

UNIVERSITY OF NAIROBI

SCHOOL OF LAW

EVALUATION OF LAW AND PRACTICE ON ENVIRONMENTAL  
PROTECTION DURING EXPLORATION AND PRODUCTION OF OIL  
AND GAS IN KENYA

A RESEARCH PAPER SUBMITTED IN PARTIAL FULFILLMENT OF THE  
REQUIREMENTS OF THE MASTER OF LAWS DEGREE OF THE  
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## **DECLARATION**

I, **NICOLE KATHINI NYAMAI**, declare that this research work is mine and has never been presented in any learning institution for the award of any degree.

Signed by: \_\_\_\_\_

**NICOLE KATHINI NYAMAI**

This research paper has been submitted with my approval as the University supervisor.

Signed by: \_\_\_\_\_

**DR ROBERT KIBUGI**

## **DEDICATION**

I dedicate this work to God Almighty, for His grace and seeing me through it all.

## **ACKNOWLEDGMENT**

I take this opportunity to offer my deep-felt gratitude to God Almighty for His grace and guidance thus far. I also want to thank my good and reliable supervisor, Dr. Robert Kibugi, for allowing me to share in his wealth of knowledge, patience, guidance and constructive criticism in the course of writing this paper. May our good Lord bless you abundantly.

## **LIST OF STATUTES**

1. Constitution of Kenya 2010
2. Energy Act No. 1 of 2019 Laws of Kenya
3. Environment and Land Court Act No. 19 of 2011 Laws of Kenya
4. Environmental (Impact Assessment and Audit) Regulations 2003
5. Environmental Management and Coordination (Waste Management) Regulations 2006
6. Environmental Management and Coordination (Water Quality) Regulations 2006
7. Environmental Management and Coordination Act No. 8 of 1999 Laws of Kenya
8. Land Act No. 6 of 2012 Laws of Kenya
9. National Land Commission Act No. 5 of 2012 Laws of Kenya
10. Petroleum Act No. 2 of 2019 Laws of Kenya
11. Water Act No. 43 of 2016 Laws of Kenya

## **LIST OF ABBREVIATIONS**

ASALs	Arid and Semi-Arid Areas
EGASPIN	Environmental Guidelines and Standards for the Petroleum Industry in Nigeria
EIA	Environmental Impact Assessment
ELC	Environment and Land Court
EMCA	Environmental Management and Coordination Act
EPRA	Energy and Petroleum Regulatory Authority
KETAP	Kenya Petroleum Technical Assistance Report
KPC	Kenya Pipeline Company
MoEP	Ministry of Energy and Petroleum
NEMA	National Environment Management Authority
NET	National Environmental Tribunal
NLC	National Land Commission
NOCK	National Oil Corporation of Kenya
OSRCRDA	Oil, Spill, Recovery, Clean up, Remediation and Damage Assessment
OSWMR	Oil Spill and Oily Waste Management Regulations
SEA	Strategic Environmental Assessment

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## **ABSTRACT**

Kenya has in the recent years witnessed an increase of activities in the petroleum industry especially in North-Western parts of the country. While the discoveries, mainly done in 2012, came with raised hopes for revitalized economic growth, it is a well-established fact, and learning from other jurisdictions that made early discoveries, that these discoveries often come with serious environmental costs.

Robust and effective legal and institutional framework on oil and gas is needed and expected to mitigate the adverse environmental effects by ensuring that the activities and resultant products including waste are well disposed and there is minimal or no pollution to the environment and its resources.

This research paper was informed by the realization that even though Kenya recently made oil and gas discoveries and has even embarked on the commercial exploitation of these resources, there has been little or no progress in putting in place stringent environmental measures in terms of policy, legal and institutional framework geared towards protecting the environment. This is even though in the general petroleum value chain (upstream, mid-stream and downstream), Kenya has experienced its fair share of various challenges that have adversely impacted the environment and people.

The research paper was mainly done through desk research and involved the analysis of the existing literature on the topic, review of the policy and legal documents as well as carrying out a comparative study on Kenya and other African states that have experienced similar challenges, with the main focus being Nigeria and partly Uganda.

The paper also highlights some of the practical challenges and disasters that have affected the environment and some communities as far as the petroleum industry operations in the country are concerned.

This paper established that even though there have been notable efforts in putting in place frameworks to effectively govern the industry, these efforts have not satisfactorily been extended to combating the environmental degradation and pollution challenges.

There are yet to be put in place specific environmental legal instruments, unlike in Nigeria, that deal with the specialized environmental challenges germane to the oil and gas sector.

Instead, Kenya still relies on the general environmental laws, guidelines and standards, which this research concluded as not being effective.

The paper therefore offers some recommendations on how the country can ably tackle environmental challenges arising from the petroleum industry through specific legal instruments that can effectively address the challenges posed to the environment.

## **CHAPTER ONE: INTRODUCTION**

### **1.1. Background of the Study**

Petroleum is a natural resource found beneath the earth surface and contains various components such as hydrocarbons, sulphur and oxygen among other elements. It can take various forms such as solid, liquid or even gas.<sup>1</sup>

The petroleum sector is divided into three main segments namely; the upstream the exploration and production stage, midstream, the transportation stage, and downstream, the refining stage of petroleum commodities.<sup>2</sup>

#### **1.1.1 Oil and Gas Exploration and Production Activities and Environmental Risks Involved**

##### **a) Exploration Stage**

This stage involves identifying and mapping out possible reservoirs which involves the drilling of a well to confirm the presence of any petroleum deposits using techniques such as shock waves introduced to the ground and the vibrations measured.<sup>3</sup>

As this happens, the following environmental risks are posed: degradation of land as a result of land clearances which ultimately leads to loss of vegetation, soil erosion and subjecting protected land to possible developments unfriendly to the environment.<sup>4</sup>

##### **b) Production Stage**

Immediately viable reserves are identified, the production stage kicks in and wells are drilled into the reserves. Various fluids are then injected into the wells in order to keep the drill cool and lubricated and to eject the drill cuttings to the surface.<sup>5</sup>

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<sup>1</sup>Ite AE, Ibok UJ, Ite MU and Petters SW, "Petroleum Exploration and Production: Past and Present Environmental Issues in the Nigeria's Niger Delta" (2013) 1 American Journal of Environmental Protection 78 <[https://www.researchgate.net/publication/256834670\\_Petroleum\\_Exploration\\_and\\_Production\\_Past\\_and\\_Present\\_Environmental\\_Issues\\_in\\_the\\_Nigeria's\\_Niger\\_Delta](https://www.researchgate.net/publication/256834670_Petroleum_Exploration_and_Production_Past_and_Present_Environmental_Issues_in_the_Nigeria's_Niger_Delta) > accessed 1 July 2019

