The Right To A Clean And Healthy Environment And The Role Of Institutions In Kenya: Steps Forward or Steps Backwards?

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COURSE CODE: GPR 699

A Research Project Submitted In Part Fulfilment of the Requirements for Master Of Laws Degree At The University Of Nairobi Law Campus

DECLARATION

I, ELIZABETH LAYLA KIMKUNG, declare that this research project is an original research work carried out by me as part of the fulfilment of the requirements for the Masters of Law Degree, studied at the University of Nairobi, Faculty of Law. The Research did include other Author's work, which has been clearly referenced, with relevant quotations made.

I view of the above I do declare this work as an original research paper, compiled by myself.

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AKNOWLEDGEMENTS

Deepest thanks to my family for their faith and willingness to have supported me when I embarked on the journey to study my Masters of Law. My special thanks to my supervisor, Dr. Kariuki Muigua, for his advice and guidance. Dr. Kariuki was always available to assist me, and I am indebted to him for his suggestions which were specific and focused, this enabled me to complete my work with more clarity. Thank you Dr. Kariuki for your guidance, encouragement expertise and the faith that you have had in me, God bless you. My appreciation to all my Lecturers of Class of 2017, University of Nairobi, Law Campus, for being a living example of integrity and truth, and for the additional knowledge I gained from them all. To my Husband Joe Kimkung, my wonderful Sons' Samuel and Isaiah, thank you for patience and your prayers.To my late Parents Camillus and Teresa, I thank you posthumously for raising me, to have become who I am today, May the almighty God rest your souls in eternal peace.

Lastly I thank the Almighty God, for giving me the gift of a healthy life. MUNGU AWABARIKI

DEDICATIONS

We have to protect our planet Earth from undue overexploitation lest we lose it. Because of greed, nature has been depleted bringing with it calamities to the once existing order in nature. It is a wakeup call not for some but everyone to do their part at least not just for ourselves but also for the future generations. God bless you all.

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ABSTRACT

Despite the provision of Constitution of Kenya 2010 on the right to a clean and healthy environment, meaningful implementation of Article 42 still remains a challenge. Other than failing to delineate the nature, scope and appropriate definition of what the right to a clean and healthy environment is, it appears that the conventional literature and laws assume that the environment is only limited to the ecosystem or natural world as a whole especially as affected by human activity while ignoring the extensive ramifications of pollutions. The general approach about the environment from the Stockholm declaration in 1972, Rio declaration in 1992 and beyond, has significantly remained unchanged despite numerous global socio-economic and political developments and evolution. It is therefore necessary to take the bold steps forward and begin breathing live to the existing progressive legislative and policy framework. Having reviewed the relevant literature on the right to a clean and healthy environment in Kenya, this study seeks to identify and reconcile the glaring gaps in order to meaningfully explore the opportunities and realize the ambitious aspirations that can guarantee a clean and healthy environment for the present and future generations.

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Convention on the Prohibition of the Military or Any Other Hostile Use of Environmental Modification Techniques (1976)

Convention on the Rights of the Child, Nov.20, 1989

Convention on Wetlands of International Importance Especially Waterfowl Habitat, adopted at Ramsar 1971

Declaration of the United Nations Conference on the Human Environment (Stockholm Declaration) 1972

European Convention for the Protection of Human Rights and Fundamental Freedoms, 1950

International Convention on Civil Liability for Oil Pollution, Dec.1992

International Convention on the Establishment of an International Fund for Compensation for Oil Pollution Damage, adopted in Brussels (1971).

International Covenant on Civil and Political Rights (1976)

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Organisation of American States Charter (1948)

Report of the United Nations Conference on the Human Environment.(1992)

UNEP Governing Council Nairobi Declaration(1997)

UNESCO (1946)

Universal Declaration of Human Rights (1946)

Vienna Convention for the Protection of the Ozone Layer(1985)

Vienna Declaration and Programme of Action adopted at the World Conference on Human Rights (1994)

World Charter for Nature(1982)

LIST OF ABBREVIATIONS

ADR	Alternative Dispute Resolution
EMCA	Environmental Management and Coordination Act
ELC	Environment and Land Court
NEMA	National Environment Management Agency
UNEP	United Nations Environment Programme
UNFCCC	United Nations Framework Convention on Climate Change
RMA	Resource Management Act
AM. PHlL. Q.	American Philosophical Quarterly.
AIR.	All India Reports.
A.S.I.C	African Society of International & Comparative Law.
ENVTL.L.	Environmental Law.
FAO.	Food & Agriculture Organization.
GEO 2000	Global Environment Outlook 2000.
H.C.	High Court.
H.C.C.C	High Court Civil Case.
I.L.M.	International Legal Materials.
ICCPR	International Covenant on Civil and Political Rights.
J.E. AFR. RES. & DEV	Journal of Eastern African Research and Development.

K.L.R.	Kenya Law Reports
KENGO	Kenya Energy and Environment Organisation.
MISC. APPN.	Miscellaneous Application.
O.A.U.	Organization of African Unity
O.A.S.	Organization of American States
OECD	Organization for Economic Co-operation and Development
OSSREA	Organization for Social Science Research in Eastern & Southern Africa
RTS.	Rights
S. A. J.E.L	South African Journal of Environmental Law and Policy
STAN. J. INT'L. L.	Stanford Journal of International Law

CHAPTER ONE

1.0 Introduction

The role of natural resources in advancing social, economic and political needs of the present and the future generations cannot be overemphasized. As in other jurisdictions, they are vital for human survival and are sources of livelihood for most communities in Kenya and Africa[1]. Kenya is well endowed with a mass of natural resources which rightfully belongs to citizens[2]. Good governance and utilization of Africa's natural resources should contribute to the realization of economic rights of the people of Africa as envisaged in various international law instruments and national laws[3]. Unfortunately, Africa's resources are fueling the world economy while Africa itself remains economically crippled, exploited and neglected[4].International instruments indicating right to exploit natural resources.

The Environmental law in Kenya describes the legal rules relating to the environment broadly into social, economic, philosophical and jurisprudential issues raised by attempts to protect, conserve and reduce the impacts of human activity on the Kenyan environment. This can be divided into two major areas, pollution control and resource conservation.

The parameters that such laws may impose on commerce, and the often unquantifiable (non-monetized) benefit of environmental protection, have generated and continue to generate significant controversy. Due to the broad scope of environmental law, no fully definitive list of environmental laws is possible. The following argument elicited give an indication of the

[1] Kariuki Muigua and Francis Kariuki *"Towards environmental justice in Kenya"* available at http://www.kmco.co.ke/attachments/article/140/TowardsEnvironmentalJusticeinKenya-January2015.pdf accessed on 9th December, 2018
[2] Kariuki Muigua *"Utilizing Africa's natural resources to fight poverty"* available at http://www.kmco.co.ke/index.php/publications/121-utilizing-africa-s-natural-resources-to-fight-poverty accessed on 9th December, 2018
[3] ibid
[4] Ibid

breadth of law that falls within the environmental matrix. Environmental issues are a common feature of disputes, and frequently lead to contract renegotiations and delays in major projects. Principal sources of tension include the direct and indirect impacts of extractive industries on the environment, safety and human health but also questions about who bears the cost of remediation. This cost can be quite high. Stakeholders will naturally differ in their perception of what is an acceptable risk, even when a solid evidence base is available on which to make an assessment – not least because the impacts of extractive sector on ecological systems or human health can be extremely complex and play out over long timescales. Shortcomings in comprehensive, systematic and transparent data collection and reporting are often an important cause of heightened tensions and mistrust. The recent risk-management processes aimed at improving compatibility, applying rigorous scientific processes and engaging with local stakeholders have been developed. Technical know-how has also enabled better environmental performance in a range of areas. This continuum includes minimizing the removal of vegetation and increasing the resilience of tailings ponds to improving remediation treatments. Near real-time monitoring systems that better reflect the dynamics.

1.1 Background

The right to clean and healthy environment as envisaged in article 42 of the Constitution of Kenya 2010 obligates the state to address environmental challenges arising from anthropocentric activities. This provision among other environmental legal framework acts as a safeguard to regulate the extractive sector to guarantee responsible exploitation of natural resources. They ensure that the state at every level of governance adopts progressive approaches to guarantee sustainable management of natural resources. Through the lens of environmental law, the said states are able to recognize the various vulnerable ecosystems and human rights concerns and consequently craft measures to mainstream sound

environmental management practices in all sectors of society characterized by strong institutional and governance measures to support the achievement of the desired objectives and goal. The legitimate expectation of a people to own, utilize and control natural resources within their countries (referred to as permanent sovereignty over natural resources) is an internationally recognized right; this can be seen from the provisions of the UDHR, ICCPR, ICSECR and Banjul Charter. On matters extractive activities, climate-related consequences end up affecting projects long after they have ceased production, bringing new issues of accountability for post-project environmental damage and remediation. Excavation infrastructure, such as tailings dams that have been constructed on the assumption of broadly stable climatic conditions, may be inadequate in the future. An increased incidence of extreme weather events may also create significant environmental hazards and financial liabilities for companies, either during the lifetime of a mining operation. Life-threatening weather events, for example, have been the leading cause of tailings dam failures over the past decade. Other than carbon pricing, few have attempted to quantify in a comprehensive manner other commercial, operational and reputational costs and risks associated with a clean and healthy environment. Although some extractive companies are starting to address some of these issues, awareness of the significant and multidimensional challenges climate change poses to the extractive sector remain limited. Nonetheless, gaining currency are attempts to develop comprehensive climate-risk management strategies. Despite extractive activities being the foundation on what would be considered development, there are many environmental degradation issues and challenges that come with exploitation of these natural resources that contravene the right to clean and healthy environment. These challenges are experienced at national, county and local levels with concerns of common approach in resolving them or mitigating the negative impacts especially to the environment. The concerns encompass the impact on human beings and the ecosystem in general. If unresolved

or unchecked, the buildup could be catastrophic. The Judiciary is equally paramount in enhancement and interpretation of environmental law. Pre-Constitution of Kenya 2010, land and environment matters were dealt with by the land and environmental court divisions.[5] The old tradition of adjudication has however been doubted in terms of how they approach environmental disputes, speed, expertise of the judges and quality of judgments which have affected the development and access to environmental justice.[6] The main idea for constitutional and statutory recognition of specialised environment courts was to improve access to justice, expertise and efficiency, clear and effective jurisprudence and faster and efficient disposal of environmental litigation.[7] The judiciary is now composed of the Supreme Court, the Court of Appeal, the High Court and Subordinate courts.[8] The 2010 Constitution of Kenya established the ELCs, which are accorded the same status as a high court and has the jurisdiction to hear and determine disputes relating to the environment and the use, occupation of, and title to, land.[9]It was created to improve access to environmental justice through sound and quality judgment from competent and well versed judges in matters environment, faster determination of cases and effective jurisprudence.[10] The Environment and Land court is further expressed in the Environment and Land Court Act[11] as having original, appellate and supervisory jurisdiction and can issue a range of orders and reliefs.[12]The judiciary in the exercise of its jurisdiction should be guided by the principles of sustainable development, the principles of land policy, of judicial authority, the national

[5] www.judiciary.go.ke/news_info/view_article.php?id=408673 on 5 March 2018.
[6] Sharma R, 'Green Courts in India: Strengthening Environmental Governance?' *Law, Environment and Development Journal*, (2008), 50.
[7] Sharma R, 'Green Courts in India: Strengthening Environmental Governance?'
[8] http://www.gabriellubale.com/courts-system-in-kenya/ on 3 July 2018.
[9] Article 162(2)(b), *The Constitution of Kenya* (2010)
[10] Otieno N, 'Appraising Specialised Environment Courts in the Attainment of Environmental Justice: The Kenyan Experience' University of Nairobi, August 2014.
11 *Environment and Land Court Act* (Act No. 9 of 2011)
12 Sections 13-16, *The Environment and Land Court Act* (2011)

values and principles of governance and the values and principles of public service.[13] This arm of the government throughout the years has made decisions showing a progressive nature of environmental justice. Domestication of international environmental treaties further shows the growth in the role of the judiciary in environmental protection.[14] The milestone on matters sustainable development in Kenya was demonstrated in *Waweru v Republic*[15]. Here the court held that development that jeopardises life is not sustainable development and ought to be halted. The Environment and Land Court nonetheless has an opportunity to apply the principle of sustainable development as expressed in Article 10(2) (d) of the Constitution. Thus, more jurisprudence is needed to achieve sustainable development and adequately deal with industrial pollution. This can follow the established pathway in the *Case Concerning the Gabcikovo- Nagymaros Project*, the court considered that Sustainable Development should balance development with environmental concerns. Judge Weeremantry expressed that the principle of sustainable development constitutes a principle which enables the balancing between environmental concerns and development concerns.[16]

1.2 Statement of the Problem

Article 42 of the Constitution of Kenya 2010 is clear on the right to clean and healthy environment. Nonetheless, it does not provide a formula on the appropriate model when it comes to implementation or interpretation of what the right to clean and healthy environment is. This provision given its importance requires contextualization as it encompasses a wide range of issues that require scoping and interpreting. As much as it affords Kenya a good

13 Section 18, *The Environment and Land Court Act* (2011)
14 Mbote PK, 'Kenya (Role of the Judiciary in Environmental Governance)' LJ Kotze & AR Paterson, The Role of the Judiciary in Environmental Governance: Comparative Perspectives (2009), 451-78.
15 (2004) eKLR (Environment and Land)
16 *Gabčikovo-Nagymaros Project (Hungary v Slovakia)*, ICJ Reports 1997.

opportunity to address environmental concerns, it puts the government in a challenging position in the wake of ambitious development projects that have a negative impact on the environment yet important to her citizen's economic aspirations. The same government is required through its decision making organs to pronounce, mitigate and address eco-centric and anthropocentric needs as a sign of efficiency and competence in meeting the legitimate expectations bestowed upon them. In practice, enforcement of this right has seen different agencies at loggerheads due to interpretation variances, complex governance demands and overlapping laws and policy. Kenya has largely relied on old methods of interpretation and environmental impact assessment which fall short of international best practices, threshold that established index. Escalating this is the idea to find the requisite balance of social economic and political rights vis-avis environmental rights. Unfortunately it is still not clear how these points of convergence should be addressed and competing interests reconciled without conflicts, overlaps and disregard to the rule of law. This research seeks to examine the inherent enforcement challenges and propose points of reconciliation and convergence by the state at the national, county or local level to realise the right to clean and healthy environment. The hope is to initiate a conversation towards a compromise bi-centric approach that is unique to Kenya which understands and contextualizes the right to clean and healthy environment without undermining development aspirations. While all this remains endemic Kenya is experiencing increasing levels of environmental depletion and industrial pollution posing a threat to the society.[17] Many nations, including developing ones, have basic environmental protection laws in place, but an enormous gap exists between the letter of the law and what is actually happening on the ground."[18] Kenya has enacted various laws to deal with the problem of industrial pollution. Despite the presence of the EMCA and

[17] Failler P, Seide W, 'Assessment of the Environment Pollution and its impact on Economic Cooperation and Integretaion Initiatives of the IGAD Region' (2016).

18 Stein P, 'Why Judges are Essential to the Rule of Law and Environmental Protection, in Judges and The Rule Of Law: Creating The Links: Environment, Human Rights And Poverty' 57 *Thomas Breiber* (2006).

judicial intervention, industrial pollution is still persistent. Drawing from the background above, this study will address the relevance of state in attaining sustainable development with regards to combating environmental degradation. Environmental law is undoubtedly a pillar of environmental protection, but after many decades it is still suffering in most of the world due to poor implementation. As a result, the organizations of the courts and their environmental sensibility, as well as the national systems of access to justice, have become crucial issues in the implementation of both environmental law and the principle of sustainable development.[19]

1.3 Justification of the Study

In Kenya, Environmental Impact assessments (EIAs) are a critical point of entry for interested parties opposed to extractives projects. The environmental impacts and risks associated with extractive sector can both trigger and exacerbate several disputes between companies, governments and local communities if not properly undertaken in line with the recent constitutional reforms. Required by the state is the state-of the-art know-how and technology for environmental protection, and environmental impacts to foresee common triggers of disputes in extractive industries and address any concerns before the public suffers irreparable damages. One reason for this is that regulations are often tightened over time, raising questions about compliance. Well informed monitoring and tracking models will highlight environmental consequences of projects that might cause extensive harm in ecologically sensitive environments. Meaningful conversations are urgent for addressing the issues emanating from the progressive realisation of the right to clean and healthy environment. It involves analysing the crucial role by national, county and local governments

19 Amirante D, 'Environmental Courts in Comparative Perspective: Preliminary Reflections on the National Green Tribunal of India' 29 *Pace Environmental Law Review* (2012).

in implementation the legislative and institutional regimes for sustainable development vital to the survival of the society. The research thus aims at directly contributing to the discussion on the attainment of clean and healthy environment and environmental protection. There is a need for addressing the issue of industrial pollution to attain sustainable development. The Judiciary plays a critical role in both attaining sustainable development and addressing industrial pollution. Judiciaries play a crucial role in the development and implementation of legislative and institutional regimes for sustainable development.[20] Attaining sustainable development leads to ecologically sound environments which are vital to the survival of the society.[21] The main aim of this research is to address the relevance of Kenyan institutions in attaining sustainable development and implementing the right to clean and healthy environment. The research aims at directly contributing to the discussion on the attainment of sustainable development and environmental protection at large.

1.4 Research Objectives

The overall objective of this study was to examine the efficacy of enforcing the right to clean and healthy environment in Kenya by various state agencies and at various levels of jurisdiction while highlighting the inherent challenges and opportunities. The study therefore seeks:

i. To investigate the responsibility of the government as a key agency in implementing the right to clean and healthy environment

20 Kaniaru D, Kururkulasuriya L and Okidi C,"UNEP Judicial Symposium on the Role of the Judiciary in Promoting Sustainable Development", The Fifth International Conference on Environmental Compliance and Enforcement in Monterey, California, November 1998.

21 Morris, J, *Sustainable Development: Promoting Progress or Perpetuating Poverty?* Profile Books, London, 2002, 255.

ii. To examine the interplay and variances in theory and practice during implementation and highlighting the challenges and opportunities.

1.5 Research Questions

This study sought to address the following questions:

i. What is the role and relevance of government agencies in implementing the right to clean and healthy environment?

ii. Is the legal framework in Kenya adequate to address the right to clean and healthy environment?

iii. What are some of the policy institutional and legal challenges or gains in realising the right to clean and healthy environment?

1.6 Literature Review

A large amount of harmful chemicals are emitted into the air every year[22] that are directly detrimental to human health, and thus, to sustainability. Other than the national and county executive departments, the judiciary is a key cog in enabling and steering other state organs at the county and National level to realise the right to clean and healthy environment. Markowitz and Gerardu are of the opinion that sustainable development depends upon good governance; good governance depends upon the rule of law; and the rule of law depends upon effective compliance and enforcement. [23] Demonstrated is that for a law's objective to be fully achieved, compliance and enforcement are required. It is therefore necessary for the

22 Postel S, *Controlling Toxic Chemicals' In State of the World*, WW Norton, New York, 1988, 119.
23 Markowitz KJ, Gerardu JJA, 'The Importance of the Judiciary in Environmental Compliance and Enforcement' 29 *Pace Environmental Law Review* (2012), 540- 41.

judiciary to be well-equipped in order to ensure that there is compliance or non-compliance with the law. An environmental court may be one possible way in which to ensure that environmental law is correctly applied.[24] This pivotal in the implementation of environmental law and sustainable development by the judiciary was reiterated in 2002.[25] This evidence was emphasised in the 2002 Johannesburg Principles on the Role of Law and Sustainable Development, which affirmed that an independent judiciary and judicial process is necessary for the implementation, development and enforcement of environmental law.[26] Acknowledged is the fragility of states as the guardian of the rule of law to boldly and fearlessly implement and enforce applicable international and national laws, which in the field of environment and sustainable development will assist in protecting economic and ecological needs of the citizenry.[27] Global comentators at the Earth Summit at Johannesburg presented a declaration on the implementation of sustainable development. In the declaration, they envisioned the Rio principles of sustainable development as an action plan to strengthen the development, use and enforcement of environmentally related laws.[28] The symposiums observed that the judiciary is a crucial partner in bringing about a judicious balance between environmental and developmental concerns and thereby promoting sustainable development through their decisions.[29] Mbote and Odote are emphatically aligned that the judicial role enables states to solve controversies between the state itself and its subjects as they balance competing interests of persons and entities. The judiciary is therefore best placed to ensure sustainable development is attained.[30]. Toepfer further opines that the judiciary is a crucial

24 Chohan I, 'Environmental Courts: An Analysis of their Viability in South Africa with Particular Reference to the Hermanus Environmental Court' LLM Thesis, University of KwaZulu-Natal, December 2013.

[25] Amirante D, 'Environmental Courts in Comparative Perspective: Preliminary Reflections on the National Green Tribunal of India'.

[26] Johannesburg Principles on the Role of Law and Sustainable Development, Journal of Environmental Law 2002

[27] Johannesburg Principles on the Role of Law and Sustainable Development

[28] 'Summit: Judges Fortify Environmental Law Principles', *Environmental News Service*, 28 August 2002

[29] Toepfer K, 'Background Paper to the Global Judges Symposium'.

[30] Mbote PK, Odote C, 'Courts as Champions of Sustainable Development: Lessons from East Africa'.

partner in promoting environmental governance, upholding the rule of law and ensuring a fair balance between environmental, social and developmental consideration through its judgment and declarations.[31] Sinha GN[32] writes that courts make significant contribution to protection of the environment because they enrich the understanding of environmental legislation through creative interpretation. Justice Isagani in *Minors Oposa v Secretary of the Department of Environmental and Natural Resources* [33] is of the view that judiciaries are the central agency of horizontal accountability in society. That is to mean that judiciaries have the capacity to check abuses by other governmental institutions, state agencies and branches of government. Kaniaru D, Kurukulasuriya and Okidi C[34] opine that judiciaries have and will continue to play a vital role in development and implementation of legislative and institutional regimes for sustainable development. In *Waweru v Republic*, the court further stated that in the case of land resources, forests, wetlands and waterways, the government and its agencies are under a public trust to manage them in a way that maintains a proper balance between the economic benefits of development with the needs of a clean and healthy environment.[35] As Judge Weeramantry said in his introduction to the UN Environment Judicial Handbook on Environmental Law published in 2004 that the judiciary is one of the most valued and respected institutions in all societies. The tone that the judiciary sets through the tenor of its decisions influences societal attitudes and reactions towards the matter in question. This is all the more so in a new and rapidly developing area. Judicial decisions and

31 UNEP Global Judges Programme 2005

32 Sinha G N, 'A Comparative Study of the Environmental Laws of India and the UK with Special Reference to Their Enforcement' LLM Thesis, The University of Birmingham, August 2003.

33 33 ILM 173 (1994) (Philippines)

34 Kaniaru D, Kururkulasuriya L and Okidi C,'UNEP Judicial Symposium on the Role of the Judiciary in Promoting Sustainable Development'

35 (2004) eKLR (Environment and Land)

attitudes can also play a great part in influencing society's perception of the environmental danger and of the resources available to society with which to contain it.[36]

1.7 Theoretical Framework

The public theory and theory of justice will drive ideology and positions of commentators in this research on the right to clean and healthy environment. Specifically J. Sax' theory of Public Trust discusses the concepts of responsible management of natural resources and the role of the judiciary and executive in protecting the public trust. This theory argues that natural resources are limited resources and should be held in trust for present and future generations.[37] This research concludes that the both by the state organs are to protect society's interest in the public trust by keeping the government in check. The study is also based on the theory of justice by John Rawls. He notes that theories of justice are concerned with the proper way to structure government and society.[38] For him, justice is the structural rules of society within which people with differing sets of values and goals in life can co-exist, cooperate, and even compete. He writes that rules are requisite for people to work together to create social and individual goods within society. This research argues that environmental justice must be boldly interpreted and enforced by the courts to be able to attain sustainable development and combat environmental pollution.

1.8 Hypothesis

This research assumed that the right to clean and healthy environment as presently envisaged requires some rethinking and a number of reconciliations with reality and development

36 Shelton D, Kiss A, 'Judicial Handbook on Environmental Law' *United Nations Environment Programme* (2005).

37 Sax J, 'The Public Trust Doctrine in Natural Resource Law: Effective Judicial Intervention' 68 *Michigan Law Review*, (1969), 47.

38 Rawls J, *A Theory of Justice* Harvard University Press, Cambridge, 1971.

aspirations if at all impactful and meaningful results are expected. The Constitution of Kenya 2010 fails to delineate the nature and scope of the right to a clean and healthy environment. It also fails to define the right to a clean and healthy environment, delineate the scope and limitations for a clean and healthy environment. The conventional literature and laws assume that environment is limited to ecosystem or natural world as a whole especially as affected by human activity, and it fails to acknowledge the place noise, pollution, land degradation and development. It is also pertinent to note that the dominant thinking about the environment from the time of the Stockholm declaration up to the Rio declaration in 1992, has not changed despite numerous global socio-economic and political developments.

1.9 Research Design and Methodology

The method used to gather information for this research will be desk research. The research will analyse existing literature on the research subject. The internet and other electronic sources will be very useful throughout the different levels of the study.

1.10 Limitations

Other than lack of field study, the main limitation of this study is that the right to clean and healthy environment is a fairly recent concept with minimal examples when it comes to practice. As the study is reliant on secondary sources, the information gathered will be limited to what various authors and scholars have written about rather than actual insight from the field.

1.11 Chapter Breakdown

Chapter one will include the Introduction. This will include the research proposal which will discuss the background of the issues, the problem and theories to be used in the study as well as a discussion of the literature used.

Chapter two encompasses the theoretical framework. It will discuss the theoretical framework and literature reviews on the right to clean and healthy environment. To be included are conceptual terms and evolution of the interpretation of the right to clean and healthy environment.

The third Chapter will entail a discussion on the legal, regulatory and institutional framework at the national and international platform.

Chapter four focusses on analysis of the jurisprudence by state institutions. It will analyse the institutional jurisprudence by the state and looking at how this question of right to clean and healthy environment has been handled by other jurisdictions especially New Zealand. From this, the expectation is that the research will lead to the conclusion that other than the other state agency, courts are the principal champion to the protection of the environment and attain sustainable development.

Chapter five is the final chapter and it will contain a summary of the findings, conclusions and recommendations gathered from the research and the bibliography section.

CHAPTER TWO

2.0 Introduction

The discussion on the role of state agencies, especially the courts, in the development and implementation of legislative and institutional regimes for sustainable development was tackled in the first chapter which established that courts have a crucial function to play in attaining the right to clean and healthy environment. The need for evaluating executive decisions to attain sustainable development was also discussed at length. The overall outcome of the deliberations would lead to ecologically sound environments which are highly important in ensuring survival of the society. This chapter analyses the theories relied on to explain the relevance of these state agencies in combatting the right to clean and healthy environment and attaining sustainable development. The key argument in Joseph Sax's theory is that natural resources are limited resources and should be held in trust for present and future generations.[39] On the other hand Rawls claims to describe a just order of the major political and social institutions of a liberal society will also be discussed.[40]

2.1 Evolution of environmental Rights

The Universal recognition of human rights was founded upon the creation of the United Nations in 1945, this Charter set to protect basic rights and freedoms as the main objectives[41]. The UDHR (1948), laid down the framework of international and national human rights tools, these were further expounded in the ICCPR and the "International Covenant on Economic, Social and Cultural rights" in (1966). Human rights adoption covenant was mainly due to the prevailing ideologies of capitalism and socialism, the capitalist countries favouring political and civil rights covenant, which were known as "first-generation" human rights

[39] Sax J, 'The public trust doctrine in natural resource law: Effective judicial intervention'.
[40] https://plato.stanford.edu/entries/rawls/#JusFaiJusWitLibSoc on 12th September 2018.

[41] Paul Stein, "Australian: A Unique Experiment in Environmental Dispute Resolution", in EPL, Vol. 23/6 (1993),p.277

while the socialist leaning towards the economic and social covenant, which were known as "second-generation" human rights. The "third-generation" were stipulated in both covenants, and are considered group rights, which include rights of people to self-determination or a people's sovereignty over its natural resources, these rights does cover groups of peoples' and nations' compared to first and second individual rights. Inclusion of group rights did open up for a new generation of human rights. The rights can be exercised by individuals, groups, peoples and mankind as a whole. They deal with global concerns like development, equitable share of natural resources, access to common heritage and to a healthy habitat. We see a relationship between protection of the environment and human rights protection having been enhanced by man activities which has happened since the conference held in Stockholm on human environment. The conference was paramount in the evolution of the concept on the rights relating to the environment, by considering the right to a conducive habitat to the right to life[42]. Justice J. B. Ojwang observes that "A clean and healthy environment is an essential component in the totality of social welfare. So important is it to personal well-being, that it may be equated to the various civil rights that often make headlines".[43]The public trust doctrine is a common law property doctrine rooted in both Roman law.[44] The doctrine protects land of communal value in perpetuity for free and unimpeded access by the public under a trust held by the sovereign.[45] It recognises that some natural resources are so important to the society and to human survival that they should not

[42] Mauelonne Dejeant-pons, "The Right to Environment in Regional Human Rights Systems", in K.E. Mahoney & P. Mahoney (eds) Human Rights in the Twenty first century: A Global Challenge, (Dordrecht:Martinus Nijhoff Publishers, 1993), p. 603

[43] UNEP group of legal experts in Malta 1990

[44] Dowie M, 'Salmon and the Caesar: Will a doctrine from the Roman Empire sink ocean aquaculture?' *Legal Affairs* (2004).

[45] Babcock HM, 'Has the US Supreme Court finally drained the swamp of Takings jurisprudence?: The impact of Lucas v South Carolina Coastal Council on wetlands and Coastal barrier beaches', 19 *Harvard Environmental Law Review*, (1995), 1.

be in exclusive private ownership.[46] This theory is relevant to this study as it discusses the concepts of environmental protection as well as sustainability.[47] Joseph Sax, the major proponent of this theory argues that a nation's natural resources are limited commodities which, if consumed too quickly, will not be available to present and later generations therefore the current generation should regard itself as trustees who hold these precious goods for the benefit of all.[48] Natural resources must be utilised by current generations setting aside some for the future generations.[49] The trust approach places responsibility for protection of natural resources in the hands of individuals who are the trustees, who share society's ideas, beliefs and understandings and are likely to provide for protection for the environment.[50] Natural resources should be regarded as goods held in common.[51] The government must assume a fiduciary duty not to waste them for the benefit of just a few as natural resources are to be enjoyed by all.[52] Further, the state must take into account future users who will be harmed if society depletes or damages the environment in irreversible ways.[53] The idea places protection of the environment in the hands of a trustee, generally some agent of the sovereign, who is issued a set of instructions and told to protect the environment accordingly.[54] It advocates for sustainable development as public resources are held in common for the use of present and future generations. This theory creates a "model for judicial scepticism," meaning that whenever a state holds a resource which is freely available for the public use, a court will view with no small degree of scepticism any governmental

[46] Wood MC, 'Nature's Trust: Environmental Law for a New Ecological Age' *Cambridge University Press* (2013).
[47] Musiker DG, France T, Hallenbeck LA, 'The Public Trust and Parens Patriae Doctrines: Protecting Wildlife in Uncertain Political Times' 16 *Public Land and Resources Review* (1995), 87-96.
[48] Sax J, 'The Public Trust Doctrine in Natural Resource Law: Effective Judicial Intervention', 484- 90.
[49] Sax J, 'The Public Trust Doctrine in Natural Resource Law: Effective Judicial Intervention', 490- 560
[50] Delgado R, 'Our Better Natures: A Revisionist View of Joseph Sax's Public Trust Theory of Environmental Protection, and Some Dark Thoughts on the Possibility of Law Reform' 44 *Vanderbilt Law Review* (1991).
[51] Sax J, 'The Public Trust Doctrine in Natural Resource Law: Effective Judicial Intervention', 478- 89.
[52] Sax J, 'The Public Trust Doctrine in Natural Resource Law: Effective Judicial Intervention', 553- 57.
[53] Sax J, *Mountains without Handrails*, The University of Michigan Press, Michigan, 1980.
[54] Bogert G, *Trusts*, 6ed, West Academic, Minnesota, 1987.

conduct limiting that resource to more restrictive uses or subjecting a public use to the self-interests of private parties.[55] Suggested is that the role of the public trust doctrine is to protect the public interest from shortcomings of the democratic process.[56] Under the public trust doctrine, courts place checks on the other branches of government.[57] When the legislature or an administrative agency fails to fully consider the public interest in making a decision that affects a trust resource, or engages in questionable governmental conduct, the doctrine provides a mechanism by which the courts may intervene to protect the resource. [58] States have a duty to prevent substantial damage of public resources.[59] Following this approach, states should not allow private activities that will prejudice the public's sovereign interest without a compelling government public purpose.[60] To fulfil this obligation, the government must consider the adverse impacts of a proposed action on trust resources to determine whether these activities would cause significant impairment of the trust resource.[61] From this point of view, states have a duty to protect public resources from impairment and the court can intervene whenever the State fails to protect the Sovereign interest. Central to the public trust is recognition that the conflict is between the survival of a society's common natural resources and individual economic interests.[62] Professor Huffman on the contrary argues that the conflict arising from the doctrine is between 'public recreational rights' and private property.[63] Even though preventing the government from taking private property without compensation is a constitutional right essential to our system of government, the government has the additional duty to protect and manage property that is lawfully owned by

[55] Sax J, 'The Public Trust Doctrine in Natural Resource Law: Effective Judicial Intervention', 7.
[56] Sax J, 'The Public Trust Doctrine in Natural Resource Law: Effective Judicial Intervention', 521.
[57] Sax J, 'The Public Trust Doctrine in Natural Resource Law: Effective Judicial Intervention', 495- 96.
[58] Sax J, 'The Public Trust Doctrine in Natural Resource Law: Effective Judicial Intervention', 491.
[59] Illinois Central Railroad v Illinois 146 US 387 (1892) 455-456.
[60] Illinois Central Railroad v Illinois 455-456.
[61] Illinois Central Railroad v Illinois 456.
[62] Huffman JL, 'Avoiding the Takings Clause through the Myth of Public Rights: The Public Trust and Reserved Rights Doctrines at Work', 3 *Journal Land Use & Environmental Law* (1987), 171.
[63] Huffman JL, 'Avoiding the Takings Clause through the Myth of Public Rights: The Public Trust and Reserved Rights Doctrines at Work'.

all.[64] The main implication of the public trust doctrine for private property rights specifically the potential of the doctrine to cause unexpected economic losses has led to resistance to its expansion.[65] The standard of non-impairment is similar to preserving the sustainability of a given natural resource.[66] Also, Professor Wood, proposes that this is nothing more than "the basic fiduciary duty to maintain an asset's ability to provide a steady abundance of environmental services for future generations."[67] Professor Huffman also argues that judicial intervention to limit the legislative and executive branches of government or to force those branches of government to impose limits on private individuals in the name of the public trust doctrine shows little respect for the rule of law or for history.[68] The Judiciary have invoked the doctrine in particular situations to question the validity of executive agency action that threatened trust resources and, in particular, public access to those resources.[69] Critics argue that today's environmental issues are often so exceedingly complex that the judicial role must necessarily be limited and reliance on administrative agencies must be great.[70]

Administrative agencies enjoy a vast discretion which they abuse to serve corporate and bureaucratic interests.[71] The court should consequently presume the decision making discretion they have to enforce the doctrine and oblige government to carry out its obligation to serve the public's interests and to ensure sustainability of natural resources.[72] This theory

[64] Sax J, 'The Public Trust Doctrine in Natural Resource Law: Effective Judicial Intervention', 479.
[65] Plater ZJB, *Environmental Law and Policy: Nature, Law, and Society*, 4ed, Aspen Publishers, 1992, 405-406.
[66] Musiker DG, France T, Hallenbeck LA, 'The Public Trust and Parens Patriae Doctrines: Protecting Wildlife in Uncertain Political Times' 16 *Public Land and Resources Review* (1995), 87-96.
[67] Wood MC, 'Protecting the Wildlife Trust: A Reinterpretation of Section 7 of the Endangered Species Act', 34 *Environmental Law* (2004), 95.
[68] Huffman JL, 'Avoiding the Takings Clause through the Myth of Public Rights: The Public Trust and Reserved Rights Doctrines at Work', 3 *Journal Land Use & Environmental Law* (1987), 171.
[69] Butler WA, Cameron RA, Review of Sax J, 'Defending the Environment: A Strategy for Citizen Action' (1971), 1 Ecology Law Quarterly 231 (1971).
[70] Butler WA, Cameron RA, Review of Sax J, 'Defending the Environment: A Strategy for Citizen Action'.
[71] http://www.bollier.org/blog/mary-wood%E2%80%99s-crusade-reinvigorate-public-trust-doctrine on 12th December 2018
[72] http://www.bollier.org/blog/mary-wood%E2%80%99s-crusade-reinvigorate-public-trust-doctrine on 12th December 2018

can be used to protect natural resources and the environment. Doing so will provide protection for natural resources in situations where other branches of the government cannot or will not act. The doctrine allows courts to enforce the people's sovereign interests.[73] Moreover, this principle has the potential to create a new dialogue in the area of environmental law.[74] The public trust doctrine can still play an important role in ensuring judicial review of actions that threaten natural resources and the environment where an environmental statute does not apply or is not being enforced, or where state constitutional provisions to protect natural resources do not exist or are ineffective.[75]

2.2 Environmental justice

John Rawls is the key proponent of this theory. His aim was to describe a just order of the major political and social institutions of a liberal society.[76] This theory is relevant to this study as it discusses the concepts of fairness and justice for the common good.[77] Justice as fairness is constructed around particular interpretations of the ideas that citizens are free and equal and that society should be fair.[78] Rawls argues that justice is the first value of social institutions thus an injustice is only tolerable when it is necessary to avoid a greater injustice. This could happen in instances where agencies and corporations pollute the air in the quest to serve individual and corporate interests. The theory posits an initial position of equality which is "designed to lead to an original agreement on principles of justice."[79] To institutionalise this, he formulated two guiding principles of justice as fairness.[80]The first

[73] http://www.bollier.org/blog/mary-wood%E2%80%99s-crusade-reinvigorate-public-trust-doctrine on 12th December 2018

[74] http://www.bollier.org/blog/mary-wood%E2%80%99s-crusade-reinvigorate-public-trust-doctrine on 12th December 2018.

[75] Klass AB, 'Modern Public Trust Principles: Recognizing Rights and Integrating Standards' 82 *Notre Dame Law Review* (2006), 699.

[76] https://plato.stanford.edu/entries/rawls/#JusFaiJusWitLibSoc on 12th September 2018.

[77] https://plato.stanford.edu/entries/rawls/#JusFaiJusWitLibSoc on 12th September 2018.

[78] https://plato.stanford.edu/entries/rawls/#JusFaiJusWitLibSoc on 12th September 2018.

[79] Rawls J, *A theory of justice*, Harvard University Press, Cambridge, 1971, 3.

[80] Rawls J, *A theory of justice*, 15.

principle states that each person has the same indefeasible claim to a fully adequate scheme of equal basic liberties, which is compatible with the same scheme of liberties for all.[81] It asserts that all citizens should have the familiar basic rights and liberties such as freedom of conscience and freedom of association, freedom of speech and liberty of the person, the rights to vote, to hold public office, to be treated in accordance with the rule of law. Firstly, the principle grants these rights and liberties to all citizens equally, as justice requires equal rights for all, in all normal circumstances. The basic rights and equal liberties of persons are given priority over economic policy and they must not be traded off against other social goods.[82] Another characteristic feature of Rawls's first principle is that it requires fair value of the political liberties. The political liberties are a subset of the basic liberties. Rawls requires that citizens should be not only formally but also substantively equal.[83] The second principle of justice as fairness states that social and economic inequalities are to satisfy two conditions[84]: Fair equality of opportunity and the difference principle. Under Rawls's hypothetical "original position of equality," persons should imagine themselves in an unknowing state when making decisions affecting other people. They should imagine themselves as acting from behind a "veil of ignorance" where no one knows their own social status, wealth, intelligence, fortune and natural skill.[85] As no one is able to create principles to suit his particular condition, the principles of justice are the result of a fair agreement or bargain."[86] Rawls tasks courts with defending a higher law based upon principles of justice that make up the overlapping consensus. According to Rawls therefore, the court has two important roles; the first is being the defender of a higher law and the second is an educative

[81] Rawls J, *Justice as fairness: A restatement*, 2ed, Harvard University Press, Cambridge, 2001.
[82] https://plato.stanford.edu/entries/rawls/#WorRawCitEnt on 13 September 2018.
[83] Rawls J, *Justice as fairness: A restatement*, 44.
[84] Rawls J, *Justice as fairness: A restatement*.
[85] Rawls J, *A theory of justice*, 11.
[86] Rawls J, *A theory of justice*, 11.

task that is, the court helps form basic assumptions regarding society to citizens.[87] The Court, as the epitome of public reason, gives life to the principles that should bind a people.[88] Rawls' theory mentions the idea of distributive justice which requires that the courts should take a liberal view of the presuppositions of law and thus interpret them as to distribute benefits to the largest number of people so that the harsh effects of the technicalities of law are contained within the narrowest limits.[89] The justice-as-fairness approach provides a useful framework for courts seeking just outcomes.[90] Justice is served through a process which bases the probable cause determination on the balancing of personal and societal interests in a way that seeks to maximise the common good.[91] Judges may thus find that their opinions stand the test of time by applying the original position analysis.[92] This approach would enable the judiciary to impartially address the social and political realities of the twenty first century[93] such as environmental concerns. The theory creates a possibility to devise an improved approach to judicial decision-making that would better serve Kenya's core principles of liberty and equal justice for all. Some critics argue that Rawls's vision is too limited as it cannot be assumed that individuals are not amoral or inevitably selfish. The possibility of a just and peaceful future is merely utopian. Rawls addresses this through what he calls a realistic utopia, that by showing how the social world may realise the features of such a world it provides a long-term goal of political endeavour.[94] Some view Rawl's theory as addressing a very limited question. The principles of justice were intended by him to apply

[87] Foss JC, 'John Rawls and the Supreme Court: A Study in Continuity and Change' PhD Thesis, Baylor University, May 2011.
[88] Freeman S, 'Constitutional Democracy and the Legitimacy of Judicial Review' 9 *Law and Philosophy*, (1991), 327.
[89] Cardozo B, *The nature of judicial process*, Yale University Press, 1949, 149-52.
[90] Antkowiak B A, 'Saving Probable Cause' 40 *Suffolk University Law Review* (2007), 599.
[91] Lawrence M A, 'Justice-as-Fairness as Judicial Guiding Principle: Remembering John Rawls and the Warren Court' 81 *Brooklyn Law Review* (2016), 673.
[92] Antkowiak B A, ' Saving Probable Cause', 605-06.
[93] Lawrence M A,' Justice-as-Fairness as Judicial Guiding Principle: Remembering John Rawls and the Warren Court'.
[94] https://plato.stanford.edu/entries/rawls/#ConCit on 12th September 2018.

primarily to a well-ordered society. He failed to address how social institutions should remedy injustices of the past, and what should be done when people live under unjust arrangements.[95] Amartya Sen[96] criticises this theory by stating that ideas about a perfectly just world do not help reduce actual existing inequality. He also adds that Rawls over emphasises on the notion of institutions as guarantors of justice, failing to consider that human behaviour may affect institutions' ability to maintain a just society. This theory can be applied by state agencies including courts in solving environmental disputes. By using the hypothetical veil of ignorance, judges are better placed to decide cases fairly, expending justice to the parties. As defenders of higher law and society's educators, courts have a big task in distributing justice through decisions they make. Fair decisions as per this theory would have a ripple effect setting effective environmental precedents and principles for application by present and future generations. By so doing, the judiciary is collectively able to combat issues such as industrial pollution and climate change and attain sustainable development.

[95] Føllesdal A, 'John Rawls' Theory of Justice as Fairness' PluriCourts Research Paper (2014), 14-18.
[96] Amartya S, 'The Idea of Justice' Harvard University Press (2009), 52–74.

CHAPTER THREE

3.0 ANALYSIS OF THE LEGAL AND REGULATORY FRAMEWORK

3.1 Introduction

This chapter discusses the legal, regulatory and institutional framework for the right to clean and healthy environment. It involves examining the current regulatory framework on State agencies and principally the Kenyan Courts, sustainable development and environmental protection in Kenya and the adequacy of the regulatory framework in Kenya. The judiciary is tasked with spearheading state agencies implementation of the law in Kenya.[97] In this regard, the law in itself is seen as the best way to deal with environmental problems.[98] It achieves this by creating the machinery, or procedures for implementing the policy choices.[99] In this context, law provides policies and legislation that will regulate and maintain the stability of the natural resources and ecosystems. So far, it remains the meaningful option for translating sustainable development policies into actions.[100] The legal framework establishes a framework of rules and procedures designed to guide action for resolving environmental problems as well as preventing adverse changes.[101]

3.2 National Legal Framework

Kenya's commitment to protection of the environment is shown by the preamble of the constitution, which states that Kenya is respectful of the environment as its heritage and is determined to sustain it for the benefit of future generations.[102] The right to a clean and

[97] International Records Management Trust, *Managing records as reliable evidence for ICT/ E-Government and freedom of information, Kenya court case study*, August 2011.
[98] Ebeku K, 'Judicial contributions to sustainable development in developing countries: An overview' 15 *Environmental Law and Management,* 13 (2003), 168-74.
[99] Ojwang JB, 'Environmental law and political change in Kenya' 1 *Ecopolicy Series* (1991), 9.
[100] Ebeku K, 'Judicial contributions to sustainable development in developing countries: An overview'.
[101] Dyreck J, *Rational Ecology: Environmental and Political Economy*, 1ed, Blackwell Publishing, Oxford, 1987, 137.
[102] Preamble, *Constitution of Kenya* (2010)

healthy environment is enshrined under Article 42[103], which includes the right to have the protected for the benefit of present and future generations and the right to have environmental obligations fulfilled.[104] The Constitution dedicates a whole chapter to Land on Environment[105], defining land and natural resources.[106] Chapter Five on Land and Environment gives principles of land policy. A distinction between public, community and private land is made in Part 1 of Chapter Five.[107] The state is allowed to regulate the use of land or any interest in or right over any land, in the interest of defence, public safety, public order, public morality, public health, or land use planning.[108] The state is obliged to ensure sustainable exploitation utilisation, management and conservation of the environment and natural resources.[109] The state acknowledges the importance of sustainable use and exploitation of land, a positive move toward combatting industrial pollution.

Where a person alleges that their right to a clean and healthy environment has been or is being denied, violated, infringed or threatened may apply to the Environment and Land court for redress.[110] In such an instance, the court may make orders or give directions to prevent, stop or discontinue any act or omission that is harmful to the environment, compel any public officer to take measures to prevent or discontinue such act or omission or provide compensation for any victim of a violation of the right to a clean and healthy environment.[111] An applicant in such a case does not have to demonstrate that any person has incurred loss or suffered injury.[112] The constitution provides for the establishment of superior courts with the

[103] Article 42, *Constitution of Kenya* (2010); Section 3(1), *Environmental Management and Coordination Act* (Cap 387 2012)
[104] Article 42(a), *Constitution of Kenya* (2010).
[105] Chapter 5, *Constitution of Kenya* (2010).
[106] Article 260, *Constitution of Kenya* (2010).
[107] Articles 61-64, *Constitution of Kenya* (2010).
[108] Article 66(1), *Constitution of Kenya* (2010).
[109] Article 69(1)(a), *Constitution of Kenya* (2010).
[110] Article 70(1), *Constitution of Kenya* (2010).
[111] Article 70(2), *Constitution of Kenya* (2010).
[112] Article 70(3), *Constitution of Kenya* (2010).

status of the high court to hear and determine disputes relating to employment and labour relations and the environment and the use and occupation of and title to land.[113] The ELC may adopt and promote alternative dispute resolution mechanisms.[114] However the use of these mechanisms should not be contrary to the Bill of Rights, should not be repugnant to justice and morality and should not be inconsistent with the Constitution or other written law.[115] Establishment of the Environment and Land Court shows Kenya's commitment to environmental protection.

The Constitution enjoins the ELC to be guided by several constitutional principles in exercising its judicial authority.[116] One of the principles that is to guide the court is sustainable development.[117] The importance of sustainable development is emphasised in the Constitution of Kenya 2010 which lists sustainable development as a national value and principle of governance.[118] Land in Kenya should be held, used and managed in an equitable, efficient, productive and sustainable manner in accordance with principles of sustainable and productive management of land resources.[119] The court in *Waweru v Republic*[120] acknowledged the importance of sustainable development and said that the government through its ministries and agencies is obliged by law to approve sustainable development. By making sustainable development a constitutional principle, Kenya is making great strides in achieving sustainable development. Courts are relevant institutions in the attainment of sustainable development as they are supposed to incorporate the principle in decision making. The Constitution of Kenya gives the organization of Kenyan courts. It divides courts into two; Superior courts and Subordinate courts. Superior courts consist of the Supreme Court,

[113] Article 162(2*), Constitution of Kenya* (2010).
[114] Article 159 (2)(c), *Constitution of Kenya* (2010).
[115] Article 159(3), *Constitution of Kenya* (2010)
[116] Article 159(2), *Constitution of Kenya* (2010)
[117] Article 10 (2) (d), *Constitution of Kenya* (2010)
[118] Article 10 (2) (d), *Constitution of Kenya* (2010)
[119] Article 60(1)(c), *Constitution of Kenya* (2010)
[120] (2006) eKLR.

the Court of Appeal and High courts. Subordinate courts include the Magistrates courts; the Kadhis' courts, the Court Martial and any other court or tribunal established by any legislation.[121]

3.2.1 The Environment and Land Court Act

Post 2010, the Environment and Land Court Act was enacted pursuant to Article 162(2) (b) of the Constitution of Kenya 2010.[122] The overriding objective of the Act is the facilitation of the just, expeditious, proportionate and accessible resolution of land and environmental disputes.[123]The Act establishes the ELC, granting it jurisdiction to hear disputes related to the environment and land including disputes: relating to environmental planning and protection, climate issues, land use planning, title, tenure, boundaries, rates, rents, valuations, mining, minerals and other natural resources; relating to compulsory acquisition of land; relating to land administration and management; relating to public, private and community land and contracts, choses in action or other instruments granting any enforceable interests in land.[124] The act lists qualifications of appointment of judges of the court which emphasise on competence, knowledge and experience in matters relating to environment and land in addition to being a legal practitioner.[125] Part III of the Act sets jurisdiction as being original, appellate and supervisory.[126] There is enhanced jurisdiction of the Environment and Land Court to even deal with constitutional issues arising out of the environment as the subject matter of litigation.[127] The court is mandated to issue a range of orders and reliefs.[128] Appeals from the court are taken to the Court of Appeal.[129]The ELC is guided by the principles of

[121] Article 169(1), *Constitution of Kenya* (2010)
[122] Section 4(2), *Environment and Land Court Act* (No. 19 of 2011)
[123] Section 3, *Environment and Land Court Act* (No. 19 of 2011)
[124] Section 13, *Environment and Land Court Act* (No. 19 of 2011)
[125] Section 7, *Environment and Land Court Act* (No. 19 of 2011)
[126] Section 13(1), *Environment and Land Court Act* (No. 19 of 2011)
[127] Section 13(3), *Environment and Land Court Act* (No. 19 of 2011)
[128] Section 13(7), *Environment and Land Court Act* (No. 19 of 2011)
[129] Section 16, *Environment and Land Court Act* (No. 19 of 2011)

sustainable development[130] and it is not bound by procedural technicalities[131] so as to ensure efficient and expedient justice for persons. It may also employ alternative dispute resolution mechanisms as per the constitution.[132] A party to the proceeding may act in person or be represented by a duly authorised person.[133] It should be noted that before the promulgation of the Constitution of Kenya 2010, environmental matters were within the jurisdiction of the high courts. As a result, the Environment and Land Court has little jurisprudence in the area of industrial pollution.

3.2.2 Environmental Management and Co-ordination Act (EMCA)

Environmental management and coordination Act (EMCA) as a principle environmental legislation recognises every person's right to a clean and healthy environment and that every person has a duty to safeguard and enhance the environment.[134] It establishes the National Environmental Management Authority (NEMA) [135] which is responsible for exercising general supervision and coordination over matters involving the environment. Suggested is that the government's principle instrument in the implementation of environmental policies.[136] NEMA is in charge of monitoring the environment and its protection as well as preventing degradation of the environment.[137] In addition, the authority has a duty to advise government of emerging conventions and treaties and their application in Kenya's legal framework.[138] EMCA defines sustainable development as development that meets the needs of the present generation without compromising the ability of future generations to meet their

[130] Section 18(a)(i), *Environment and Land Court Act* (No. 19 of 2011)
[131] Section 19(1), *Environment and Land Court Act* (No. 19 of 2011)
[132] Section 20(1), *Environment and Land Court Act* (No. 19 of 2011)
[133] Section 22, *Environment and Land Court Act* (No. 19 of 2011)
[134] Section 3(1), *Environmental Management and Co-ordination Act* (Cap 387 2012)
[135] Section 7, *Environmental Management and Co-ordination Act* (Cap 387 2012)
[136] Section 9(1), *Environmental Management and Co-ordination Act* (Cap 387 2012)
[137] Section 9(2), *Environmental Management and Co-ordination Act* (Cap 387 2012)
[138] Section 9(2)(f), *Environmental Management and Co-ordination* Act (Cap 387 2012)

needs by maintaining the carrying capacity of the supporting ecosystems.[139] In Kenya, these principles have found expression in the Environmental Management and Co-ordination Act. Among the key principles of sustainable development[140] are the following: the principle of international cooperation in the management of environment and natural resources where such resources are shared with other states or where management measures in one state may have adverse or positive consequences in another state, The principle of inter-generational equity and sustainable utilization, ensuring that the present generation utilises and enjoys environment and natural resources without jeopardising the interests of future generations, which requires that those responsible for the degradation of environment and natural resources are responsible for the costs of the corrective measures, including reparations and The precautionary principle, that where there are threats of serious or irreversible damage to the environment, lack of full scientific certainty shall not be used as a reason for postponing cost-effective measures to prevent new or continuing environmental degradation. [141] These principles should guide all decisions made in administrative and judicial domains on matters related to environment and natural resources to ensure sustainable development.[142]

EMCA makes it an offence to discharge any dangerous materials into land, air, water or aquatic environment, to pollute the environment and to discharge any pollutant to the environment.[143] Persons who contravene these provisions are on conviction liable to a fine not exceeding five hundred thousand shillings.[144] The court may also direct such persons to pay the full cost of cleaning up the polluted area and removing the pollution or to clean up the

[139] Section 2, *Environmental Management and Co-ordination Act* (Cap 387 2012)
[140] Section 3(5), *Environmental Management and Co-ordination Act* (Cap 387 2012)
[141] Section 3(5), *Environmental Management and Co-ordination Act* (Cap 387 2012); Section 18, *Environment and Land Court Act* (No. 19 of 2011)
[142] Section 3(5), *Environmental Management and Co-ordination Act* (Cap 387 2012); Section 18, *Environment and Land Court Act* (No. 19 of 2011).
[143] Section 142(1), *Environmental Management and Co-ordination Act* (Cap 387 2012).
[144] Section 142(1), *Environmental Management and Co-ordination Act* (Cap 387 2012).

polluted environment and remove the effects of pollution.[145] EMCA relies on judicial review for its control of the activities of NEMA.

EMCA establishes the National Environment Tribunal[146] which is not bound by the rules of evidence.[147] It makes inquiries into matters forwarded to it from the Authority and makes awards, orders and decisions.[148] Persons aggrieved by decisions or orders given by the Tribunal may appeal to the High Court within thirty days of the decision.[149] The Tribunal and the Environment and Land Court both deal with industrial pollution cases, the former dealing with matters arising from decisions of the authority and the latter having original and appellate jurisdiction over environmental matters.

3.2.3 Environmental Management and Co-ordination (Air Quality) Regulations

The Standards and Enforcement Review Committee in consultation with the relevant lead agencies[150] came up with the Environmental Management and Co-ordination (Air Quality) Regulations to provide for the prevention, control and abatement of air pollution to ensure clean and healthy air.[151] Part II of the Regulations points out general prohibitions. Regulation 5 prohibits persons from acting in a way that directly or indirectly causes or is likely to cause air pollution. The Regulations also puts emission standards and prohibit a person or facility to cause emission of air pollutants in excess of the limits stipulated in the Third Schedule of the Regulations.[152] Occupiers or operators of premises are to ensure that exposure of indoor air pollutants does not exceed the exposure limits set out under the Factories and Other Places

[145] Section 142(2), *Environmental Management and Co-ordination Act* (Cap 387 2012).
[146] Section 125(1), *Environmental Management and Co-ordination Act* (Cap 387 2012).
[147] Section 126(1), *Environmental Management and Co-ordination Act* (Cap 387 2012).
[148] Section 126(2), *Environmental Management and Co-ordination Act* (Cap 387 2012).
[149] Section 129(1), *Environmental Management and Co-ordination Act* (Cap 387 2012).
[150] Section 78(1), *Environmental Management and Co-ordination Act* (Cap 387 2012).
[151] Rule 3, *The Environmental Management and Co-ordination (Air Quality) Regulations* (2009).
[152] Rule 15, *The Environmental Management and Co-ordination (Air Quality) Regulations* (2009).

of Work other known as 'Hazardous Substances' Rules.[153] The Authority is empowered to carry out monitoring of ambient air quality or request a relevant lead agency to do so on its behalf.[154] It is an offence to contravene the provisions of the Regulations and persons who do are liable on conviction imprisonment or a fine as provided by the act.[155] The Authority may also charge penalties of ten thousand shillings for every parameter not being complied with, per day to persons who fail to comply with standards set out in the Regulations until such persons demonstrate full compliance.[156]

Waste Management Regulations oblige every industrial undertaking to mitigate pollution by installing anti-pollution technology for the treatment of wastes emanating from the industry.[157]

3.3 International Legal Framework

Stockholm declaration of 1972 on human environment does not have effect on the declarants but has to a large extent influenced public opinion. The "African Charter on human and Peoples' rights" (1981), does provide for people to have a "generally satisfactory environment' being the first regional human rights body to address the issue, on clean environment. There are certain technical and procedural problems in implementing this charter, mostly in relation to a favourable habitat. The "World Commission on Environment and Development" came up with similar proposal in regards to environmental rights in 1987. The Commission was mandated to draft a global agenda for the protection of the environment and development for 21st Century and beyond. The first principle proposed by the Commission read as follows: "All human beings have the fundamental right to an environment adequate for their health and wellbeing".

[153] Rule 29(1), *The Environmental Management and Co-ordination (Air Quality) Regulations* (2009).
[154] Rule 58, *The Environmental Management and Co-ordination (Air Quality) Regulations* (2009).
[155] Rule 76, *The Environmental Management and Co-ordination (Air Quality) Regulations* (2009).
[156] Rule 77, *The Environmental Management and Co-ordination (Air Quality) Regulations* (2009).
[157] Rule 17, *Environmental Management and Co-ordination (Waste Management) Regulations* (2006).

There are some critical concepts of environmental protection which relate to the same principle, namely; inter-generational equity, sustainable development, information rights and access to judicial institutions and the early warning systems, all being proposed by the WCED[158] Legal Experts Group in 1992 at the convention convened in Rio de Janeiro.[159] All principles proposed by WCED Legal Experts were adopted, with the notable exception of the recommendations made in respect of the ranking of the right to a favourable habitat. Principle 1 talks of human being as a centre of concern for sustainable development, while Principles 2 and 3 talks of the right to growth, and the right to a favourable environment is not substantively addressed. We therefore see a situation where development objectives override environmental rights. Principle 2 recognises the State sovereignty as regards the manner of exploitation of their resources. It states as follows: The protection envisaged under the "Rio declaration" is limited to problems associated with trans boundary environmental pollution, this fails to deal with possible abuse of sovereign states within their own jurisdictions. It is urgent to deal with current environmental degradation, which have led to a point where the survival of mankind being threatened.

Ozone layer depletion, global warming, desertification, marine resource depletion, nuclear weapons testing, and nuclear reactor accidents have been tackled in recent times by means of treaty undertakings. Although sustainable use of natural resources has become an internally accepted environmental principle, its realisation does not seem to be within reach. The right to a favourable environment may have done well at regional levels in comparison to global levels. The mechanisms of dispute settlement in the regional human rights instruments do not entitle individuals to institute action directly before such organs. Globally or regionally there is no forum where individuals are given locus standi. The "American Convention on

[158] Our common future. Report of the World Commission on Environment and Development. G. H. Brundtland, (Ed.). Oxford: Oxford University Press

[159] United Nations Conference on Environment and Development (UNCED), Rio de Janeiro, 3-14 June 1992.

Human Rights" has comprehensively looked at individual rights to a favourable environment, yet the role of individuals in seeking the enforcement of such a right is not clearly established. Presently in the set-up of international law, only states can invoke the environmental rights of their citizens. There are several cases where environmental rights of nationals formed part of the state claims, these are Trail Smelter Arbitration, Corfu Channel Case, Nuclear Test Case, and the Chernobyl Accident Case. There have been national decisions which dealt with rights of individuals, groups, peoples and even generations. Even though there is widespread environmental awareness, states are still hesitant to fully implement and accept some principles of environmental law. The existing substantive and procedural laws are not enough to confirm the right of individuals and groups to a healthy environment.

We therefore lack clear and enough legal provisions in the existing international law on human rights, for the protection of the right to a conducive environment, making it necessary to include such rights in human rights documents as fundamental rights. The Stockholm declaration on human environment, and subsequent developments in the area involving environmental protection at global levels, including environmental rights have been in contention for many years, a proper analysis should be done to get the right solution. There is an increase in environmental degradation through advanced technology, and under-development on the other hand, all these need to be checked by going back to the sustainable development goals and global partnerships, an effective way has to devised so as to put in place these principles and objectives bot at international and national levels. Environmental issues are of a global nature therefore they require global cooperation between states.[160] States have over time developed legal regimes to address environmental issues and their

[160] http://www.scielo.br/scielo.php?script=sci_arttext&pid=S0034-73292015000100191 on 18th March 2018.

impacts such as climate change.[161] Kenya acknowledges the importance of international law rules which are now sources of Kenyan law by virtue of the constitution.[162] This was not the case prior to the promulgation of the Constitution of Kenya 2010 where international law rules and principles were only considered to form part of Kenyan law by domestication. General rules of international law form part of Kenyan laws.

3.3.1 International Laws

In the global village, Kenya is a signatory to, and has ratified the African Charter on Human and Peoples Rights.[163] Article 24 of the charter grants all people the right to a general satisfactory environment favourable to their development. Article 26 obliges states to guarantee the independence of courts as well to allow the establishment and improvement of appropriate national institutions entrusted with the protection of the rights and freedoms guaranteed by the charter. The 1972 Stockholm Declaration on Human Environment contains principle 21 of general application and represents custom. Principle 21 provides that states have "the responsibility to ensure activities within their jurisdiction or control do not cause damage to the environment of other states or of areas beyond the limits of national jurisdiction.[164] Principle 2 of the Stockholm Declaration[165] posits that the environmental policies of states should enhance the present and future development potential of developing countries and that they should not hamper the attainment of better living conditions for all persons. By using these principles as a guide in the judicial process, the court can attain sustainable development. The Brundtland Report (Our Common Future).[166] The report was

[161] Otieno N, 'Appraising specialised environment courts in the attainment of environmental justice: The Kenyan experience' University of Nairobi, August 2014.
[162] Article 2(5), *Constitution of Kenya* (2010).
[163] *African (Banjul) Charter on Human and Peoples' Rights*, 27 June 1981, No. 26363.
[164] McEldowney JF, McEldowney S, 'Environment and the Law: An introduction for environmental scientists and lawyers' *Pearson Longman Publishing* (1996), 37.
[165] UNGA, *United Nations Conference on the Human Environment* (Stockholm Declaration), UN A/RES/2994 (June 16 1972).
[166] The World Commission on Environment and Development, *Our common future*.

published by the World Commission on Environment and Development.[167] The Brundtland Report stated that critical global environmental problems were as a result of the enormous poverty of developing states and the non-sustainable patterns of consumption and production in developed countries.[168] It called for a strategy that united development and the environment which was referred to as sustainable development.[169] Sustainable development was defined as development "that meets the needs of the present without compromising the ability of future generations to meet their own needs."[170] It is a principle of law with normative status.[171] On a recommendation by the World Commission on Environment and Development, the United Nations General Assembly held The United Nations Conference on the Environment and Development (also known as the Earth Summit) in 1992 in Rio de Janeiro, Brazil.[172] Five documents enunciating the concept of ecologically sustainable development and recommending a programme of action for the implementation of the concept were signed at the United Nations Conference on the Environment and Development. They were: The Rio Declaration on Environment and Development; Agenda 21; The Convention on Biological Diversity; The Framework Convention on Climate Change; and The Statement of Forest Principles.[173]

3.3.2 The Rio Declaration on Environment and Development[174]

[167] The World Commission on Environment and Development, *Our common future*.
[168] The World Commission on Environment and Development, *Our common future.*
[169] https://www.are.admin.ch/are/en/home/sustainabledevelopment/internationalcooperation/2030agenda/un-milestones-in-sustainable-development/1987--brundtland-report.html on 18th April 2018.
[170] The World Commission on Environment and Development, Our common future.
[171] *Gabcikovo-Nagymaros Project* (*Hungary V Slovakia*), Judgment, 1 ICJ Reports 1997.
[172] Boer B, 'The Globalisation of Environmental Law: The Role of the United Nations' 20 *Melbourne University Law Review* (1995), 101.
[173] Sands P, *Principles of International Environmental Law*, 2ed, Cambridge University Press, Cambridge, 2003, 52 – 53.
[174] UNGA, *Report of the United Nations Conference on Environment and Development* (Rio Declaration on Environment and Development), UN A/CONF.151/26 (August 12 1992).

Sustainable development was coined at the 1992 Rio Earth Summit with the environmental adjudicative bodies being part of the effort in achieving the vision based on the technical and scientific nature of the environmental litigation.[175] The Rio Declaration comprises of 27 Principles which have had a significant impact on development of philosophy and law in environmental field.[176] Many of the principles have been incorporated into global and regional treaties, as well as in soft law instruments. Some have been included in national Constitutions and statutes which has led to their enforceability by states as done by Kenya.[177] These principles should guide all decisions made in administrative and judicial domains on matters related to environment and natural resources to ensure sustainable development. The Rio Declaration states at that, "Human beings are at the centre of concerns for sustainable development. They are entitled to a healthy and productive life in harmony with nature."[178] Principle 3 states that "the right to development must be fulfilled to equitably meet developmental and environmental needs of present and future generations." the concept of sustainable development in the Rio Declaration emphasises upon human needs as their developmental needs in accordance with nature. Principle 4 of the Rio Declaration states that in order to achieve sustainable development, environmental protection shall constitute an integral part of the development process and cannot be considered in isolation from it.[179] To achieve sustainable development environmental protection should constitute an integral part of the development process and should not be considered in isolation from it.[180]

[175] UNGA, *Rio Declaration On Environment And Development.*
[176] UNGA, *Rio Declaration On Environment And Development* .
[177] Section 3(5), *Environmental Management and Co-ordination Act* (Cap 387 2012).
[178] Principle 1, UNGA, *Rio Declaration on Environment and Development.* http://www.un.org/documents/ga/conf151/aconf15126-1annex1.htm on 5 August 2018.
[179] *Rio Declaration on Environment and Development* (1992).
[180] *Rio Declaration on Environment And Development* (1992)

3.3.3 Agenda 21

Agenda 21 is the programme of action for sustainable development.[181] It is in this respect that Agenda 21[182] lays emphasis on governments' responsibilities to involve their publics at large, and particular groups, in their environmental protection programmes. Although Agenda 21 itself is not legally binding, its elaboration of sustainability in its comprehensive principles and predatory norm constitutes a minefield for the development of new rules setting out enforceable thresholds for permissible environmental conduct.[183]The United Nations Framework Convention on Climate Change (UNFCCC) recognises that states have the right to sustainable development and encourages them to promote sustainable development.[184]The Johannesburg Principles on the Role of Law and Sustainable Development (the Johannesburg Principles) are founded on the premise that an independent judiciary should act as the "guardian of the Rule of Law to implement and enforce applicable international and national laws ensuring that the inherent rights and interests of succeeding generations are not compromised. The Aarhus Convention[185] is an environmental treaty which is directed mainly at those states forming part of the United Nations Economic Commission for Europe;[186] however it is open for ratification by other states.[187] The Convention seeks to address three areas: access to information,[188] public participation in decision-making,[189] and access to justice.[190] These three core areas are reiterated in the Rio Declaration and Kenyan

[181] http://www.un.org/esa/sustdev/documents/agenda21/english/Agenda21.pdf on 11th December 2018
[182] https://sustainabledevelopment.un.org/outcomedocuments/agenda21 on 11th September 2018
[183] Odhiambo M, 'The Role of Courts in Environmental Management: The case of Kenya' LLM Thesis, The University of Nairobi, July 2003.
[184]Article 3(4), *United Nations Framework Convention on Climate Change* (May 9 1992) FCCC/INFORMAL/84.
[185] *Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters* (Aarhus Convention), 25 June 1998, 37770.
[186] Preamble and Article 17, *Aarhus Convention*.
[187] Article 19(3), *Aarhus Convention*.
[188] Article 4, *Aarhus Convention*.
[189] Article 6, *Aarhus Convention*.
[190] Article 9, *Aarhus Convention.*

Constitution 2010. They are vital in the court process as efficient and expedient court processes promote environmental justice.

3.4 Institutional Framework

State agencies, principally the courts, are mandated to interpret and apply the laws of the country, to adjudicate and make the final determination on questions of a civil, criminal and admiralty nature. Because of this function, the Judiciary is referred to as the custodian of justice. It is the final arbiter in all matters touching and concerning the exercise of power, the protection of legal rights and the enforcement of duty.[191]Before promulgation of the Constitution of Kenya 2010, environmental matters in Kenya were left to the private law realm.[192] Environmental cases were based on Common law under causes of action in tort such as nuisance, trespass and negligence; remedies available were certiorari, prohibition, mandamus and declaration.[193] Procedurally, access to environmental justice was limited due to narrow interpretation of locus standi as aggrieved persons had to prove injury.[194] One could not institute claims on behalf of others or a group. Parameters of common law were too limiting for environmental cases thus leading to the development of environmental rights in the Constitution. Currently, environmental protection is catered to in the Constitution and enabling legislations. Rules of locus standi are now more flexible and applicants do not have to demonstrate that they have incurred loss or suffered injury.[195] A new structure of courts was created by the Constitution of Kenya (2010). The Supreme Court is the highest court of the land and its decisions bind all courts.[196] It has appellate jurisdiction to hear appeals from

[191] Kuloba R, *Courts of Justice in Kenya*, Oxford University Press, Nairobi, 1997.
[192] Odhiambo M, 'The Role of Courts in Environmental Management: The case of Kenya' LLM Thesis, The University of Nairobi, July 2003.
[193] Odhiambo M, 'The Role of Courts in Environmental Management: The case of Kenya' LLM Thesis, The University of Nairobi, July 2003.
[194] Odhiambo M, 'The Role of Courts in Environmental Management: The case of Kenya' LLM Thesis, The University of Nairobi, July 2003.
[195] Article 70(2) (a), *Constitution of Kenya* (2010).
[196] Article 163(7), *Constitution of Kenya* (2010).

the Court of Appeal and any other court or tribunal prescribed by national legislation.[197] Appeals from the Court of Appeal can be on cases involving interpretation of the Constitution or any other case in which both the Supreme Court and Court of Appeal certify to be a matter of general public importance.[198] The Court may also give and advisory opinion when requested by the national government, any county government or any state organ with respect to matters concerning county government.[199]Article 164 of the Constitution establishes the Court of Appeal.[200] The court has jurisdiction to hear and determine appeals from the High Court and any other court or tribunal whose appeals lie to the Court of Appeal.[201]High Courts are established by Article 165 of the Constitution. The Court has unlimited original jurisdiction to hear both civil and criminal matters, jurisdiction to determine whether fundamental rights under the Bill of Rights have been infringed, threatened or violated, jurisdiction to hear appeals from tribunals regarding appointment or removal of officials, jurisdiction in matters regarding interpretation of the Constitution and supervisory jurisdiction over subordinate courts.[202]Magistrates' courts have jurisdiction to hear both criminal[203] and civil matters.[204] The Courts are also empowered to hear environment and land matters.[205] This position however changed as the Court of Appeal in Malindi Law Society v Attorney General & 4 others held that Section 26 of the ELC Act was unconstitutional and the conferment of jurisdiction to deal with land and environment matters to Magistrates' Courts is inconsistent with the Constitution.[206] Jurisdiction to hear and determine land and environment matters is limited to the ELC. Following the court of Appeal's decision, the

[197] Article 163(3)(b), *Constitution of Kenya* (2010).
[198] Article 163(4), *Constitution of Kenya* (2010),
[199] Article 163(6), *Constitution of Kenya* (2010).
[200] Article 164(1), *Constitution of Kenya* (2010).
[201] Section 3(1), *Appellate Jurisdiction Act* (Act No. 12 2012).
[202] Article 165, *Constitution of Kenya* (2010).
[203] Section 6, *Magistrates' Courts Act* (Cap 10 2015).
[204] Section 7, *Magistrates' Courts Act* (Cap 10 2015).
[205] Section 26, *Environment and Land Court Act* (No. 19 of 2011).
[206] (2016) eKLR.

Supreme Court ruled that judges of the ELC can only handle environment and land court matters as Article 162 of the Constitution was designed to separate the High Court from specialised Labour and Environment and Land courts.[207]

3.5 Case Law

Conceptualizing environmental protection and delivering decisions that promote sustainable development is important in every jurisdiction. In *MC Mehta v Union of India and others*,[208] on the petition of a citizen, tanneries were restrained from disposing effluents into the River Ganges. In reaching its decision, the court relied on article 48A of the Indian constitution which enjoins the state to protect and improve the environment and article 51A which imposes the duty on every citizen to protect the environment. The court also relied on the Stockholm Declaration.[209] Another judicial contribution in the field of sustainable development is in the celebrated decision of the supreme court of Philippines in *Minors Oposa v Secretary of the Department of Environmental and Natural Resources,*[210] where 45 children (represented by their guardians ad litem) instituted a representative action against the government's granting of timber licence agreements beyond the sustainable capacity of the forest. This action was on their behalf and of behalf of future generations. The defendants challenged the standing of the plaintiffs in bringing the action for themselves and for future generations. The court ruled against the objection of the defendants and held that the agreements were contrary to the concept of sustainable development as recognised by the constitutional right of a balanced and healthy environment. In *Shell v Farah*[211], the Nigerian Court of Appeal awarded compensation to victims of oil-related environmental damage and

[207] https://www.businessdailyafrica.com/analysis/Will-Supreme-Court-ruling-end-turf-wars-/539548-3965758-pd4m1kz/index.html on 24th April 2018.
[208] 1988 AIR 1115, SCR (2) 530 (India).
[209] Stockholm Declaration.
[210] 33 ILM 173 (1994) (Philippines).
[211] *Shell Petroleum Development Company ltd v Councillor FB Farah and others* (1995) 3 NWLR 148 (Nigeria).

ordered for the rehabilitation of damaged land. This decision was influenced by the ideas of sustainable development despite there not being reference to any constitutional provision, statute or treaty dealing with the right to environment and sustainable development.

To rehabilitate the damaged land protects the interests of present and future generations in line with the concept of sustainable development. In the celebrated *Gabcikovo Nagymaros*[212] case, Judge Weeramantry noted that the principles of international law, the right to development and the right to environmental protection are likely to conflict in their application with each other unless courts could identify and apply a principle of reconciliation. The court took the opportunity to reaffirm its statements that the environment 'is not an abstraction but represents the living space, the quality of life and the very health of human beings, including generations yet unborn'; and that the 'general obligation to ensure that activities within their jurisdiction and control respect the environment of others states or areas beyond national control is now part of the corpus of the international law of the environment'.[213] Sustainable development provides the basis of reconciling these potentially conflicting principles; a mediating principle which aids judicial decisions and provides scope for progressive legal development.

Such decisions show the attitude of judiciaries in the implementation of sustainable and generally in the protection of the environment as interpreters of national and international laws. By applying the guiding principles of sustainable development in rendering decisions, judges contribute largely to the promotion and enforcement of the principle of sustainable development.[214]

[212] *Gabcikovo-Nagymaros Project.*
[213] Legality of the Threat or use of Nuclear Weapons, Advisory Opinion, ICJ Reports (1996), 29.
[214] Ebeku K, 'Judicial Contributions to Sustainable Development in Developing Countries: An Overview'.

3.6 Conclusion

Evidently, Kenya has an extensive framework which provides for the protection of the environment, sustainable development, and role of state agencies in attaining sustainable development as well as sanctions available to polluters and remedies available to victims. Kenya has adopted institutional and effective legislative mechanisms to protect the environment. The discussion also sheds light on the Environment and Land Court and its functions. The Constitution addresses environmental protection and sustainable development at large. This chapter also discusses a number of international instruments most of which uphold the principle of sustainable development. The principle's importance is emphasised in the instruments and the problem of industrial pollution can be solved by incorporation of sustainable development in legislation and judicial processes. It is in implementation of the law that the law becomes an effective means of translating sustainable development policies into action.[215] The judiciary's role in pollution and natural resource management is secondary to that of executive and administrative agencies. Although secondary, the role of the judiciary is significant enforcing compliance with rules and standards. Because courts are final arbiters of actions to enforce environmental laws they can be instrumental in promoting compliance. Courts also are often given the role of reviewing the legality of decisions made by administrative agencies. Thus, the judiciary has a crucial and unique role in the management of pollution ensuring that it operates under the rule of law.[216]

[215] Ebeku K, 'Judicial Contributions to Sustainable Development in Developing Countries: An Overview'.
[216] http://siteresources.worldbank.org/INTRANETENVIRONMENT/Resources/244351-1279901011064/GuidanceNoteonRoleofJudiciary.pdf on 18th January 2018

CHAPTER FOUR

4.0 AN ANALYSIS OF KENYAS JURISPRUDENCE AND COMPARATIVE STUDY

4.1 Introduction

The deliberations in chapter three largely dealt with the legal and regulatory framework governing the right to clean and healthy environment in Kenya. Kenya has a multitude of laws regarding sustainable development and environmental degradation. Among the county and national governments there are also institutions created to deal with environmental matters such as the Environment and Land Court, the National Environmental Authority and The National Environmental Tribunal. The chapter established that despite having numerous laws, implementation and enforcement are the major issues. The discussion concluded that incorporation of sustainable development in decision making would ultimately combat industrial pollution and lead to attainment of sustainable development. The natural environment is a requirement and a resource for human life. Humans act upon their surrounding natural environment, not only by using its resources, but also simultaneously by changing it and adopting it to meet their economic and other needs. Human activities are now affecting some of the most basic climatic and biological cycles of the planet. Ozone layer depletion, global climate change, trans-boundary shipment of hazardous materials, soil loss, desertification, deforestation, and destruction of wetlands are some of the practical manifestations of the impact of human activity on the environment. Rio de Janeiro in June 1992[217], marked an important milestone in the awakening of the world to the need for a development process that does not jeopardize the future of generations to come. The major achievement of the UNCED[218] includes the adoption of a set of principles to support the

[217] The Rio Declaration is one of five agreements coming out of the United Nations Conference on Environment and Development (also called the "Earth Summit") in Rio de Janeiro in June 1992. Although a non-binding, or "soft law" instrument, the Rio Declaration sets forth important principles of international environmental law, especially sustainable development.

[218] Ibid

sustainable management of forests and two binding conventions designed to prevent global climate change and to conserve biologically diverse species.[219] These conventions have been signed by over 150 nations of the world.[220] In order to capitalise on the experience and knowledge gained, the last stage of an EIA is to carry out an Environmental Audit sometime after completion of the project or implementation of a programme. It will therefore usually be done by a separate team of specialists to that working on the bulk of the EIA. The audit should include an analysis of the technical, procedural and decision-making aspects of the EIA. Technical aspects include: the adequacy of the baseline studies, the accuracy of predictions and the suitability of mitigation measures. Procedural aspects include: the efficiency of the procedure, the fairness of the public involvement measures and the degree of coordination of roles and responsibilities. Decision-making aspects include: the utility of the process for decision making and the implications for development.[221]The audit will determine whether recommendations and requirements made by the earlier EIA steps were incorporated successfully into project implementation. Lessons learnt and formally described in an audit can greatly assist in future EIAs and build up the expertise and efficiency of the concerned institutions. Environmental audits are reviews of a company's operations and processes to determine compliance with environmental regulations. Audits cover buildings and building sites; activities and procedures; industrial and commercial developments; and engineering hazard and operability studies. Environmental audits can be costly but, conversely, failure to carry out such audits can have much more expensive, and sometimes prohibitively expensive, consequences. They are undertaken, for these reasons, when mandated by law or prudence. Two major types of audits are conducted: 1) site inspection related to buying and selling land

[219] The Rio Declaration is one of five agreements coming out of the United Nations Conference on Environment and Development (also called the "Earth Summit") in Rio de Janeiro in June 1992. Although a non-binding, or "soft law" instrument, the Rio Declaration sets forth important principles of international environmental law, especially sustainable development.
[220] Donnelly A. et al 1998
[221] Sadler in Wathern, 1988.

and 2) operational audits carried out either voluntarily in order to avoid or reduce penalties or because they are mandated under law.

Environmental auditing started developing at the beginning of 70s of the past century in the United States of America and in the Western Europe. In that period the developed countries were adopting the environmental legislation in order to reduce the harmful consequences of the companies' actions that had affected the environment. At the beginning the environmental auditing involved reviews of independent experts assessing whether companies operated in line with the demands of the environmental legislation. Presently the companies decide to undertake environmental audits in order to obtain an independent external assessment whether the management has created efficient environmental policy and provided for acceptable environmental attitude. The most important results of the environmental audits are recommendations how a company can reduce the damaging impacts on the environment in an efficient and cost-benefit manner, and how it can in a long-term save funds by using environment friendly technology. The implementation of the environmental audits is not obligatory for the companies never the less it shows high awareness of the companies on their social responsibilities and an overall attitude towards the environment. Greater awareness and understanding of environmental issues have led the supreme audit institutions to recognise the key role of the state in defining appropriate measures for reducing the damaging consequences for the environment; for the efficient and effective solutions of environmental problems. The increasing concern has influenced the SAIs to introduce the environmental auditing in the public sector. Environmental auditing in the public sector encompasses independent and objective assessments whether: The governments implement the international agreements on environmental protection, There is a complete and appropriate institutional framework for the efficient protection and preservation of the environment, There is an efficient control over the implementation of the national legislation

in order to realise the set strategic objectives of protection and preservation of the environment, There is provided for the appropriate use of public funds for the assessment and for solving of the environmental problems.

Most of the governments around the world have recognised the importance of the environmental auditing and have started implementing them as a part of their regular work. In some countries the implementation of the environmental audits is mandatory, namely the national legislation defining the state auditing determines those audits as obligatory. In order to harmonise the methods of implementing the environmental audits and to exchange the experience in auditing this new area the Working Group on Environmental Auditing has been established within the INTOSAI. The INTOSAI Working Group on Environmental Auditing has developed a strategy for co-operation with the regional organizations of supreme audit institutions. Working Groups on Environmental Auditing operate within six regional organisations of the supreme audit institutions, i.e. AFROSAI (SAIs of African countries), ARABOSAI (SAIs of Arab countries), ASOSAI (SAIs of Asian countries), EUROSAI (SAIs of European countries), OLACEFS (SAIs of Latin-America and Caribbean countries), and ACAG/SPASAI (SAIs of South Pacific countries, Australia and New Zealand). The tasks of the working group are the development of the environmental auditing guidelines, launching initiatives to promote environmental auditing and the assistance in defining environmental auditing

It is of high importance to include the environmental audits in the working programmes of the SAIs, since they can in line with their mandate, by issuing recommendations and remedial measures, contribute to: the implementation of the adopted international responsibilities and conventions on the environment protection, the defining of the unambiguous and harmonised environmental legislation, the creation of the efficient and effective control mechanisms over the implementation of the national environmental legislation and environmental policy, the

implementation of the national environmental programmes and to the allocation of public funds for the redressing the consequences of environmental problems, the efficient and economic use of public funds for the implementation of the central-government and local environmental programmes and for reducing the damaging consequences.

Environmental concerns rarely formed an integral part of development plans, particularly in the Third world countries. The major objective of a company is not only increasing the company's profit but its multidimensional: economic, social and environmental.[222] Supported activities for sustainable development worldwide have increased company's confidence in auditing systems of environmental impact and environmental performance to gain a competitive advantage in strategic positioning. An organization's ability to achieve environmental objectives depends heavily on monitoring the continuous improvement of environmental performance through efficient planning of organizational, economic investments and necessary technological measures. The realization that sustainable development can only be achieved through interdependence between economic growth and environmental quality has compelled some governments to now regard the environment as a valued and an integral part of economic growth. Consequently, environmental issues are now at the vanguard of international and domestic as well as local governments' agenda. However, environmental policies are rarely enforced in some third world countries. The inability of government to implement stringent environmental regulations is compounded by the fact that the goals of most corporate organizations are purely economic. Little attention is devoted to their social responsibilities. How organizations achieve their goals are issues of great social importance, but organisations are more concerned about the elements in their environment that are necessary to their success and less about the social and ethical implications of their actions (Koontz & Weihrich, 1988). There is now a growing interest on

[222] Caraiani, Lungu, Dascălu, Colceag & Guşe, 2010.

environmental issues, but organizational researchers and scholars rarely discuss environmental issues and sustainable development. Issues of discourse have always been ethics, organizational structures and processes, the impact of the environment on organization, etc. Thus, there is a dearth of literature on the impact of corporate activities on the environment. Environmental auditing is not a particularly new discipline; however its popularity as a means of assessing environmental performance has recently increased dramatically.[223] The first compliance audits can be traced back to the United States. Corporations adopted this methodology during the early 1970s in response to their domestic liability laws. The importance of environmental audits has gained momentum greatly during the last few years, with the launch of Eco-Management and Audit Scheme (EMAS) in 1993 and the publication of ISO 14001 in 1996. More and more companies are finding it valuable to audit their environmental impacts.[224]

An infringement to the right to clean and healthy environment is mainly ascribed to development and industrialization[225] in Kenya led to the enactment of the EMCA and recognition of environmental rights in the Constitution of Kenya 2010. Further, Kenya established the Environment and Land Court to deal with matters relating to land and the environment. The case of New Zealand gives an interesting insight with regard to specialised environmental court thus has had a lot experience in the area of environmental adjudication.[226] Environmental Court in New Zealand has existed for a long time and is considered one of the oldest environment courts in the world and has provided, and continues to provide, a model for other jurisdictions to examine.[227] The court is also renowned for

[223] Welford, 2002.
[224] Ibid
[225] https://www.ncbi.nlm.nih.gov/pmc/articles/PMC4012528/ on 18th May 2018.
[226] Warnock C, 'Reconceptualising the Role of the New Zealand Environment Court' Journal of Environmental Law, 26 (2014), 507–518.
[227] Pring G, Pring C, 'Greening Justice: Creating and Improving Environmental Courts and Tribunals' World Resources Institute (2009).

incorporating sustainable development principle in its workings, entitling it as the adjudicator of sustainability. It is for these reasons that this study chooses to focus on New Zealand's experience to determine whether Kenya's ELC is relevant in addressing industrial pollution and attaining sustainable development. This comparative study is worth undertaking as Kenya requires knowledge on how the environment and land court can attain sustainable development.

A glaring difference between the New Zealand Environmental Court and the ELCs of Kenya is in the structure of the court systems of both countries. In New Zealand's court structure, courts are divided into two; courts of general jurisdiction and specialised courts and tribunals.[228] The organogram from the apex is Supreme Court, the Court of Appeal, the High courts and district courts.[229] Outside the pyramid for courts of general jurisdiction are specialist courts and tribunals. These include the Employment Court, the Environment Court, the Māori Land Court, the Waitangi Tribunal, Coroners Courts, the Courts-Martial Appeal Authority and others. Appeals from specialised courts and tribunals are taken to courts of general jurisdiction.[230] For example appeals from the Environment are taken to the High Court.[231]

4.2 The Case of New Zealand

It is arguable that New Zealand was the first country in the world to adopt an environmental management strategy based on sustainability.[232] Enactment of the Resource Management Act (RMA) in 1991, New Zealand's environmental management approach was only considered after a serious reflection of the country's emphasis on economic growth and emphasis on

[228] https://www.courtsofnz.govt.nz/about-the-judiciary/structure-of-the-court-system on 18th September 2018.
[229] https://www.courtsofnz.govt.nz/about-the-judiciary/structure-of-the-court-system on 18th September 2018.
[230] https://www.courtsofnz.govt.nz/about-the-judiciary/structure-of-the-court-system/diagram on 18th September 2018.
[231] Section 299, *Resource Management Act* (1991) (New Zealand)
[232] Birdsong BC, 'Adjudicating Sustainability: New Zealand's Environmental Court', 29 *Ecology Law Quarterly* (2002).

private property rights.[233] By the early 1970s, an extensive bureaucracy of government departments evolved that focused heavily on resource development.[234] These departments were largely focused on development, barely focusing on coordinated planning or analysing the environmental impact of their activities.[235] Policies adopted at the time focused on exploitation of natural resources through.[236] Despite the central government's historical support for economic development and resource utilization, by the early 1980s, New Zealand had enacted a number of statutes to address environmental and natural resource issues.[237] This is similar to Kenya's experience before the enactment of the EMCA in 1999 where Kenya lacked a comprehensive environment regulatory legislation.[238] New Zealand had numerous statutes, policies and institutions which had no unifying principle.[239] By the 1980s, environmental problems were gaining global attention which led to conversation on the need to address these issues. Various forums were held such as the World Conservation Strategy endorsed by New Zealand's government[240] in 1980 and later the World Commission on Environment and Development[241] in 1987 commonly known as the Brundtland Commission, which advocated the concept of sustainability as a vital principle in environmental policy. It was the workings of these groups that substantially informed New Zealand's emphasis on sustainable development in the Resource Management Act. The Brundtland Commission's Report, Our Common Future particularly influenced New Zealand's law makers in using

[233] Birdsong BC, 'Adjudicating Sustainability: New Zealand's Environmental Court', 29 *Ecology Law Quarterly* 26-27.
[234] Memon PA, 'Keeping New Zealand Green: Recent Environmental Reforms' 31 *University of Otago Press* (1993), 26-27.
[235] Birdsong BC, 'Adjudicating Sustainability: New Zealand's Environmental Court', 7.
[236] Smith I, 'The State of New Zealand's Environment' *GP Publications* (1997).
[237] Birdsong BC, 'Adjudicating Sustainability: New Zealand's Environmental Court', 8.
[238] Barczewski B, 'How Well Do Environmental Regulations Work in Kenya?: A Case Study of the Thika Highway Improvement Project' Centre for Sustainable Urban Development (2013).
[239] Palmer G, Palmer K, *Local government law in New Zealand*, 2ed, Thomson Reuters, Wellington, 1993.
[240] International Union for the Conservation of Nature and Natural Resources, World Conservation Strategy: Living Resource Conservation for Sustainable Development (1980).
[241] The World Commission on Environment and Development, Our common future.

sustainable development as a guiding principle in the RMA.[242]This legislation replaced sixty distinct environmental laws with a comprehensive law created to promote the sustainable management of physical and natural resources. It was anchored on three essential policy themes; sustainable management, effects-based management, and public participation and the policy instruments that implement these themes.[243] The RMA governs the management of all land, air and water by regulating the impacts of human activities on the environment and operating to allocate natural resources to various uses.[244]

The New Zealand Environmental Courts(NEC) is not only a court of record but a court of expertise as well. It has two forms of specialisation; the judiciary and lay commissioners with expert knowledge, and the two forms work together. The environmental court reviews every important mechanism for environmental management including regional policy instruments, regional and district plans. The exercise of its authority under the RMA include, the power to make declarations in law[245], the power to review on a de novo basis decisions of local authorities and the power to enforce the duties of the RMA through civil or criminal proceedings.[246] The power of de novo review is key in the Environment Court's power above that of an ordinary adjudicator as it vests it with the authority to set and implement New Zealand's environmental policy.[247] When exercising its power of de novo review, it becomes the primary decision maker and bears full responsibility for exercising discretion and for achieving the purpose id the RMA.[248]It hears primary applications in some circumstances and it also hears appeals from decisions made by local authorities.[249] The Environment court does

[242] Williams DAR, *Environmental and resource management law*, 2ed, Butterworths Publishers, Oxford, 1997.
[243] Birdsong BC, 'Adjudicating Sustainability: New Zealand's Environmental Court', 11.
[244] Warnock C, 'Reconceptualising the Role of the New Zealand Environment Court'.
[245] Section 310-313, Resource Management Act 1991
[246] Section 314-321, Resource Management Act 1991
[247] Birdsong BC, 'Adjudicating Sustainability: New Zealand's Environmental Court', 34.
[248] Wheen N, 'A Response to the Minister's Proposals for RMA Reforms' 20 *Environmental Perspectives* (1998), 4-7.
[249] Section 290, Resource Management Act 1991

not have originating jurisdiction as cases are brought to it by parties.[250] The court is expected to give reasoned judgments. The court is empowered to confirm, amend or cancel regional and territorial planning instruments.[251] It also has the express power to amend or alter subordinate legislation on the merits.[252] This extended power of the court to hear appeals on a de novo basis, make declarations of law and to issue enforcement orders make the court very effective as enforcement is at the discretion of the court and not on local authorities.[253]The RMA enacts a form of the sustainable development concept as the primary legislative purpose in Part 2 of the Act. The act provides that natural and physical resources must be managed in a way so as to enable the economic, social and cultural wellbeing of peoples and communities, while 'avoiding, remedying, or mitigating' any adverse effects on the environment.[254] Part 2 of the RMA contains a list of principles relevant to sustainability which address preservation and protection of natural resources. Some of the principles listed include the protection of outstanding natural landscapes,[255] access to resources, such as the importance of public access to waterways,[256] or the relationship of Maori with their ancestral lands, water and sites.[257] The Environment Court takes a significant role in construing the words and phrases in Part 2 of the RMA in making its decisions. The court in addition to using statutory interpretation mixed with facts employs policy ideas, opinion, discretion and philosophical references to determine the applications before it.[258] Decision making of the court is subject to and should be in accordance with Part 2 of the RMA.[259]The High Court in

[250] Section 276, Resource Management Act 1991
[251] Section 290, Resource Management Act 1991
[252] First Schedule Clause 14, Resource Management Act 1991
[253] Amirante D, 'Environmental Courts in Comparative Perspective: Preliminary Reflections on the National Green Tribunal of India' 29 *Pace Environmental Law Review* (2012).
[254] Section 5(2), Resource Management Act 1991
[255] Section 6(b), Resource Management Act 1991
[256] Section 6(d), Resource Management Act 1991
[257] Section 6(e), Resource Management Act 1991
[258] Davis KC, 'An Approach to the Problems of Evidence in the Administrative Process' 402 Harvard *Law Review* (1952).
[259] Auckland City Council v John Woolley Trust (2008) NZRMA 260 (HC) [47]

Auckland City Council v John Woolley Trust held that Part 2 of the RMA is intended to infuse the approach to interpretation and implementation of the act throughout.

The NEC, crafts environmental and ecological phenomena into concepts that can be used in future interpretation.[260] In exercising its jurisdiction, the court has the status and powers of an ordinary trial court[261] and is not bound by procedural and evidentiary formalities that apply to judicial proceedings in NEC.[262] The NEC has the power to set its own rules of procedure.[263] In addition, the Court is authorised by the RMA to make declarations regarding the existence or extent of any power, function, right or duty provided by the RMA.[264] This power is often invoked to obtain guidance on the division of authority between regional and territorial authorities and in determining whether certain acts by government authorities violate the general duty to avoid, remedy or mitigate adverse environmental effects.[265] The Court is has the power to declare any inconsistencies between provisions in various policy statements and plans and whether any act or omission violates or are likely to contravene any rule in a plan or proposed plan.[266]The NEC's power to make declarations is discretionary and the court has in the past been willing to rule on uncontested issues where it had reason to believe the public interest warranted judicial interpretation.[267]

The NEC broad power to make declarations allows it to make rulings on issues that may otherwise be beyond the scope of its reach in appeals and references.[268]This declaration procedure also allows litigants to resolve disputes at an early stage and prevent the

[260] Winstone Aggregates Ltd v Franklin District Council (NZEnvC Auckland A080/02, 17 April 2002)
[261] Section 278, Resource Management Act 1991
[262] Section 276(2), Resource Management Act 1991
[263] Section 269, Resource Management Act 1991
[264] Section 310(a), Resource Management Act 1991
[265] Sayers vWestern Bay of Plenty District Council (1992) 2 NZ RMA 143
[266] Section 301(b), Section 310(c), Resource Management Act 1991
[267] Canterbury Frozen Meat Co Ltd (1993)1 2 NZ RMA 282
[268] Quarantine Waste NZ, Ltd v Waste Resources Ltd (1994) NZ RMA LEXIS 25

unnecessary use of resources.[269]The Environment Court has wide powers to issue enforcement orders under the RMA. "Any person" may apply to the Court for an enforcement order to: (1) enjoin a person from taking actions that contravene provisions of the RMA, regulations, rules in regional or district plans, or resource consents; (2) enjoin a person from action that "is likely to be noxious, dangerous, offensive, or objectionable to such an extent that it has or is likely to have an adverse effect on the environment"[270]; (3) require a person affirmatively to act to ensure compliance with the RMA's provisions and instruments or to avoid, remedy, or mitigate adverse effects on the environment caused by or on behalf of that person; and (4) compensate others for reasonable costs associated with avoiding, remedying or mitigating effects caused by a person's failure to comply with one of several instruments, including rules in plans or resource consents.[271] This far-reaching authority to issue enforcement orders is a potentially powerful mechanism for enforcing duties that arise under the RMA, particularly the general duty to avoid, remedy or mitigate any adverse environmental effects of applicable plans.[272] Issuance of an enforcement order lies upon the discretion of the court. The Environment Court of New Zealand, in fulfilling its role in sustainability-based environmental decision-making, has developed an active case management system, and, in addition to adjudication through court hearings, uses a range of procedures including a court annexed mediation service. The Court regards mediation and other forms of ADR as particularly well-suited to resolving environmental disputes and the court-annexed mediation service is now widely accepted as a valuable option. Decisions arising from mediation procedures are often more sustainable. Indeed it may be argued that the use of such models of consensus-based decision-making is a cornerstone of

[269] Birdsong BC, 'Adjudicating Sustainability: New Zealand's Environmental Court', 32.
[270] Section 314(1)(a)(ii), Resource Management Act, 1991
[271] Section 314, Section 316, Resource Management Act, 1991
[272] Section 316, Resource Management Act, 1991

sustainability.[273] Under the RMA, NEC has considerable flexibility to regulate its own proceedings. This flexibility, subject to concepts of natural justice and reasonableness, enables the Court to respond readily to the variety and complexity of the cases that come before it by providing a range of dispute resolution techniques and procedures without requiring further legislative amendments. Implementing sustainability is a complex challenge that requires a suite of measures and tools to achieve. The practical experience of the NEC, and in particular its Court-annexed mediation service, is relevant to Kenya in seeking the development of mechanisms to facilitate the prevention and peaceful settlement of environmental disputes such as pollution.[274]

4.3 Conclusion

This Chapter outlines Environmental courts in New Zealand and their experience in implementing sustainability. It gives an insight of what can be borrowed by Kenya's Environmental and Land Court to New Zealand's Environmental Court. To realise the right to clean and healthy environment, the fundamental practical lesson to be learned from the New Zealand experience is the incorporation of sustainable development in both legislation and the judicial process. Looking at both narratives, Kenya mentions sustainable development principles in its laws, it is yet to infuse and incorporate the principles in interpreting and implementation of the law. It is the incorporation of these principles that promote environmental justice in combatting the right to clean and healthy and attainment of sustainable development.

[273] Oliver M, "Implementing Sustainability – New Zealand's Environment Court-Annexed Mediation" Indian Society of International Law (ISIL) Fifth International Conference on International Environmental Law, New Delhi, India, 8 - 9 December 2007

[274] Oliver M, 'Implementing Sustainability – New Zealand's Environment Court-Annexed Mediation'.

CHAPTER FIVE

5.0 FINDINGS, RECOMMENDATIONS AND CONCLUSIONS

5.1 Introduction

The objective of study was to analyse existing international, regional and national laws on the right to a clean and healthy environment, indicating possible legal solutions to some of the existing problems. It also examines the problems being seen owing to the gaps in our existing national laws. In Kenya, the environment issue is envisaged in the Constitution 2010. Sustainable development goals are hand in hand with the basic elements that sustain human life, and environment conservation is one of the first components of the said principle, one of the main issues in regards to environment is the good system of control to both and management of social and economic activities, to avoid generation of harmful levels of pollution and waste, thus it is a fundamental concern to have a favourable environment. The environmental obligations, therefore, require to be more specifically defined for the purpose of being able to enforce laws. Recommendations shall be made for the resolution of some of the difficulties experienced in the course of the study, difficulties found around environmental rights and their mode of application.In regards to justification of the research, if it is acceptable that human beings are endangered with environmental crisis, then the need for protection of this right through a legal framework becomes evident. Unfortunately legality lags behind social change, this seems to be the same for environmental law, which, despite the enlightened public opinion prevailing about environmental protection for more than three decades, failed to provide for binding provisions for the safeguard of environmental rights. Though states have recognized the need for environmental protection, they failed to bind themselves globally. States do always give priority to their sovereignty over resources at the expense of environmental security. There is no doubt as to the urgent

need for effective environmental protection; but existing legal mechanisms do not measure up to the tasks involved.

5.3 Conclusions

This right to clean and healthy environment has become significant in the recent past, its relevance in Africa arose from the dumping of hazardous waste in 1988, around several countries in Africa, by international multinational, whereby the Organisation of African Unity Council of Ministers resolved to condemn the import of toxic wastes to Africa, followed by the convention which banned importation of toxic waste into Africa.[2]More writings have been done on environmental law unlike on favourable and conducive environment. Air pollution is defined by reference to deleterious effects on living resources and ecosystems. What therefore is the standard of care applicable to prevent significant substantial or serious environmental damage? These can include fault, strict liability and absolute liability. However, according to Philippe Sands, "there is no single basis of international responsibility, used in all circumstances, but rather several nature of which depends on the particular obligation in question. This obligation may distinguish between ultra-hazardous activities and other activities. This approach is justified on policy grounds. Dangerous activities are more likely to cause serious environmental damage and absolute obligation more likely to provide an incentive to adopt special precautions when engaging in such activities." Individuals also do have a duty to work together with the government so as to protect and conserve the habitat to make certain there is an ecological sustainable development.

The Constitution of Kenya 2010, does provide for redress mechanisms of rights violation to a" clean and healthy environment" Article 70(1). Courts may therefore make orders it finds suitable to prevent any activity that may cause harm to the habitat. The courts may also instruct any government officer to prevent or stop any activity or omission that may bring about destruction of the environment. Lastly courts can award compensation for persons having suffered violation of their rights. In Africa the case that brought about some pertinent issues in regards to a "clean and healthy environment" was the "Ogoni case", where the "Ogoni people" alleged that the Nigerian military had violated amongst others, Article 2 of "The African Charter", this case was of the oil spills in the Ogoni village which did contaminate the water, soil and air, resulting in skin infections, respiratory ailments, cancer risk and neurological disorders. The content of an ideal right to environment has become a difficult to define. The difficulty comes from the many interpretations given to the term 'environment', note that different jurisdictions who embrace the right to 'environment'[23], gives it qualification using different phrases. Environmental rights can be protected through procedural guarantees, for example the right to recourse before competent frameworks, access to environmental information. The concerns of this approach is that procedural rights are not able to be interpreted to include substantive rights to environment, without over stretching procedural guarantees beyond their logical extent[6]The hurdle on definitional problems has been overcome because many jurisdictions who recognize the right to environment have successfully defined and applied it within their context as evidence by a growing fund of jurisprudence and international practice[7]. This right signifies a composite right which "encompasses a compendium of rights constructed in an effort to protect the environment, as well as human life and dignity[8]".This right does incorporate substantive standards of known economic, cultural and social rights, thus an anthropocentric approach, which is premised on the assumption that environment possess rights found its own inherent

value, separate and different from human use of environment[9].The Kenyan Constitution has made strong allocation on "right of access to information"[10], "freedom of association[11], access to justice[12] and public participation[13], these can significantly play a role in making the constitutional right to environment provision.One outstanding work relating to" human rights and environment" is by Paul Gormely[21], which did expound the issue of the "right to a decent, healthful and pure environment", within the framework of the European Community including UN systems. This looked at the manner in which the council of Europe has tried to deal with environmental issues within its area of operation. Gormley was of the opinion that efforts of the joint forces in Europe specialised on human environment protection issues, can be seen as a precedent, in the implementation of the Stockholm Declaration, and the United Nations' subsequent programmes in the field of environmental protection. He also emphasized the need for global co-operation in making certain the protection of human environment is through legal measures. However his work did not address the element of national environment protection, which is the most important factor in the implementation process for this right.

From these discussions, it is evident that Kenya needs to realistically embrace the right to clean and healthy environment in order to achieve sustainable development. The study concludes that the state agencies but most importantly the judiciary is a relevant player in curbing environmental pollution to attain sustainable development. In addition, strict enforcement of legislation and regulations is necessary. Kenyan courts have barely been litigious on environmental matters.[275] Kenya can learn from New Zealand's approach to environmental protection by emphasizing on the incorporation of sustainable development as a key principle in legislation and judicial law making. Kenya can also increase the scope of

[275] Odhiambo M, 'The Role of Courts in Environmental Management: The case of Kenya' LLM Thesis, The University of Nairobi, July 2003.

the ELC's powers to make declarations on ruling on uncontested issues that are of public interest.

5.2 Recommendations

The right to a decent environment need to be recognised as a specific human right and as a basis for claims on environment in the pursuit of environmental justice. Some of the human rights related bodies that can serve as starting points for the purpose of addressing and seeking environmental justice are the "European Commission on Human Rights". African Commission on Human and Peoples' Rights, and the Inter-American Commission on Human Rights. Generally the effective implementation of environmental provisions in a constitution would entail significant reforms in the overall system of government structure, because of the overlapping of laws and regulations from the various government bodies. Protection and enforcement of environmental rights in Kenya need changes in the existing framework of the judicial attitudes, and, perhaps, judicial structure. The Environmental Management and Co-ordination Act, 1999, has moved a step towards this direction by creating a "National Environment Tribunal" under its section 125. The Act grants legal capacity to any person to sue if his or her right to a healthy environment has been, is being or likely to be contravened. This provision is likely to dramatically widen access to justice in environmental matters. However, it ought to be noted that the responsibility for effective prosecution of environmental claims still remains with the victims of environmental harm. The ability to frame effective suits and effectively prosecute them will continue to be a vital step towards vindicating environmental rights. This entails the use of funds for meeting litigation costs which, in most cases, are prohibitive to the ordinary citizen. In view of this, we recommend amendments to section 24(4) of the Act, to expand the objects of the National Environment Trust Fund established under section 24, to include the provision of legal aid to litigants in environmental claims. These institutional reforms aside, this study has shown that by giving

more thought to the scope of environmental rights, one sees that the right to a decent environment has emerged as a compelling agenda for Kenya's Constitution. Experiences from other countries with similar challenges, however, provide good lessons. Further, given the current political developments, including the on-going referendum debate to change the constitution, and, considering that the Constitution represents the primary duties of the state and government institutions, and further, that it provides the basic structural scheme for government policy, there is need for the proposed review of the Kenya Constitution to circumscribe;

(i) definition of the right to a decent environment as a fundamental human right

(ii) the definition of public interest in the Constitution to incorporate environmental human rights

(iii) provisions protecting the environment as a basic input and foundation for national, social and economic development in a sustainably

(iv) Substantive provisions declaring the crucial environment role, and environmental rights as human rights to the survival of all Kenyans.

(v) Specific and substantive provisions guaranteeing the enforcement of environmental human rights of the individual.

Such provisions must of necessity guarantee every Kenyan the right to live in a decent environment, the fundamental right to participate in all matters relating to the environment, the right of access to environmental information, and the right to have the environment protected for the benefit of present and future generations.

Owing to the developments of human rights and environmental law, environmental rights should now be considered at par with other human rights. Consequently, we consider environmental rights as juridical rights to be enjoyed by all. They are positive rights that carry a corresponding duty on the state and citizens to take steps to protect the environment and not merely to refrain from action. The need to broaden the human rights catalogue to include fundamental environmental rights and remedies is evident.

The Government through the Ministry of environment should look at measures to be put in place to reduce air pollution as follows; The use of methane gas emitted from waste sites as biogas.; access to affordable clean energy for cooking, heating and lighting; shifting clean modes of power generation, shifting to cleaner heavy-duty diesel vehicles and low emissions vehicles and fuels with reduced sulphur content; energy efficiency improvements in buildings and making cities more green and compact, thus energy efficient; increased used of low emission fuels and renewable combustion free power sources.

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