

**THE ROLE OF PUBLIC PARTICIPATION IN REALIZING ENVIRONMENTAL  
RIGHTS IN KENYA**

**PRESENTED BY**

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**DECLARATION**

I, OKOTH EVA MARIA ANYANGO, declare that this research project is my original work and has not been previously presented for the award of a Master’s Degree in any other university.

..... **Date**.....

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..... **Date**.....

Prof. Albert Mumma

Supervisor

## **DEDICATION**

This work is dedicated to all people who have supported me throughout my journey as a student. Special thanks to my family, especially my parents, Mr. Martin Okoth Odhiambo and Mrs. Mary Okoth for their constant financial and moral support, as well as, my husband Mr. Lincoln Ouma Onyango and dear daughter Abigail Adhiambo Onyango for their never-ending motivation. Above all, I thank God for bringing me this far.

## **ACKNOWLEDGMENT**

This work is without a doubt a product of the efforts of many people. I am sincerely indebted to my best friend, Rose Jeptoo Birgen, for the constant support and advice during the entire period of writing this research project. I am also grateful to my supervisor, Prof. Albert Mumma, and the entire team of the School of Law for their support in different ways.

## ABSTRACT

The topic for this research is “*The Role of Public Participation in Realising Environmental Rights in Kenya*”. Accordingly, the overall objective of the study is to evaluate the significance of meaningful public participation in realizing the right to a clean and healthy environment. This research deals with three (3) issues that affect the quality of public participation in Kenya including: lack of access to information; the effectiveness of the existing guidelines for conducting public consultation in environmental decision-making processes and the effectiveness of the judicial and administrative remedies for seeking redress.

The gap in knowledge that this research fills, is the identification of gaps and weaknesses in Kenya’s legal framework on access to information, public participation and access to remedies for redress of grievances. In this way, the research seeks to provide a clear definition of what amounts to effective public participation.

This research project is founded on the theory of sustainable development as propounded in the ‘Brundtland Report’. The research methodology adopted in this study is doctrinal in nature and therefore, largely qualitative. The researcher collected data by conducting an extensive desktop review of existing laws and case laws from data bases in the Kenya Law Reports, the National Environmental Management Authority (NEMA) and the National Environmental Tribunal (NET) websites among other sources.

The findings of this research affirms the hypothesis that the lack of effective public participation in environmental decision making processes in Kenya is attributed to the absence of a comprehensive legal framework on access to information, guidelines on a sound public consultation process and access to remedies. Further, the researcher established that existing laws on access to information, public participation and access to remedies are not being implemented properly by the duty bearers.

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Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters 2161 UNTS 447; 38 ILM 517 (1999).

International Covenant on Economic, Social and Cultural Rights GA res. 2200A (XXI), 21 UN GAOR Supp. (No. 16) at 49, UN Doc. A/6316 (1966); 993 UNTS 3; 6 ILM 368 (1967).

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Rio Declaration on Environment and Development UN Doc. A/CONF.151/26 (vol. I); 31 ILM 874 (1992).

UN Guidelines for States on the Effective Implementation of the Right to Participate in Public Affairs, based on the report (found under symbol A/HRC/39/28).

### **C. REGIONAL TREATIES AND AGREEMENTS**

African Charter on Human and People's Rights OAU Doc. CAB/LEG/67/3 rev. 5; 1520 UNTS 217; 21 ILM 58 (1982).

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*Mohamed Ali Baadi and Others Versus The Hon. Attorney General and 11 Others* [2018] eKLR.

*Mui Coal Basin Local Community & 15 Others Versus Permanent Secretary Ministry of Energy & 17 Others* Constitutional Petition No. 305 of 2012.

*Mumo Matemu Versus Trusted Society of Human Rights Alliance & 5 others* [2013] eKLR.

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*Nelson O Kadison Versus Advocates Complaints Commission & another* [2013] eKLR.

*National Association for the Financial Inclusion of the Informal Sector Versus Minister for Finance & Another* [2012] eKLR.

*North Rift Motor Bike Taxi Association (Nrmbta) Versus Uasin Gishu County Government* [2014] eKLR.

*Robert N. Gakuru & Others Versus Governor Kiambu County & 3 Others* [2014] eKLR.

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*Zebedeo John Opore Versus The Independent Electoral and Boundaries Commission* [2017] eKLR.

## **B. INTERNATIONAL CASES**

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*Guerra v Italy* (1998) 26 EHRR 357.

*Gujarat in Center for Social Justice Versus Union of India* AIR 2001 Guj 71.

*Oneryildiz v Turkey* (2005) 41 EHRR 20.

*The Kaliña and Lokono Peoples Versus Suriname* (Judgment of November 25, 2015)

## ACRONYMS AND ABBREVIATIONS

ACHPR	: African Charter on Human and People’s Rights
BMU	: Beach Management Unit
CoK	: Constitution of Kenya
CS	: Civil Society
CSOs	: Civil Society Organizations
EA	: Environmental Assessment
EIAAR	: Environmental Impact Assessment and Audit Regulations
EIA	: Environmental Impact Assessment
EMCA	: Environmental Management and Coordination Act
EU	: European Union
ICESCR	: International Covenant on Economic, Social and Cultural Rights
JSC	: Judicial Service Commission
KPLC	: Kenya Power and Lightning Company
LAPSSET	: Lamu Port South Sudan – Ethiopia Transport Corridor
MoU	: Memorandum of Understanding
MW	: MegaWatts
NEPAD	: New Partnership for Africa’s Development
NEMA	: National Environmental and Management Authority
NET	: National Environmental Tribunal
PIL	: Public Interest Litigation
SEA	: Strategic Environmental Assessment
SIDA	: Swedish International Development Cooperation Agency
UN	: United Nations
UNESCO	: United Nations Economic, Social and Cultural Organization

## **OPERATIONAL DEFINITION OF TERMS**

**Sustainable Development** : development that meets the needs of the present generation without compromising the ability of the future generations to meet their own needs.

**Public** : Ordinary citizens.

**APPROVAL NOTE**

This research project has been submitted for examination with the approval of the research supervisor.

Prof. Albert Mumma

Signature.....Date .....

## CHAPTER ONE: BACKGROUND TO THE STUDY

### 1.1 INTRODUCTION

There is a link between human well-being and their environment.<sup>1</sup> Accordingly, the fact that human rights are important for the realization of development that is progressive, goes without saying.<sup>2</sup> In the recent past, the United Nations (UN) has increasingly acknowledged the significance of human rights in safeguarding the environment and vice versa.<sup>3</sup> During the United Nations meeting on the Human Environment, held in 1972 in Stockholm, it was observed *that “both aspects of man’s environment, the natural and the man-made, are essential to his well-being and to the enjoyment of basic human rights - even the right to life itself.”*<sup>4</sup> This conference led to the development of every individual’s claim to a healthy environment that is documented in national Constitutions of several States.<sup>5</sup> As at 2015, more than ninety (90) States had incorporated this right within their Constitutions<sup>6</sup> and regional instruments like the African Charter on Human and People’s Rights (ACHPR)<sup>7</sup>.

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<sup>1</sup> Costanzo Chiara, ‘The Right to A Healthy Environment: A Rights Based Approach to Environmental Issues’ (PhD Thesis, National University of Ireland, Galway, 2015), 17.

<sup>2</sup> John H. Knox, ‘Human Rights, Environmental Protection, and the Sustainable Development Goals’ (2015) 24 (3) WILJ 517.

<sup>3</sup> Ibid, p. 517 - 518.

<sup>4</sup> U.N. Conference on the Human Environment, Declaration of the United Nations Conference on the Human Environment, U.N. Doc. A/CONF G.48/14/rev.1 (June 16, 1972), 11 I.L.M. 1416.

<sup>5</sup> David R. Boyd, ‘The constitutional right to a healthy environment.’ (2012) 54 (4) ESPSD 3, 4.

<sup>6</sup> Knox, ‘Human Rights, Environmental Protection, and the Sustainable Development Goals,’ op. cit., p. 519.

<sup>7</sup> Article 24.

In Kenya, the entitlement to a safe environment is provided for in Chapter four of the Constitution of Kenya (CoK), 2010. In the wording of the constitution<sup>8</sup>:-

*“Every person has the right to a clean and healthy environment which includes the right-*

*a) To have the environment protected for the benefit of present and future generations through legislation and other measures, particularly those contemplated in Article 69; and*

*b) To have obligations relating to the environment fulfilled under Article 70.”*

While Article 69<sup>9</sup> lists the State’s responsibilities in the management of the environment, Article 70<sup>10</sup> speaks to the enforcement of environmental rights. Of particular importance to this research paper is Article 69 (1) (d)<sup>11</sup> which stipulates that, the State should engage its citizens through public participation processes when making decisions and taking actions concerning the management and conservation of the environment. This provision implies that indeed, public participation plays an important role in implementing the right to a clean and healthy environment which in turn guarantees the protection of other legal freedoms such as the right to life, health, livelihood and human dignity among others. Put differently, the right to a clean and healthy environment is an entitlement that facilitates other rights. In the same way, Costanzo Chiara argues that the significance of ‘meaningful participation’ in the endeavour to realize the

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<sup>8</sup> Article 42.

<sup>9</sup> CoK, 2010.

<sup>10</sup> Ibid.

<sup>11</sup> Ibid.

right to a healthy environment cannot be overstated.<sup>12</sup> In addition, several studies have confirmed that where a State adopts a more people-centric approach in environmental policy-making procedures, the probability that human rights violations will occur, is low.<sup>13</sup>

Although many developing and underdeveloped States recognize the significance of public participation in fulfilling environmental rights, lack of environmental democracy characterized by lack of accountability by decision-makers still prevail.<sup>14</sup> Despite the milestones that Kenya has achieved towards implementing the requirements of the CoK on the right to a clean environment, Courts still lay emphasis on the need for the government to proactively furnish citizens with adequate information on planned ventures and allow meaningful engagement particularly where it is anticipated that a project may affect the environment adversely.<sup>15</sup> This calls for a better understanding of this concept of public participation which has been the source of conflict between the citizenry, and the Government, as well as, project proponents in several States including Kenya.

### **1.1.1 Understanding the Concept of Public Participation**

The mandate given to public resource and management agencies is founded in the law. These agencies are required by law to engage in consultations with the CS since public participation is

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<sup>12</sup> Chiara, 'The Right to A Healthy Environment: A Rights Based Approach to Environmental Issues,' op. cit., p. 210.

<sup>13</sup> Faith Rotich and Waikwa Wanyoike, 'Implementing the Constitutional Right to a Clean and Healthy Environment' *The Star* (Nairobi 26 September 2015) <[https://www.the-star.co.ke/news/2015/09/26/implementing-the-constitutional-right-to-a-clean-and-healthy\\_c1211389](https://www.the-star.co.ke/news/2015/09/26/implementing-the-constitutional-right-to-a-clean-and-healthy_c1211389)> accessed 2 November 2018.

<sup>14</sup> Maria Adebawale and others, 'Environment and Human Rights: A New Approach to Sustainable Development' (2001) IIED<[http://ring\\_alliance.org/ring/ring\\_pdf/bp\\_enrights.pdf](http://ring_alliance.org/ring/ring_pdf/bp_enrights.pdf)> accessed 2<sup>nd</sup> Nov 2018.

<sup>15</sup> Rotich and Wanyoike, 'Implementing the Constitutional Right to a Clean and Healthy Environment,' op. cit.

a vital element of the decision-making process, if the human rights of citizens are to be enforced.<sup>16</sup> As such, the idea of public involvement has its brass tacks in the law.

Just like many other countries, public participation is embedded in the CoK. It lists public participation as a guiding national value and good governance practice.<sup>17</sup> Public participation is also a requirement in the management, protection and conservation of the environment.<sup>18</sup>

Further legislation has been enacted to encourage citizens to participate when making administrative decisions such as the Environmental Impact Assessment (EIA) process. Article 2(5) and 2(6) of the CoK is an expression of Kenya's commitment to promoting public participation by ratifying several international laws that provide for the same. Some of the treaties that provide for public consultation in environmental governance include the Rio Declaration on Environment and Development; Agenda 21; the Johannesburg Plan of Action and the Environmental Initiative of New Partnership for Africa's Development (NEPAD); and the UN Guidelines for States on the Effective Implementation of the Right to Participate in Public Affairs.

In terms of specific local statutes, Kenya has an Environmental Management and Coordination Act (EMCA), 1999<sup>19</sup> and the Environmental (Impact Assessment and Audit) Regulations

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<sup>16</sup> Lucas Alastair R., 'Legal Foundations for Public Participation in Environmental Decisionmaking' (1976) 16Nat. Resources J.73 <<http://digitalrepository.unm.edu/nrj/vol16/iss1/6>>accessed 4 November 2018. At page 73.

<sup>17</sup> Article 10 of the CoK, 2010.

<sup>18</sup> Article 69(1)(d) of the CoK, 2010.

<sup>19</sup> Section 58.

(EIAAR) of 2003<sup>20</sup>, which also recognize the importance of stakeholder engagement in matters environment with the aim of giving effect to Article 69 of the CoK.

In light of this background information, the research paper will endeavour to carry out a thorough study to understand the role that public participation plays in promoting the human right to a clean and healthy environment. This is so, given the acknowledgement that implementing the right to consultation remains a challenge in Kenya hence hampering the enjoyment of environmental rights.

### **1.1.2 The Role of Effective Public Participation in Sustainable Development**

Including denizens in negotiations is an essential requirement for ensuring that States achieve sustainable development. That is because the goal of involving stakeholders is to promote the inclusion of all affected persons in management processes and consequently increase the legitimacy of decisions made. It is argued that formulating solutions and recommendations through public participation increases the chances of success.<sup>21</sup> In that respect, public participation informs models of development hence leading to sustainable outcomes that are sensitive to the socio-economic desires of people and the need to preserve the environment for today's and tomorrow's generations.

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<sup>20</sup> Section 3.

<sup>21</sup> Nosiku Sipilanyambe Munyinda and Lee M Habasonda, 'Public Participation in Zambia: The Case of Natural Resources Management' (2013) <<http://zgfoffce.org:8080/jspui/handle/123456789/397>> Accessed 31 December 2018, 30.

### **1.1.3 Effectiveness of the Public Consultation Process**

In the researcher's view, the standards against which the success of public participation is measured should differ from one case to another depending on the social, economic and political factors affecting an issue. For that reason, my take is that, the standards of measure used to evaluate the efficiency of civic involvement in urban areas, for instance, cannot be the same standards of measure used to appraise the usefulness of the process in a rural area. As such, rather than simply gauging the value of a public participation program against a uniform set of procedural requirements, one should look at the outcomes of the public consultation process as well in order to establish whether the process was effective or not.

**Beierle** and **Cayford** affirm this position in their paper entitled *Public Participation: Lessons from the Case Study Record* which reviewed existing case study records of the United States' efforts to implement public participation over a period of 30 years. The aim of the paper was to not only assess the success of past programs, but also find out what factors made the consultation processes efficacious. Beierle and Cayford's study revealed five social goals/outcomes which, if achieved, will influence the merit or otherwise of a public consultation hearing.<sup>22</sup> These include the goals of integrating public ideals within verdicts, enhancing the material quality of ultimate outcomes, settling differences among opposing interests, creating a conducive environment for building trust in government bodies and keeping the public well-versed with the issues.<sup>23</sup> Following their analysis, the authors outline six important lessons including the fact that many of the public participation processes in the US were successful in attaining social goals. Secondly,

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<sup>22</sup> Thomas C. Beierle and Jerry Cayford, 'Public Participation: Lessons from the Case Study Record' (2001) No. NEI-SE--436, 68 at p. 69.

<sup>23</sup> *Ibid*, p. 70 -71.

they established that although instinctive public participatory processes guaranteed the realization of social goals, it did not lead to the engagement of the wider public. Thirdly, it was their finding that irrespective of the consultation method adopted, the success of public participation processes depended on agency responsiveness, the participant's enthusiasm and the quality of consultations. A fourth lesson was that, challenging decision-making contexts did not affect the success of public participation. Fifthly, the authors' study revealed the weak link between good public participation and effective implementation. Lastly, it was their argument that public participation programs should be designed through a strategic process, starting with the justification and goals for consultation and then moving to design.<sup>24</sup>

## **1.2 STATEMENT OF THE PROBLEM**

Kenya is a fast growing economy that has expressed its commitment to sustainable development.<sup>25</sup>As such, in the recent past, the government of Kenya has initiated several projects in a bid to achieve its 'Big Four' agenda. However, it has been difficult to strike a balance between achieving economic growth and the right to a clean and healthy environment due to the environmental concerns of citizens and various Civil Society Organizations (CSOs) with respect to numerous development projects. The most recent controversial projects in Kenya that have threatened the right to a clean and healthy environment include the Lamu Port South Sudan – Ethiopia Transport Corridor (LAPSSET) and the proposed Lamu Coal Powered Plant. In their judgement in Petition 22 of 2012 between *Mohamed Ali Baadi and Others v. The Hon. Attorney*

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<sup>24</sup> Ibid, p. 73 – 75.

<sup>25</sup> SDGs, 'Kenya: Voluntary National Review 2017' (2017)  
<<https://sustainabledevelopment.un.org/memberstates/kenya>> accessed 2<sup>nd</sup> December 2018.

*General and 11 Others*<sup>26</sup> the court, in addressing the issue of whether the petitioner's right to public participation was violated, stated that there was inadequate stakeholder consultation hence raising the need for a robust public participation process before the project is implemented. The court also acknowledged that implementing the project as is, would potentially threaten the right of community members to a clean and healthy environment. Similarly, the proposed Lamu Coal Powered Plant has raised controversies following the issuance of an EIA licence by the National Environmental Management Authority (NEMA) which has made residents and activists from Lamu raise protests that culminated in proceedings before the National Environmental Tribunal (NET) challenging the issuance of the licence. Among their concerns was the failure of the project proponent to carry out adequate public participation given that the initiative is risky to their environment and health.<sup>27</sup>

All these concerns have drawn the attention of many scholars particularly on the question whether public participation can have an effect on the implementation of the right to a clean and healthy environment in Kenya. More specifically, the gap that the research will endeavour to consider is the question whether the mere legal provision of the procedural requirement for public participation protected by the law provides, in themselves an effective forum for public involvement in environmental decisions. Therefore, this research will revolve around establishing what amounts to effective public participation and how this meaningful engagement

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<sup>26</sup> [2018] eKLR.

<sup>27</sup> John Kamau, 'Power, Politics and Economy of the Coal-Fired Plant in Lamu' *Daily Nation* (10 April 2018) <<https://www.nation.co.ke/news/Power--politics-economy-of-coal-fired-plant-in-Lamu-/1056-4379590-112cm0xz/index.html>> accessed 4 November 2018.

can help in the implementation of the right to a clean and healthy environment and by extension other rights in the Constitution such as the right to life, human dignity, and health among others.

### **1.3 HYPOTHESES**

HO<sub>1</sub>: Lack of effective public participation in environmental decision making processes in Kenya is attributed to the absence of a comprehensive legal framework on access to information, guidelines on a sound public consultation process and access to remedies.

HO<sub>2</sub>: Existing laws on access to information, public participation and access to remedies are not being implemented properly by the duty bearers.

### **1.4 RESEARCH OBJECTIVES**

1. To establish the impact of lack of access to information on the effectiveness of public participation in environmental decision-making processes in Kenya.
2. To evaluate the effectiveness of the existing guidelines for conducting public consultation in environmental decision-making processes in Kenya.
3. To examine the effectiveness of judicial and administrative remedies available for the violation of the right to public participation in environmental decision-making processes in Kenya.

### **1.5 RESEARCH QUESTIONS**

1. What is the impact of lack of access to information on the effectiveness of public participation in environmental decision-making processes in Kenya?

2. How effective are the existing guidelines for conducting public consultation in environmental decision-making processes in Kenya?
3. How effective are the judicial and administrative remedies available for the violation of the right to public participation in environmental decision-making processes in Kenya?

## 1.6 CONCEPTUAL FRAMEWORK

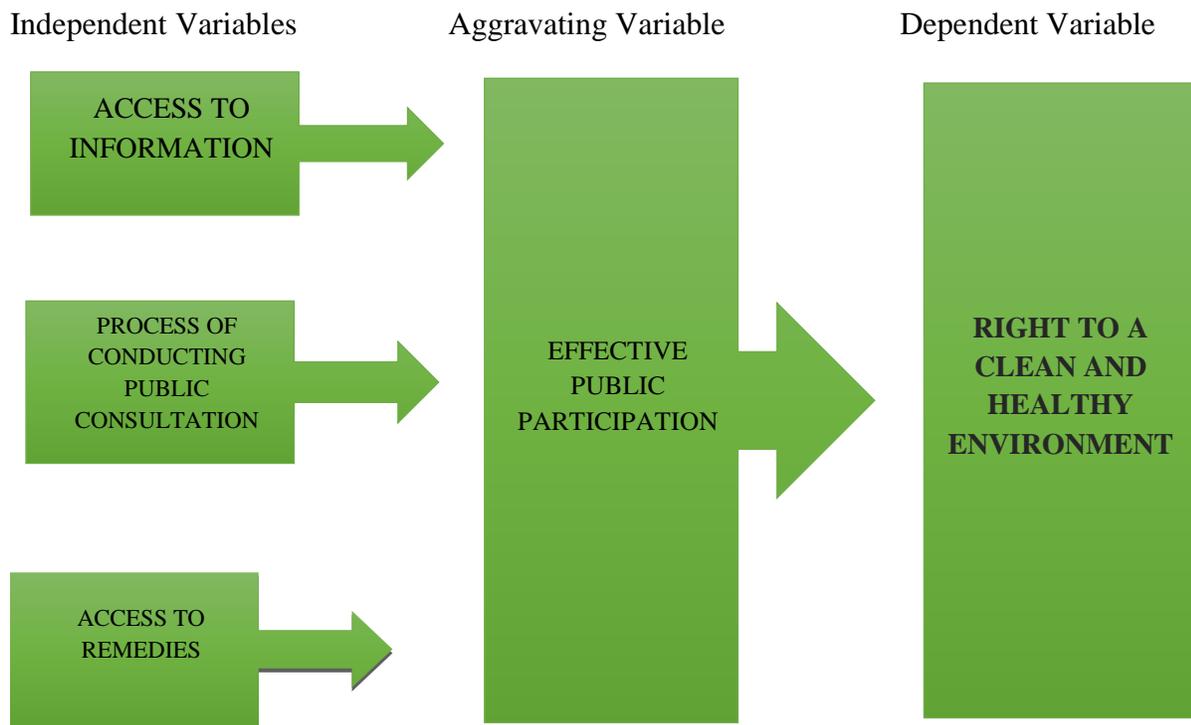


Figure 1: Diagrammatic representation of the conceptual framework.

**Source:** *This figure has been developed by the researcher.*

## 1.7 JUSTIFICATION OF THE STUDY

Although Kenya has adequate legislation to protect the right to a clean and healthy environment, often, various stakeholders involved in the process of bringing this provision to life fail to cooperate in the implementation process while using the vagueness of the law as an excuse. This uncertainty as to what amounts to effective public participation, has created a conducive

environment where lack of meaningful and effective participation among players in the environmental sector can thrive.<sup>28</sup> Therefore, this research is important for the countless stakeholders who engage in substantial and procedural environmental decision-making processes including, the NEMA, Judiciary, Civil Society Organization (CSOs), public and private project proponents or developers, and most importantly the citizens of Kenya, particularly those whose rights to a clean environment are under a threat of violation or have already been violated.

More specifically, this research will assist the project proponents, developers, CSOs and affected community members to acquire an understanding of what amounts to effective public participation and the roles they have to play to achieve the greater goal of the right to a clean environment for everyone. For enforcement authorities such as NEMA and the judiciary, this research will help in future decision-making, policy formulation and in the process of monitoring the level of compliance. It will also help improve the level of accountability by the authorities to the public. Above all, this research will promote effective and meaningful participation hence making environmental rights and justice a people-centred affair.

## **1.8 THEORETICAL FRAMEWORK**

The 1987 ‘Brundtland Report’ initiated discussions around sustainable development in the political international arena.<sup>29</sup> According to this report, ‘Sustainable Development’ refers to the *“development that meets the needs of the present generation without compromising the ability of*

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<sup>28</sup> Joel Kimutai Bosek , ‘Implementing Environmental Rights in Kenya's New Constitutional Order: Prospects and Potential Challenges’ (2014) AHRLJ 14(2) 505.

<sup>29</sup> Jennifer Elliott, ‘An Introduction to Sustainable Development: Routledge Perspective on Development’ (Routledge 2006) p. 8.

*the future generations to meet their own needs*".<sup>30</sup> The primary goal of the notion of sustainable development is to ensure that States achieve their economic development visions while also meeting their responsibilities under international environmental law.<sup>31</sup> Sustainable development is founded on three key principles including environmental, social and economic sustainability<sup>32</sup> as demonstrated in the diagram below (figure 2). Environmental sustainability refers to ensuring that development activities do not interfere with the ecosystem's ability to retain its functionality.<sup>33</sup> Economic sustainability entails the use of financial resources in a prudent way to meet maximum economic production and development.<sup>34</sup> Social sustainability, on the other hand, strives to ensure that decisions and projects are implemented with the aim of promoting the welfare of the society in general.<sup>35</sup> Accordingly, it is essential for States to incorporate ecological, societal and fiscal factors when making development resolutions in order to promote developments that balance all interests of different parties.<sup>36</sup>

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<sup>30</sup> United Nations General Assembly, 'Report of the World Commission on Environment and Development: Our Common Future' (United Nations General Assembly: Oslo Norway, Development and International Co-operation; Environment 1987) p. 43.

<sup>31</sup> Ibid.

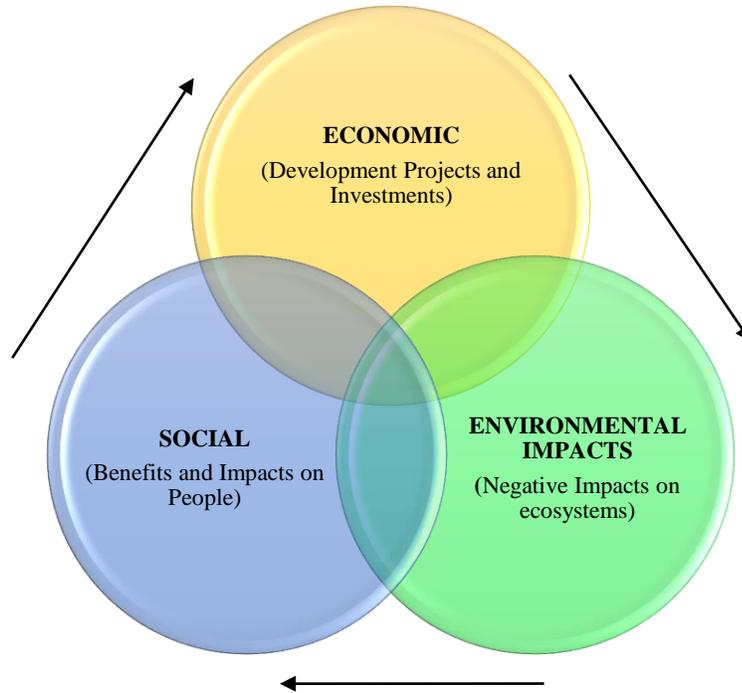
<sup>32</sup> Rachel Emas, 'The Concept of Sustainable Development: Definition and Defining Principles' (Brief for GSRD, Florida International University 2015)  
<[https://sustainabledevelopment.un.org/content/documents/5839GSDR%202015\\_SD\\_concept\\_definiton\\_rev.pdf](https://sustainabledevelopment.un.org/content/documents/5839GSDR%202015_SD_concept_definiton_rev.pdf)>  
p. 1.

<sup>33</sup> Giorgos Goniadis and Maria Lampridi (Eds.), 'Introduction to Sustainable Development: A Brief Handbook for Students by Students' (International Hellenic University 2015) p. 26.

<sup>34</sup> Ibid.

<sup>35</sup> Ibid.

<sup>36</sup> Emas, 'The Concept of Sustainable Development: Definition and Defining Principles,' op. cit., p. 1.



**Figure 2:** *Diagrammatic representation of the pillars of sustainable development*  
**Source:** <https://soapboxie.com/social-issues/The-Environmental-Economic-and-Social-Components-of-Sustainability> (with modifications by the researcher to suit the context)

The diagram above demonstrates the interdependence between the three pillars of sustainable development. The economic component, in the context of this research represents the development projects which are associated with environmental impacts. The social aspect represents the people who are disadvantaged as a result of the negative environmental impacts of development projects as well as draw certain benefits from them. Sustainability is attained at the point where all the three circles overlap. Therefore, to attain sustainability, individuals whose lives will be impacted the most by development schemes must be given a chance to contribute effectively in economic and environmental decision-making processes.

Several criticisms have been levelled against the concept of sustainable development with different scholars proposing diverse interpretations and definitions of the term.<sup>37</sup> The criticism of growth is one of the most commonly fronted arguments against sustainable development.<sup>38</sup> According to this criticism, growth eventually results in the over-use of resources and therefore, the source of the difficulty cannot also be the answer to the problem.<sup>39</sup> It is also argued that increasing the efficiency of production also involves the over-use of resources which leads to further environmental degradation as opposed to its protection and improvement.<sup>40</sup> Additionally, critiques argue that environmental management cannot guarantee the achievement of sustainable development because they are based on epistemological assumptions of modernity which have been criticised<sup>41</sup>. It is also impossible to assemble all statistics and evidence concerning a particular ecosystem, making environmental governance an incomplete strategy that can be affected by instability or inadequacy of a known system.<sup>42</sup>

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<sup>37</sup> Tomislav K, 'The Concept of Sustainable Development: From its Beginning to the Contemporary Issues' (2018) 21 ZIREB 47, 72.

<sup>38</sup> Ingmar Lippert, 'An Introduction to the Criticism on Sustainable Development' (Brandenburg University of Technology, Cottbus, 2004 November 10) <[https://s3.amazonaws.com/academia.edu.documents/6512794/critic.sustain.pdf?AWSAccessKeyId=AKIAIWOWYYGZ2Y53UL3A&Expires=1549792984&Signature=LS8aRSGApQJB%2BBwP%2BAVdIo1Zf%2F0%3D&response-content-disposition=inline%3B%20filename%3DAn\\_Introduction\\_to\\_the\\_Criticism\\_on\\_Sust.pdf](https://s3.amazonaws.com/academia.edu.documents/6512794/critic.sustain.pdf?AWSAccessKeyId=AKIAIWOWYYGZ2Y53UL3A&Expires=1549792984&Signature=LS8aRSGApQJB%2BBwP%2BAVdIo1Zf%2F0%3D&response-content-disposition=inline%3B%20filename%3DAn_Introduction_to_the_Criticism_on_Sust.pdf)> accessed 10 February 2019, 22.

<sup>39</sup> Ibid.

<sup>40</sup> Ibid.

<sup>41</sup> Ibid.

<sup>42</sup> Ibid.

## 1.9 LITERATURE REVIEW

### 1.9.1 Access to Information

**Kariuki Muigua's** paper on *Realising Environmental Democracy in Kenya* attempts a comprehensive analysis of the concept of environmental democracy and proposes some suggestions that seek to promote the realization of environmental democracy. Quoting the work of Gellers, Joshua C and Chris Jeffords, Muigua explains that when citizens have access to information, they are capable of holding relevant authorities accountable for their choices and actions.<sup>43</sup> He observes that keeping the affected communities informed influences their attitudes by giving them a sense of belonging<sup>44</sup> which is essential for promoting a conducive environment to allow for effective participation. The paper further establishes that whereas providing information is important, such information must be sufficient in quantity and quality to enhance the level of participation of citizens that will result in the adoption of the best solutions aimed at protecting and conserving the environment.<sup>45</sup> Most importantly, Muigua notes that access to information is necessary to enable the citizens give their Free Prior and Informed Consent (FPIC) to development projects.<sup>46</sup> In the researcher's view, this article fails to critique existing laws on environmental democracy in Kenya which still make the exercise of the right to information, public participation and access to justice difficult for citizens. This research will therefore not stop at only stating the legal framework on environmental democracy but delve

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<sup>43</sup> Kariuki Muigua, 'Realising the Right to Education for Environmental and Social Sustainability in Kenya' (May 2018) <<http://kmco.co.ke/wp-content/uploads/2018/08/REALISING-ENVIRONMENTAL-DEMOCRACY-IN-KENYA-4th-May-2018-1-1.pdf>> Accessed 30 December 2018, 17.

<sup>44</sup> Ibid.

<sup>45</sup> Ibid.

<sup>46</sup> Ibid.

further into the weaknesses and gaps in Kenya's laws with the aim of advocating for legal and policy reforms.

**Kariuki Muigua** and **Francis Kariuki** further affirmed their position through their article entitled *Towards environmental justice in Kenya*. This article examines the link between the contemporary environmental wrongs in Kenya and the foreign laws and policies developed during colonial times. They commence by defining the concept of environmental justice to include information rights.<sup>47</sup> Muigua and Kariuki state that:<sup>48</sup>

*“Communities cannot be meaningfully engaged on matters relating to the environment and the exploitation of natural resources without an understanding of what the ideals should be in a society where there is environmental justice. As such, the first step towards achieving environmental justice for the Kenyan people must be to afford them access to the relevant environmental information in forms that they will appreciate.”*

While Muigua and Kariuki's article depict the conceptual parameters of environmental justice based on the proportionate distribution of environmental burdens, adequate provisions of spaces for the CS to participate in environmental decision-making processes and access to natural resources, this research brings in a different perspective of the concept. In this study, the theory of environmental justice is measured based on the ability of citizens to access information,

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<sup>47</sup> Kariuki Muigua and Francis Kariuki, 'Towards environmental justice in Kenya' (January 2015) <<http://kmco.co.ke/wp-content/uploads/2018/08/Towards-Environmental-Justice-in-Kenya-1st-September-2017.pdf>> Accessed December 2018, 4.

<sup>48</sup> Ibid, at p. 4.

participate effectively and acquire available remedies for redress of grievances and how these can impact the struggle towards realizing Article 42 of the CoK.

Towards Accountability through Kenyans' Empowerment in Participation and Active Request for Transparency (**TAKE PART**) **organization**, through their researchers Morris Odhiambo and Romanus Opiyo, conducted a study to weigh the productiveness of public involvement mechanisms at the county level in Mombasa, Kilifi and Kajiado.<sup>49</sup> The research establishes that unpacking the meaning of public participation and finding better ways of implementing this right is still considered an uphill task in Kenya.<sup>50</sup> This is largely attributed to the lack of clarity in our legislation on the characteristics of a participation modality that meets the constitutional criteria.<sup>51</sup> According to this research report, effective public participation occurs where the right holders and the duty bearers fulfil their part of the bargain in the process.<sup>52</sup> In such an ideal situation, the decision-makers will ensure that they put in place the requisite infrastructure including availing information and feedback on decisions made among other duties while the citizenry should use such infrastructure proactively to influence the decisions of government agencies.<sup>53</sup> This paper, in the researcher's opinion, takes a broad approach to public participation in the sense that it considers the adequacy of public hearings in all areas of governance in only three counties in Kenya out of forty-seven counties. The current research will, however, take a

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<sup>49</sup> TAKE PART, 'Effective Public Participation Mechanisms in Mombasa, Kilifi, Taita Taveta and Kajiado Counties' (Comitato Internazionale per lo Sviluppo dei Popoli - International Committee for the Development of People, (2017) 3.

<sup>50</sup> Ibid, p. 4.

<sup>51</sup>Ibid, p. 5.

<sup>52</sup> Ibid, p. 6.

<sup>53</sup> Ibid.

narrow approach by only limiting itself to consultation processes in Kenya's environmental sector.

**Nosiku Sipilanyambe Munyinda** and **Lee M Habasonda** conducted a study describing the status of community involvement in Zambia with an objective to establish the obstacles to and identify the opportunities for beneficial public participation. Following their case study of Zambia's natural resource management as at 2013, the authors averred that one of the obstacles to constructive stakeholder engagement was the laxity of government in adopting the Access to Information Bill even though several institutions had recommended the need to implement the right to access information as a positive step towards reinforcing the right to meaningful public participation.<sup>54</sup> The most unique aspect of this research is that in their study, Munyinda and Habasonda, establish a link between an individual's awareness of their right to give their views in matters of public concern and the probability that they will actually take part in the process. According to their findings, those people who are aware that they have such a privilege are more likely to exercise the right unlike those who have no idea of the existence of such openings.<sup>55</sup> Unfortunately, they note that, only 23% out of 80 respondents and 35% out of 130 respondents interviewed in Mfuwe and Solwezi respectively, knew about their right to access information stored by state agencies.<sup>56</sup> In view of the weight of the factors that affect public participation, the authors conclude by proposing recommendations including the enforcement of legislation that protects the right to access information and the creation of awareness about the existence of this

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<sup>54</sup> Munyinda and Habasonda, 'Public Participation in Zambia: The Case of Natural Resources Management,' *op. cit.*, 16.

<sup>55</sup> *Ibid.*, p. 40.

<sup>56</sup> *Ibid.*

right among the CS.<sup>57</sup> After critically examining this piece of work, the researcher feels that Munyinda and Habasonda's study did not consider how effective the available judicial and administrative remedies are where citizens are aggrieved, a subject which this paper will examine.

**Odparlik** did a study on the role of access to information in the Environmental Assessment (EA) process in Germany. In her thesis entitled *"The grass is always greener on the other side": Access to environmental assessment documents in Germany in international comparison*, Odparlik endeavours to demonstrate the importance of a web-based system in distributing relevant materials among the public to facilitate a more satisfactory participation practice in the environmental decision-making procedures.<sup>58</sup> Following her study and analysis, Odparlik recognised that, the significance of information rights in ensuring successful public participation cannot be overstated.<sup>59</sup> She argues that access to information is an essential element in promoting effective public participation which is a fundamental aspect in the concept of environmental democracy.<sup>60</sup> In fact, Odparlik affirms Kofi Annan's and Francis Bacon's views that *"knowledge is equal to power"* in that, when citizens participate in environmental decision making procedures from an informed point of view, there is a high probability that their feedback will influence the planning and policy making process positively.<sup>61</sup> This, in her view, shows that the

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<sup>57</sup> Ibid, p. 62.

<sup>58</sup> Lisa Friederike Odparlik, 'The Grass is Always Greener on the Other Side: Access to Environmental Assessment Documents in Germany in International Comparison' (Doctoral Thesis, Technische Universität Berlin 2017) 19.

<sup>59</sup> Ibid, p. 7.

<sup>60</sup> Ibid.

<sup>61</sup> Ibid.

level of access to information and fruitful public participation are positively related.<sup>62</sup> Odparlik further emphasises that the need to keep the public informed should not simply be made a formal process. Instead, the disclosure should be substantive as well which includes aspects such as making sure that the information availed is readable and provides a detailed background to an ordinary citizen with no expertise.<sup>63</sup> Unfortunately, however, she notes that issues concerning access to information in Germany still remain a problem. That is because although there are elaborate legal provisions supporting the proactive provision of information to a large number of citizens through the website, in reality, no information is actively provided by lead agencies.<sup>64</sup> In my opinion, this paper seems to advocate for a web-based system of providing information but does not look at other procedural, administrative and social barriers that can negatively impact citizen's ability to access information as the current research will attempt to establish.

Similarly, the **Green Alternative organization** acknowledged, in their policy brief entitled *Opportunities for Public Participation in the Decision-Making on Issuing Environmental Impact Permits in Georgia*, that a direct link does exist between effective development and improved accessibility of information, public participation and accountability.<sup>65</sup> In this study, Green Alternative conducted a research on the process of issuing environmental impact permits through observation over a period of one year to enable them establish the gaps and weaknesses in the

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<sup>62</sup> Ibid, p. 109.

<sup>63</sup> Ibid.

<sup>64</sup> Ibid.

<sup>65</sup> Green Alternative, 'Opportunities for Public Participation in the Decision-Making on Issuing Environmental Impact Permits in Georgia' (Policy Brief, June 2014) 1.

public participation opportunities within the decision-making cycle.<sup>66</sup> In describing the relationship between the different variables, the report observed that educating and availing information to the public promotes meaningful stakeholder engagement which in turn ensures the incorporation of the social and environmental concerns of people in environmental decision-making processes and natural resource management.<sup>67</sup> The report further claims that access to information, public participation and access to justice are, without a doubt, vital preconditions for the realisation of sustainable development.<sup>68</sup> Just like , Odparlik above, this report reveals several challenges regarding access to information, one of the central problems being the provision of information that is too technical for local communities to understand without providing further guidance or a simplified version.<sup>69</sup> This reveals the great concern that citizens have shown regarding substantive rights to information on the ground. The gap that this paper fails to address are the procedural barriers to accessing environmental data embedded in Kenya's laws on access to information.

**Popovic Neil's** paper on *The Right to Participate in Decisions That Affect the Environment* examined the status and challenges of the implementation of the right to participate in environmental decision-making with the aim of determining the prerequisites of effective participation.<sup>70</sup> Popovic notes that indeed, the government can affect the environment through

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<sup>66</sup> Ibid, p. 5.

<sup>67</sup> Ibid.

<sup>68</sup> Ibid.

<sup>69</sup> Ibid.

<sup>70</sup> Neil A.F. Popovic, 'The Right to Participate in Decisions That Affect the Environment' 10 (2) (1993) PELR 683, 684.

the decisions that they make<sup>71</sup> and in making those decisions, they may or may not consider the views of various stakeholders as required by the law.<sup>72</sup> He further points out that the extent and influence of participation differ significantly, although several States have enacted elaborate legislation for public participation.<sup>73</sup> As such, the scholar, through his article, attempts to point out some elements of ensuring that the public participation processes are effective including education on matters concerning the environment and aspects that might impact on it negatively, access to available and existing information, ensuring that citizens have a voice in the process of making decisions, promoting transparency of the process, involvement of citizens in implementation and enforcement by the State.<sup>74</sup> With regards to access to information, Popovic maintains that effective public participation significantly depends on the availability and access to relevant information that the government possesses.<sup>75</sup> This paper has not however consider, in a concrete way, the need for legal and policy reforms as we will see through this research study.

**Spijkers, Xian, and Liping** also wrote an article that carried out an in-depth analysis of the role of public participation in China's water governance. Following their analysis, the article established that China already has sufficient rules and regulations that advocate for public participation but the rules are too vague to the extent that it makes it difficult to apply them in

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<sup>71</sup> Ibid, p. 683.

<sup>72</sup> Ibid.

<sup>73</sup> Ibid.

<sup>74</sup> Ibid, p. 691.

<sup>75</sup> Ibid, p. 694.

practice.<sup>76</sup> The ambiguity in the law, according to Spijkers, Xian and Liping, lie in the fact that the law neither specifies the type of public participation required nor does it identify the type of stakeholders who qualify as the public in order to participate in decisions affecting the environment.<sup>77</sup> In several instances in their article, the authors affirm the position that giving communities information is a prerequisite element that guarantees the realization of effective public participation and by extension the right to a clean and healthy environment.<sup>78</sup> In their discussion, there is however no analysis of the comprehensiveness of the laws on access to justice which the current research will seek to establish in the Kenyan context.

**Parola Giulia** in her attempt to explore the concept of environmental democracy dedicates a section in her article to explaining *The Actors of Environmental Democracy: the Environmental and Ecological Citizen*.<sup>79</sup> Beyond classifying the right to access information as an environmental and human right, Giulia states with conviction that it is a key necessity in public participation, a fact which, several scholars and green political proposals have acknowledged.<sup>80</sup> Interestingly, in Parola's view, environmental rights can be classified into two broad categories including substantive and procedural rights,<sup>81</sup> both of which are essential in the enforcement of the legal provisions on guaranteeing favourable environments. In this categorization, the right to access information qualifies as a procedural environmental right. Perhaps one weakness of this paper is

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<sup>76</sup> Otto Spijkers, L. I. Xian, and D. A. I. Liping, 'Public Participation in China's Water Governance' 23;2 (1) CJEL (2018) 28, 40.

<sup>77</sup> Ibid.

<sup>78</sup> Ibid.

<sup>79</sup> Parola Giulia, 'Chapter I: Environmental Democracy: A Theoretical Construction' in *Environmental Democracy at the Global Level* (Sciendo Migration 2013) 56.

<sup>80</sup> Ibid, p. 64.

<sup>81</sup> Ibid, p. 63.

that it perceives access to information as a purely procedural right. But, as will be argued in this research, access to information is also a substantive right. That is because, the right to environmental information can be violated not only placing barriers on the process of accessing it, but also providing information in forms that citizens cannot easily comprehend.

The 3<sup>rd</sup> *Economic and Social Rights Report* on environmental rights endeavoured to examine whether government institutions of South Africa were meeting the constitutional obligations to promote the environmental rights of citizens. Just like other articles and research findings, this report reinforces the importance of the right to access information in the implementation of the right to a clean and healthy environment.<sup>82</sup> While noting that the legislations does not expressly link environmental rights to the right of access to information, the report contends that it is pertinent to environmental concerns.<sup>83</sup> The gap in this report which shall be addressed through this research is the identification of some of the barriers embedded in the laws, which make it difficult for citizens to access environmental information.

**Renee Scott**, in his Master Degree Thesis, also evaluated the effectiveness of South Africa's public participation strategies and whether these strategies had a positive influence on the process of making decisions. Affirming their research hypothetical arguments, Scott established that public participation still remains ineffective in South Africa and hardly influence the decision-making procedures, even though there is an elaborate legislative framework that

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<sup>82</sup> \_\_\_, 'Chapter nine: Environmental Rights' (3<sup>rd</sup> Economic and Social Rights Report, n.d) <[https://www.sahrc.org.za/home/21/files/Reports/3rd%20ESR%20Report%20chapter\\_9.pdf](https://www.sahrc.org.za/home/21/files/Reports/3rd%20ESR%20Report%20chapter_9.pdf) >Accessed 30<sup>th</sup> December 2018, 324.

<sup>83</sup> Ibid.

guarantees the right to participate.<sup>84</sup> Unlike Scott's thesis, this research will go ahead and attempt to identify parameters to employ in the evaluation of the fruitfulness of a public consultation process.

**Müllerová** and **Bělohradová** also examined the role of access to information and how it assists the actualization of environmental human rights through ensuring effective public participation in their article on *Public Participation in Environmental Decision-Making: Implementation of the Aarhus Convention*. Besides identifying access to information as an environmental justice pillar, the authors rightfully aver that public participation cannot be rendered effective where there is a lack of access to information and the possibility of attaining justice in a court of law.<sup>85</sup> The authors, therefore, conclude that the inseparable themes of access to information, public participation and access to justice comprise the principle of environmental justice.<sup>86</sup> This work lacks a criticism of the laws on access to information, public participation and access to justice which must be addressed in order to improve current public participation practices.

**Julia Abelson** and **François-Pierre Gauvin's** book reviewed existing works on public participation. Realizing the challenge of determining what qualifies as sound public participation, the authors note that this assessment is subjective and the parameters of excellent public participation depends on the person whose views are being considered, as well as, the

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<sup>84</sup> Renee Scott, 'An Analysis of Public Participation in the South African Legislative Sector' (Degree of Master of Public Administration, Stellenbosch University 2009).

<sup>85</sup> Hana Müllerová and Others, 'Public Participation in Environmental Decision-Making: Implementation of the Aarhus Convention' Praha: Ústav státu a práva AV ČR (2013) 1.

<sup>86</sup> Ibid, p. 3 – 7.

contents of their opinions.<sup>87</sup> As such, it is difficult for the participants and the project proponents to reach a consensus on what amounts to effective public participation given that they have different goals and expectations out of the process.<sup>88</sup> Even with such diverse ideas on what amounts to effective public participation, Abelson and François-Pierre point out that there is a move towards a common understanding on some of the indicators of successful public participation including, but not limited to, representativeness of the people engaged, the design of open, all-encompassing and engaging processes, ensuring access to information in a way that encourages easy comprehension and knowledge among participants and the legality of the process.<sup>89</sup> Even though they recognise the importance of access to information, no specific legal recommendations are made on how to further enhance citizen's ability to access information.

The overarching theme in **Carl Brunch's** book on *The New "Public": The Globalization of Public Participation* is the relationship that exists between access to information, stakeholder consultation and access to justice, as well as, administrative remedies. The book, through its various chapters, reveal that there is compelling evidence to demonstrate the dependence of all these factors on each other and their ultimate positive influence on environmental governance when all these rights are implemented.<sup>90</sup> The missing knowledge component is a discussion on how the right to access information can influence the realisation of the right to a clean and healthy environment. As we will see in the subsequent discussions and existing judicial

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<sup>87</sup> Julia Abelson and François-Pierre Gauvin, *Assessing the Impacts of Public Participation: Concepts, Evidence and Policy Implications* (Ottawa: Canadian Policy Research Networks 2006).

<sup>88</sup> *Ibid*, p. 7.

<sup>89</sup> *Ibid*.

<sup>90</sup> Carl Brunch, *The New "Public": The Globalization of Public Participation* (Environmental Law Institute 2002).

precedents, disclosure of information in Kenya is an essential tool for protecting of fundamental rights including the right to a clean environment.

Just like Odparlik, **Astrid Kalkbrenner** believes that information is power and consequently a tool for ensuring the enjoyment of human rights.<sup>91</sup> She argues that access to information is an important human right because it is one among many requirements necessary for the realisation of a democratic society and one that lies at the very heart of good governance.<sup>92</sup> Through her article, Kalkbrenner affirms that the increased access to information promotes a more transparent system of governance where the CS can question the actions of decision-makers and hold them accountable for the effects of their actions. The most striking aspect of this article is that it goes a mile further to espouse the key features of a favourable access to information policy. The author argues that for a system to provide effective access to information, it must guarantee that there is maximum disclosure of information and transparency of governmental data; provide a few, but permissible exemptions to decline an interested person access to information; promote free access to information or access at a reasonable cost; provide timely information; and spell out remedies for denial of access to information.<sup>93</sup> These requirements, however, appear to fall short of other fundamental parameters such as the nature and form of information to be disseminated. The form in which information is disseminated is important because it determines the level of comprehension of the information provided to ordinary citizens.

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<sup>91</sup> Astrid Kalkbrenner, 'Environmental Rights in Alberta: A Right to a Healthy Environment, Module 4: Access to Environmental Information' (2017) ELC (Alberta) 1, 5.

<sup>92</sup> Kalkbrenner, 'Environmental Rights in Alberta: A Right to a Healthy Environment, Module 4: Access to Environmental Information' (2017) 9.

<sup>93</sup> Ibid, p. 36 – 40.

**Bruch** and **Czebiniak**, in their article on *Globalizing Environmental Governance: Making the Leap from Regional Initiatives on Transparency, Participation, and Accountability in Environmental Matters*, carry out an analysis of how the experiences of current regional initiatives have played a role in the establishment of a globally accepted environmental governance framework. In their discussion, the authors emphasize the key obligation of the society in participating during debates about environmental issues.<sup>94</sup> They agree, like other scholars discussed above, that access to information increases the chances of achieving effective public engagement processes by not only making the relevant individuals aware of the possible environmental threats to their health and their surrounding but also enhancing their ability to participate in the formulation of solutions in response to the threats posed by a particular development.<sup>95</sup> The barriers to accessing information are however not discussed in detail and the same will be outlined in subsequent chapters of this research paper.

In a paper prepared by the **Swedish International Development Cooperation Agency's (SIDA)** division for democratic governance, the researchers carried out a project with the goal of demonstrating that participation can be used as a strategy to strengthen the interaction between the State and CS. While arguing that increased participation in governance is a tool for poverty reduction, the report postulates that it is possible to reduce corruption by promoting access to information since informed citizens can act as watchdogs of government actions.<sup>96</sup> Moreover,

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<sup>94</sup> Carl E. Bruch and Roman Czebiniak, 'Globalizing Environmental Governance: Making the Leap from Regional Initiatives on Transparency, Participation, and Accountability in Environmental Matters' (Environmental Law Institute 2002) 10429.

<sup>95</sup> Bruch and Czebiniak, 'Globalizing Environmental Governance: Making the Leap from Regional Initiatives on Transparency, Participation, and Accountability in Environmental Matters' (2002) 10433.

<sup>96</sup> SIDA, 'Participation in Democratic Governance' (Division for Democratic Governance 2002) 8.

adopting an open access to information system bridges the communication disconnect between the authorities and CS, consequently enhancing the engagement of marginalized groups<sup>97</sup> who more often than not live below the poverty line.<sup>98</sup>

Last but not least, **Roberts, Dobbins** and **Bowman's** article on *The Role of the Citizen in Environmental Enforcement* proposes many approaches towards ensuring environmental rights of members of the society, are adhered to. The paper states that over and above all the factors that promote effective involvement, the lack of access to ready information would render all the other efforts meaningless.<sup>99</sup> It was their finding that, availing information including information on the pollution levels released by the polluters can help in accessing environmental justice since it can act as evidence to support Public Interest Litigation (PIL)<sup>100</sup>. Dobbins and Bowman should have gone further to identify the challenges people face in obtaining information and how it can jeopardise the implementation of environmental rights.

From my assessment, there is a wealth of information on access to information, public involvement and the right to a pollution-free environment. The literature, however, falls short of a critical analysis of existing legal, procedural, administrative and other barriers to accessing environmental information which this research seeks to examine.

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<sup>97</sup> Ibid.

<sup>98</sup> Ibid.

<sup>99</sup> E Roberts, J Dobbins, and Bowman M, 'The Role of the Citizen in Environmental Enforcement' (In International Conference on Environmental Enforcement, Budapest, Hungary 1992 Sep 22).

<sup>100</sup> Ibid, p. 25.

## 1.9.2 Public Participation

**Pagatpatan** and **Ward** also conducted a review of 77 articles in which they endeavour to establish the mechanisms that yield positive results in the process of public participation. In their article entitled *Understanding the Factors that Make Public Participation Effective in Health Policy and Planning: A Realist Synthesis*, they acknowledge the difficulty of establishing the effectiveness or otherwise of a public participation process because it is neither an obvious and objective process nor a measurable concept.<sup>101</sup> According to Pagatpatan and Ward, literature reveals that a public participation process is considered effective if: it has a genuine public influence on policy decisions; it results in a consensus between negotiating parties; it promotes increased mutual understanding of issues among stakeholders; results in improved quality decisions and increased trust between the policy planners and the public they consult.<sup>102</sup> The missing component in Pagatpatan and Ward's work missed to give an explanation on the input of the law in promoting effective public participation and any weaknesses and gaps in the legal framework that call for reform in order to strengthen the consultation processes.

Similarly, **Rowe** and **Frewer's** article on *Public Participation Methods: A Framework for Evaluation* proposes a method for evaluating the level of public involvement by considering the desirable aspects of the procedure and then evaluating the presence or quality of these process aspects.<sup>103</sup> The authors recommend a theoretical evaluation criteria, which comprises of the acceptance and the process criteria. Whereas the acceptance criteria relate to aspects of a process

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<sup>101</sup> Celso P. Pagatpatan and Paul R. Ward, 'Understanding the Factors that Make Public Participation Effective in Health Policy and Planning: A Realist Synthesis' (2018) 23 AJP 516, 517.

<sup>102</sup> Ibid, p. 517.

<sup>103</sup> Gene Rowe and Lynn Jayne Frewer, 'Public Participation Methods: A Framework for Evaluation' (2000) 25 Science, Technology, & Human Values 3.

that make it acceptable to the public at large, process criteria addresses feature of the process itself that ensure that public participation takes place effectively.<sup>104</sup> Therefore, using the acceptance criteria, one should consider the level of representativeness of participants, the independence of true participants, whether the participants were involved at the initial phase, the influence of the people's input on the final policy and the level of transparency of the process.<sup>105</sup> When using the process criteria, emphasis should be placed in resource accessibility, the definition of the nature and scope of the participation task, structured decision-making that allows the public evaluate the reasons behind a decision and cost effectiveness of the process.<sup>106</sup> The authors therefore recommend the need to conduct further research with the aim of coming up with instruments to evaluate these criteria with precision and find out the contextual and environmental factors that will help determine which methods are appropriate over another depending on the context and other factors.<sup>107</sup> It is my opinion that Rowe and Frewer's article imply that only the method chosen for public participation will determine the usefulness of discussions. While this is true to some extent, they fail to point out other parameters including social, cultural and political factors which can influence the quality of a consultation process.

**Odemene**, in his thesis evaluates the process of public participation in environmental decision making in Nigeria with the aim of identifying the factors that prevent the realization of effective public participation through the existing regulatory frameworks. In his analysis, Odemene measures the national policy and regulation on public participation against the internationally set

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<sup>104</sup> Ibid, p. 17.

<sup>105</sup> Ibid, p. 19.

<sup>106</sup> Ibid, p. 20.

<sup>107</sup> Ibid, p. 25.

standards to assess whether there are gaps in the laws of Nigeria that need to be improved. He argues that an excellent public participation process is open and supportive of stakeholder engagement, leads to a conclusion that is acceptable to all stakeholders and reconciles conflicting interests, adopts the best techniques and tools of consultation, ensures population representativeness and engages the ordinary persons at the introductory stage. Further, it should ensure the provision of relevant resources, have defined objectives and goals and one that is cost effective.<sup>108</sup> The findings of this research revealed gaps in Nigeria's laws and policies on public participation including the absence of adequate details on the requirements for public participation, lack of inclusion of affected stakeholders and communities in the process of arriving at decisions particularly on the issue of resettlement, failure to provide for vulnerable and disadvantaged groups, provision for compensation for only individuals who have documented evidence of proprietary rights of affected properties, the omission of monitoring and evaluation instruments of resettlement processes, and lack a grievance mechanism.<sup>109</sup> This paper recommends the need to conduct further field work studies on the extent of public involvement in order to establish the political underpinnings affecting the advantage of public participation.

**Webler** and **Tuler** in their article *What Is a Good Public Participation Process? Five Perspectives from the Public* conducted a detailed study on a forest management strategy in northern New England and New York to find out how participants characterise a suitable approach to public participation. The research findings revealed five different perspectives that

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<sup>108</sup> Sandra E. Odemene, 'Optimizing Public Participation in Environmental Decision Making in Nigeria' (Degree of Master of Environmental Policy and Management, The University of Adelaide, 2015) 29.

<sup>109</sup> Ibid, p. 45.

people use to ascertain the viability of public involvement.<sup>110</sup> While some participants measured the value of a public hearing by looking at the legitimacy of the program characterised by consensual decision-making process, others felt that a process is considered good if it promotes a search for common values.<sup>111</sup> Additionally, a good process is one that realises fairness and equality, promotes equal power among all participants and viewpoints, as well as, fosters responsible leadership.<sup>112</sup> In concluding, the authors observe that the diverging views on what amounts to effective public participation in specific contexts are likely to raise conflicts. This may pose difficulties to those responsible for designers and implementers of public participation programs.<sup>113</sup> This research does not identify any hurdles to the effectiveness of public participation engagements and how such limitations can be eliminated.

### **1.9.3 Access to Remedies for Redress of Grievances**

**Okello** and **Others** conducted a research on *The Doing and Un-doing of Public Participation During Environmental Impact Assessments in Kenya*. The research's objective was to evaluate the level of implementation of public participation in EIA and Strategic Environmental Assessment (SEA) processes in Kenya. The paper also identifies, through their fieldwork study, the intervening obstacles to better public participation in Kenya. The outcomes of this research reveals that one of the barriers to effective public participation in Kenya is deficiency in law enforcement characterised by NEMA's lack of its own prosecutors, lack of knowledge of

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<sup>110</sup> Thomas Webler, Seth Tuler and R.O.B Krueger, 'What is a Good Public Participation Process? Five Perspectives from the Public' (2001) 21 Environmental Management 435, 447.

<sup>111</sup> Ibid, p. 442.

<sup>112</sup> Ibid, p. 443 – 444.

<sup>113</sup> Ibid, p. 448.

environmental crimes by government prosecutors and the level of bureaucracy in the prosecution process.<sup>114</sup> Consequently, these barriers have a negative impact on the Aarhus pillar of access to justice.<sup>115</sup> The gap in this research is that it does not acknowledge the importance of traditional and alternative methods of dispute settlement which can be used as a strategy towards promoting access to justice as we will recommend in this research paper.

**Alam** wrote a paper on *Public Participation in the Enforcement of Environmental Laws: Issues and Challenges in the Light of the Legal and Regulatory Framework with Special Reference to EIAs in Malaysia*. The author emphasizes the significance of access to justice in realizing the right to effectively participate in environmental decision-making processes.<sup>116</sup> Alam goes ahead to note that accessing justice is the most fundamental corner stone of the Aarhus Convention which ensures that environmental laws are enforced.<sup>117</sup> She, however, notes with concern that there are several barriers to access justice in Malaysia including financial incapacity of victims and illiteracy.<sup>118</sup> Just like Okello and Others' article above, there is no discussion on alternative affordable, and more peaceful means of accessing justice. In this research, we will therefore be advocating for the need to move towards traditional methods of resolving disputes and less formalistic administrative and judicial processes.

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<sup>114</sup> Nelly Okello and Others, 'The Doing and Un-doing of Public Participation During Environmental Impact Assessments in Kenya' (2009) 27 IAPA 217, 221.

<sup>115</sup> Ibid.

<sup>116</sup> Shahin Alam, 'Public Participation in the Enforcement of Environmental Laws: Issues and Challenges in the Light of the Legal and Regulatory Framework with Special Reference to EIAs in Malaysia' (2014) 3 BRFJ 87, 93.

<sup>117</sup> Ibid, p. 96.

<sup>118</sup> Ibid.

Through his article entitled *Public Participation in Environmental Decision Making in India: A Critique* Parikh delves into the role and scope of public participation in environmental decision making processes in India, particularly during the EIA process. In his discussion, Parikh acknowledges the judiciary's duty in enforcing the right to public participation, noting that the Supreme Court and the High Court of India have reiterated, through their decisions, the mandatory nature of the obligation to ensure that public participation takes place during the EIA process.<sup>119</sup> For instance, the decision of the High Court in the case of *Gujarat in Center for Social Justice v. Union of India*<sup>120</sup> laid down the following directions that informed the concept of public participation in India<sup>121</sup>:

- ✓ The place where a public hearing is held must be as close as possible to the proposed site for the project.
- ✓ Publication of the notice of the public hearing for a minimum of 30 days, in two newspapers that are widely circulated in the region must be ensured. The local government should also be requested to assist with giving publicity to the notice.
- ✓ At least 30 days before the public hearing is held, the affected persons and locals should be furnished with a summary of the project. An interpreted version of the summary of the EIA report should also be availed to the concerned person on demand.
- ✓ For the hearing panel to comprise a quorum, one half of the total membership must be present. Representatives from the board and state environment department, one senior and an environmentalist nominated by the collector should be present.

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<sup>119</sup> Madhuri Parikh, 'Public Participation in Environmental Decision Making in India: A Critique' (2017) 22 IOSR-JHSS56, 61.

<sup>120</sup> AIR 2001 Guj 71.

<sup>121</sup> Parikh, 'Public Participation in Environmental Decision Making in India: A Critique,' op. cit., p. 61.

- ✓ The ecological impacts of the development should guide the committee in deciding on the number of hearings to be held. The rules are however flexible depending on the situation.
- ✓ The state pollution control board should promptly provide minutes of the hearing on request. The government of a state should proactively publish the substance of the clearance certificate in newspapers where the notice for public hearing is published.
- ✓ Imposing a reasonable fee for furnishing copies of records, such as, the executive summary of the project and a summary of the environment assessment, is acceptable.

In terms of the gap in knowledge, **Parikhdelves** overlooks the challenges with judicial processes which may render access to justice impossible. The barriers may range from procedural, administrative and cost considerations as well as, other social, cultural and political challenges.

## **1.10 RESEARCH METHODOLOGY**

Generally, this research will be doctrinal and hence, qualitative in nature. It will endeavour to answer the research questions by critically analysing the law and cases that have been decided by Kenyan Courts and the NET Tribunal touching on the issue in question. It will involve the collection of data through desktop reviews of primary and secondary sources of information.

## **1.11 LIMITATIONS AND ASSUMPTIONS**

### *Time Constrain*

Owing to the wide scope of the study which attempts to assess the situation of Kenya post 2010 to date, the limited time might affect the effectiveness of the data collection process. To avoid

this problem, the researcher will commence the data collection process early enough in order to collect as much information as possible achieve the objective of this research proposal.

#### *Financial Constrain*

This study will require finances for the purchase and printing of various relevant literature, policy documents and ultimately the final research proposal and research report which will be costly. Therefore, the researcher will endeavour to find alternative sources of funding or donations to meet extra financial needs.

### **1.12 PROPOSED CHAPTER BREAKDOWN**

Chapter 1: Introduction (The Proposal).

Chapter 2: Access to Information.

Chapter 3: Public Participation.

Chapter 4: Access to Remedies for Redress of Grievances.

Chapter 5: Conclusions and Recommendations.

## **CHAPTER 2: ACCESS TO INFORMATION**

### **2.1 INTRODUCTION**

This chapter will discuss the constitutional and statutory framework on the access to information in Kenya. The argument here is that although Kenyans have a constitutional right to the access of information, that right is limited in key aspects, thereby restricting the effectiveness of the access to information. The chapter also argues that whereas Kenya has a wide range of statutes that impose some obligations on the State actors to provide this access to information, the obligations and the ability of citizens to enjoy that right is limited by key procedural, administrative and cost considerations. Consequently, the constitutional right granted to Kenyans over information does not translate into an ability to use the information effectively to participate in decision making on matters of the environment.

The first part of the chapter discusses the provisions of the Constitution on access to information and the way in which these have been given effect in the Access to Information Act<sup>122</sup>. The limitations to the access of information under the Constitution and the Access to Information Act are also discussed. The second part of the chapter discusses selected laws in the sector of environmental management touching on the provision on access to information and the statutory limitations provided therein.

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<sup>122</sup> No. 31 of 2016.

## 2.2 THE RIGHT OF ACCESS TO INFORMATION

### 2.2.1 The Constitutional Right to Information and Its Limitations

The Constitution of Kenya 2010 guarantees all Kenyans the right to the access of information held by the either the State and/or by another person and is required for the exercise or protection of any fundamental freedom and rights.<sup>123</sup> This right to information as stipulated in the Constitution places two types of obligations on the State including active and passive transparency.<sup>124</sup> It is a requirement that the State actively provides information by publishing and publicising important information that can affect the nation.<sup>125</sup> The reference to the State in this instance includes all the branches of the government to name them the executive, parliament and the judiciary, national and county governments, not excluding the independent institutions (Such as NEMA) and commissions established under the CoK. In the case of *Guerra v. Italy*<sup>126</sup> and *Oneryildiz v. Turkey*<sup>127</sup> the court stated that where people live close to an environmentally hazardous site, particularly where the right to life is threatened, the government has an obligation to publicly disclose all information about the risks involved.

The State has a duty to ensure access even to the information held by private persons where the information is essential for the protection of rights. This condition imposes a passive

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<sup>123</sup> Article 35 of the Constitution of Kenya, 2010.

<sup>124</sup> Commissions on Administrative Justice, 'Handbook on Best Practices on Implementation of Access to Information' (Commission on Administrative Justice 2018) 11.

<sup>125</sup> Article 35 (3) Constitution of Kenya, 2010.

<sup>126</sup> (1998) 26 EHRR 357.

<sup>127</sup> (2005) 41 EHRR 20.

obligation.<sup>128</sup> However, private entities and persons are also placed under a disclosure obligation where the information is required to exercise and protect fundamental rights as was stated in the case of *John Harun Mwau v. Linus Gitahi & 13 others*.<sup>129</sup> In this case, the Nation Media Group, through a report, alleged that Harun Mwau was the proprietor of cocaine found in a container that was seized in Malindi. Due to this report, the United States imposed a sanction against Mwau. He therefore petitioned the Court seeking orders compelling his accusers to supply him with information. In his argument, he stated that the importance of the information was to protect his fundamental rights. The Court was called upon to determine whether providing Mwau with details such as the location where the container was being held and the individual who confiscated it, was necessary as stipulated in Article 35. Since it was necessary for the protection of his rights, the judges ruled in Mwau's favour, granting his access to the information demanded. In the researcher's view, it appears that both vertical and horizontal revealing of information is necessary for realising the right to information. Arguably, this case also reveals the fact that the right to access information is essential for the realisation of additional rights protected under the bill of rights such as privacy, fair hearing, politico-economical, socio-cultural and environmental rights among others. The right to environmental information is also impliedly protected as a constitutional right.<sup>130</sup> The State has an duty to call for public participation in the protection, management and the conservation of the environment at Article 69.

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<sup>128</sup> Article 35 (1) Constitution of Kenya, 2010.

<sup>129</sup> [2016] eKLR.

<sup>130</sup> See Article 69 (1) (d) of the Constitution of Kenya, 2010.

In the case of *Friends of Lake Turkana Trust v. Attorney General & 2 others*<sup>131</sup> the court pronounced itself on the importance of information access in ensuring that effective public consultation takes place and in promoting the awareness of the right to a healthy and clean environment. The petitioners filed a constitutional petition seeking orders to compel the GoK and the Kenya Power and Lightning Company (KPLC), to fully reveal all deals entered into with the Ethiopian Government pertaining to the planned purchase of electricity from the Gibe III Dam Project including the Memorandum of Understanding (MoU) signed in 2006. They alleged that this agreement would violate the constitutional rights of the members of communities living around Lake Turkana including environmental rights due to lack of conducting a thorough EIA study before entering into the agreement. Thirdly, the petitioners averred that this project would be detrimental to the environment and the communities living around the said lake and also posing a threat to their cultural heritage. Discussing the right to information, the court found that:

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**“The right to public participation could only be exercised where the public has access to relevant information, and is facilitated in terms of reception of views. It is the view of this Court that access to environmental information is therefore a prerequisite to effective public participation in decision-making and to monitoring governmental and private sector activities on the environment.”**

Kariuki Muigua’s paper on *Realising Environmental Democracy in Kenya*, Odparlik’s thesis entitled “*The grass is always greener on the other side*”: *Access to environmental assessment documents in Germany in international comparison* and Parola Giulia’s paper on *The Actors of Environmental Democracy: the Environmental and Ecological Citizen*, express similar views. They all argue that the access information and public participation as human rights are inseparable, with the realisation of effective public participation being significantly dependent on

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<sup>131</sup> [2014] eKLR.

how much the stakeholders are informed. Just like the cases shown above, they note that information rights are a prerequisite for holding the state and private entities accountable, hence leading to the implementation and enforcement of their rights to the environment. In that sense, it enables citizens engage in effective public consultation processes that often result in the development of the best and most sustainable policies.

The right to access information as enshrined at Article 35 of CoK can be said not to be absolute. To start with, this right to information is limited only to the Kenyan citizens. With no definition of the term “citizen” in the constitution, it can be argued that according to the constitution, citizenship only refers to natural persons.<sup>132</sup> Judicial interpretations of the term “citizenship” have, however, elicited diverging views, with some courts expanding the concept to include juristic persons and others adopting the express textual formulation that includes only natural persons.<sup>133</sup>

Article 24 of the CoK outlines a further limitation whose implication is to allow the infliction of a limitation on the right to information by law. The constitution further states that a limitation should be imposed by law only to the extent that the limitation is allowable and reasonable in an autonomous and open society.

### **2.2.2 Statutory Right to Information**

The *Act on the Access to Information* was enacted as its main legal framework is to give effect to the exercise of the right to information as outlined in the constitution. The following

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<sup>132</sup> See Chapter Three of the Constitution of Kenya on Citizenship.

<sup>133</sup> Commissions on Administrative Justice, ‘Handbook on Best Practices on Implementation of Access to Information’ op. cit., p. 11.

environmental laws were also drafted to provide effectiveness to the constitutional right to information in specific sectors related to the environment including: Environmental Management and Coordination Act, No. 8 of 1999; County Governments Act, No. 17 of 2012; Wildlife Conservation and Management Act, No. 47 of 2013; Forest Conservation and Management Act No. 34 of 2016; Water Act, No. 43 of 2016; Mining Act, No. 12 of 2016 and Official Secrets Act, Cap 187.

The EMCA expressly guarantees that every citizen has a right to access environmental information in possession of NEMA, lead agencies and any other person, subject to the laws relating to access to information.<sup>134</sup> Under the Act, NEMA is also obliged to disclose and make available to the public, certain types of information for inspection including the experts register authorised by NEMA to prepare or conduct EIA studies, all EIA licences register, all effluent discharge licences register, a register of all emission licences and as well as that of all radioactive substances imported into Kenya.<sup>135</sup> The Act provides that such information may be inspected as a fee and qualifies as public documents.

The *County Government Act* expressly speaks to the right to access information from county offices and departments. For this provision to be implemented, county governments should set aside an office to effect the exercise of the right to information. The Act also stipulates that all

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<sup>134</sup> Section 3A (1) and 123 of EMCA, 1999.

<sup>135</sup> Sections 58(5), 67(30), 77, 85 and 104 (i) of the Environmental Management and Coordination Act, 1999.

county governments should come up with laws that are meant to guarantee access to information by all Kenyans.<sup>136</sup>

Section 62 of the *Wildlife Conservation and Management Act* specifically addresses the right to access wildlife data. It states that the Wildlife Research and Training Institute shall avail the data in the manner the applicant requests for it. The only exception is where providing the information in a different format is reasonable, or where it is already in the public domain and readily available in an alternative format. Under this provision, the Institute is permitted to refuse to grant an application for information where such data is classified and restricted.

Pursuant to Article 69 of the CoK, the *Forest Conservation and Management Act* was enacted to ensure the development and sustainable management of the forest resources in Kenya. It dedicates no specific section to the right to information, but provides that community involvement and public participation in the management of forests is a guiding principle of the Act.<sup>137</sup> Various institutions are specifically obliged to provide certain types of information under the Act. For instance, the Kenya Forest Service is required to maintain, develop, and regularly update a geographical system of database of all forests in Kenya.<sup>138</sup> Section 22 of the Act calls upon the Kenya Forest Research Institute to formulate development and research programs to offer information and technologies on sustainable development of forests and related natural

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<sup>136</sup> Section 96 of the County Government Act.

<sup>137</sup> Section 4 (b) of the Forest Conservation and Management Act.

<sup>138</sup> Section 8 (q) of the Forest Conservation and Management Act.

resources. Lastly, the CS is expected to publish information on any tree species that ought to be protected in Kenya.<sup>139</sup>

The *Water Act* provides for the management, regulation and development of sewerage services and water resources and for connected purposes. It provides for the establishment of a national monitoring and geo referenced information system on water resources.<sup>140</sup> Pursuant to Article 35, the Act provides that a member of the public shall access any specific information contained in the national information system and can be supplied with a copy of any document contained in the information system accessible to the public.<sup>141</sup>

The *Mining Act* gives effect to the provisions of Articles 60, 62(1)(f), 66(2), 69 and 71 of the Constitution and provides for mining, processing, mining, treatment, refining, the transport and any dealings related with minerals. It states that the Director of Mines shall be responsible for, among other things, facilitating access to information by the public, subject to any confidentiality restrictions.<sup>142</sup> The Director of Geology is also required to develop a national depository of geoscience information and enhance the public's ability to access this it.<sup>143</sup> Under this Act, the CS is obligated to ensure that information and a database of geoscience is kept and maintained and should be made available to the public upon request.<sup>144</sup>

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<sup>139</sup> Section 40 (1) of the Forest Conservation and Management Act.

<sup>140</sup> Section 21 (1) of the Water Act, 2016.

<sup>141</sup> Section 21 (3) (a) and (b) of the Water Act, 2016.

<sup>142</sup> Section 21 (1) (f) of the Mining Act, 2016.

<sup>143</sup> Section 21 (d) of the Mining Act, 2016.

<sup>144</sup> Section 29 (a) and (b) of the Mining Act, 2016.

Typically, the statutes enforce on the state agencies to do the following: -

- i. Maintain a register of information which must be constantly updated.
- ii. Provide access to the information by the public at a reasonable cost.
- iii. The access provided is only to the information on the register and
- iv. The authority is given the discretion to determine whether certain information qualifies to be confidential information due to *official secrecy, national security, commercial confidentiality* or *other public interests*.

Despite having all the above statutory provisions, Kenya's access to information legal framework remains frail for failing to make provisions for protection of data. Currently, Kenya doesn't have any data protection laws to ensure that the personal information touching on private individuals are protected. This law is important because statutory bodies have a right to demand information which goes to a public register. Such information, when made available to the public, might end up with people who may use the information for pursuing selfish goals. This impacts negatively on the exercise of the right to access to information because it prevents private persons, natural or legal, from providing information to the public voluntarily because of security and other reasons.

The exercise of this right by citizens and its realization is, therefore, still impossible due to a number of reasons. A comprehensive analysis of existing laws and jurisprudence have revealed that the main issues affecting the right to access information include the limitations imposed on

the right to information, procedural requirements, the cost of accessing information and language barriers.

### **2.2.3 Qualifications to the Right to Access to Information**

Given that the right to information is not an absolute right, all the laws discussed above impose limitations on the right to information. The limitations include the restriction of the right to citizens only, and the granting of powers to duty bearers to exercise their discretion to deny or allow a request for access to information. Information is also restricted to limited documents prescribed by the law as public.

Most laws, including the *EMCA*, *County Governments Act* and *Water Act*, only allow citizens to have access to the information. Although the *Access to Information Act* limits access to information to citizens, it adopts a boarder interpretation of citizens to include natural and juristic persons.<sup>145</sup> The case of *Katiba Institute v. President Delivery Unit & 3 others*<sup>146</sup> overturned the positions in previous cases where the courts construed the right to access information as only restricted to natural persons.<sup>147</sup> In this case, the court stated that a legal person whose director(s) is a Kenyan citizen can also request for information as stipulated under section 2 of the Access to Information Act.

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<sup>145</sup> Commissions on Administrative Justice, 'Handbook on Best Practices on Implementation of Access to Information,' op. cit. p. 11.

<sup>146</sup> [2017] eKLR.

<sup>147</sup> See *Famy Care Limited- Versus-Public Procurement Administrative Review Board & Another* [2012] eKLR where the High Court restricted the concept of citizenship for purposes of access to information to only natural persons. Similarly, in *Nairobi Law Monthly Limited- Versus- Kenya Electricity Generating Company & 2 others* [2013] eKLR, the High Court upheld the restrictive interpretation. See also *Nelson O Kadison - Versus - Advocates Complaints Commission & another* [2013] eKLR and *Friends of Lake Turkana Trust- Versus - Attorney General & 2 others* [2014] eKLR.

The laws grant the authority the power to keep certain information confidential. The *Official Secrets Act*<sup>148</sup> limits the right to the access to information to the extent that it allows the government to deny information where national security is at stake.<sup>149</sup> This Act describes acts that are prejudicial to the republic as including releasing information or official documents that are considered confidential by the state.<sup>150</sup>

The *Access to Information Act* also exempts the duty bearers from a disclosure obligation or allows them to enforce limitations on access to certain types of information generally due to public interest. It provides that information may be denied or limitations imposed due to personal privacy, national security, court proceedings, commercial interests, national economy and professional confidentiality.<sup>151</sup> Of all the interests that this exemption seeks to protect, public interest supersedes all other interests that are often of a personal nature. The general rule is that where there is a conflict between the need to disclose information on grounds of public and personal interests, public interest shall supersede personal interests. The onus of determining whether, according to a particular case scenario, public interest outweighs personal interests is vested in the courts.<sup>152</sup> Among the issues of public interest enumerated in the Act include matters touching on the **safety of the environment**.<sup>153</sup> Such information must however not have been

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<sup>148</sup> Cap 187 LOK, 1970.

<sup>149</sup> Preamble of the Official Secrets Act.

<sup>150</sup> Section 3 of the Official Secrets Act.

<sup>151</sup> Section 6 (1) (2) of the Access to Information Act, 2016.

<sup>152</sup> Section 6 (4) of the Access to Information Act, 2016.

<sup>153</sup> Section 6 (6) of the Access to Information Act, 2016.

held for over 30 years. Similar express or implied provisions on confidentiality are contained in other sector specific laws including EMCA, County Governments Act, Mining Act and Water Act.

Almost all the laws define the types of information or documents that can be circulated publicly leading to only partial disclosure of information. Granting the duty bearer wide discretion without clear guidelines, brings with it interpretation challenges and raises the risks of abuse of power and discretion by persons in authority. The absence of regulations to provide guidelines on the implementation of the right to information and imposition of limitations while exercising discretion has provided a leeway for public agencies to deny the citizens access to environmental information. In a South African case of *Shabalala Versus A-G*<sup>154</sup> the court stated that having a blanket ban was inconsistent with the right to access information.

### **2.3 PROCEDURE FOR ACCESSING INFORMATION**

Since the right to information is not a self-propelling right, an applicant must follow the required procedure when requesting for information. The process generally entails putting in a formal request which will be responded to by the duty bearer within a stipulated time period. The general presumption as outlined in the *Access to Information Act* is in favour of disclosure. However, in its provisions, information can be subject to disclosure either upon request or without request (also known as proactive disclosure). All records held by a public body are subject to disclosure once a request is made. The component of “information held” is construed

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<sup>154</sup> 1996 (1) SA 725 (Constitutional Court of South Africa).

to mean information that is either in possession of the public or private body or information held by them on the basis of their competence.

The provision on proactive disclosure requires the duty bearers to disclose certain information to the public without receiving a formal request for information. Updating such information on annual basis is necessary.

The procedure of exercising the right to the access of information is a key aspect discussed in the Act. It is important to understand the process of requesting for information as required under the Act because this right is not a self-propelling right. If it is established that the information needed has not been published, the first step towards acquiring information is to request for information from a public or private entity. A request should be written in English or Kiswahili and must clearly state in sufficient detail, the particulars of the information requested to enable the public officer carry out his duty.<sup>155</sup> Where the person seeking information is unable, due to illiteracy or disability, to make a written request, the Act states that they should be assisted by reducing the requests to a written form and a copy of the same furnished to them.<sup>156</sup> The Act gives public entities the discretion to have prescribed forms for making access to information requests as long as it does not occasion delay in exercising the right.<sup>157</sup>

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<sup>155</sup> Section 8 (1), Access to Information Act, 2016.

<sup>156</sup> Section 8 (2) and (3), Access to Information Act, 2016.

<sup>157</sup> Section 8 (4), Access to Information Act, 2016.

The court, in *Kahindi Lekalhaile & 4 others v. Inspector General National Police Service & 3 Others*<sup>158</sup> stated that one must begin by requesting for information from the public body holding it. Kahindi Lekhaile and others demanded for audits of the ivory stock in the country which Kenya Wildlife Service and other private institutions were holding. Their request was based on reports that the ivory was being traded in illegal markets. One of the issue for determination revolved around the Court's authority to determine the matter before an applicant makes a request for information and the same is denied. Secondly, the judges were to consider the petitioners' entitlement to the information sought. The Court affirmed that it was mandatory to first seeking the information from the relevant public entity. When the information is denied, an aggrieved party can then approach the Court for redress.

The Act requires the information provider to furnish information within stringent timelines. It is a requirement that requests for information are processed promptly but within 21 days. In instances where the information sought relates to the life or liberty of a person, it should be processed within 48 hours. However, extending the 48 hours to not more than 14 days is acceptable under the Act particularly where a duty bearer has to sift through large amounts of information or engage in further consultations that cannot be done within a short period.<sup>159</sup>

The duties of an officer upon receiving a request for information are two folds. In their response, they have a responsibility to state whether they are in possession of the information needed. Where they have the information, the officer must communicate the same to the applicant upon

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<sup>158</sup> [2013] eKLR.

<sup>159</sup> Section 9 (1), (2) and (3) of the Access to Information Act, 2016.

approval.<sup>160</sup> The law and good practice dictate that a declined to furnish the information requested should be accompanied with reasons and justifications for the decision. Section 9 (4) of the Act further stipulates that where information is denied, the person who requested for information must be informed of their right to appeal to the office of the Ombudsman.<sup>161</sup>

The case of *Zebedeo John Opore Versus The Independent Electoral and Boundaries Commission*<sup>162</sup> provides jurisprudence on the obligation to provide a justification for the refusal to grant access to information. The facts of this case are that, the petitioner requested for information on the records and documents pertaining to Bonchari Member of National Assembly's election, from the 1<sup>st</sup> Respondent. The issue for determination by the Court was whether the Respondent was justified, in line with Section 6 of the Access to Information Act, to deny the petitioners their right to information. The court stated that every denial of a request for information must not only be reasonable, but must also be accompanied by justified reasons. The court also found that the respondent had violated the right of access to information and ordered that the petitioner be granted access to the requested forms. Even so, public entities are not obliged to supply information to a requestor if the information is reasonably accessible by other means. The failure of an institution to furnish information requested for within 21 days is presumed to amount to a denial of information under the Act.<sup>163</sup>

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<sup>160</sup> Section 9 (4) of the Access to Information Act, 2016.

<sup>161</sup> Section 9 (4) of the Access to Information Act, 2016.

<sup>162</sup> [2017] eKLR.

<sup>163</sup> Section 9 (5), Access to Information Act, 2016.

Sometimes, a public entity may be unable to provide information because the data requested for is in the hands of another officer or public office. Such circumstances call for further assistance by the requested officer who should take steps to forward the request to the relevant officer or entity which holds the information requested. The transfer ought to be facilitated within 5 days and the requestor informed of the transfer within 7 days from the date the application was made.<sup>164</sup> Upon receipt of the transferred request, the public entity to which the request was sent must arrive at a decision within 21 days from when the first application was made.<sup>165</sup>

Following the approval of a request, a response in writing should be prepared by the relevant entity and forwarded to the applicant within 15 days. This is meant to bring to the applicant's attention the approval of the request. In some instances, this response may also state the form in which the information is available, amounts of any fee to be remitted and how to make the payment, the proposed mode of accessing the information and the applicant's right to appeal a decision to deny information to the ombudsman.<sup>166</sup> After the fee is remitted, the officer must make the information available or permit relevant inspection of the information within 2 days. The applicant bears all costs incidental to the process of supplying the information, e.g. photocopying costs.

## **2.4 PROCEDURAL BARRIERS TO ACCESSING INFORMATION**

This formalistic approach to accessing information, as will be demonstrated in this section, is unnecessarily lengthy and costly. Moreover, the law fails to address the difficulty of accessing

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<sup>164</sup> Section 10 (1) and (2) of the Access to Information Act, 2016.

<sup>165</sup> Section 10 (3) of the Access to Information Act, 2016.

<sup>166</sup> Section 11 (1) of the Access to Information Act, 2016.

adequate information by the public for purposes of making a clear request and the absence of centralised systems of storing information.

#### **2.4.1 Bureaucratic and Lengthy Procedure for Accessing Information**

The procedural requirements for accessing information as described above is too bureaucratic and extremely inconveniencing. One of the reasons is the prescription of an unreasonably long time within which an applicant should receive a response to a request for information. Besides, in several instances, rarely do institutions provide information readily as they are duty bound. Access to information letters are rarely responded to in time or even never responded to at all. In addition, when an agency is not in possession of the required information, they rarely go a step further to assist the applicant to reach out to the institution in possession of the information.

#### **2.4.2 Lack of Adequate Information to Craft a Proper Formal Request**

The requirement to make formal written requests for information fails to recognise that an ordinary citizen may be unable to make a precise request that meets the standards set out in law because they lack information that is necessary to draft the request. For example, an individual may be unable to indicate the reference number of an EIA Study Report without getting such details from the NEMA, which will require the applicant to first make a formal request for such details before putting in the main request for the EIA study report.

According to the Access to Information Act, the first step in the information request process is the making of a formal request through a letter. As earlier stated, the letter must be written in

English or Kiswahili and must clearly state in sufficient detail, the particulars of the information requested to enable the public officer carry out his duty.<sup>167</sup>

### **2.4.3 Lack of A Centralised System of Storing Information**

No law provides for a centralised system of storing environment related information that should be made public. Both the national and the county offices of NEMA lack a centralised and coordinated system of storing information. Although there is a requirement to publicise certain types of information, the information is rarely made available on the institution's online website by the authority. With both the national and county government offices holding various types of information, there is a need to have a coordinated system where it is possible to obtain all relevant information in the custody of the national office at the county level and vice versa. The authority also has the mandate to constantly update the information in the public domain.

## **2.5 LANGUAGE BARRIER**

English is the prevalent language in which environmental information is provided. In law and in practice, all EIA Study Report, EIA Licences and conditions are provided only in English. Project proponents are also not bound by the law to provide translated versions of the EIA study report. The NEMA is also under no obligation to provide translated versions of the EIA licence and conditions. The laws on access to information, therefore, fails to take into account the fact that not everyone is English literate. Sometimes, the technical nature of a study may also make it difficult for people who are literate to understand its content, if they lack the necessary expertise in a specific area of study. This situation may lead to the questioning of a public consultation process because it cannot be said that the information was conveyed effectively.

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<sup>167</sup> Section 8 (1), Access to Information Act, 2016.

According to the EMCA and the Environmental (Impact Assessment and Audit) Regulations, 2003 (EIA Regulations), it is the duty of a project proponent to submit either report of a project or an EIA Study Report when making an application for an EIA licence. A detailed outline of the contents of these reports are provided in the EIA Regulations.<sup>168</sup> The Regulations also state that the EIA study report should be accompanied by a summary which is non-technical outlining the major findings, conclusions and recommendations of the study.<sup>169</sup>

To the extent that it demands the provision of the summary of a non-technical of the EIA study report, the law is progressive. However, as many scholars argue, the inaccessibility of information arises as a consequence of the provision of information that is presented in a language not easily understood by ordinary people. Thus, the absence of a requirement to translate the study reports or executive summaries where necessary, demonstrates some lacunae in law that needs to be addressed.

## **2.6 THE COST OF ACCESSING INFORMATION**

There are two types of costs associated with accessing information which can be broadly categorised into direct and indirect costs. Whereas direct costs arise from the imposition of a prescribed fee, indirect costs are incidental to the process of obtaining information including the cost of photocopying and any travelling costs where the information is to be obtained from multiple state agencies located in different regions. Where stakeholders are unable to cover the costs of accessing information, they can only rely on the little information provided in the notice

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<sup>168</sup> See Regulation 7 (1) for the contents of a projects report and Regulation 18 (1) of the Regulations, of the EIA Regulations, 2003.

<sup>169</sup> Regulation 18 (2) of the EIA Regulations, 2003.

or the information provided during public hearings. Such information is usually incomplete, in which case one cannot assert that effective consultation will take place. In the case of *Katiba Institute v Presidents Delivery Unity & 3 Others*<sup>170</sup> the court stated that -

*“...successful and effective public participation in governance largely depends on the citizen’s ability to access information held by public authorities. Where they do not know what is happening in their government, and/or if actions of those in government are hidden from them, they may not be able to take meaningful part in their country’s governance. In that context, therefore, the right to access information becomes a foundational human right upon which other rights must flow...”*

### **2.6.1 Direct Costs**

The Access to Information Act provides that the applicant may be required to remit fees in exchange for information. In such instances, the duty bearer should provide the recipient with information on, among other things, the mode of payment of the fees following their decision to provide the information requested for.<sup>171</sup> It is only after the fees payment that the information shall be released.<sup>172</sup> The applicant also bears any costs associated with copying, reproduction or conversion to sound transmission. The Act restricts fees in the context of information requests to the actual cost of making copies of the information and supplying the information.<sup>173</sup>

The narrative is similar under the EMCA and it provides that NEMA should avail information that qualifies as public documents and may allow it to be inspected at a fee.<sup>174</sup> Under the County Government Act the county is also allowed to impose, within its county legislation on access to

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<sup>170</sup> [2017] eKLR.

<sup>171</sup> Article 11 (1) (d) of the Access to Information Act, 2016.

<sup>172</sup> Article 11 (2) of the Access to Information Act 2016.

<sup>173</sup> Section 12 (1) and (2) of the Access to Information Act, 2016.

<sup>174</sup> Section 3A of EMCA, 1999.

information, reasonable fees for access to information held by the county government, its agencies or departments.<sup>175</sup> The Wildlife Conservation and Management Act provides that a person is entitled to information once a request is made and the prescribed fees remitted.<sup>176</sup> The Water Act also provides for the prescription of a fee.

### **2.6.2 Indirect Costs**

Besides the prescribed fee, the cost implication of accessing information may be over and above simply the cost of making copies or converting the information to sound transmission. The researcher argues that sometimes, the cost of reproducing copies may be exorbitant due to the bulkiness of the information needed. The absence of a properly decentralised system of storing information can also have cost implications since applicants may be required to travel long distances in order to obtain information from the relevant authority. These incidents are common despite the fact that lead agencies such as NEMA have established offices at the county level. Sometimes, the information required can only be accessed from county offices, while certain documents are only available at the national headquarters. Having only a few offices in possession of information makes it extremely difficult for everyone to access it at a low or reasonable cost.

## **2.7 CONCLUSION**

This chapter has reviewed key constitutional and statutory provisions on access to information related to the environment. As earlier stated, the constitutional right to information is limited to citizens. Further exemptions to the right to information are imposed under the Access to

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<sup>175</sup> Section 96 of the County Government Act, 2012.

<sup>176</sup> Section 62 of the Act.

information Act and other sector specific law which ultimately eliminate a wide range of information from what should be accessible to the public. These limitations prevent both citizens and non-citizens from effectively participating in the processes of decision making. The administrative costs and procedural barriers discussed above also hinder the exercise of the right to information. As such, the right to information is only accessible to small groups of private institutions such as NGOs and business entities who can bear the cost of accessing information and use such information to participate in decision-making processes. Having established the importance of access to information in ensuring the effective participation of citizens, the next chapter discusses the effectiveness of the public consultation process in Kenya.

## **CHAPTER 3: PUBLIC PARTICIPATION**

### **3.1 INTRODUCTION**

Besides access to information, the legal procedure for conducting public consultations can determine how effective citizens feed into environmental decision-making processes. In this chapter, the researcher argues that, the mere presence of the substantive right to public participation and procedural requirements for conducting public consultation in Kenyan laws has not, in itself, guarantee the effectiveness of the process. Judicial decisions have, in fact, termed the Constitutional and other statutory prescriptions on public participation as vague, for the reason that they fail to provide guidance on how to gauge the effectiveness of public participation. This ambiguity has turned public participation into a mere exercise of ticking the box which duty bearers have used to sabotage the spirit behind the constitutional right to citizen participation. There are also technical limitations associated with the conduct of public participation including language barrier and lack of expertise in environmental matters, which have prevented the effective participation of affected stakeholders.

In view of this introduction, this chapter begins by discussing the constitutional and statutory provisions on public participation in Kenya. It then goes ahead to discuss the administrative, procedural, technical and legal barriers to public participation.

### **3.2 THE RIGHT TO PUBLIC PARTICIPATION**

#### **3.2.1 The Constitutional Right to Public Participation**

All national principles in Kenya's Constitution binds state bodies when applying or interpreting its provisions.<sup>177</sup> Participation of the people is among the recognized principles.<sup>178</sup> Participation in

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<sup>177</sup> Article 10 (1) of the Constitution of Kenya, 2010.

environmental decision-making processes including, its management, protection and conservation, is also enshrined in the constitution.<sup>179</sup>

The constitutional provisions demonstrate the general requirement that consultation must take place during processes such as environmental risk surveys, audits and monitoring. The importance of participation rights was brought out in the case of *Communications Commission of Kenya and Others Versus Royal Media Services & Others*.<sup>180</sup> The court observed that public participation is the foundation of achieving feasible development. The court stated that: -

“[381] Public participation calls for the appreciation by the State, Government and all stakeholders implicated in this appeal that the Kenyan citizenry is adult enough to understand what its rights are under Article 35. *In the cases of establishment, licensing, promotion and protection of media freedom, public participation ensures that private “sweet heart” deals, secret contracting processes, skewed sharing of benefits - generally a contract and investment regime enveloped in non-disclosure - do not happen. Thus, threats to both political stability and sustainable development are nipped in the bud by public participation. Indeed, if they did, the word and spirit of the Constitution would both be subverted.*”

### **3.2.2 Statutory Right to Public Participation**

In harmony with the requirements of the Constitution, other sector specific laws including the Environmental Management and Coordination Act, Forest Conservation and Management Act, Water Act, County Government Act and the Mining Act have also listed public participation as a guiding principle in the implementation of their provisions.

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<sup>178</sup> Article 10 (2) (a) of the Constitution of Kenya, 2010.

<sup>179</sup> Article 69 (1) (d) of the Constitution of Kenya, 2010.

<sup>180</sup> [2014] eKLR.

Engaging ordinary persons is one of the guiding principles of the *Forest Conservation and Management Act*. It advocates for public consultation and engagement with the communities in the forest conservation matters.<sup>181</sup> Public participation is a requirement, under the *Water Act*, when formulating the National Water Resources Strategy, during an application for a water permit, variation of water permits and an application for a licence. The *Wildlife Conservation and Management Act*, defines public participation as the “*active involvement by the citizenry in decision making processes through, inter alia, use of the national media, relevant consultative mechanisms and public hearings.*” It states that “effective public consultation” shall be one of the guiding principle in the protection of wildlife.<sup>182</sup> The guiding principles of the *Mining Act* are those outlined in Articles 10, 66 (2), 201 (c) and (d) and 232 of the Constitution which includes public participation among other values. The conduct of activities of the county assembly requires public participation in counties as stipulated under the *County Governments Act*.<sup>183</sup>

### **3.3 PROCEDURAL REQUIREMENTS FOR CONDUCTING PUBLIC CONSULTATION**

Public participation involves the requirement to consult the public, especially those likely to be affected negatively by development projects. On the one hand, it imposes a duty to consult and on the other hand it grants citizens the right to give their views about development projects and their potential impacts. The main methods of engaging the public stipulated in the law is through

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<sup>181</sup> Section 4 of the Forest Management and Coordination Act.

<sup>182</sup> Section 4 (b) of the Wildlife Conservation and Management Act.

<sup>183</sup> Section 3, Section 6A, Section 104 of the County Government Act.

the conduct of public hearings and the submission of written comments. The EMCA and other sector specific laws provide further specific guidelines on how to conduct public consultations.

The *Environmental (Impact Assessment and Audit) Regulations, 2003* provides guidelines and procedures on how to conduct an EIA as required under the *EMCA*.<sup>184</sup> The basis of public consultation in environmental decision making is founded on the provisions of Regulation 17 (1) and (2) of the EIA Regulations. It provides that when an EIA study is being conducted, the proponent must consult the victims affected by a project. Regulation 12(2) states that, when seeking the views of the public, the proponents shall: -

- a) Make the plan and its estimated impacts publicly known by –
  - i. Placing advertisements about the project in conspicuous but common places that are close to the project location.
  - ii. Advertising a notification on the future development in a widely circulated newspaper for two succeeding weeks; and
  - iii. Announcing the notice in both official and local languages on national radio station. The announcement must be made at least once a week for two consecutive weeks;
  - iv. Ensuring that a minimum of three public meetings are held for purposes of consulting the affected communities and explaining the project and its impacts, as well as, giving affected persons an opportunity to express their oral or written views;

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<sup>184</sup> Section 6A of EMCA.

- v. Ensuring that a week before convening the gatherings, the notices should be sent out to the public. The venue and times selected for the meetings must not be inconvenient to communities and the other parties who feel distressed; and
- vi. Ensuring there is a duly qualified coordinator to receive and keep a clear record of comments made.

Other sector specific laws also prescribe the methods of conducting public participation. Where public consultation is required in the *Forest Conservation and Management Act*, the process to be followed is provided for in the second schedule. It provides that, the responsible agency should circulate a notice about the proposal through the gazette, national and local newspapers, and a radio station. The contents of a notice include: a shortened version of the proposal, where to find and inspect further details on the proposal. It must also include a solicitation to submit written views or objections on the issue within sixty (60) days after the notice publication. Although no regulations exist, the Act provides for the formulation of rules requiring the authority to hold a public meeting before making a decision. In arriving at its verdict, both written and oral comments received must be considered and a notice of the final outcome published.

The *Water Act* describes the meaning and requirements of public consultation at section 139. Just as seen above, the starting point is to publish a notice informing the public about the application or recommended action in a minimum of one newspaper and local broadcasting station registered in Kenya. The communication must provide a snapshot of the application or proposed activity; where information on the same can be obtained or inspected, invite the public

to submit written comments or objections and where to submit them; and specify a deadline for submissions which should not be prior to the expiry of thirty (30) days after publication of the notice. The decision makers are required in law, to consider any written or oral comments received during the process of evaluating an application. Ultimately, they must publish a notice informing the public of the place where they can access a copy of the Authority's decision and the reasons for the decision. The Water Act states that regulations may be made to require the designated person to hold a public meeting in relation to an application or proposed action.

The requirements for public participation under the *Wildlife Conservation and Management Act* are contained in the fourth schedule. As understood from the preceding laws discussed, the process begins with the gazettelement of a notice, followed by newspaper and radio adverts. The time period within which the public should submit written comments should not be less than sixty (60) days. The authority should make available, to the public, the relevant documents at a reasonable cost. The format for conducting public consultation is through the submission of written and/or oral comments. The Authority must consider any comments when making its decision. It is a requirement to also publish a notice of the place where the public can inspect the final decision and the reasons for the decision.

Interestingly, the *Mining Act* does not provide further guidance on the modality and method of conducting the public consultation process, that meets a desirable threshold despite mentioning public participation as a guiding principle.

The *County Governments Act*, unlike the others, attempts to move away from the totally procedure oriented format in other laws. It stresses the outcomes of the process as well. The submission of comments in writing can, however, be a barrier to participation due to language. Where a referendum is required, minorities might suffer because decisions are arrived at based on the majority voices. Rules establishing the techniques and platforms for civilian participation should be articulated to ensure that the actions of the authority are in check.

The public, in the context of the provisions of this Act on public consultation, means the residents of a particular county, the rate payers of a particular city or municipality, any resident civic organisation or NGO, private sector or labour organization, non-resident persons who rely on services delivered by the county, city or municipality. A detailed description of the requirement for public consultation are contained in Part VII of the Act. The guiding values of citizen inclusion at the county level include<sup>185</sup>:-

- i. Delivery of relevant information in a timely manner.
- ii. The provisions of reasonable opportunities for contributing to policy construction dealings.
- iii. Protection of the interests and rights of marginalised communities and the enhancement of their ability to access relevant information.
- iv. Access to legal remedies with respect to any decisions affecting various persons especially groups that are ordinarily marginalised such as women, youth and disadvantaged communities.
- v. Co-operation between county governments and non-state actors in decision-making processes to encourage shared responsibilities.

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<sup>185</sup> Section 87 of the County Government Act.

- vi. Promotion of public-private partnerships, to enhance constructive dialogue and rigorous action on sustainable development.
- vii. Acknowledgement and advancement of the worth of NGOs' input and governmental assistance and oversight.

For any matters falling within the county's mandate, citizens are allowed under this Act to petition the county government in writing.<sup>186</sup> Upon receiving a petition, the relevant county agency should provide an expeditious response to the problem.<sup>187</sup> The Act allows a referendum on local questions including county laws and petitions, as well as, planning and investment decisions, where citizenry raises issues through petitions.<sup>188</sup> The county government is responsible for launching the participation approaches including technologically advanced information communication channels, informal public meetings, financial planning and endorsement mediums, selections, procurement, rewards and development project sites amongst others.<sup>189</sup> The Act establishes the County Development Board. It provides an atmosphere favourable for public consultation at the county level and between national and county government on development matters.<sup>190</sup> A progressive provision in this Act is the requirement that the governor submits an annual report to the County Assembly on citizenry participation in the affairs of the county government.

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<sup>186</sup> Section 88 of the County Government Act.

<sup>187</sup> Section 89 of the County Government Act.

<sup>188</sup> Section 90 of the County Government Act.

<sup>189</sup> Section 91 of the County Government Act.

<sup>190</sup> Section 91A (2) (a) of the County Government Act.

### 3.3.1 Parameters for Assessing the Adequacy of a Consultation Process

One of the challenging short comings of the legislation on public consultation is the absence of guidance on how to evaluate the success or otherwise of a consultation process based on the outcomes of the public consultation exercise. This problem is primarily because of the prescriptive and procedural nature of the law making the parameters for measuring success dependent on compliance with the step-by-step procedure of the law. In the case of *National Association for the Financial Inclusion of the Informal Sector v. Minister for Finance & Another*<sup>191</sup>, the court stated that:-

*“I agree that public participation as a national value is rooted in the fact that Kenya is a democratic state and that public participation fulfils and complements the other values of good governance, transparency and accountability. **The Constitution does not prescribe how public participation is to be effected and in every case where a violation is alleged, it is a matter of fact whether there is such a breach or not.**”*

The NET in its recent decision in the case of *Save Lamu & 5 Others Versus NEMA & Another*<sup>192</sup> pronounced itself on what amounts to effective public participation. In this case, the appellants lodged an appeal against the first respondent’s decision to grant an EIA Licence authorising the development of a coal plant in Lamu. The lack of adequate public consultation was among the grounds cited by the appellants. The Tribunal reaffirmed the position that access to information for the persons affected was important for ensuring that meaningful participation occurred.<sup>193</sup> Adopting the judges’ decision in the Constitutional petition of *Mui Coal Basin Local*

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<sup>191</sup> [2012] eKLR.

<sup>192</sup> Tribunal Appeal No. NET 196 of 2016.

<sup>193</sup> See Paragraph 24 of the Judgement.

*Community & 15 Others Versus Permanent Secretary Ministry of Energy & 17 Others*<sup>194</sup> the Tribunal outlined the following as the minimum basis for adequate public participation<sup>195</sup>:-

- a) The government authority must be involved in designing a public participation programme that suits the nature of the subject matter. However, while designing this programme, both the qualitative and quantitative aspects of participation must be considered.
- b) Since having a single regime of public participation is impossible, the process must be varied in an innovative way depending on the subject matter, culture, logistical constraints among other factors. Courts will, therefore, want to see that the process was effective and that reasonable opportunity was afforded to affected persons to contribute. The Courts define “reasonable opportunity” based on the case before it. (*Minister of Health and Another Versus New Clicks South Africa (Pty) Ltd and Others 2006 (2) SA 311 (CC)*)
- c) Thirdly, the right to access relevant information must be integrated into every public participation programme.

See the dispute between *Republic Versus The Attorney General & Another ex parte Hon. Francis Chachu Ganya* (JR Misc. App. No. 374 of 2012) where the Court stated: “Participation of the people necessarily requires that the information be availed to the members of the public whenever public policy decisions are intended and the public be afforded a forum in which they can adequately ventilate them.” In the instant case, the availability of information determines the degree of environmental data dissemination. Consequently, public participation is an enduring duty on the state during the EIA study.

- d) Fourth, it is not mandatory that each person’s sentiments on a matter of environmental significance is given.
- e) In line with principle (d) above, it is not an assurance that every individual’s views will be taken as controlling. As long as they have stated their opinions, the agency has no obligation to accept their input, but take them into consideration, in good faith. The will prevent the conversion this pertinent process into a casual activity of marking off the Constitutional box.
- f) The right of public participation is not aimed at taking over the role of the office holders but to complement their views with those who will be negatively impacted by their decisions.”

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<sup>194</sup> Constitutional Petition No. 305 of 2012.

<sup>195</sup> See Paragraph 25 of NET 196 of 2016

In as much as no particular regime cannot be put in place to assess the adequacy of a consultation process, there is a need to come up with holistic tools of review and evaluation mechanisms for assessing how adequate a public consultation process was, taking into consideration procedural, social, cultural and other relevant factors. These tools should set down the bare minimum standards required to ensure that the consultation process is meaningful both qualitatively and quantitatively. This can go a long way towards promoting the effectiveness of the process.

### **3.4 BARRIERS TO EFFECTIVE PUBLIC PARTICIPATION**

The legislative framework discussed above generally presents certain procedural, technical and administrative hindrances to the conventional practices of consulting the populace in the following ways: -

1. They are all too formalistic in nature as opposed to outcome based;
2. They all fail to prescribe parameters for assessing the adequacy of a public consultation process;
3. They all provide for the conduct of public consultations by way of public hearings/ workshops and the submission of written comments;
4. They are all silent on the language to be used when conducting public consultations.

#### **3.4.1 FORMALISTIC NATURE OF THE PUBLIC CONSULTATION PROCESS**

The general presumption is that what amounts to effective public participation is based on adherence to the procedural requirements set out in the law. This implies that so long as the duty bearer shows that they followed the steps provided in law, they are deemed to have effectively consulted the public. On the contrary, following the law does not automatically amount to

effective consultation but reduces the participation process to a formal exercise of ticking the box.

In the case of *Diani Business Welfare Association & Others Versus County Government of Kwale*<sup>196</sup>, Justice Emukule reiterated the words of Justice Odunga in *Robert N. Gakuru & Others Versus Governor Kiambu County & 3 Others*<sup>197</sup> who stated as follows regarding public participation:-

**“In my view, public participation ought to be real and not illusionary and ought not to be treated as a mere formality for the purpose of fulfilment of the Constitutional dictates.** It is my view that it behoves the County Assemblies in enacting legislation to ensure that **the spirit of public participation is attained both quantitatively and qualitatively.** It is not just enough in my view to simply “tweet” messages as it were and leave it to those who care to scavenge for it. The County Assembly ought to do whatever is reasonable to ensure that as many of their constituents in particular and the Kenyans in general are aware of the intention to pass legislation and where the legislation in question involves such important aspects as payment of taxes and levies, the duty is even more onerous. I hold that it is the duty of the County Assembly in such circumstances to exhort its constituents to participate in the process of the enactment of such legislation by making use of as many forums as possible such as churches, mosques, temples, public barazas, national and vernacular radio broadcasting stations and other avenues the public are known to converge to disseminate information with respect to the intended action.”

Based on the legal analysis above, there is a need for reforms to make public consultation less formalistic. That is not to say that the duty to follow the laid down procedure is less important. On the contrary, courts have consistently maintained that the rule of law demands complete and not simply substantial compliance with the law.<sup>198</sup> Even so, specific procedural requirements of public consultation including the use of notices, imposition of time limitations and the use of

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<sup>196</sup> [2015] eKLR.

<sup>197</sup> [2014] eKLR.

<sup>198</sup> See the case of *Moffat Kamau & 9 Others v. Aelous Kenya Limited & 9 Others* [2016] eKLR and *Ken Kasinga v Daniel Kiplangat Kirui & 5 Others*.

public hearings as well as written submissions also presents further barriers to the participation of citizens as discussed below.

#### **A. Requirement to Use Notices**

The potential difficulty with the use of notices is that they rarely reach a large proportion of the public. It is unreasonable, for instance, to assume that people who live in remote areas can access Gazette Notices, newspapers and radio station announcements from their location. They may also be unable to understand the contents of the notice and its requirements without assistance from literate people.

This requirement to use notices is found in a majority of the laws including the EMCA, the Forest Conservation and Management Act, the Water Act and the Wildlife Conservation and Management Act. They prescribe the use of Gazette notices, newspaper advertisements and radio media announcements, to invite the public to make comments on proposed development projects or proposals that can potentially affect the environment. The laws further state the requirements as to the contents of a notice which make it valid in law.

Considering the unique situations that may arise, the law should require the relevant authority or project proponents to go an extra mile to reach out to affected communities through other socially defined channels such as community based organizations, churches and other groups set up in the community. This will ensure that several people are consulted and that the interests of a number of groups are represented including women, youth, persons living with disabilities and even children.

## **B. Time Limitations**

In every notice inviting the public to submit comments, the responsible authority must indicate a time period within which such comments can be submitted. Time limitations may negatively impact the effectiveness of a public consultation process particularly where affected stakeholders are not afforded sufficient time to interact with the relevant documents/information and submit their comments. The law should recognise that sometimes key stakeholders may be unable to submit comments within the prescribed period for reasons that are justifiable. In practice, it is also common for the authorities to simply prescribe the minimum period stipulated in law without using their discretion to calculate the extent of public participation required in a particular situation.

The laws prescribe a minimum period of between thirty (30) and sixty (60) days. The Environmental Management and Coordination Act prescribes a time limit of sixty (60) days which can be subject to extension. The Forest Conservation and Management Act and the Wildlife Conservation and Management Act allows for a minimum of sixty (60) days for public consultation following the issuance of a notice. The Water Act, on the other hand, prescribes the submission of written comments in thirty (30) days following the publication of an invite.

The question as to what amount of time is adequate, is hinge on a number of factors. In *North Rift Motor Bike Taxi Association (Nrmbta) Versus Uasin Gishu County Government*<sup>199</sup> the court borrowed a lot from the decision of Justice Odunga in the case of *Robert N. Gakuru & Others*

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<sup>199</sup> [2014] eKLR.

*Versus Governor Kiambu County & 3 others [2014] eKLR<sup>200</sup>*. Justice Odunga, in his decision, affirmed the position in the South African case of *Glenister Versus President of the Republic of South Africa and Others*<sup>201</sup>, where the court said that meaningful participation was impossible where members of the public are not afforded a substantial amount of time to interact with a Bill, reflect through their stance and articulate their deliberations. An adequate opportunity to participate, in the court's opinion, is one that is "capable of influencing the decision to be taken". Therefore, a blanket provision on the time limit may prevent successful consultation.

As such an authority or project proponent should be required to give adequate time to allow for effective public participation considering that other factors such as the length of time and cost of accessing information may affect the quality of public consultation. This can be achieved by allowing the public consultation period to run from the time when a notice inviting comments is published to the time when the relevant authority arrives at its final decision.

### **C. Limitations of Holding Workshops/ Public Hearings**

Public hearings often take the form of workshops where a few members from the public are selected to take part in the consultation meetings of public hearing workshops. For public hearings, the law recommends the formulation of regulations to provide for guidelines for the process. No regulations on how public meetings are to be held have been drafted and enacted yet, even though public hearings do take place during consultation processes. The limitations associated with holding workshops and the absence of guidelines is that the selection of

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<sup>200</sup> H.C at Nairobi Constitutional Petition No. Petition No. 532 Of 2013 Consolidated With Petition Nos. 12 Of 2014, 35, 36 Of 2014, 42 Of 2014, & 72 Of 2014 And Judicial Review Miscellaneous Application No. 61 Of 2014.

<sup>201</sup> (CCT 48/10) [2011] ZACC 6; 2011 (3) SA 347 (CC) ; 2011 (7) BCLR 651 (CC).

participants is left to the relevant authority's discretion. When that happens, the tendency is to include only those who are pro a development project in the consultation forum. Another issue is that the period of the notices before the meeting is held is usually short leaving the participants with no time to prepare adequately. Issues about the venue and days for holding public hearings are also common because they are often decided upon without consulting the communities whose economic status, religious, social and/or cultural values may affect their ability to participate in a public hearing on a particular day or at place. For instance, holding a public hearing on a Friday in an area where community members are Muslims may prevent them from attending public forums because this is their day of worship.

In the case of *The Kaliña and Lokono Peoples Versus Suriname*<sup>202</sup> the court observed that when conducting public participation during an EIA process, the relevant authority must respect the traditions and culture of the Indigenous Peoples.

In some instances, the law requires the responsible authority to organize public hearing. The EMCA, EIA Regulations and the Wildlife Conservation and Management Act gives the responsible authority the power to decide whether a public hearing is necessary or not, in addition to participation through the submission of written comments. These laws are all silent on how these hearings should be conducted. The authority can therefore choose the approach according to what suits them.

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<sup>202</sup> (Judgment of November 25, 2015).

#### **D. Limitations of Consultation Through Submission of Written Comments**

The public must be afforded an opportunity to submit written comments on an application or proposed action during public consultation. The limitation of this approach is that it presents language barriers to communication. There is also no prescribed format or template for making written submissions hence making it difficult for a lay person to address their concerns through written comments in a coherent manner. When issues are not addressed in an organised and coherent way, chances are that the relevant authority will not take them into consideration, rendering legitimate concerns irrelevant.

### **3.5 LANGUAGE BARRIER**

Requirements as to the language of conducting public consultations are not expressly provided for in the law. As such, common practice dictates that consultations should be conducted in English. In most instances, therefore, written comments are usually submitted in English and public hearings are conducted in English as well. There is no provision in law, placing an obligation on the relevant authority to conduct consultations in languages other than English. It is arguable that such a provision may be impractical due to the technicality of a subject matter. While such arguments are valid, the law should at least make it mandatory for the relevant authority to make use of translators and even sign language interpreters where the audience cannot understand English.

The learned judge in the case of *Lucy Wanjiru and John Ndirangu Versus The Attorney General & County Government of Kajiado*<sup>203</sup> discussed the issue of what amounts to effective public participation. In an *obiter dicta* statement, he couldn't help but question whether, the

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<sup>203</sup> [2016] eKLR.

respondents, in conducting the outreach programme on public participation with respect to the Kajiado County Finance Act 2014, took into consideration the language barriers to participation given the high level of illiteracy in Kenya. He questioned whether the Bill was translated in other languages, say Kiswahili, to accommodate those who were not conversant with the English language. The learned judge also wondered whether measures were taken into account to reach out to the vulnerable groups and or other persons with disabilities. These sentiments suggest how important it is to ensure that stakeholders are engaged to a level that they feel that they were given a real opportunity to have their say.

### **3.6 NO REQUIREMENT TO GIVE FEEDBACK AFTER CONSULTATION**

Contrary to the Fair Administrative Act which demands that decision-makers inform persons concerned about their final decision and give reasons thereof, the law does not place an obligation on the authority to give feedback to the public on how their comments were considered during the decision-making process. The EMCA and EIA regulations do not require the decision-maker or project proponents to give feedback on how they used the comments from the public to arrive at their decisions or modify their project proposals. It is also not a requirement for NEMA to publish, a notice on their decision regarding an application for a licence. Failing to notify the public about the outcome of an EIA Licence application can also negatively affect the exercise of their right to appeal.

This issues came up in the case of *Mahinda Gatigi & 13 Others Versus NEMA & Universal Corporation Ltd*<sup>204</sup> where the Tribunal stated that the absence of a public notice of the EIA licence application meant that the appellants would not have known of the grant of the EIA

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<sup>204</sup> NET Appeal No. 15/07 (The Pharmaceutical Factory Case).

licence. Based on this grounds, the Tribunal allowed the appellants to file the appeal out of time, in exercise of their discretion under Rule 7 of the Tribunal Procedure Rules.

### **3.7 CONCLUSION**

The discussion in this chapter has demonstrated that although the law makes public consultation a requirement during environmental decision-making, it fails to guarantee the sufficiency of the public participation process. That is because the law is too procedure oriented as opposed to being result oriented. As pointed out, the procedural requirements not only present administrative, technical and language barriers, but also makes the public consultation process a mere formality that the duty bearers must abide by. Judicial decisions have pointed to the fact that the absence of clear parameters of assessing the adequacy of public consultation is a difficulty and courts have used their discretion to measure the effectiveness of public participation based on a case to case basis. Similar problems are also encountered by citizens when they want to access justice, which is one of the means through which they can exercise their right to public participation.

## **CHAPTER 4: REMEDIES FOR REDRESS OF GRIEVANCES**

### **4.1 INTRODUCTION**

This chapter critically examines Kenya's legal framework on access to justice, a concept closely linked to public participation and dependent on access to information. The author's argument is that access to remedies is important for promoting effective public participation in decision making in environmental matters. The enforcement of the right to citizen participation by judicial and quasi-judicial bodies has shown that access to justice is necessary for the protection and realisation of the right to a clean and healthy environment. We further seek to prove, through this discussion, that while Kenya has put in place a robust constitutional and statutory legal framework to guarantee its citizens the right to access justice, the practical implementation and exercise of this right still remains a challenge. By and large, ordinary citizens continue experiencing difficulties in asserting this right.

The first section of this chapter speaks to the constitutional and statutory foundation of the right to access justice in Kenya. By way of a critical analysis, the chapter then discusses procedural, administrative and legal limitations which prevent citizens from accessing legally available remedies.

### **4.2 THE RIGHT TO ACCESS REMEDIES**

#### **4.2.1 The Constitutional Right to Access Remedies**

The entitlement to seek redress for the violation of rights protected under the Constitution of Kenya are well established in various provisions. Access to justice in environmental matters is an internationally recognised principle meant to promote sustainable development. It ensures that citizens can access remedies through legally available channels for the violation of rights which affect them. As Parikh puts it in his article entitled *Public Participation in Environmental*

*Decision Making in India: A Critique*, the role of the judiciary in the enforcement of the right to public participation in EIA processes is indispensable.

By giving individuals the power to enforce their constitutional rights and creating a framework for the establishment of various independent, judicial and quasi-judicial institutions, the constitution creates an avenue for the realisation of the right to a healthy and clean environment. The foundation of the right to access justice is expressed in **Article 48** which requires that the state ensures that all people can access justice at a reasonable fee. **Article 22** grants every person the right to institute proceedings in court claiming that a right or fundamental freedom in the Bill of Rights has been violated, denied or infringed or threatened. This provision eliminated the limitations imposed on access to justice under the Kenyan independence Constitution due to the concept of *locus standi*.<sup>205</sup> The constitution establishes the High Court<sup>206</sup> and gives it the powers to hear and determine applications for redress of a denial, infringement of or violation, or threat to, a right or fundamental freedom in the Bill of Rights. The remedies one may seek include: -

- An injunction,
- A conservatory order,
- A declaration of rights,
- A declaration of rights,

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<sup>205</sup> Article 22 (2) which provides that: in addition to a person acting in their own interest, court proceedings under clause (1) may be instituted by: a person acting on behalf of another person who cannot act on their own name; a person acting as a member of, or in the interest of, a group or class of persons; a person acting in the public interest; or an association acting in the interest of one or more of its members. See also the case of *Mumo Matemu v Trusted Society of Human Rights Alliance & 5 others [2013] eKLR* where the court observed that the conservative requirements of locus that existed in the old regime that treated litigants, other than those directly affected, as mere or meddling busy bodies had the negative effect of limiting access to justice.

<sup>206</sup> Article 165 of the Constitution.

- A declaration of invalidity of any law that denies, violates, infringes or threatens a right, and order for compensation and an order for judicial review.<sup>207</sup>

The enforcement of the rights related to the environment is further protected under Article 70 of the CoK. It allows an individual to seek redress in addition to other legal remedies where the right to a clean and healthy environment is threatened or violated. The guiding principles established to guide courts and tribunals in exercising their mandate include: **justice for all irrespective of status, expedient justice, the promotion of alternative dispute resolution mechanisms, the administration of justice without undue regard to procedural technicalities and the promotion of the purpose and principles of the constitution.**<sup>208</sup>

Pursuant to these constitutional provisions, other laws governing specific sectors have put in place mechanisms for promoting access to justice in the event that disputes arise.

#### **4.2.2 The Statutory Right to Access Remedies**

As the Constitution provides the general framework and guiding principles for access to justice, various statutory provisions have been incorporated into sector specific laws to further reinforce the right to justice. Relevant statutes considered for purposes of this discussion include the following: -

- The County Government Act
- The Environmental Management and Coordination Act
- Water Act
- The National Environmental Management Rules

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<sup>207</sup> Article 23 of the Constitution.

<sup>208</sup> Article 159 (2) of the Constitution.

- The Environment and Land Court Rules
- The Forest Conservations and Management Act
- The Wildlife Conservation and Management Act
- The Mining Act
- Civil Procedure Rules

*Environmental Management and Coordination Act* Part XII establishes the National Environmental Tribunal (NET) to hear and determine appeals from the decisions of the NEMA.<sup>209</sup> Proceedings before the NET are governed by the National Environmental Tribunal Rules of 2003.

Disputes arising under the *Forest Management and Conservation Act* are to be referred, in the first instance, to the lowest possible structure under the devolved system of government as set out in the *County Governments Act, 2012*. The Act goes on to state that any unresolved matters shall be referred to the NET and a subsequent appeal filed in the ELC.<sup>210</sup> The *Wildlife Conservation and Management Act* makes similar provisions with respect to disputes arising under the Act.<sup>211</sup> The *Water Act* establishes the Water Tribunal to hear and determine appeals of a person (s) affected by the orders or decisions of the CS, Regulatory Board and the Authority.<sup>212</sup> The *Mining Act* provides three ways of resolving disputes including lodging a memorandum

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<sup>209</sup> Section 125 of the EMCA.

<sup>210</sup> Section 70 of the Forest Management and Conservation Act.

<sup>211</sup> Section 117 of the Wildlife Conservation and Management Act.

<sup>212</sup> Section 120 of the Water Act.

together with a statement of claim in the prescribed form with the CS<sup>213</sup>, mediation or arbitration upon agreement by the parties or through a court of competent jurisdiction.<sup>214</sup>

Common issues with the exercise of the right to access remedies as stipulated in the laws listed above include procedural, technical, cost and time limitations. This discussion will also endeavour to demonstrate that allowing appeals only to the High Court is a hindrance to the right to access remedies for grievances.

### **4.3 PROCEDURAL REQUIREMENTS FOR SEEKING REDRESS**

#### **4.3.1 Requirement to Prepare and Lodge a Notice of Appeal/ Petition/ a Complaint in The Prescribed Form**

The procedural requirements for lodging a claim are too technical and may prevent lay people who are unable to afford an advocate's fees, from accessing justice and remedies for the violation of their environmental rights. That is because drafting a well-articulated complaint, appeal or petition in the prescribed form or format requires expertise to ensure that the issues are presented in a convincing manner. The rules of evidence also tend to apply strictly in most cases even though the EMCA Act excludes its application in proceedings before the NET.

The *NET Rules* provide that an appeal to the Tribunal shall be made by written notice or by way of a form of notice prescribed and approved by the Tribunal.<sup>215</sup> The notice should state the address and name of the appellant(s), the particulars of the disputed decision and a statement of

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<sup>213</sup> Section 154 (a) read together with Section 156 (a) of the Mining Act.

<sup>214</sup> Section 154 (b) and (c) of the Mining Act.

<sup>215</sup> Rule 4 of the NET Rules, 2003.

the purpose of the hearing and a precise and short statement of the grounds of the dissatisfaction of the appellant with the decision.<sup>216</sup> Although the EMCA excludes proceedings before the Tribunal from the application of the rules of Evidence set out in the Evidence Act<sup>217</sup>, an appeal lodged at the NET should also be accompanied by supporting documents that the appellant seeks to rely on during the hearing.<sup>218</sup> Just like in ordinary suits of a civil or criminal nature, strict timelines for filing and service apply, failing which an applicant must make a formal application for extension of time if they fail to do any act within the time limits prescribed in the Rules.<sup>219</sup>

Just like the Constitution, the *EMCA* provides that, any one who alleges that the right to a clean and healthy environment has been violated or is threatened can apply to the Environment and Land Court (ELC) for redress on their own behalf, on behalf of others or in association with others.<sup>220</sup> The EMCA clearly states that, in exercising the jurisdiction conferred upon it, the ELC shall be guided by the following principles of sustainable development which includes the principle of public participation. Guided by the *Environment and Land Court Act*<sup>221</sup>, proceedings before the ELC are subject to the procedure laid down by the *Civil Procedure Act*.<sup>222</sup> Any appeals from the NET are to be lodged with the ELC, whose decision shall be final.<sup>223</sup>

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<sup>216</sup> Rule 4(3) of the NET Rules 2003.

<sup>217</sup> Section 126 of the EMCA, 1999.

<sup>218</sup> Rule 8 of the NET Rules, 2003.

<sup>219</sup> Rule 8 of the NET Rules, 2003.

<sup>220</sup> Section 3 (3) of the EMCA.

<sup>221</sup> No. 19 of 2011.

<sup>222</sup> Section 19 of the Environment and Land Court Act, 2011.

Where there are issues that are not resolved at the county level, the *Forest Management and Conservation Act* states that it shall be referred to the NET and a subsequent appeal filed in the ELC.<sup>224</sup> The *Wildlife Conservation and Management Act* makes similar provisions with respect to disputes arising under the Act.<sup>225</sup> This means that the process of seeking redress under these Acts are similar to the process provided under the EMCA and NET Rules.

The *Water Act* gives the Water Tribunal the power to make Rules that govern its procedures.<sup>226</sup> No Rules have however been enacted for this purpose. Further appeals from the Water Tribunal lie in the Environment and Land Court only on an issue of law.<sup>227</sup>

Complaints to the Cabinet Secretary under the *Mining Act* are lodged with the Cabinet Secretary, by way of a memorandum together with a statement of claim which are in the prescribed form. The other methods of resolving disputes including mediation or arbitration are regulated by the rules set down. Where parties choose to use the judicial process, then the *Civil Procedure Rules* apply. Appeals from the decisions of the Cabinet Secretary lie in the High Court.<sup>228</sup>

These procedural requirements, combined with language barriers further impose a limitation on access to justice.

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<sup>223</sup> Section 130 of the EMCA.

<sup>224</sup> Section 70 of the Forest Management and Conservation Act.

<sup>225</sup> Section 117 of the Wildlife Conservation and Management Act.

<sup>226</sup> Section 122 of the Water Act.

<sup>227</sup> Section 124 of the Water Act.

<sup>228</sup> Section 157 of the Mining Act.

#### 4.4 LANGUAGE BARRIER

From a practical perspective, language is a key barrier to accessing justice. This is not only because of the high levels of illiteracy among citizens, but also because of the technical nature of the subject matter of discussion in environmental disputes. So that, although the law may make provision for the use of languages other than English, difficulties may still arise where a victim is required to present a convincing case dealing with technical issues that require the input of an expert.

The *NET Rules* provide for the language to be used during the conduct of proceedings before the Tribunal. It clearly states that the Tribunal uses two languages i.e. Kiswahili and English.<sup>229</sup> Lodging an appeal in any local language spoken in Kenya is however allowed, subject to the court's discretion and provided that the appellant undertakes to obtain the translation within a reasonable time. The Rules also require the Tribunal to grant assistance of a competent interpreter free of charge to a party or witness who does not speak or understand the language used at the hearing or who is deaf, after taking into account all the circumstances.<sup>230</sup> The Tribunal's rulings shall equally be prepared in English but may be translated on request by a party into Swahili language.

The *Environment and Land Court Act*, unlike the NET Rules states that the language of the Court shall be English.<sup>231</sup> It further states that where necessary, the court shall facilitate the use

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<sup>229</sup> Rule 46 of the NET Tribunal Rules, 2003.

<sup>230</sup> Rule 46 of the NET Rules, 2003.

<sup>231</sup> Section 23 of the Environment and Land Court Act.

by parties of indigenous languages, Kenyan sign language, braille and other communication formats and technologies accessible to persons with disabilities.<sup>232</sup> The Act also allows the conduct of proceedings and appearances through electronic means of communication.<sup>233</sup>

The *Mining Act* is silent on the language to be used during the dispute settlement process before the Cabinet Secretary. Since Appeals are to be lodged in the High Court, it can be presumed that the language of the court, which is English, will apply.

Similarly, the *Water Act* does not expressly state the language to be used to conduct the proceedings before the Water Tribunal. Therefore, in the absence of Rules to provide guidance on the language of the Tribunal, the presumption is that English is the official and formal language. In cases of an appeal to the Environment and Land Court, as provided for in the Act, the Environment and Land Court Act is clear about the language that applies as discussed above.

The *Wildlife Conservation and Management Act* and the *Forest Conservation and Management Act* adopt the language prescribed in the NET Rules and the ELC Act. That is because all disputes arising under the Act are to be referred, at the first instance, to the NET and later Environment and Land Court. Otherwise, the Acts themselves do not specify the language to be adopted during dispute settlement processes at the first instance.

Clearly, the provisions of the *NET Rules* and the *ELC Act* concerning language are progressive. However, the ELC Act needs to also adopt a similar approach to the NET Rules by adding

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<sup>232</sup> Section 23 (2) of the Environment and Land Court Act.

<sup>233</sup> Section 23 (3) of the Environment and Land Court Act.

Kiswahili as a formal language of the Court. The Mining Act, Wildlife Conservation and Management Act, Forest Conservation and Management Act and Water Act, should also be clear about the language to be used during dispute settlement.

#### **4.5 COST OF ACCESSING REMEDIES**

The cost of seeking redress for the violation of the right to participate in environmental decision-making processes and environmental rights is among the leading barriers to accessing justice.

The costs associated with seeking remedies for violations include: -

1. The cost of filing a complaint or suit.
2. The cost of hiring an advocate.
3. The Cost of hiring expert witnesses.
4. Logistical and administrative costs.
5. Costs related to the enforcement of the right to information.

##### **4.5.1 Cost of Filing a Complaint or Suit**

The *NET Rules* provide that there shall be paid to the Tribunal such filing and other fees for service by the Tribunal of any notice or process, as shall be prescribed by the Minister.<sup>234</sup> The Tribunal may waive all or part of the filing fees payable in any appeal if it considered it to be in the interest of justice, or on grounds of financial hardship on the part of the appellant.<sup>235</sup>

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<sup>234</sup> Rule 47 of the NET Rules, 2003.

<sup>235</sup> Rule 47 of the NET Rules 2003.

Since the provisions of the *Environment and Land Court Act* are read and implemented in line with the Civil Procedure Rules, prescribed fees must be paid for any proceedings lodge in the Environment and Land Court. It can however be argued that the Civil Procedure Rules includes a section on paupers or indigents. It offers persons who are unable to afford filing fees assistance (upon proof).<sup>236</sup> Even so, in the event that the pauper/plaintiff wins the case, the court is entitled to deduct the costs that should have been paid were it not for the plaintiff's financial situation.<sup>237</sup> If the papuper loses the case, he/she will have to pay the outstanding court fees as though the suit had not been filed under the pauper designation.<sup>238</sup> These provisions apply where appeals are brought to the High Court pursuant to the Mining Act, Wildlife Conservation and Management Act, Forest Conservation and Management Act and Water Act.

At a glance, these legal provisions seem to offer legal assistance to persons who are financially unable to access the judiciary. These provisions however still pose difficulties for ordinary citizens for the reasons that they have to prove to the court that they are paupers or financially incapable and because they still have to bear the cost of filing a suit before the court, where they either win or lose the case. Regard proof of indigent status, the courts have laid down strict rules of demonstrating to the court one's inability to cover the costs of suing since ultimately, it is the court's discretion to determine if a person can afford justice or not, depending on the evidence presented to them. In the case of *John Mbugua and another v. the Attorney General*<sup>239</sup>, the

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<sup>236</sup> Order 33 of the Civil Procedure Rules, 2010.

<sup>237</sup> Order 33 Rule 10 of the Civil Procedure Rules, 2010.

<sup>238</sup> Order 33 Rule 11 of the Civil Procedure Rules, 2010.

<sup>239</sup> [2013] eKLR.

Supreme Court of Kenya pronounced itself on the requirements of pauperism. The Court stated that: -

*“The threshold of proving that an applicant deserves the leave of the Court to be pronounced as one capable of filing in forma pauper **is extremely high**...The onus in pauper briefs lay squarely on the applicant to candidly and in extreme openness reveal all about his status to the court. Failure to provide disclosure in its strict sense would knock out the matter and would render a matter as uncreditworthy...The court must be satisfied on the application of an applicant that he lacks the means to pay the required fees or to deposit the security for costs and that the matter is not without reasonable possibility of success...A court [is] entitled to reject such an application where the court [is] satisfied that the applicant [may] not recover more than nominal damages [idea of proportionality], the court might well be justified in refusing permission because it would be unjust to the other party who [may] have to incur substantial costs which might not be recoverable.”*

The provisions of recovering the court fees from the pauper whether or not they win a suit beats the noble purpose behind ensuring that access to justice is meant for everyone regardless of their financial situation. This demonstrates the fact that the law, as it stands, only guarantees access to justice for persons who can afford it.

Given the seriousness of environmental concerns and the potential effects of damaging the environment, access to remedies should be made available to ordinary citizens especially marginalized and Indigenous Peoples, as well as, those who institute suits in the interest of justice for the community at large. In such cases, court fees should be set at the lowest amount possible or even made free.

#### **4.5.2 Costs Related to the Enforcement of the Right to Information**

The provisions on enforcing the right to information are progressive. Unfortunately, however, very few people have the financial ability to enforce this right because of the prohibitive cost of review/appeal or the cost of litigation and enforcement of the decisions of the Commission in the

courts. Just like litigation, the cost of securing a representative is not possible for everyone, so that justice is only available to those who can afford the services of a counsel. In the researcher's opinion, the cost of enforcing the right to access information should be made less formal and less costly.

The *Access to Information Act* provides a mechanism for enforcement of the right to access information. There is a two-tier system of review/appeal in the Act. Once a dissatisfactory decision on a request for information is made, an appeal can be filed with the Commission on Administrative Justice (CAJ) within 30 days from the day the applicant knows about the decision. The Commission may also, following a request or of its own volition, review decisions on proactive disclosure. Following a review, can order the release of information denied, recommend payment of compensation or any other lawful remedy. These decisions are binding and can be executed through the High Court. The second tier appeal mechanism lies in the courts. Thus, the Commission's decisions can be challenged the High Court within 21 days.

The issues discussed above demonstrate the need to rethink the legal regime with the aim of eliminating the cost of accessing information in totality or restricting it only to the cost of making copies without having to incur additional and incidental costs. Similarly, Astrid Kalkbrenner's article advocates for the promotion of free access to information or the provision of information at a reasonable cost. It is also necessary to define what a reasonable fee means where the imposition of a fee is unavoidable.

### **4.5.3 Cost of Hiring an Advocate**

The *NET Rules* allows an appellant to either appear in person or to be represented by an Advocate.<sup>240</sup> A similar provision is made under the *Environment and Land Court Act*<sup>241</sup>. The technical nature of proceedings related to environmental concerns and the legal process in general requires the assistance of an advocate. Majority of cases where an aggrieved party represents themselves tend to fail due to procedural technicalities that substantially affect the strength of the case such as lack of sufficient evidence or failure to comply to essential legal requirements. This also creates an environment where respondents who can afford advocates use the ignorance of appellants with no representation to evade sanctions for their actions and omissions. While it may require financial resources, the law should establish an independent legal assistance unit that can assign affected communities an advocate for free particularly where it is established that a project can have serious environmental impacts.

### **4.5.4 Cost of Hiring Expert Witnesses**

The rule of law requires the determination of disputes based on the law and the evidence place before a court of law or tribunal. In the same way, matters touching on the environment require experts including an EIA expert. Therefore, the *NET Rules* and the *Civil Procedure Rules* allows an appellant to call an expert to testify during the hearing of a dispute.<sup>242</sup> The wording of the law is such that expert witnesses are optional. Nevertheless, they are an almost indispensable aspect of the dispute resolution process since they provide technical guidance where the question relates to matters that are complicated to an ordinary person or beyond the court's expertise. The

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<sup>240</sup> Section 126 (6) of the EMCA.

<sup>241</sup> Section 22 of the Environment and Land Court Act.

<sup>242</sup> See Section 5 (b) and (c) of the NET Rules.

inability to afford an expert witness where required can weaken an appellants case hence denying the affected victim access to remedies or compensation for damage suffered.

#### **4.5.5 Logistical and Administrative Costs**

The costs associated with filing a claim or violation of a right is not only restricted to filing, an advocate's or expert's fees. Logistical and administrative costs of facilitating the conduct of proceedings before the Tribunal or a court can potentially prevent access to justice. These include transport costs for the appellant and the required witnesses, the cost of printing and preparing copies of complaints or court documents, the cost of gathering the necessary evidence and the cost of serving the documents on the respondents, among others. These costs are unavoidable hence it is not easy to find a solution that is immediate. But it is possible to reduce the burden of such costs by reducing the costs associated with filing a suit.

#### **4.6 PROTRACTED NATURE OF GRIEVANCE REDRESS**

Although one of the aims of establishing the NET, in addition to the court systems, was to promote the cost-effective and speedy determination of disputes, the length of period within which disputes are heard and determined are still prohibitive. This can be attributed to the limited number of staff who have to deal with the large volumes of disputes related to environmental matters. The law does not also prescribe a time limit within which matters should be heard and determined.

The Tribunal established pursuant to EMCA states that it shall sit at such times and in such places as it may appoint.<sup>243</sup> That means that there is only one NET Tribunal established to listen to all appeals from the decisions of the NEMA in the entire country. The Water Act also establishes the Water Tribunal to hear all disputes arising under the Act in the entire country.<sup>244</sup> This creates a situation where the numbers of cases to be handled by the Tribunals are overwhelmingly large leading to a backlog of cases. It is also time consuming and tedious since the tribunal has to move from time to time. There is a need to decentralize the Tribunal to the county level by establishing offices at the county level as and when they arise. Alternatively, the number of members of the tribunals should be increased to allow for the division of appeals between different panels.

The Environment and Land Court in Kenya is also facing the challenge of a backlog of cases making it difficult to obtain expedient justice. This is largely due to the large number of suits filed and the limited number of staff available to handle the cases.

#### **4.7 NO PROVISION TO APPEAL BEYOND THE HIGH COURT**

In all matters relating to environmental issues, both the EMCA and its regulations, as well as, other sector specific laws only allow a party aggrieved with the administrative body's decision to appeal to the High Court. Mumma Albert in his article *"The Resolution of Urban Housing Development Disputes as a Mechanism for Poverty Alleviation: A Case Study of Kenya's*

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<sup>243</sup> Section 126 (3) of the EMCA, 1999.

<sup>244</sup> Section 119 of the Water Act.

*National Environmental Tribunal*” argues that administrative tribunals are meant to provide cost-effective and expeditious access to justice.<sup>245</sup>

The EMCA states that any person aggrieved by the decision or order of the Tribunal can lodge an appeal in the Environment and Land Court.<sup>246</sup> The decision of the Environment and Land Court on any appeal lodge pursuant to the EMCA shall be final.<sup>247</sup>

The Water Act provides that an appeal lodged against the decision of the Water Tribunal shall be filed in the Environment and Land Court. Such an appeal shall only be based on a point of law. The Act does not state whether the decision of the Environment and Land Court shall be final.

The Forest Conservation and Management Act and the Wildlife Conservation and Management Act also allow the lodging of an appeal in the first instance with the NET Tribunal and later at the Environment and Land Court. The Acts do not state whether or not the decision of the Environment and Land Court shall be final.

The Mining Act provides that a party aggrieved by the orders of decision of the Cabinet Secretary may appeal to the High Court within thirty (30) days.<sup>248</sup>

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<sup>245</sup> Albert Mumma, ‘The Resolution of Urban Housing Development Disputes as a Mechanism for Poverty Alleviation: A Case Study of Kenya’s National Environmental Tribunal’, in Yves Le Bouthillier, Miriam Alfie Cohen Jose Juan Gonzalez, Albert Mumma & Susan Smith (eds), *Poverty Alleviation and Environmental Law* (IUCN Academy of Environmental Law Series, 2012).

<sup>246</sup> Section 130 (1) of the EMCA.

<sup>247</sup> Section 130 (5) of the EMCA.

<sup>248</sup> Section 157 of the Mining Act.

Restricting appeals from the NET Tribunal to the Environment and Land Court, by the EMCA, amounts to the denial of access to justice as stipulated in the Constitution. Appeals to higher courts should be allowed to ensure that the rights of affected victims are implemented without any bias.

#### **4.8 CONCLUSION**

This chapter has analyzed the legal framework on access to justice in Kenya. The discussion has demonstrated that, despite the existence of an institutional and legal framework to promote access to justice procedural requirements for seeking redress, the cost of seeking redress, the length of time for seeking redress and the lack of provision to appeal to courts higher than the High Court are still practical concerns. Thus, addressing these challenges is necessary to promote enforcement and compliance which are prerequisites for the realisation of the right to a clean and healthy environment. For change, there is a need to rethink the law to make provision for less costly and expeditious procedures for seeking redress and promoting legal empowerment to help ordinary citizens use the law to assert their rights.

## **CHAPTER FIVE: RESEARCH FINDINGS, CONCLUSIONS AND RECOMMENDATIONS**

### **5.1 INTRODUCTION**

Having identified and discussed the core issue affecting public participation, this chapter seeks to state the findings, deductions and make proposals on ways of addressing the hitches identified. After discussing the researcher's findings on each objective and making conclusions in its first section, this chapter will conclude by providing legal and policy recommendations on the major issues affecting access to information, public consultation and access to justice.

### **5.2 SUMMARY OF RESEARCH FINDINGS AND CONCLUSIONS**

This study set out to prove the veracity of two hypotheses. The first hypothesis was the argument that, lack of effective public participation in environmental decision-making processes in Kenya is attributed to the absence of a comprehensive legal framework on access to information, guidelines on a sound public consultation process and access to remedies. The second hypothesis was that existing laws on access to information, public participation and access to remedies are also not being implemented. Based on these hypotheses, the researcher identified three key objectives and three research questions to answer including the following: -

1. What is the effect of lack of access to information on the effectiveness of public participation in environmental decision-making processes in Kenya?
2. How effective are the existing guidelines for conducting public consultation in environmental decision-making processes in Kenya?

3. How effective are the judicial and administrative remedies available for seeking redress for violation of the right to public participation in environmental decision-making processes in Kenya?

Following an analysis of existing literature, the laws and judicial decisions, the researcher established that there is a nexus between the right to information, appropriate public participation and access to justice. So closely intertwined are these concepts that compromising one of them would jeopardise the realisation of the other. Secondly, it is now widely accepted that access to information, public participation and access to justice are essential ingredients for the realisation of the right to a clean and healthy environment.

Thus, as demonstrated in the second chapter of this research, barriers to accessing information do affect the ability to give excellent feedback. It was pointed out through the analysis of laws and judicial precedents that limitations on access to information, cost implications, procedural barriers and language barriers are among concerns that the law fails to address. The lack of a clear legal framework on data protection is also a challenge to the implementation of the right to information in Kenya.

Secondly, it is generally agreed that the manner in which public consultation is conducted can affect the quality of feedback given by the public and therefore, the quality of decisions made concerning the environment. In that sense, the effectiveness of the public consultation process can have a direct impact on the realisation of environmental rights. In Kenya, there is still a legal gap when it comes to the question of what amounts to effective public participation. Courts and

several scholars have noted that indeed, the qualitative and quantitative aspects of a public consultation process must be used to evaluate its adequacy. Unfortunately, the laws of Kenya are too formalistic in nature in addition to presenting other administrative, technical, procedural and language barriers.

Access to justice provides a mechanism through which citizens can use legally available administrative and judicial channels to assert their environmental rights. Access to justice in itself also provides a forum where citizens can protect their right to participate in environmental decision making processes by holding the responsible authorities accountable for their actions. This research established that the progressive provisions in the law on access to justice are difficult to implement since citizens still experience procedural barriers when seeking redress, financial constraints and delayed justice. A further potential shortcoming of the law is the lack of a provision to appeal to courts higher than the High Court on environmental matters raised with administrative and quasi-judicial bodies such as the NET.

To conclude, it is evident that several gaps and weaknesses in primary and sector specific laws on access to information, guidelines on public consultation and access to remedies, which make the implementation of effective public consultation difficult. The running theme across all the objectives discussed also reveal various technical, procedural and administrative barriers to the practical implementation of effective public participation and the realisation of the right to a clean and healthy environment. The research project has therefore affirmed the first and second hypothesis.

Given the challenges and need for legal and policy reform, the next section of this chapter attempts to propose required changes. The research proposes reforms on access to information, public participation and access to information in light of the issues that have emerged from the findings of this research.

## **5.3 RECOMMENDATIONS TO PROMOTE ACCESS TO INFORMATION**

Policy recommendations on access to information revolve around the need to eliminate limitations on access to information, procedural, financial and language barriers, as well as the establishment of a data protection law.

### **5.3.1 SHORT TERM RECOMMENDATIONS**

#### ***A. Designation of Qualified Information Officers***

All public institutions holding relevant environmental information such as NEMA should designate an information officer(s) to provide the public with an updated register of all public information in their possession and assist citizens access information with ease. Public institutions receive and store a lot of raw data on a daily basis. There is, however, no legal obligation to inform the public as and when such data comes into their possession. Consequently, the search for information by citizens is often a fishing expedition with the expectation that they may or may not get the information they require from the relevant institutions. Lack of knowledge of the type of information held by the state also makes it difficult to make precise and clear requests as stipulated in the law. This is one of the reasons why the process of accessing information is lengthy. The process would become less tedious where people are aware of the type of information in the government's possession and where to access them before they draft a

formal request. In this case, hardcopy and digital formats of registers should be made available for ease of access.

### **5.3.2 MEDIUM TERM RECOMMENDATIONS**

#### ***A. Development of a System of Tracking All Access to Information Requests***

Every government institution or department handling environmental related information such as NEMA, should establish a system for tracking the progress of both formal and informal access to information requests. It is not enough to give an institution at least 21 days to respond to a request for information. The applicant should be able to track the progress of their request easily from the beginning to the end. This will enhance transparency and accountability on the part of the authority.

#### ***B. Designing a Centralised System of Storing Information***

The establishment of a centralized and coordinated system of storing information is a measure that all public institutions at the national and county level should consider. All information held by the national and county public institutions should be made available through a centralized and coordinated information system. This will enable citizens access information with ease, at a low cost and within the shortest time possible.

#### ***C. Formulation of Access to Information Regulations***

The Cabinet Secretaries for the Ministry of Environment and Ministry of Information, Communication and Technology (ICT) in collaboration with NEMA, who is Kenya's environmental watchdog, should also develop guidelines/regulations on the exercise of discretion to impose limitations on access to information. That is because the law on access to information gives the relevant authorities the power to impose limitations on access to information generally

due to confidentiality and public interest issues. To prevent instances of abuse of discretion, clear guidelines on the exercise of such authority should be laid down to guide the duty bearer.

### **5.3.3 LONG TERM RECOMMENDATIONS**

#### ***A. Eliminating Limitations to Access Information***

The researcher proposes an amendment of the law by parliament to eliminate the limitation of access to information to citizens only. Globalization and increased migration has opened up the borders of several states to individuals and entities who are not nationals. Concerns over transboundary harm has also placed the lives of citizens in other states at risk due to environmental damage resulting from the harmful activities of neighbouring countries. Thus, environmental issues may affect everyone, whether citizens or non-citizens. Non-state actors including international, regional, national and local NGOs also continue to play a vital role in the realization of the right to a clean and healthy environment in the interest of victims who are unable to protect their rights. To support their efforts, information on the environment should be made available to not only citizens but also non-citizens directly or indirectly affected by environmentally harmful undertakings occurring within Kenya's territory. This provision should be expressly stipulated in the Constitution, EMCA and other sector specific laws.

#### ***B. Reducing Procedural Requirements***

Parliament should also amend the law to reduce the 21-day period within which the authority should provide information. The urgency of environmental concerns calls for the swift provision of information to the public. Since most public participation processes take approximately 30 days, providing information within 21 days will not give the stakeholders enough time to go

through the EIA Study Reports and give constructive feedback. In any case, such information should be divulged immediately and made readily available to the public on the institution's websites.

### ***C. Eliminating Language Barriers***

Another recommendation is for parliament to amend the law to allow for the request for information in languages other than English and Kiswahili. The Access to Information Act requires citizens to submit formal requests for information through letters written in English and Kiswahili. This provision is prejudicial to illiterate persons who are also entitled to the enjoyment of environmental rights. The law should be amended to allow for the making of requests using native languages, where an individual is illiterate. The duty should be placed on the responsible authority to find an interpreter to assist the individual. Alternatively, the law should allow such people to make oral requests which can be reduced into writing by an officer of the relevant authority.

The law should also be amended to include a requirement to translate the executive summary of the EIA Study Report by every project proponent. The *EMCA, Environmental (Impact Assessment and Audit) Regulations, 2003* should be amended to make the translation of the Executive Summary of EIA study reports into Kiswahili, mandatory where the victims do not understand English. Further simplified explanations should be given to the stakeholders in their vernacular language during public hearings, where the participants neither understand English or Kiswahili. Similar provisions should be made in other sector specific laws where certain types of data should be made available to the public.

#### ***D. Recommendations for Costs***

The requirement to pay a prescribed fee should be repealed from the law. Access to information should be made free to all citizens and easily accessible to reduce the burden on logistical and administrative costs.

#### ***E. Enactment of a data protection law by parliament***

Passing a data protection law is a necessity. Even though it is crucial to enhance access to information, Parliament should also set measures to protect the privacy of personalities whose information is available to the public. As the principles of data protection demand, information of private individuals, such as registers of company owners' details, should be protected from unscrupulous members of the public who seek information for malicious purposes. Having a data protection law will encourage investors to share the necessary information without fear.

### **5.4 RECOMMENDATIONS FOR PUBLIC PARTICIPATION**

We recommend reforms in the area of public participation to make the process less formalistic and more outcome based. Moreover, the research advocates for the development of guidelines on to execute public consultation exercises during fieldwork and how to measure the effectiveness of public consultation processes.

#### **5.4.1 SHORT TERM RECOMMENDATIONS**

##### ***A. Capacity Building Citizens About Ways of Participating in Decisions***

NEMA should work with CSOs and NGOs to build the capacity of citizens on how to become instrumental in processes of negotiating environmental problems. This may include developing a template for the submission of written comments should also be designed for use by the public.

There is a need to also develop a template to guide the public when submitting written comments of a project. Without proper guidance, the public may be unable to give coherent feedback. It will also enable the project proponent and authority analyse the volumes of comments easily. It can also entail formulating participation toolkits and training manuals for citizen.

#### **5.4.2 MEDIUM TERM RECOMMENDATIONS**

##### ***A. Developing Guidelines/Manuals for Project Proponents on How to Conduct Public Participation Effectively***

NEMA should develop guidelines that will assist project proponents when conducting public participation. Guidance is need for instance on the method of selection of participants of a public hearing. The absence of rules on how to select participants of a public consultation forum has provided an avenue for project proponents to select people in a biased way. The temptation is to always select those who support a project. This may influence the outcome of an EIA study process or other environmental decision making process. Even better, the decision making Authority (NEMA), should pre-approve the list of participants selected to take part in an EIA process before allowing project proponents to proceed with the consultations. Because of issues of language barrier, the law should place an obligation of project proponents to provide interpreters at their cost when conducting public consultations in remote areas where the levels of illiteracy are high.

#### **5.4.3 LONG TERM RECOMMENDATIONS**

##### ***A. Making The Requirements for Public Consultation Less Formalistic***

One way of doing away with this difficulty is by developing public consultation regulations to guide EIA experts during field work. To avoid a formalistic approach while conducting public

hearings, NEMA should develop detailed and clear public consultation regulations to guide EIA experts when conducting public participation. The guidelines should require the EIA expert to develop a public consultation plan whose success will be assessed after the EIA study is complete. The regulations should provide a matrix to assist with determining the appropriateness of open dialogues. The failure of conducting effective public consultation should be a basis for the denying project proponents an EIA licence.

Secondly, the use of community-based institutions such as CBOs, SACCOs, CSOs and Chama's to invite relevant stakeholders to public consultation forums should be adopted by project proponents and NEMA. The ordinary method of inviting people's contributions to discussion forums is through media channels. The use of notices and adverts may not reach a wider population where the affected people do not have access to newspapers, gazette notices and radio. These methods should, in the researcher's view, be supplemented further with invitation letters and notices addressed to community-based institutions. This will ensure that a larger proportion of the public is informed of the public consultation process and enhance its effectiveness.

#### ***B. Eliminating the limitation for submitting written comments***

Eliminating time limitations to allow the public submit written comments any time before the final decision is made can be a progressive step. For effective public consultation to be realized, NEMA afford all stakeholders sufficient time for reading plus understanding relevant materials before giving their written comments. The technical nature of environmental information demands that the public has enough time to digest the information. When we factor in the time taken to request for and access the information, stakeholders are often left with very little time to

go through the volumes of documents and prepare meaningful feedback. Parliament should therefore amend EMCA to eliminate time limitations prescribed in law to allow the public submit their comments from the publication of invitation notices to the time the Authority makes its final decision.

### ***C. Making it Mandatory to Provide Feedback Post Public Participation Processes***

It should be made a requirement to provide feedback to the public after consultation. This can be done through an amendment to the law by Parliament or through regulations on Public Participation as suggested above. In line with the Fair Administrative Actions Act No. 4 of 2015, environmental decision makers and project proponents should be required to give feedback to the public whether or not their issues were considered and how their concerns were addressed. The Act<sup>249</sup> provides that if the verdict of an directorial body is expected to curtail the general public's welfare or a section of it, the decision-maker shall: -

- a) Notify the public of the proposed action and invite their comments.
- b) While arriving at a final decision, take into account all their views.
- c) Consider pertinent and substantial facts; and
- d) If the proposed action is to be taken, the administrator must publish a notice: -
  - i. Stating the reasons for the decision;
  - ii. Specifying the internal channels available for challenging the decision; and
  - iii. Explaining the time limitation for lodging an appeal from the decision.

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<sup>249</sup> Section 5 of the Fair Administrative Actions Act.

The dictates of good governance requires every administrator to make known all reasons informing a resolutions with an influence on the lives of people.<sup>250</sup> This is meant to enable such a person file an appeal or review. Thus, NEMA should also notify the public about their final decisions on EIA Licence applications to give sufficient time for the lodging of an appeal if necessary. They should also be required to provide reasons for their decisions to the public and more so those likely to be affected by projects.

## **5.5 RECOMMENDATIONS ON ACCESS TO REMEDIES**

### **5.5.1 SHORT TERM RECOMMENDATIONS**

A second critical element that can open avenues to channels for redress is legal empowerment of communities. Enlightenment is an important tool that can be used to educate citizens on how to use the law and legally available channels to protect their environmental rights. That is because, in addition to lacking the technical skills necessary to defend themselves, citizens do not have knowledge of environmental issues and laws that will enable them assert and defend their rights. In that regard, it may be necessary to set up a legal assistance unit to provide legal empowerment to such people.

### **5.5.2 MEDIUM TERM RECOMMENDATIONS**

#### ***A. Devolution of the NET Functions***

The Judicial Service Commission (JSC) should establish NET Tribunals at the county level. Currently, there is only one Tribunal that serves the entire nation. Just like there are NEMA offices at the county level, so should there be NET Tribunals set up at county levels to ensure the expeditious determination of disputes.

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<sup>250</sup> Section 6 of the Fair Administrative Actions Act.

### ***B. Putting in Place Measures to Reduce the Protracted Process of Seeking Redress***

One way of achieving this goal is by amending the law/regulations to prescribe a time frame within which environmental disputes should be heard and determined. Due to the potential impacts of environmental damage on the lives of people, the processes for seeking redress should be made shorter.

The JSC ought to recruit more judges in the Environment and Land Court (ELC) to ease pressure. One reason for the accumulation of disputes before the ELC is the limited number of judges. The recent move by the Chief Justice, to hire more judges in the ELC is positive and hopefully this will result in a positive change.

### ***C. Promoting Traditional Methods of Dispute Settlement***

To avoid overdependence on court systems for seeking redress, the Judiciary should gradually find ways of encouraging the use of traditional methods of resolving disputes and addressing grievances. This is particularly suitable where the rights of organised marginalized communities who depend on their environment are likely to be impacted negatively due to lack of effective consultation.

## **5.5.3 LONG TERM RECOMMENDATIONS**

### ***A. Eliminating Barriers Related to Procedural Requirements***

The law should be amended by parliament to make provision for lodging of informal complaints including oral complaints. The process of filing a complaint should be made less formal so as to make it easy for a common person to bring complaints on their own behalf, but are unable to

draft technical documents. The NET can also establish a legal aid programme to assist the public where they are unable to draft a complaint.

The Mining Act, Wildlife Conservation and Management Act, Forest Conservation and Management Act and Water Act, should be amended by parliament to provide clarity about the language to be used in dispute settlement. From the discussion on language barriers as a barrier to accessing justice, the researcher observed that the provisions of EMCA, NET Rules and the Environment and Land Court Act were progressive. Equally, the Mining Act, Wildlife Conservation and Management Act, Forest Conservation and Management Act and Water Act should adopt a similar approach for the avoidance of doubt.

#### ***B. Reduction or total elimination of the Cost of environmental Accessing Justice***

The judiciary should move towards reducing/totally eliminating of the cost of filing a complaint or suit in environmental matters. Legal remedies for accessing justice in environmental matters should be made free or less costly for marginalized and indigenous communities who are unable to afford paying filing and other required fees. Once the court is satisfied that a person or group of people are paupers and that their claim has merit, they should not be required to pay for accessing justice, whether the court finds in their favour or not.

#### ***C. Allow Appeals Beyond the High Court***

Appeals on environmental matters from the NET Tribunal, under EMCA can only be lodged with the ELC. The ELC makes the final decision which cannot be appealed further. This is unconstitutional, to the extent that it denies the aggrieved parties their appellate rights up before

higher court. As such, parliament should amend the law to allow for further appeals on questions of law.

## **5.6 AREAS FOR FURTHER RESEARCH**

This study has shown that there is still limited literature comparing Kenya's legal framework on access to information, access to justice and public participation with internationally prescribed minimum best practices. Further studies should also be conducted on the competence of EIA processes as prescribed in Kenyan law and whether it affords people adequate and fair occasions for participation. Compliance by government institutions with access to information laws and EIA regulations are other area of study to consider.

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