<sup>2</sup>Melton M, Hudson A and Ladislaw S, "Energy 101: Introduction to Oil from the CSIS Energy and National Security Program" <[https://csis-prod.s3.amazonaws.com/s3fs-public/legacy\\_files/files/publication/150910\\_oil.pdf](https://csis-prod.s3.amazonaws.com/s3fs-public/legacy_files/files/publication/150910_oil.pdf) > accessed 1 July 2019

<sup>3</sup>Abdullah K, "A seismic Shift in Oil Exploration," (2018) <<https://phys.org/news/2018-05-seismic-shift-oil-exploration.html> > accessed 1 July 2019  
[https://www.unepfi.org/fileadmin/toolkit/Oil\\_Gas\\_amended180806.pdf](https://www.unepfi.org/fileadmin/toolkit/Oil_Gas_amended180806.pdf) accessed 1 July 2019

<sup>4</sup>Ibid

<sup>5</sup>Ibid

In order to push the oil and gas components to the surface and prevent possible clogging of the commodities, water and other chemicals are introduced into the well. It is also important to note that excess gasses are usually flared off and emitted into the atmosphere.<sup>6</sup>

This exercise poses the following risks to the environment: greenhouse gas, gas venting and flaring, odor, dust, noise and air pollution, pollution of surface water and ground water systems and flows just to mention but a few.<sup>7</sup>

Traces of oil and gas were first discovered in Kenya in the 1950s. However, the wells drilled then dried up. In order to fully explore this commodity, NOCK was established to oversee these operations.<sup>8</sup>

The now repealed Petroleum (Exploration and Production) Act of 1984 was the country's first law to govern the operations of the petroleum industry. In the year 2010, the industry breathed a sigh of relief because of the offshore and onshore gas was discovered in some parts of Mozambique, Tanzania and Uganda thus attracting potential investors to Kenya.<sup>9</sup>

In the year 2010, the government of Kenya entered into an agreement with two companies that identified viable exploration blocks in Turkana, Marsabit and Baringo Counties respectively.<sup>10</sup> Since then, more potential wells have been discovered in South Lokichar Basin at the Ngamia-1, and in Kisumu County and it is estimated that the already identified wells contain millions of crude oil barrels.<sup>11</sup>

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<sup>6</sup>Abdullah K, "A seismic Shift in Oil Exploration," (2018) <<https://phys.org/news/2018-05-seismic-shift-oil-exploration.html> > accessed 1 July 2019

<sup>7</sup>Abdullah K, "A seismic Shift in Oil Exploration," (2018) <<https://phys.org/news/2018-05-seismic-shift-oil-exploration.html> > accessed 1 July 2019

[https://www.unepfi.org/fileadmin/toolkit/Oil\\_Gas\\_amended180806.pdf](https://www.unepfi.org/fileadmin/toolkit/Oil_Gas_amended180806.pdf) accessed 1 July 2019

<sup>8</sup>"Oil Exploration in Kenya: Success Requires Consultations. Assessment of Community Perceptions of Oil Exploration in Turkana County, Kenya"

<[https://www.cordaid.org/media/medialibrary/2015/09/Turkana\\_Baseline\\_Report\\_DEF-LR\\_Cordaid.pdf](https://www.cordaid.org/media/medialibrary/2015/09/Turkana_Baseline_Report_DEF-LR_Cordaid.pdf)> accessed 30 April 2019

<sup>9</sup>"Oil Exploration in Kenya: Success Requires Consultations. Assessment of Community Perceptions of Oil Exploration in Turkana County, Kenya"

<[https://www.cordaid.org/media/medialibrary/2015/09/Turkana\\_Baseline\\_Report\\_DEF-LR\\_Cordaid.pdf](https://www.cordaid.org/media/medialibrary/2015/09/Turkana_Baseline_Report_DEF-LR_Cordaid.pdf)> accessed 30 April 2019

<sup>10</sup>Ibid

<sup>11</sup>Ite AE, Ibok UJ, Ite MU and Petters SW, "Petroleum Exploration and Production: Past and Present Environmental Issues in the Nigeria's Niger Delta" (2013) 1 American Journal of Environmental Protection 78 <[https://www.researchgate.net/publication/256834670\\_Petroleum\\_Exploration\\_and\\_Production\\_Past\\_and\\_Present\\_Environmental\\_Issues\\_in\\_the\\_Nigeria's\\_Niger\\_Delta](https://www.researchgate.net/publication/256834670_Petroleum_Exploration_and_Production_Past_and_Present_Environmental_Issues_in_the_Nigeria's_Niger_Delta) > accessed 1 July 2019

Today, Kenya has four (4) main petroleum exploration basins that have been mapped and these are: Lamu Basin, Anza Basin, Mandera Basin and Tertiary Rift Basin.<sup>12</sup> In these four (4) basins, there are forty six blocks and out of these blocks, the government has signed and entered into exploration agreements and also licensed forty four of them to various exploration companies among them is; Africa Oil Corporation, Camac Energy, Imara Energy, Lamu Oil & Gas, , NOCK, Tullow Oil (K) B.V, Zarara Oil & Gas just to mention but a few.<sup>13</sup>

### **1.1.2 Environmental Risks Associated with Petroleum Operations in Kenya**

Kenya prides itself in having in place a rich biodiversity as well as a good climate due to its geographical location on the African Continent, all of which contribute immensely to the growth and sustainability of its economy and nationals.<sup>14</sup>

Despite the country being lavished with such immense natural occurring beauty, many environmental challenges lie in its the way of development such as air pollution, water, soil, contribution to biodiversity loss, the destruction of the ecosystems and consequently to the living beings.<sup>15</sup>

In the general petroleum value chain (upstream, mid-stream and downstream), Kenya has experienced with various challenges that adversely impact the environment, and human beings. The illustrations below are mainly drawn from the mid-stream and downstream segments, but are intended to demonstrate the risks that arise in petroleum processes:

- i. Oil and Gas spills. This mostly results from accidents or leakages from the pipelines. Some of the documented oil spills in Kenya include:
  - a) Kibarani area oil spill. In 2018, a cargo train ferrying oil and petrol products derailed and caused oil and petrol spills in the Kibarani Changamwe area of Mombasa County Government where at least 250,000 liters of petrol spilled into the nearby Indian Ocean.<sup>16</sup>

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<sup>12</sup> “Kenya Petroleum Technical Assistance Report (KETAP): Strategic Environmental and Social Assessment” (Ministry of Energy and Petroleum) <<http://ices.or.ke/wp-content/uploads/2016/11/SESA-Draft-Report-for-Petroleum-Sector-in-Kenya.pdf>> accessed 30 April 2019

<sup>13</sup>Ibid

<sup>14</sup>Ibid

<sup>15</sup>Ibid

<sup>16</sup> Orinde H, 'Changamwe on Lockdown after Train Carrying Fuel Plunges into Sea' *The standard* (2018) <<https://www.standardmedia.co.ke/article/2001281072/changamwe-on-lockdown-after-train-carrying-fuel-plunges-into-sea>> accessed 8 May 2019

- b) Sinai Tanker Accident. In 2011, a leak from the Kenya Pipeline Company (KPC) sent fuel gushing out of the pipeline caused by a broken gasket that is used to join two or more pipes and whose work is to prevent leaks where there is high pressure in the pipeline. The fuel gushed out into the storm drains which carried it into the nearby Sinai Slum and river resulting into deaths of more than 100 people who were burnt and many others seriously injured when the fuel burst into flames.<sup>17</sup>
- c) Sachangwan Accident. In 2009, a tanker transporting petroleum products from Nakuru to Eldoret overturned at the Sachangwan trading center along the Nakuru-Eldoret Highway spilling all its contents in the area and the adjacent forest. As the locals scampered to siphon petrol, the tanker burst into flames killing and injuring more than 130 people. The spill and fire also went deep into the nearby forest burning down trees, grass and other animals residing therein.<sup>18</sup>
- d) In May 2015, it was reported that a leakage on KPC's Mombasa-Nairobi oil pipeline in Thange area, Makueni County, caused oil products to flow into River Thange and its environs causing serious pollution to the water resource relied upon by many locals in the area as well as making the adjacent land unproductive as all crops and vegetation were dried up.<sup>19</sup>
- ii. Land Acquisition, Displacements and Land Use Changes. A good example of land displacement, change of use and disputes is the Turkana residents' disputes with Tullow Oil. Between 2012 and April 2015 a total of 14 demonstrations, road blocks and attacks have been witnessed in Lokichar town.<sup>20</sup> It was reported that the County had illegally leased out 6 sq. km of land to an investor in the south for him to build a 600 bed hotel and an airstrip that was later leased to Tullow Oil.<sup>21</sup> The contested land

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<sup>17</sup>Mutiga M, 'No Mask Can Ever Hide My Agony' *Daily Nation* (2012)  
<<https://www.nation.co.ke/lifestyle/dn2/Sinai-tragedy-a-year-later/957860-1503458-baio42/index.html>>  
accessed 8 May 2019

<sup>18</sup>Mkawale S, 'Over 100 Dead in Nakuru Oil Tanker' *The Standard* (2009)  
<<https://www.standardmedia.co.ke/article/1144005519/over-100-dead-in-nakuru-oil-tanker-accident>> accessed  
8 May 2019

<sup>19</sup>Business Daily, 'Lessons from KPC Clean Up of the Makueni Oil Spill,' February 29, 2016.  
<https://www.businessdailyafrica.com/analysis/Lessons-from-KPC-clean-up-of-Makueni-oil-spill/539548-3097106-1pxxb6/index.html> Accessed on 11/7/2019

<sup>20</sup>Mkutu K and Wandera G, "Conflict, Security and the Extractive Industries in Turkana, Kenya" (2016)  
<<http://crimeresearch.go.ke/wp-content/uploads/2018/02/Conflict-and-Extractive-Industries-in-Turkana.pdf>>  
accessed 2 July 2019

<sup>21</sup>Ibid

was part of an important grazing ground for pastoralists who had not been consulted before the leasing of the land, and they could not therefore honor a deal which had been done without proper consultation. The community alleged that bribery may have been involved.<sup>22</sup>

### **1.1.3 Governance Framework for Environmental Protection in the Petroleum Industry in Kenya**

Preventing and or reducing environmental degradation and rehabilitation requires joint efforts from all key stakeholders as well as having elaborate legal and institutional frameworks stipulating clear environmental principles and standards in place to help in securing the various ecosystems thus achieving sustainability.<sup>23</sup>

In response to the environmental challenges posed to the environment, the Government of Kenya, has enacted legal and policy framework that provide for effective utilization and management of the environment as discussed below:<sup>24</sup>

The Constitution of Kenya<sup>25</sup> provides a fully furnished legal framework to effectively protect the environment *inter alia* the Preamble calls on all people to respect the environment and sustain it for future generations, Article 42<sup>26</sup> provides for “the right to a clean and healthy environment” and further calls on the environment to be safeguarded for all generations subject to the land principles provided for under Article 60(c)<sup>27</sup> and (e).<sup>28</sup>

EMCA<sup>29</sup> provides a coordination mechanism for various sector laws dealing with elements of the environment. Section 58<sup>30</sup> provides for an EIA for all projects, programmes or policies likely to harm the environment. The Act also deals with water pollution, prevention<sup>31</sup> and

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<sup>22</sup>Ibid

<sup>23</sup>Ministry of Environment and Natural Resources, “Strategic Investment Framework for Sustainable Land Management 2017-2027” (2016) <<http://www.environment.go.ke/wp-content/uploads/2018/08/KSIF-Kenya-Strategic-Investment-Framework-on-SLM-2017-2027.pdf>> accessed 11 July 2019

<sup>24</sup>Ibid

<sup>25</sup>2010

<sup>26</sup>Ibid

<sup>27</sup>Ibid

<sup>28</sup>Ibid

<sup>29</sup>1999

<sup>30</sup>Ibid

<sup>31</sup>Environmental Management and Coordination (Water Quality) Regulations 2006

waste management<sup>32</sup> which are associated with the extractive industry as it generates different categories of waste during operation.

Other key sector law is the Petroleum Act<sup>33</sup> that regulates the issuance of Petroleum Agreements and operating licenses between the government and contractors. Sections 32<sup>34</sup>, 59<sup>35</sup>, 60(1)<sup>36</sup>, 66<sup>37</sup> and 67<sup>38</sup> provide for the environmental requirements that must be satisfied by prospective contractors before they can be issued with any petroleum operating licenses. Namely: EIA Reports, waste management, effective safety and emergency measures to prevent loss of life, pollution and damage to property among others.

## **1.2. Statement of the Problem**

The exploration of the oil and gas in Kenya began way back in the 1950s. It was however not until the year 2012 that a major breakthrough was launched in Kenya when the UK based Tullow Oil Company Limited made a discovery of promising wells of crude oil in Turkana County Government at the Ngamia-1 well. Since then, more wells have been drilled and promises more than 600 million barrels of crude oil.

Many environmental challenges continue to lie in the way of Kenya's oil and gas development such as pollution to air, water, soil, contribution to biodiversity loss, the destruction of the ecosystems and consequently to the living beings.

Kenya has experienced its own share of environmental disasters though not directly linked to the upstream segment, but the mid and downstream segments such as: the Kibarani area oil spill accident of 2018 that saw a cargo train ferrying oil and petrol products derail and cause oil and petrol spills where at least 250,000 liters of petrol were spilled on land and the nearby Indian Ocean and the Sinai Tanker Accident of 2011 where a leak from the Kenya Pipeline Company (KPC) sent fuel gushing out of the pipeline caused by a broken gasket into the storm drains which carried it into the nearby Sinai Slum and river resulting into deaths of more than 100 people just to mention but a few.

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<sup>32</sup>Environmental Management and Coordination (Waste Management) Regulations 2006

<sup>33</sup>2019

<sup>34</sup>Ibid

<sup>35</sup>Ibid

<sup>36</sup>Ibid

<sup>37</sup>Ibid

<sup>38</sup>Ibid



In the upstream petroleum segment, two main stages are involved: first is the exploration stage that involves the mapping out of oil and gas reserves and in mapping out these reserves, the following activities take place. Namely; use of detonations and explosives that are intended to send waves through the layers of the rocks which waves are then transmitted onto advanced technologies that decode the waves and establish the locations and quantity of the oil and gas reserves. The second step is the production step that involves the drilling of wells in the already mapped out areas. In order to do so, this involves: use of explosives, acids, water, steam and other chemicals on the ground to force the oil and gas up to the surface. These two processes pose great risks to the environment namely; land clearance, loss of vegetation, emission of green gas, gas venting and flaring, dust, noise and air pollution among others.

Even as these disasters are happening, Kenya prides itself in having some of the best environmental and petroleum legal and policy framework in the region namely; the Constitution of Kenya 2010 that provides comprehensive standards and guidelines on environmental protection specifically under Articles 10, 42, 60, 69 and 70, EMCA that governs the use of the environment specifically under Sections 3,7,57A,58 and 69, Environmental Management and Coordination (Water Quality) Regulations that establish guidelines and standards for the discharge of effluents to the environment and the Environmental Management and Coordination (Waste Management) Regulations that provide the standards and guidelines for waste disposal, just to mention but a few.

Research shows that environmental degradation continues to occur due to serious gaps in the existing laws namely; lack of specific environmental laws and agencies to effectively govern the industry. It has been demonstrated that the framework in place cuts across all sectors in Kenya making it difficult to adequately govern and address the environmental concerns from the oil and gas industry.

Borrowing from experiences and measures that have worked in other countries such as Nigeria, namely, the establishment of specific laws, standards, guidelines and agencies to specifically govern the oil and gas industry environment, Kenya will be able to efficiently if not adequately address the environmental concerns that emanate from the sensitive operations of this industry. In so doing, this will call for a review of the existing framework to align it with the current environmental trends and evolutions.

This research paper therefore investigates whether the existing environmental legal and policy framework is fit, sufficient and adequate to govern and regulate the petroleum industry in Kenya thus achieving highest standards of environmental protection. This paper is therefore limited to the adequacy and efficacy of the law.

### **1.3. Research Objectives**

This research paper is guided by the following objectives:

- a) To examine the current status of oil and gas exploration and production in Kenya?
- b) To review the legal and institutional framework governing the oil and gas industry in Kenya, and comparable jurisdictions from which Kenya can draw lessons.
- c) To examine the challenges and barriers limiting the ability of the legal framework from ensuring effective environmental protection during oil and gas exploration and production.
- d) To propose measures and mechanisms that can be put in place to ensure the highest standards of environmental protection during oil and gas exploration and production.

#### **1.4. Research Questions**

This paper is guided by the research questions below;

- a) What is the current status of oil and gas exploration and production in Kenya?
- b) What is the legal and institutional framework governing the oil and gas industry in Kenya and comparable jurisdictions from which Kenya can draw lessons?
- c) What are the challenges and barriers limiting the ability of the legal framework from ensuring effective environmental protection during oil and gas exploration and production?
- d) What measures and mechanisms can be put in place to ensure the highest standards of environmental protection during oil and gas exploration and production?

#### **1.5. Research Hypothesis**

This research will work from the assumption that the legal and institutional framework in Kenya governing the environment are inadequate to protect it from the adverse effects the petroleum industry poses to the environment.

#### **1.6. Justification of the Study**

Proper mechanisms are lacking to look after environmental issues in Kenya. This can be attributed to the existing legal and institutional lack of proper demarcation of roles between regulation, policy and commercial operations. This has affected the proper governance and management of the exploration and production processes in the petroleum sector, resulting to environmental degradation. The research therefore comes in time to give practical recommendations that would bridge the possible gaps in sustaining the environment.

#### **1.7. Theoretical Framework**

The theoretical basis for this study is firstly, the Sociological Theory of Interest: law as a tool of social control should be made responsive to the needs of the society it is serving. This theory is employed in order to understand the law. It provides an emphasis on the social impact of legal institutions, doctrines, and practices.<sup>39</sup> In so doing, it seeks to establish the following elements; the actual and real effects of the legal institutions and doctrines; sociological studies of the preparation of legislation particularly comparative legislation;

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<sup>39</sup>Definitions.uslegal.com. (n.d.). *Sociological Jurisprudence Law and Legal Definition* / US Legal, Inc. <<https://definitions.uslegal.com/s/sociological-jurisprudence/>> accessed 16 April 2018

study of means of making legal rules effective; advocacy of reasonable and just solutions of legal cases (a realist approach) and making effort more effective in achieving the purpose of law.<sup>40</sup>

The proponents in this area like Pound Roscoe were concerned with the individual, public and social interest.<sup>41</sup> They argued that the laws of a nation should be made to serve these particular interests as they classified them into three.

The second ideal theory to be read together with the Sociological Theory of Interest is the Environmental Rule of Law which are principles meant to provide guidance in decision making processes thus strengthening environmental laws.<sup>42</sup> It calls for fairness in the enactment of environmental laws. This theory therefore seeks to ensure that any laws that are developed, they are developed to address a specific gap or challenge and should achieve their objectives.<sup>43</sup> In order for vision of this theory to be achieved the following guiding principles must be observed: fairness, clarity, public participation and access to justice just to mention but a few.<sup>44</sup>

The purpose of this theory is to identify who is responsible handling and or for addressing environmental problems.<sup>45</sup> It argues that without proper and effective coordination between all relevant institutions and stakeholders, serious challenges are posed. This therefore calls for all institutions to have clearly defined roles and mandates in order to fulfill their responsibilities in enforcing environmental laws.<sup>46</sup>

As a result, the Sociological Theory of Interest together with the Environmental Rule of Law are the ideal approach to use to analyze whether or not the Kenyan laws and the various institutions established under them are adequate and effective for the purposes they are intended for, which is in broad terms, to ensure optimum and sustainable utilization of natural

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<sup>40</sup> Nalbandian E, “Sociological Jurisprudence: Roscoe Pound’s Discussion on Legal Interests and Jural Postulates” <<https://www.ajol.info/index.php/mlr/article/viewFile/145483/135010>> accessed 16 April 2019

<sup>41</sup> Pound R, Jurisprudence (The Law Book Exchange, Ltd 1959)

<sup>42</sup> Neale A and Katzeff B, “Environmental Rule of Law: Making Sure our laws achieve their purpose” (2019) <<https://www.wcel.org/blog/environmental-rule-law-making-sure-our-laws-achieve-their-purpose>> Accessed 11 July 2019

<sup>43</sup> Ibid

<sup>44</sup> Ibid

<sup>45</sup> Ibid

<sup>46</sup> Ibid

resources, at the same time ensuring that the highest standards of environmental protection is achieved.

The objectives of this study are to firstly examine the current status of oil and gas industry in Kenya, to review the existing legal and institutional framework governing the industry and to examine the challenges and barriers limiting the ability of the legal and institutional framework from ensuring effective environmental protection during oil and gas exploration and production. In this regard, the study analyses whether the law, policies and institutions in place are sufficient and adequate in ensuring effective governance of the environment. Finally, the study seeks to propose effective and sustainable measures and mechanisms that can be put in place to ensure the highest standards of environmental protection during oil and gas exploration and production.

To achieve these objectives, the following questions are considered: what is the current status of oil and gas exploration and production in Kenya, what is the existing legal and institutional framework governing the oil and gas industry in Kenya and comparable jurisdictions from which Kenya can draw lessons, what are the challenges and barriers limiting the ability of the legal framework from ensuring effective environmental protection during oil and gas exploration and production and lastly, what measures and mechanisms can be put in place to ensure the highest standards of environmental protection during oil and gas exploration and production?

### **1.8. Literature Review**

The very purpose of literature review is to look into what other authors and writers have written on the subject being researched on in order to establish the gaps that are still in place and that require immediate attention in order for them to be adequately addressed.

The literature review for this study borrows heavily from both published and unpublished works of various scholars and authors. In reviewing the literature in place, this study is guided by the study objectives. It is from the literature review that the objectives of this study are addressed accordingly.

### ***Objective 1: The current status of oil and gas exploration and production in Kenya***

Ministry of Energy and Petroleum, “*Kenya Petroleum Technical Assistance Report (KETAP): Strategic Environmental and Social Assessment*”.<sup>47</sup> The authors discuss the situation on the ground in as far as petroleum activities in the country are concerned, the risks posed to the environment and their causes, which they attribute to the weak legal and institutional framework. They further argue that in order to address some of the environmental challenges, there is the need for the country to develop proper environmental guidelines and standards to effectively govern and regulate the operations of the petroleum industry. The authors however give very general recommendations and conclusions and do not show how the changes are to be arrived at and by who. This paper will therefore narrow down and focus on the key changes that need to be done and specify the entities responsible for making those changes in order to ensure effective management and responsibility.

Kariuki Muigua, “*Environmental Impact Assessment (EIA) in Kenya*.”<sup>48</sup> The author discusses the place Environmental Impact Assessment in proposals for all development projects in Kenya. He argues that EIA is important as it gives live to the obligations in relation to the environment. He further points out that there are developments in Kenya that have not complied with sound environmental practices. He attributes this challenge to the numerous fragmented lead agencies involved in the governance of the environment. The author however fails to indicate the manner in which some of the challenges he has pointed out hampering effective implementation of EIAs can be addressed. This paper will therefore seek to address this gap.

Ephraim Ikechukwu Elenwo and Justine Ayaegbunem Akankali in “*Environmental Policies and Strategies in Nigeria Oil and Gas Industry: Gains, Challenges and Prospects*,”<sup>49</sup> The authors argue that there is lack of concerted efforts from all relevant stakeholders mandated to ensure effective management of the environment thus the challenges faced.

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<sup>47</sup> “Kenya Petroleum Technical Assistance Report (KETAP): Strategic Environmental and Social Assessment” (Ministry of Energy and Petroleum) <<http://ices.or.ke/wp-content/uploads/2016/11/SESA-Draft-Report-for-Petroleum-Sector-in-Kenya.pdf>> accessed 6 August 2018.

<sup>48</sup> Muigua K, ‘Environmental Impact Assessment (EIA) in Kenya’ <<http://kmco.co.ke/wp-content/uploads/2018/08/A-Paper-on-Environmental-impact-assessment.pdf>> Accessed 7 March 2019

<sup>49</sup> Elenwo EI and Akankali JA, “Environmental Policies and Strategies in Nigeria Oil and Gas Industry: Gains, Challenges and Prospects” (2014) 5 *Natural Resources* 884 <<http://www.scirp.org/journal/PaperDownload.aspx%3Fpaper/D%D51888>> accessed 23 October 2015

O. W. Achawa and E. Danso-Boateng, in “*Environmental Management in the Oil, Gas and related Energy Industries in Ghana*,”<sup>50</sup> The authors examine the importance of the various environmental agencies and argue that there is the need for these agencies to put their foot on the front in order to prevent the environment from any form of degradation. The authors however do not indicate how and the manner the relevant regulatory bodies and authorities are to enforce the existing environmental regulations in order to prevent the degradation. This paper will therefore demonstrate what needs to be done to ensure the relevant entities effectively implement the existing environmental regulations.

### ***Objective 2: The legal and institutional framework governing the oil and gas industry in Kenya***

Ministry of Energy and Petroleum, “*Kenya Petroleum Technical Assistance Report (KEPTAP): Strategic Environmental and Social Assessment*,”<sup>51</sup> the Report discusses among other things, the challenges facing the petroleum sector in Kenya. The authors also discuss and argue out the risks that have been posed to the environment and the causes of those weaknesses and they attribute this to the weak legal and institutional framework. They further argue that in order to address some of the environmental challenges, there is the need for the country to develop proper environmental guidelines and standards to effectively govern and regulate the operations of the petroleum industry. The authors however give very general recommendations and conclusions and do not show how the policy, legal and institutional changes are to be implemented and by who. This paper will therefore narrow down and focus on the key changes that need to be done and specify the entities responsible for making those changes in order to ensure effective management and responsibility.

Justus Omollo (2013) in “*Oil and Gas Sector in Kenya; The Legal Status on Exploration and Extraction*.”<sup>52</sup> The author argues that Kenya’s petroleum industry sector has operated without a clearly defined policy framework. He further argues that the laws must address the concerns

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<sup>50</sup> Achawa OW and Danso-Boateng E, “Environmental Management in the Oil, Gas and related Energy Industries in Ghana” (2013) 4 International Journal of Chemical and Environmental Engineering <[https://www.researchgate.net/publication/258439245\\_Environmental\\_Management\\_in\\_the\\_Oil\\_Gas\\_and\\_related\\_Energy\\_Industries\\_in\\_Ghana](https://www.researchgate.net/publication/258439245_Environmental_Management_in_the_Oil_Gas_and_related_Energy_Industries_in_Ghana)> accessed 23 October 2015

<sup>51</sup>“Kenya Petroleum Technical Assistance Report (KETAP): Strategic Environmental and Social Assessment” (Ministry of Energy and Petroleum) <<http://ices.or.ke/wp-content/uploads/2016/11/SESA-Draft-Report-for-Petroleum-Sector-in-Kenya.pdf>> accessed 6 August 2018

<sup>52</sup>Omollo J, “Oil and Gas Sector in Kenya; The Legal Status on Exploration and Extraction” (2013) <[https://www.academia.edu/9571301/OIL\\_AND\\_GAS\\_SECTOR\\_IN\\_KENYA\\_THE\\_LEGAL\\_STATUS\\_ON\\_EXPLORATION\\_AND\\_EXTRACTION](https://www.academia.edu/9571301/OIL_AND_GAS_SECTOR_IN_KENYA_THE_LEGAL_STATUS_ON_EXPLORATION_AND_EXTRACTION)> accessed 27 March 2019

of the Kenyans. He concludes by arguing that it is important to have a “codified law” to govern the sector since the existing laws establish institutions whose responsibilities result to an overlap and duplication of efforts. He calls for the streamlining of their responsibilities. The author however does not give directions as to how the laws and the institutions established therein re to be streamlined in order to achieved a well-defined and comprehensive framework governing the oil and gas industry. This paper will therefore provide solutions on how to go about streamlining the petroleum laws and institutions to make them more comprehensive and effective in their implementation.

Olujimi Julius Ajilowo Bayode, Emmanuel Adebayo Adewunmi and Sogbon Odunwole, in “*Environmental Implications of Oil Exploration and Exploitation in the Coastal Region of Ondo State, Nigeria: A Regional Planning Appraisal.*”<sup>53</sup> The authors advocate for the need to put in place oil effective oil and gas management plans and controls. They however fail to provide measures on how to achieve this. Thus, the timeliness of this paper will provide for those measures.

## **Conclusion**

The gap that emerges from the review above is that Kenya has more than enough laws to govern the environment in the petroleum industry. The only challenge is that there are many sector laws which have also led to the establishment of institutions with more or less the same mandate that in the implementation of their roles, there is an overlap of mandates. Further, the law does not provide for specific provisions to govern the operations of the petroleum industry making it unfit to effectively govern and regulate the operations of the industry. There is therefore the need to revisit the legal and institutional framework to ensure that the issue of multi sector laws and institutions whose mandate overlap is addressed. There is also the need to revise the existing laws to make them more comprehensive on matters oil and gas to ensure maximum conservation and protection of the environment.

***Objective 3: The challenges and barriers limiting the ability of the legal framework from ensuring environmental protection during oil and gas exploration and production.***

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<sup>53</sup> Bayode OJA, Adewunmi EA and Odunwole S, “Environmental implications of oil exploration and exploitation in the coastal region of Ondo State, Nigeria: A regional planning appraisal” (2011) 4 Journal of Geography and Regional Planning<[https://academicjournals.org/article/article1381833024\\_Bayode%20et%20al.pdf](https://academicjournals.org/article/article1381833024_Bayode%20et%20al.pdf)> accessed 19 October 2015



Kariuki Muigua, “*Environmental Impact Assessment (EIA) in Kenya.*”<sup>54</sup> The author discusses some of the challenges and barriers in Kenya that lead to ineffective implementation of the environmental management tools in Kenya and among them are the many environmental agencies that seem not to trust each other as well as unharmonized mandates. He however fails to indicate the manner in which to address these shortcomings. This paper therefore seeks to fill in the gaps the author has failed to address by highlighting the specific measures that can be put in place for effective management of the environment.

Ministry of Energy and Petroleum, Kenya Petroleum Technical Assistance Report (KEPTAP) in “*Strategic Environmental and Social Assessment.*”<sup>55</sup> The authors discuss the situation on the ground as far as petroleum activities are concerned, the risks posed to the environment and the causes which they attribute to the weak legal and institutional framework. They further argue that in order to address some of the environmental challenges, there is the need for the country to develop proper environmental guidelines and standards to effectively govern and regulate the operations of the petroleum industry. The authors however give very general recommendations and conclusions and do not show how the changes are to be arrived at. This paper will therefore narrow down and focus on the key changes that need to be done and specify the entities responsible for making those changes in order to ensure effective management and responsibility.

Justus Omollo (2013) in “*Oil and Gas Sector in Kenya; The Legal Status on Exploration and Extraction.*”<sup>56</sup> The author argues that Kenya’s petroleum industry sector has operated without a clearly defined policy framework. He concludes by arguing that it is important to have a “codified law” to govern the sector since the existing laws establish institutions whose responsibilities result to an overlap and duplication of efforts. He calls for the streamlining of their responsibilities. The author however does not give directions as to how the laws and the institutions established therein re to be streamlined in order to achieved a well-defined and comprehensive framework governing the oil and gas industry. This paper will therefore

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<sup>54</sup>Muigua K, “Environmental Impact Assessment (EIA) in Kenya” <<http://kmco.co.ke/wp-content/uploads/2018/08/A-Paper-on-Environmental-impact-assessment.pdf>> Accessed 7 March 2019

<sup>55</sup>“Kenya Petroleum Technical Assistance Report (KETAP): Strategic Environmental and Social Assessment” (Ministry of Energy and Petroleum) <<http://ices.or.ke/wp-content/uploads/2016/11/SESA-Draft-Report-for-Petroleum-Sector-in-Kenya.pdf>> accessed 6 August 2018

<sup>56</sup> Omollo J, “Oil and Gas Sector in Kenya; The Legal Status on Exploration and Extraction” (2013) <[https://www.academia.edu/9571301/OIL\\_AND\\_GAS\\_SECTOR\\_IN\\_KENYA\\_THE\\_LEGAL\\_STATUS\\_ON\\_EXPLORATION\\_AND\\_EXTRACTION](https://www.academia.edu/9571301/OIL_AND_GAS_SECTOR_IN_KENYA_THE_LEGAL_STATUS_ON_EXPLORATION_AND_EXTRACTION)> accessed 27 March 2019

provide solutions on how to go about streamlining the petroleum laws and institutions to make them more comprehensive and effective in their implementation.

Isaiah K. Okuthe, in *“Environmental and Social challenges of Oil and Gas Exploration in Kenya,”*<sup>57</sup> The author argues that among the challenges ailing the Kenyan system on matters environmental protection is weak institutions, absence of important crucial policies, and poor organizational structures. The author however fails to provide solutions on how the challenges he has discussed such as weak institutions and absence of crucial policies among others can be addressed. This paper will therefore focus on identifying some of the key solutions that can be put in place to ensure the challenges are adequately addressed.

Allan Ingelson and Chilenye Nwapi, in *“Environmental Impact Assessment Process for Oil, Gas and Mining Projects in Nigeria: A Critical Analysis,”*<sup>58</sup> The authors argue that some of the challenges impeding effective management of the environment is attributable to the multiplicity of agencies and institutions mandated to oversee effective implementation of environmental laws and policies. They therefore call for the need to sufficiently equip these agencies and institutions in order to effectively implement their mandates. Despite the authors pointing out some of the challenges that face the petroleum industry namely multiplicity of regulatory bodies among others, they fail to give solutions on how to go about addressing this concern. This paper therefore seeks to address this gap by providing key proposals on how this concern can be adequately addressed to ensure the environment is properly governed and regulated.

Kadafi Adati Ayuba, in *“Environmental Impacts of Oil Exploration and Exploitation in the Niger Delta of Nigeria,”*<sup>59</sup> The author argues that some of the negative effects to the environment emanating from the petroleum industry can be addressed by revising legislations and adopting technology that is friendly to the environment. The author however gives very general solutions without breaking it out down to what specific steps should be taken in

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<sup>57</sup> Okuthe IK, “Environmental and Social challenges of Oil and Gas Exploration in Kenya” (2015) 1 International Journal of Innovation and scientific Research

<sup>58</sup> Ingelson A and Nwapi C, “Environmental Impact Assessment Process for Oil, Gas and Mining Projects in Nigeria: A Critical Analysis” (2014) 10 Law, Environment and Development Journal <[www.lead-journal.org/content/14035.pdf](http://www.lead-journal.org/content/14035.pdf)> accessed 19 October 2015

<sup>59</sup> Kadafa and Ayuba A, “Environmental Impacts of Oil Exploration and Exploitation in the Niger Delta of Nigeria” (2012) 12 Global Journal of Science Frontier Research Environment & Earth Sciences <[https://globaljournals.org/GJSFR\\_Volume12/2-Environmental-Impacts-of-Oil-Exploration.pdf](https://globaljournals.org/GJSFR_Volume12/2-Environmental-Impacts-of-Oil-Exploration.pdf)> accessed 6 May 2019

ensuring the legal and institutional framework is looked into. This paper therefore seeks to highlight the key areas of the existing petroleum policy and legal framework that should be given attention in order to ensure the environment is well governed and regulated.

## **Conclusion**

The gap that emerges from the literature review above is that the barriers and challenges to effective management of the environment in the petroleum sector are attributable to the fragmented laws and overlapping mandates that cut across the various institutions established under those laws. There is therefore the need to put in place measures that ensure effective governance of the petroleum sector environment. This calls for the revision and consolidation the existing petroleum legislation in Kenya. It also calls for alignment of the mandates of the various institutions established under those laws to avoid overlap of mandates and duplication of efforts.

***Objective 4: The measures and mechanisms that can be put in place to ensure the highest standards of environmental protection during oil and gas exploration and production.***

Justus Omollo (2013) in “*Oil and Gas Sector in Kenya; The Legal Status on Exploration and Extraction*”.<sup>60</sup> The author argues that Kenya’s petroleum industry sector has operated without a clearly defined policy framework. He concludes by arguing that it is important to have a “codified law” to govern the sector since the existing laws establish institutions whose responsibilities result to an overlap and duplication of efforts. He calls for the streamlining of their responsibilities. The author however does not give directions as to how the laws and the institutions established therein re to be streamlined in order to achieve a well-defined and comprehensive framework governing the oil and gas industry. This paper will therefore provide solutions on how to go about streamlining the petroleum laws and institutions to make them more comprehensive and effective in their implementation.

Isaiah K. Okuthe, in “*Environmental and Social challenges of Oil and Gas Exploration in Kenya*,”<sup>61</sup> The author argues that among the challenges ailing the Kenyan system on matters environmental protection is weak institutions, absence of important crucial policies, and poor

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<sup>60</sup>Omollo J, “Oil and Gas Sector in Kenya; The Legal Status on Exploration and Extraction” (2013) <[https://www.academia.edu/9571301/OIL\\_AND\\_GAS\\_SECTOR\\_IN\\_KENYA\\_THE\\_LEGAL\\_STATUS\\_ON\\_EXPLORATION\\_AND\\_EXTRACTION](https://www.academia.edu/9571301/OIL_AND_GAS_SECTOR_IN_KENYA_THE_LEGAL_STATUS_ON_EXPLORATION_AND_EXTRACTION)> accessed 27 March 2019

<sup>61</sup> Fn 131

organizational structures. The author however fails to provide solutions on how the challenges he has discussed such as weak institutions and absence of crucial policies among others can be addressed. This paper will therefore focus on identifying some of the key solutions that can be put in place to ensure that these challenges are properly addressed in order to ensure effective governance of the oil and gas industry in Kenya.

Kadafi Adati Ayuba, in “*Environmental Impacts of Oil Exploration and Exploitation in the Niger Delta of Nigeria*,”<sup>62</sup> The author argues that some of the negative effects to the environment emanating from the operations of the petroleum sector can be reduced by revising legislations and adopting technology that is friendly to the environment. The author however gives very general solutions without breaking it out down to what specific steps should be taken in ensuring the legal and institutional framework is looked into. This paper therefore seeks to highlight the key areas of the existing petroleum policy and legal framework that should be given attention in order to ensure the environment is well governed and regulated.

## **Conclusion**

The gap that emerges from the literature review above is that there is an urgent need to review of the existing legal and institutional framework to conform with the environmental principles as provided for under Constitution of Kenya 2010 in order to seal most of the loopholes that have been created by the confusion by the many laws and institutions mandated to ensure proper management of the environment and the natural resources in Kenya.

### **1.9. Research Methodology**

To achieve the objectives of this research paper, the preferred methodology is the qualitative research. As a result, the paper will mainly employ desk research in collecting the data required. The study will involve analysis of both primary and secondary sources of data; Laws and Statutes, published and unpublished works from distinguished scholars and authors, such as Books, Articles, Journals and Reports. These sources will help in

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<sup>62</sup> Kadafa and Ayuba A, “Environmental Impacts of Oil Exploration and Exploitation in the Niger Delta of Nigeria” (2012) 12 Global Journal of Science Frontier Research Environment & Earth Sciences<[https://globaljournals.org/GJSFR\\_Volume12/2-Environmental-Impacts-of-Oil-Exploration.pdf](https://globaljournals.org/GJSFR_Volume12/2-Environmental-Impacts-of-Oil-Exploration.pdf)> accessed 6 May 2019

appreciating what other scholars have written about and addressed regarding this paper's area of study, and the manner in which they have conducted their research so that this work can employ different techniques and methods and address the issues that the gaps that may have emerged and/or have been inadequately addressed, to ensure that originality is attained and hence build on to the existing study. However, while the study looks at what has been written on in this area, it is to be appreciated that since the upstream sector in Kenya is still young, little has been written and hence the paper mainly focuses on evaluation and analysis of the existing legal and institutional frameworks governing the sector. The paper also highlights some of the relevant court decisions impacting on the topic.

### **1.10.Limitation of the Study**

The study of the adverse effects of the petroleum industry is very wide; which ranges from environmental implications such as destruction of the ecosystem, to humanitarian implications which involves the violation of human rights, health complications such as respiratory diseases and deformities, and lastly, to commercial implications.

Due to the wide scope and nature of the study of oil and gas exploration implications, and also due to time and financial constraints, this study will narrow down and focus on the need to protect the environment from such implications, undertaking an in-depth study on the need to uphold and promote the principles of sustainable development and polluter pays respectively.

Further, due to time and financial constraints, this research will not conduct a field study as one would have hoped for. It will only collect data from library-based study and through a comparative study and analysis in other countries and jurisdictions where Kenya can borrow some best practices from.

Considering that this research paper investigates the adequacy and efficacy of the existing environmental legal and policy framework in the upstream petroleum segment in Kenya is concerned, detailed analysis of incidental and or related matters and issues may be lacking and or omitted.

### **1.11. Chapter Breakdown**

This research paper is broken down into five chapters and below is a brief summary of what each chapter discusses;

**CHAPTER ONE:** This chapter seeks to address the background of the study, statement of the problem, objectives of the study, the research questions, and the research hypothesis, the theoretical framework of the study, the research methodology, limitation of the study, the literature review and lastly the chapter breakdown.

**CHAPTER TWO:** This chapter looks into the current status of oil and gas exploration and production in Kenya.

**CHAPTER THREE:** This chapter analyses the legal and institutional framework that govern the oil and gas exploration and production sector in Kenya.

**CHAPTER FOUR:** This chapter analyses the challenges and barriers limiting the ability of the existing legal and institutional framework from ensuring effective environmental protection during oil and gas exploration and production.

**CHAPTER FIVE:** This chapter provides a comprehensive conclusion on the study and proposes key recommendations and measures that are necessary in ensuring effective implementation of the existing legal and institutional framework governing the oil and gas industry in Kenya thus mitigating possible environmental harm.

## **CHAPTER TWO: CURRENT STATUS OF THE UPSTREAM OIL AND GAS EXPLORATION AND PRODUCTION INDUSTRY IN KENYA**

### **2.1. Introduction**

The petroleum industry in Kenya is divided into three main segments as earlier pointed out.<sup>63</sup> There is no production of petroleum products in Kenya yet. The country is still in its exploration stage.<sup>64</sup>

In the year 2010, the government of Kenya entered into an agreement with two oil companies that identified viable exploration blocks in Turkana, Marsabit and Baringo Counties respectively.<sup>65</sup> Since then, more potential wells have been discovered in the South Lokichar Basin at the Ngamia-1, and in Kisumu County and it is estimated that the already identified wells contain millions of crude oil barrels.<sup>66</sup>

Today, Kenya has four (4) main petroleum exploration basins that have been mapped out and these are: Lamu Basin, Anza Basin, Mandera Basin and Tertiary Rift Basin.<sup>67</sup> In these four (4) basins, there are forty six blocks and out of these blocks, the government has signed and entered into exploration agreements and also licensed forty four of them to various exploration companies among them is; Africa Oil Corporation, Camac Energy, Imara Energy, Lamu Oil & Gas, , NOCK, Tullow Oil (K) B.V, Zarara Oil & Gas just to mention but a few.<sup>68</sup>

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<sup>63</sup>Rift Energy, "Upstream Oil and Gas Industry in Kenya"  
<[http://www.riftenergycorp.com/database/files/library/Overview\\_of\\_upstream\\_oil\\_and\\_gas\\_industry\\_in\\_Kenya.pdf](http://www.riftenergycorp.com/database/files/library/Overview_of_upstream_oil_and_gas_industry_in_Kenya.pdf) > accessed 2 August 2018

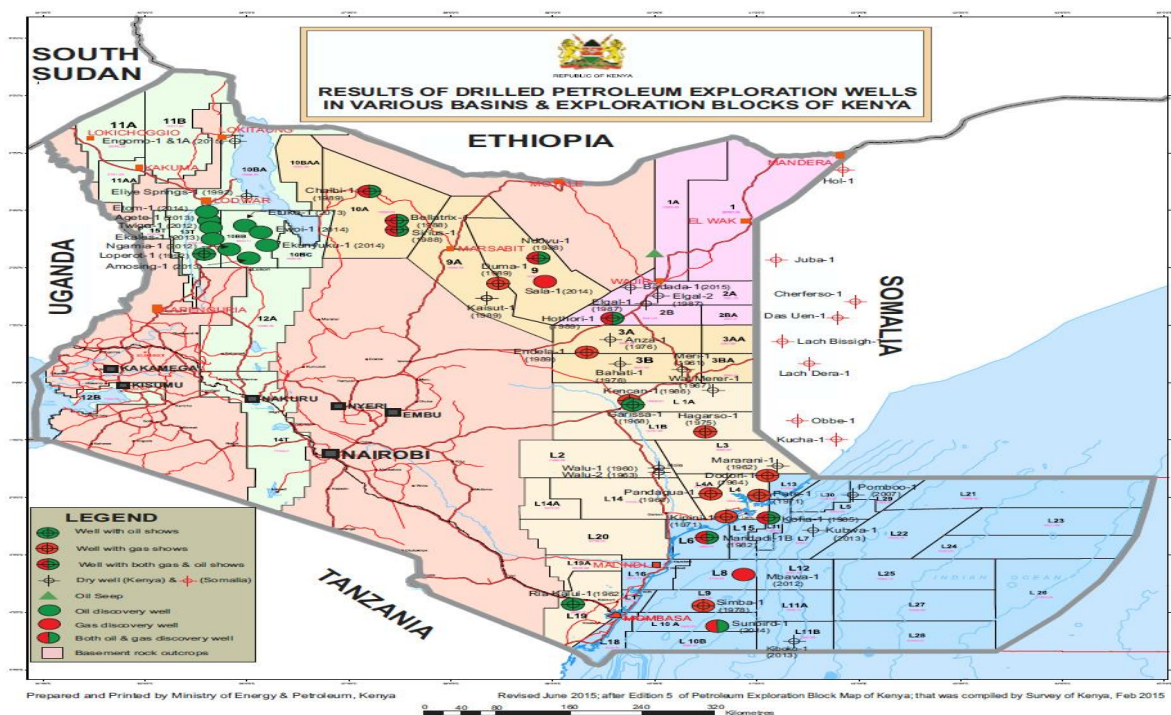
<sup>64</sup> