported landowners.[15] On 22 April 2004, Nguruman Limited was granted leave to institute judicial review proceedings against all members of the Shompole Group Ranch and all these unknown trespassers on LR No. Narok/Nguruman/Komorora/1. The suit also names the Commissioners of Police, The Minster in charge of Internal Security and the Permanent Secretary in charge of Provincial Administration and Internal Security as defendants.[16]

The applicant in this case is seeking for orders of mandamus against the commissioner of police requiring him to assist the Applicant in protecting its property to wit LR No. Narok/Nguruman/Kamorora/1 from invasion, forcible entry and occupation and damage by an unusual number of people. In particular the applicant requires the police commissioner to assist it to evict from and restrain further entry into its land, and also to prosecute those who have invaded the said land.[17]

The applicant seeks to compel the Minister of State in the Office of the President in charge of Internal Security and require him to order and command the Kenya Police Force to enforce the laws of the land and in particular to order the police to arrest, prosecute the invaders and prevent further invasion of the said land.[18]

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[15] In High Court Miscellaneous Civil Application no. 222 of 2004 (unreported).

[16] Daily Nation, Friday, November 19 2004 at P. 24 (advertised by way of substituted service).

[17] *Ibid.*

[18] *Ibid*

In the opinion of this study, this case is illustrative of what has been described as the 'Maasai invasions' of their land. The Maasai claim the land that is held by a minority of registered owners is their ancestral land and should revert back to them. The absence of institutions that can administer arbitration or facilitate mediation between the parties leaves them with little room for maneuvre.

The registered land owners rely on sanctity of title and are ready and willing to use force to eject what has been described by the law as trespassers yet these 'trespassers' were the original owners of the land for hundreds of years they had access to and the right to use this land

It is the view of this study that the government needs to address the issue through mediation, arbitration and law reform measures aimed at correcting historical wrongs. Where possible law reform should include the introduction of multiple land use. Communities would get back some of the user rights they used to have when the land was expropriated by the colonial administration.

Further, all the concerned parties should have been required to take part in a mediation or arbitration process. This would have created the much-needed forum where parties can ventilate their grievances and have them resolved without resorting to force. Kenya does not have in place provisions requiring parties to pursue mediation or arbitration before the case goes to trial.

d) Conflicts over land in urban informal settlements (slums)[19]

Urban informal settlements (Slums) in Kenya have experienced conflicts over land leading to loss of lives and injuries. Mechanisms to deal with the conflicts or at the very least prevent their occurrence have been weak and in many cases eroded by politics and

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[19] see generally http:www.sdi..org>slum/shack dwellers international <ww.pamojatrust.org>;Alder Graham(1995) *Tackling Poverty in Nairobi's informal settlements: developing on institutional strategy. Environment & urbanization* vol. 7 no 2 Oct. p 85-107.

other vested short-term interests. The effective use of mediation and arbitration in the resolution of such conflicts is virtually unknown within the Kenyan urban setting. Other institutional frameworks to address such conflicts are ineffective. Thus such conflicts continue to escalate and threaten to ruin the lives of millions of Kenyans who live in the slums in conditions of poverty.

Although Nairobi is the Capital City of Kenya, housing conditions for much of the population remain very poor. A slum inventory in 1995 found that over half of the city's population lived in informal or illegal settlements that are squeezed into one twentieth of Nairobi's total area. Pamoja Trust[20] has updated this inventory and has found very little improvement since then. A survey of Nairobi's informal settlements in 1988 found very high levels of infant and child mortality.[21]

In most informal settlements, there are high levels of over crowding, very inadequate provision for basic infrastructure (piped water provisions for sanitation and drainage) the population pressure generates conflicts over natural resources such as water and land for settlement.[22]

Any attempt to improve conditions in Nairobi's informal settlements is complicated by the potential conflict between landlords and tenants and by the conflicts between different ethnic groups that have been exacerbated by the manipulations of powerful political interests.[23]

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[20] A non governmental organization set up in 2000 to help urban poor communities to organize themselves to oppose demolition and forced Pamoja Trust is a member of the slum/shark dwellers international evections.

[21] African population & Health Research Center: population and health dynamics in Nairobi's informal settlements. April (2002), Nairobi).

[22] *Ibid*

[23] *Supra* note 18.

In most informal settlements, the inhabitants do not have tenure of the land they occupy. Even without official tenure, there are landlords (structure owners) and tenants and these two groups have very different priorities within any programme to legalize land tenure. Structure owners want to acquire full legal tenure of the land on which their structures are built; tenants want recognition of the right to live there and the possibility of becoming land and house owners. Many structure owners are in effect large scale (and often absentee) landlords, as they own large numbers of houses and make high incomes from renting these out.[24]

From the time of Kenya's independence in 1963 up the late 1970's official government policy was to demolish informal settlements even though much of the urban population had no other means of getting housing. During the 1980's this changed to a more permissive approach there were few demolitions. During the 1990's official policy alternated between ignoring the problem and demolishing the settlements.[25]

In 1990 two large settlements (Muoroto and Kibagare), were razed to the ground and an estimated 30,000 people were rendered homeless or displaced. In 1992 the return to multiparty policies and local elections in Nairobi reduced the demolition, evictions and violent conflicts. There were no notable attempts at engaging the various interested groups (landlords, city council, tenants) in mediation or arbitration to resolve the disputes. Even if such moves were to be attempted the effort would be hampered by the lack of a normative framework creating stable institutions that could effectively carry out such mediations.[26]

This study takes the view that our Arbitration Act 1995 is ill suited to deal with disputes of this nature. The requirement of certain formalities including an arbitration clause and the complicated enforcement procedure serve to make the arbitration Act 1995 as

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[24] *Ibid.*

[25] *Ibid.*

[26] *Ibid.* Then at least the Government started bowing to international and domestic political pressure.

presently formulated ineffective to deal with such natural resource related conflicts in the urban areas.

The study takes the view that enhancing mediation and arbitration as mechanisms for the resolution natural resource conflicts can go a long way in reducing resolving or preventing these conflicts. The enhancement should be through the enactment of new laws that guarantee mediation and arbitration, amendment of the existing Arbitration Act to make it more sensitive to local realities, public education and awareness creation of people's rights.

Another issue that brings about the conflicts over land in the slums and in rather astounding magnitude is enumeration. Enumerations represent the first part of the process by which informal settlements become 'regularized' with secure tenure house construction to improve conditions and structures built or negotiated from local authorities. Enumerations provide the means by which data is gathered to allow for local planning but also the process by which consensus is built and the inclusion of all residents negotiated.[27]

In December 2001 the then President of Kenya, Daniel Arap Moi issued a directive that the residents of Korogocho slum (with a population of 100,000) should be permanently settled on the land they already occupied (which was owned by the government). This created considerable tension between 'the structure owners' who were seeking formal title to the land and the majority of residents who were tenants and who paid rent to the structure-owners.

In Korogocho,[28] there was a vicious informal political authority whereby no inhabitant could repair their house or use land for growing vegetables without 'permission' and a

[27] Pamoja Trust *(op cit)*.

[28] Korogocho Slums Nairobi, Pamoja Trust & SDI.*(Ibid)*.

payment. Also Korogocho had experienced many NGO interventions, which had created the expectation that NGO's would deliver for them.

The structure owners once again tried to get a court order to stop the enumeration but the Provincial Commissioner refused to accept the court papers. In court the association of structure owners sought not only to stop the enumeration but also to confirm themselves as landowners. On the day of the court case the settlement committee was able to mobilize 6000 people who went to the court when the case was being heard. The case was not revolved and it has dragged on with the date for the hearing constantly being set and then the matter getting postponed. The residents have been joined in as interested parties to the suit on the basis of the enumerations. The enumeration initiative had to be put on hold upon orders of the court.[29]

It is worthy noting that the mediations that were carried out in the instant case were not effective enough to prevent conflicts. The matter still ended up in court and the enumerations have stagnated. This research takes the view that what is needed is a mediation that is acceptable to all the parties. The mediators should be respected members of the society who are neutral. All the parties should be given a chance to outline their cases and propose solutions. The solutions need not be based on legal perceptions and principles. Agreements reached through such a mediation would be more effective than a court order imposed on the parties.

There are at present no formal structures supporting mediation in this context. These need to be developed. The cultures and various norms accepted by the slum dwellers should be taken into account. The mediation procedures need to be simplified so as to enable every person affected by a particular set of circumstances to come forward and have their issues redressed.

Further, arbitration can be used to settle issues that have not been agreed on. Arbitral procedures need to be simplified and made easy to understand. Arbitration should not be

[29] *Ibid.*

a very formal process mimicking litigation. The Arbitration Act should be amended to make it easier to enforce arbitration awards. An arbitral award may take any form and be in any local language so long as a translation is provided. The present Arbitration Act provides that an arbitration award should take a particular form. It should be dated signed and should confirm and certain prescribed formalities.[30] The Act as presently constituted is not conducive to arbitrations involving various groups of slum dwellers, tenants and landowners.

It is the considered view of this research that the use of arbitration and mediation in the resolution of natural resource conflicts should be enhanced. However the arbitral and mediation procedures currently in place need to undergo reform to take into account the circumstances prevailing in various parts of the country, and the cultural institutions and norms that have for years been used to settle disputes relating to natural resources and to prevent conflicts over natural resources.

e) Conflicts under the jurisdiction of the Land Disputes Tribunals Act 1990

In our view, this statute represents a failed top-bottom attempt at arbitration over natural resource (land) disputes. This was an attempt to address land disputes through the establishment of land disputes tribunals. The Act has however largely failed to effectively deal with conflicts relating to land as a natural resource.

The Act was well intentioned, as its principle objectives capture:

> "The Land Disputes Tribunals Act is an Act of parliament to limit the jurisdiction of magistrate's courts in certain cases relating to land, to establish land disputes tribunals and define their jurisdiction, powers and connected purposes"[31]

The tribunals are supposed to deal with all cases of a civil nature involving disputes as to:

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[30] Section 32.

[31] Land Disputes Tribunal Act, Preamble.

(a) The division of or the determination of boundaries to land, including land held in common

(b) A claim to occupy or work land; or

(c) Trespass to land[32]

The tribunals are established under the Act for every registration district[33] and shall consist of a chairman "who shall be appointed from time to time by the District Commissioner from the panel of elders appointed under the Act[34] and either two or four elders selected by the District commissioner from a panel of elders appointed under the Act.[35]

The tribunal is essentially an arbitral tribunal whose decision is supposed to be filed in the Magistrate's courts together with any depositions or documents, which have been taken or proved before the tribunal.[36] The court is then required to enter judgment in accordance with the decision of the tribunal and upon judgment being entered, a decree shall issue and shall be enforceable in the manner provided for under the Civil Procedure Act.[37]

Appeals from the decisions of the tribunal are heard by the Appeals committee. Either party to the appeal may appeal to the High Court on a point of law within sixty days from

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[32] *Ibid*, Section 3.

[33] *Ibid*, Section 4.

[34] *Ibid*, Section 5.

[35] *Ibid*.

[36] *Ibid* Section 7(1).

[37] *Ibid* Section 7(2).

the date of the decisions complained of[38] otherwise the decision of the Appeals committees shall be final on any issue of fact and no further appeal shall lie therefrom to any court.[39]

Elders for the purposes of the Act are defined as:

> "…. Persons in the community or communities to which the parties by whom the issue is raised belong and who are recognized by custom in the community or communities or being, by virtue of age experience or otherwise competent to resolve issues between the parties."[40]

The operation of the Act has been plagued with difficulties. It has been unable to reconcile the conflicts experienced when non-customary tenure, ideology and legal provisions confront the customary land tenure system. The operation of the Act has been unable to deal with the question of unregistered, communal customary land holding in the face of individualized land tenure.[41]

The tribunals have been prone to manipulation by the provincial administration. The elders who ultimately sit in them are not those who are recognized by custom as being competent to resolve the issues between parties. The credibility of the land disputes tribunals is thus put at stake.[42]

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[38] *Ibid* Section 8(9).

[39] *Ibid* Section 8(8).

[40] *Ibid* Section 2.

[41] Ong'wen O S. *The land question in Kenya: the place of land Tribunals in the land reform process in Kambewa Division.* A paper presented to the Codestria Tenth General Assembly, Kampala Uganda, 8th December 2002.

[42] *Ibid.*

Ong'wen Okuro examines the place of land tribunals in the land reform process in Kombewa Division, Kisumu District, Nyanza Province. He argues that land tenure is as in other parts of Africa very fluid. People get access to land through their social networks, customary institutions, family relations, through service and renting arrangements and only occasionally through the law. This necessitates that the law should not have exclusive rights in arbitrating land cases. Neither should tribunals constituted by the minister of lands and settlement be given excessive powers to determine land disputes. Rather, the article[43] argues for the establishment of independent tribunals comprising elders of "integrity" drawing their legitimacy and recognition from the entire community. These tribunals should be based on a common understanding of respect for human rights and the local socio-economic political realities.[44]

This study takes the view that the Land Disputes Tribunal Act 1990 was a "top-bottom" attempt at creating arbitral tribunals to deal with land issues. It ignores the norms that constitute customary land tenure. It does not take into account the existing customary institutional frameworks that have traditionally dealt with conflicts over natural resources. Instead the Government arrogates itself dictatorial powers to appoint the "chairman" of the tribunals without any reference to the communities.

Public participation and consultation with the relevant customary institutions is not envisaged by the Act. As such, the Act is bound to fail. Arbitrations carried out under the Act by the tribunals generally lack credibility and are prone to manipulation. It is recommended that the Act be repealed forthwith and replaced with an arbitral system that is based on the norms and institutions recognized by communities in resource allocation and conflict resolution in matters relating to equitable use and access to natural resources.

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[42] *Ibid*. P.2.

[43] *Ibid*.

[44] *Ibid*.

This research finds proposes that efforts to prevent and mitigate violent conflicts involving Kenyan communities all over the country and which arise from natural resources must address each of the contributory factors particularly public participation and local ownership of the conflict resolution process.

More often than not, the development of effective actions to tackle each cause of conflict is difficult because the problems are rooted in people's cultures. However, serious attempts to address these problems can contribute immensely to conflict resolution if they are recognized as such by the communities involved.

This research further recommends the taking of measures directly aimed at conflict prevention such as developing mediation and conflict prevention capacities of communities' involved and establishing projects in support of such communities. The need to strategically invest in awareness raising (early warning systems for early action) training and indigenous peace building, negotiation and settlement processes cannot be gainsaid.

The displaced groups must be rehabilitated and-re-oriented into mainstream society by siding them with alternative livelihoods e.g. promotion of eco-tourism, small-scale business enterprise, basketry and provision of social amenities such as schools, health facilities and water.

This research also progresses the view that the primary responsibility for developing and implementing programmes and measures to resolve the current natural resource based conflicts must rest with the Kenya government, the local communities themselves, national and international stakeholders. It must then be appreciated by these stakeholders that the continuity of these conflicts is a perpetual hindrance to the realization of sustainable development for those communities and for the country at large.

In the next chapter of the study, we shall seek to set an agenda for the reforming of the law relating to the resolution of conflicts over natural resources. We shall propose a structure/framework for the management and resolution of conflicts over natural resources, using mediation as the primary method and arbitration as the secondary or residual method.

Chapter Four: Conclusions and Recommendations

> "Resolution 1325 (2000) of the United Nations Security Council...also points out to the need to address the core causes of conflict taking into account the needs of different stakeholders, and assessing the potentials for interventions for different actors. ...it is critical that a determination be made on who has access to and control over the resources, actors and factors that are pivotal to conflict. The main challenge is to negotiate competing needs, claims and rights. Local equitable ownership of tools and techniques for addressing of conflict is critical if these are to be effectively employed as part of conflict prevention and management. Central to these is the recognition and guarantee of the rights of diverse actors. A rights-based approach ensures the incorporation of the interests of all in dealing with conflicts, especially where these are inseparable from grievances rooted in the uneven distribution of resources."[1]

This research takes the view that there is no effective legal mechanism for the resolution of natural resource conflicts in Kenya. Clearly the continuing instances of these conflicts have become the primary hindrance to the realization of sustainable development in the country.

The Kenyan public has lost faith and confidence in the existing land dispute settlement mechanisms and institutions, because they are characterized by incompetence, corruption, nepotism, political interference conflict of interest, confusion and unnecessary bureaucracy especially when there is a low participation of the local people in (land) dispute resolution mechanisms[2]

In Kenya, conflicts over natural resources basically manifest themselves as land disputes. Most of the conflicts over land are customary and/or transactional, more often than not generated by the failure of land delivery systems to clearly record or effectively transmit property rights in contractual situations of a transfer. The majority of the litigants are

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[1] Mbote P K Gender, *Conflict and Regional Security* (2004) in Africa Regional Security in the Age of Globalisation, Makumi Mwagiru eds., Heinrich Boll Foundation, University of Nairobi and the National Defence College of Kenya, Nairobi) p.94.

[2] Republic of Kenya, Report of the commission of inquiry into the land system of Kenya on principles of a National Land Policy Framework Constitutional position of land and the New Institutional Framework for Land Administration (Njonjo Commission Report), November 2002 Government Printer, p. 78 para 208.

ordinary Kenyans who cannot access the established conflict resolution mechanisms. In the court system the mechanisms are cumbersome, expensive and too slow, provisions for settlement of conflicts being scattered in several statutes. Most disputes involve boundaries, succession and inheritance[3].

Normal judicial mechanisms have not been successful in resolving customary land conflicts[4]. These conflicts have barred/inhibited beneficial economic exploitation of natural resources, and have indeed continued to undermine the principles of sustainable development. Therefore, it is the primary objective of this study to propose a carefully designed conflict management system, to address the conflicts arising over natural resources within the country.

The study shall propose a structured mediation procedure to primarily address conflicts over natural resources alongside a secondary arbitration procedure to resolve the more complex natural resource based conflicts. *Mutatis mutandis,* due regard shall be had to traditional/ customary conflict resolution systems and values, to make the proposal more acceptable and useful to most Kenyan communities, and also in so far as they promote sustainable development.

4.1 Proposals for the effective management and resolution of conflicts over natural resources

In this section of the study we shall make proposals on how conflicts over natural resources in Kenya can be resolved though the application of mediation and arbitration in order to facilitate the beneficial use of those resources to promote sustainable development. We shall adopt a structured procedure of mediation as the primary mechanism and that of arbitration as the secondary (residual) mechanism.

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[3] *Ibid*, p. 8-82 para 218

[4] *Ibid* p. 86 para 216.

A) Mediation

The proposed structure shall be in the context of the existing administrative structures in Kenya.

(a) Nature of the mediation

In this context, mediation shall be mandatory as a matter of law and a prerequisite to any litigation over any conflicts arising from natural resources.
A mediation in this instance refers to a situation where a neutral person shall facilitate communication among the parties to a dispute or conflict, to assist them in reaching a mutually acceptable resolution.

(b) Application/scope

This proposal shall apply to all conflicts having a bearing over natural resources and the rights of communities and or transactions except the aspects relating to the criminal justice.

(c) Designation

- Locational mediation committee (LMC)
- District mediation committees (DMC)

(d) Jurisdiction of the mediation committees (applicable to both LMC and DMC)

- All conflicts arising that have a bearing over natural resources within the geographical area of the committee.
- With regard to conflicts over land, conflicts relating to land regardless of the registration regime governing the land *inter alia*:
  a) Transactions over land

b) Trespass to land
c) Disputes over boundaries
d) Customary trust over land
e) Successions and inheritance of land
f) Such other aspects as may be conferred by an Act of parliament or by the Minister through subsidiary legislation.

- With regard to conflicts having a bearing on other forms of natural resources these shall include, *inter alia*:

(a) Identification of the communities involved
(b) Compensation of the communities involved
(c) Benefits accruing to the comminutes as may be affected by the proposed exploitation of the natural resources.
(d) Whether there is effective participation of the community in decision making *visa-a-vis* the project.
(e) Scientific evaluations with regard to the project
(f) The interest of sustainable development
(g) Compliance with the relevant legal provisions by the project proponent.
(h) The rights of access by the community to pasture, water and access roads.
(i) Such other aspects as may be conferred by an Act of parliament or by the Minister though subsidiary legislation.

It is important to note that for purposes of allowing flexibility the provisions of paragraph (d) above relating to jurisdiction should by governed by subsidiary legislation to be gazetted and tabled in parliament.

(e) Constitution of these committees

I Location mediation committee (LMC)

(i) **Jurisdiction:** The jurisdiction of the LMC shall cover the geographical area of an administrative location. It shall have jurisdiction in the first instance to deal with conflicts over natural resources.

(ii) **Constitution:** The LMC shall constitute of the following:

(a) Five members of the local community with integrity and knowledge in management of public affairs and

(i) Two of whom must be women

(ii) None of whom should be an employee of the Provincial Administration or the Ministry in charge of environment and natural resources and lands.

(b) The chief, who shall be the secretary to the committee.

(iii) **Election of members**

The members of the LMC, with the exception of the chief, shall be elected through universal suffrage. Eligibly to vote shall be though membership to a land owning or land holding household (individual, group or communal) in the location and the age of majority.

They shall serve for a three year term renewable only once.

(iv) **Functions**

(a) To provide secretariat services for all natural resource based conflict mediation, within the jurisdiction of the LMC

(b) To vet the suitability of any proposed mediator in any particular conflict

(c) To draw up local guidelines to govern a mediation and for the enforcement of the same. These however must be approved by the DMC.

(d) To enforce the outcome of the mediation though locally acceptable mechanisms (traditional or statutory).

(e) To nominate one of its members, except the chief, to the District Mediation Committee (DMC).

(f) The LMC shall elect its own chairperson from amongst its members except the chief.

(g) The LMC shall ensure that the principles of sustainable development are at all times applied in the mediation process.

(h) To ensure that local customary values are applied to the most practical extent and so long as they are not repugnant to written law and justice, in the mediation process.

(i) To carry out a process of civic education on the general public on the suitability on non-litigious strategies for resolution of natural resource conflicts.

(j) Where the natural resource conflicts take the form of violence, to undertake peace initiatives with maximum public participation locally, as the first step to resolving the conflict. In this instance, regard must be had to customary law and values, which may be applied to the most practical and legal extent.

(k) To ensure utmost confidentiality.

(l) To transfer to the District Mediation Committee for further determination all matters not agreed on by the parties at the conclusion of a mediation.

(m) Such other function as may be conferred by statute or by subsidiary legislation.

II District mediation committee (DMC)

(i) **Jurisdiction:** the jurisdiction of the DMC shall cover the geographical area of an administrative district. The DMC shall exercise jurisdiction only in the second instance and limited to matters transferred to it by the LMC.

(ii) **Constitution:** the DMC shall constitute of the following:

(a) Such number of members as may be nominated by the administrative locations in the districts provided that at any one time, one third of these members shall be women.

(b) The District Commissioner who shall be the secretary.

(c) A judicial officer serving in the district with the rank of Resident Magistrate or above and who shall provide guidance on legal issues.

(iii) Functions.

(a) To act as mediators in resolution of the secondary matters transferred to the DMC by the LMC

(b) To approve or reject enforcement guidelines as proposed by the respective LMC's.

(c) To enforce any agreement reached by the parties during mediation at the DMC, through the above guidelines

(d) To offer guidance on the applicable law to parties in any mediation.

(e) The DMC shall elect its own chairperson from amongst its members except the District Commissioner.

(f) The DMC shall ensure that the principles of sustainable development are at all times applied in the mediation process.

(g) To ensure that local customary values are applied to the most practical extent and so long as they are not repugnant to written law and justice, in the mediation process.

(h) To carry out a process civic education on the general public on the suitability on non-litigious strategies for the resolution of natural resource conflicts.

(i) To ensure utmost confidentiality.

(j) To frame up the complex issues undetermined at the end of the mediation and transfer the same for determination by the District Arbitration Tribunal (DAT).

(k) To elect from among its members a sub-committee of not more than five persons to mediate in any particular mediation. Provided that the DMC members shall not sit in a sub-committee mediating on matters originating from their nominating locations.

(l) To propose areas of law reform with regard to natural resources as may appear necessary during the mediation process.

(m) Where the natural resource conflicts take the form of violence, to undertake peace initiatives with maximum public participation locally, as the first step to resolving the conflict. In this instance, regard must be had to customary law and values, which may be applied to the most practical and legal extent.

(n) Such other functions as may be conferred by statute or by subsidiary legislation.

B) Arbitration

In this section, we seek to propose a new structure and the repealing of the Land Disputes Tribunal Act, 1990. This is with a view to developing a new structure that would allow effective arbitration to resolve conflicts over natural resources:

(i) Nature of the Arbitration

- The arbitration shall be carried out by a District Arbitration Tribunal (DAT) established for each administrative district.
- The tribunal shall adjudicate over the issues presented to it by the District Mediation Committee (DMC) in accordance with the provisions of statute and customary law.

- Parties to the dispute shall be allowed to give evidence and call witnesses. Further each party has a right to cross-examine the other parties witnesses.
- The arbitration award made by the DAT shall be binding and enforceable:

(ii) Scope of the arbitration (jurisdiction)

All matters relating to conflicts or disputes having a bearing on natural resources as may be transferred to the DAT by the DMC. Provided that any disputes/conflicts arising out the government exercising the power of compulsory acquisition under the Constitution shall, if no mutual agreement is reached during mediation at LMC and DMC, be heard and determined by the High Court.

(iii) Constitution

The DAT shall be based in the office on the relevant District Commissioner, who shall be the secretary to the tribunal. The office shall also provide support services to the DAT. Members to the DAT shall be on an *ad-hoc* basis.
In the resolution of any dispute before the DAT:

(a) Each of the parties to the dispute shall nominate an arbitrator to the tribunal.
(b) The nominated arbitrators shall then elect a chairperson/Umpire.
(c) If the number of nominated arbitrators is even they shall through consensus and in consultation with the parties to the dispute nominate such number of other arbitrators to make the sum total an odd number.
(d) The term of the arbitrators is limited to a particular dispute, the parties to which shall also meet the cost of the arbitration.

iv) Functions

(a) To arbitrate over conflicts and disputes over natural resources as may be transferred to it by the DMC

(b) To register the arbitral awards it may make in the arbitration process.

(c) To supervise the enforcement of the arbitral award it makes in the cause of an arbitration.

(d) To educate the general public in its locality on the importance of non-litigious resolution of natural resource conflicts.

(e) To propose areas of law reform with regard to natural resource, as may appear necessary from the process of arbitration.

(f) To apply the principles of sustainable development as defined in the Environmental Management and Coordination Act (EMCA) 1999 in the arbitration process.

(g) To undertake peace building initiatives where the DMC is unable to complete the initiative, in the event of a violent manifestation of the conflict.

Generally, arbitral awards made by the DAT at this level and in this respect shall be enforceable through a court of competent jurisdiction, within the District, from the rank of Resident Magistrate.

V) Right of Appeal

A right of appeal from the decision of the D.A.T will lie to the High Court only on a point of law (including customary law). The decision of the High Court shall be final.

VI) Enactment of legislation

It is proposed that this proposed structure should be codified in a framework law to be tentatively named The Natural Resource Conflicts Resolution Act. The more detailed normative and procedural elements of the proposed non-litigious methods of conflict resolution should be contained in subsidiary legislation. The latter method is favoured as it will allow room for flexibility and also provide discretion to make guidelines well customized to fit in with the traditional/customary values as appreciated by various communities in different parts of Kenya. It will also allow for the variation of the guidelines periodically so as to ensure the promotion of sustainable development.

4.2 Possible application of the proposed conflict resolution structure to actual conflict situations

In this section of the study we shall reflect on our proposed structure of non-litigious conflict resolution as explained in 4.2 above. This shall be in the context of its applicability to certain of the conflict situations analyzed in chapter three of this study.

The process of mediation albeit done informally and as a tool to resolve conflicts over natural resources can and should be applied to the diverse related conflict situations around the country. The proposed new law should make mediation available at the village level. Mediation indeed possesses certain obvious advantages over arbitration and/or litigation. This is mainly because in mediation, the disputing parties actually find their own solution or compromise, which a neutral third party facilitates.

We shall look at how our proposed structure of mediation could have been applied to prevent conflict in two of the conflict situations analyzed earlier on (chapter three) of this study:

1) **Conflicts over mineral resources: the proposed Baringo District ruby mining project**

This is a major natural resource project that affects the livelihoods of mainly the Endorois community. The project will take away their land if Corby Ltd, the project proponents, proceeds ahead. The project has received authorization from the Government and the Baringo county council. However the local community has reacted violently protesting their non-involvement and also demanding to know how they would benefit from the project. The Endorois are also concerned about whether the mining project will preserve the culture they have preserved for many generations.

Our proposed structure for mediation would bring mediation down to the rural level. All the affected locations would have active location mediation committees (LMC). The local chiefs would act as the link and secretariat. However, the local people would hold all the powers.

The LMC could attempt to mediate using the proposed procedure. The mediation in this context must address the issues of interest to the Endorois community *inter alia*.

(a) Compensation and lease of their land
(b) Preservation of their culture.
(c) Benefits to the community
(d) Reclamation of the old mines
(e) How the project would promote sustainable development for the community.

If the LMC is unable to resolve the conflict at all or if there are any complex issues, then the LMC is to transfer them to the more superior District mediation committee (DMC). The DMC would also proceed with the process of mediation in the proposed way and reach a mutually acceptable compromise for the parties.

If however, this compromise is not reached, then the DMC would transfer the whole of the dispute or the complex components of it to the District Arbitration Tribunal (DAT). The DAT is to be constituted in the proposed procedure. The DAT has full arbitral powers and shall make an award.

If any of the parties is aggrieved with the arbitral award, they have an automatic right on appeal to the High Court of Kenya only on points of law (including customary law). This ensures full protection of the interests of both the mining company, the Endorois community and also paves way for the community (public) participation in the conflict resolution process. It also sets the stage to ensure that only projects that benefit the Endorois community and promote sustainable development in their favour are approved.

In any event the Baringo District Mediation Committee and the reciprocal arbitration tribunal have the power to engage in civic education and undertake peace initiatives for the local community. This will again ensure a constructive public participation in the process and promote access to environmental information and justice for the community. This will very much be in tandem with the requirements of the internationally acclaimed Arhus Convention.[5]

Such a high level of local community/public participation will also set the stage to propose areas of law reform with regard to natural resources, as they being very affected, the local communities are bound to make very concrete and sound proposals.

(II) Conflicts over pasture in the Narok/Nguruman Case

This a case that arose out of an application made by the landowners for leave to institute judicial review proceedings in the High Court of Kenya. The proceedings are against all members of the Shompole group ranch and all other unknown trespassers of LR.NO. Narok/Nguruman/Komorora/1.

The application also seeks orders of mandamus against the Commissioner of Police, the Permanent Secretary and the Minister of State in charge of Internal Security and Provincial Administration.

The very act of a private land owner, regardless of how he obtained the title over the land, to bring a lawsuit against a group ranch (read members of the local community) and government officials especially those of the provincial administration is an overt display that the existing mechanisms for natural resource conflict resolution are neither effective nor workable.

The registered landowners always rely on the concept of sanctity of title as security of tenure and with it are willing to use even force to evict/eject trespassers under the law. In

[5] See generally, Arhus Convention, Arhus Denmark 25th June 1998

the immediate case, the trespassers are actual members of the local Maasai community who have occupied the private land for pasture and water.

Instead of proceeding directly to the High Court for judicial review proceedings, we propose to examine how the dispute could be resolved using our envisaged structure. Being district with a history of violent conflicts over land, due to conflicting landholding regimes and land uses, Narok should have functional location and district mediation committees (LMC's and DMC's).

In this particular conflict, the relevant LMC should have started the process of mediation by involving all the members of the Shompole Group Ranch on the one hand and the private owners of the land on the other hand. The LMC should have educated the local community on the impact, significance and consequence of private person holding title over a parcel of land. They then should have gotten into a discussion between the conflicting parties on what long-term compromises could be reached between them to prevent further conflict to protect their combined interests (proprietary and cultural) as well as to promote sustainable development on the disputed land in favour of the local Maasai and the private title holders.

If at the LMC level no compromise is reached or certain complex issues are not resolved, then the LMC should have transferred the same to the DMC for more deliberation in line with our proposed procedure. A mutually acceptable compromise may either be reached at this level or any resultant complex issues should be transferred for arbitration by the District Arbitration Tribunal (DAT). From this point, if any of the parties is aggrieved by the arbitral award made by the DAT, they have an automatic right of appeal to the High Court only on points of law (including customary law).

4.3 The projected impact of the proposed conflict resolution procedure on sustainable development in Kenya

From the case studies in chapter three, it is clearly evident that the different conflict situations over natural resources have in the least impaired development in those areas and at worst put barriers on the realization of natural resource based sustainable development.

It is important to note that in order to achieve a reasonable level of success in sustainable development with regard to natural resources, the process of utilization, exploitation, management, reaping of benefits and the resolution of related conflicts must be participatory and information based. It is imperative that the process should be owned by the public (especially the local community) who are the ones that will be affected by the process. There should be a deliberate process by the government to disseminate any related critical information to the general public.

The effective resolution of conflicts that have a bearing over natural resources is an important ingredient if the recipe for sustainable development is to be fully constituted. More so in order to retain the traditional/customary socio-economic fabric, the Kenyan society must embrace pacific modes of settling such conflicts. Notably, pacific settlement of natural resource based conflicts is the primary objective of this study and the core of the recommendations therein.

In order for the country to realize the requisite effective resolution of natural resource conflicts in the mode we have proposed, a nebulous of stakeholders must be involved. They are *inter alia*:

(a) The local communities

(b) The government

(c) Non-Governmental Organizations (NGOs)

(d) The provincial administration, and

(e) Religious organizations

It is to be noted that the proposed new structure involves the Provincial Administration purely as a matter of convenience. The people of Kenya have a long-standing mistrust of the provincial administration. The proposed new structure puts into place certain safe guards that are intended to ensure that the provincial administration does not take over the proposed structure of customized mediation and arbitration. These safeguards are very essential if the primary aim of the proposed new structure, being the sustainable use of natural resources to realize meaningful sustainable development is to be realized.

It is imperative to emphasize that the Chiefs and the District Commissioners are NOT, in the proposed new structure, designated to act as the mediators and are not eligible for election as mediators. Elections of the proposed Locational Mediation Committee (LMC) and the District Mediation Committee (DMC) level are by universal suffrage.

The study takes the view that until a new Constitutional dispensation for Kenya takes effect and abolishes the Provincial Administration, the latter remains a reality and an integral component of local government, which cannot be assumed.

The provincial administration has dispute resolution roles. What is needed is to enhance democratic space for the common man and let him/her run the process of resolving conflicts/disputes over natural resources.

Traditional governance structures that used to exist before colonization have crumbled or are ineffective. Our proposed structure encourages the reworking of such customary governance structures and norms. Natural resources have always been governed by communities. The proposed structure gives the communities through their representatives a say over what is to be done with their natural resources.

Mediation gives parties a chance to air their views on the management of natural resources. The study takes the view that the LMC and the DMC are just the right fora for the expression for such views.
Further, the proposed enactment of the Natural Resource Conflicts Resolution Act is meant to give the mediation and customized arbitral process a legislative framework within which to operate.

Decisions reached at mediation panels and at customized arbitral panels need either to be codified by way of subsidiary legislation or enforced through the court system.

It is important to note that the proposed structure is not meant to oust the existing system. The mediation and arbitration envisaged in this study could even be court annexed. Provisions in the Civil Procedure Act would be amended to require that parties to disputes should exhaust the proposed alternative dispute resolution methods before they bring such matters to court.

Matters that are already in court could still be referred back to arbitration and mediation. If a settlement or award is arrived at, then this can be enforced in court.

The proposed new structure is not expensive. The study takes the view that the loss of human lives is more expensive than any amount of money.

It is imperative to note that the proposed new structure requires funding. This could be sourced through donors and international organizations dealing with alternative dispute resolution (ADR), that are willing to fund the project in addition to funding by the Kenya Government from the consolidated fund.

The sustainable management of Kenya's natural resources is crucial and cannot be ignored. The Kenyan economy largely depends on the exploitation of its natural resources, and as such land is particularly important. Current estimates indicate that agriculture and pastoralism not only provide livelihoods for a substantial proportion of

the country's population in daily subsistence but that they are also major micro-economic boosters for the average income earning Kenyan. They also reflect traditional land uses in Kenya. Major land uses outside subsistence and commercial agriculture include harvesting of forest products, tourism, pastoralism, among others. All these activities are usually carried out with an economic agenda in mind and are usually largely inconsistent with each other, resulting in improper land use and the related residual hindrances it bears upon sustainable development.

To address this issue substantively, it is necessary to push forward an agenda for constructive, all inclusive and widely consultative law and policy reform processes. To this end, and as primary goal, such a process must seek to address the question of historical land injustices going back to the colonial days, the exclusive ownership of most natural resources by the state and more importantly the factor of community rights and interests in the management of land and other natural resources. It will also simultaneously tame the ever-costly conflict over natural resources.

As a starting point, the government of Kenya has initiated a process of developing a land use policy for the country. To this end, the Ministry of Lands has been consulting widely with stakeholders to seek a consensus on future land policy among various interest groups. The involvement of the public, private sectors, communities and the civil society is a strategy aimed at ensuring the acceptability of a future land policy and its successful implementation

This study takes the view that the fact that there is such a process in progress is a realization that the previous legal and policy approaches to the management of natural resources have failed in many ways, among them the realization of related sustainable development for the concerned rural communities.

The concept of sustainable development especially with regard to natural resources is closely linked to the concept of sustainable use, which means a present use of the environment or natural resources which ensures intra generational and inter generational

equities. This concept has had widespread international backing. The declarations of first the United Nations Conference on the Environment and Development (UNCED)[6] and that of the second UNCED in Rio de Janeiro in 1992 (Rio Earth Summit) are particularly significant in this context. The latter Declaration in particular specifically addresses the question of public participation.[7]

Sustainable development as such should be a mandatory pre-requisite prior to the approval of any project relating to the environment and/or natural resources. The process of resolving related conflicts should as well be embraced to ensure that the resultant development meets the needs of the present generation without compromising the ability of future generations to meet their needs using the same environment and /or natural resources.

Consequently, the use of mediation and arbitration as tools to resolve conflicts that have a bearing over natural resources must go hand in hand with all other components of sustainable development. The processes must result in sustainable exploitation of the concerned natural resources, and must as a matter of law, convention or practice embrace active public participation (especially the local community), public civic education, public contribution, mutual and equitable distribution of resultant benefits and in any event, it must ensure the full realization of sustainable development.

[6] UNCED Stockholm Declaration 1972

[7] Principles 10-17

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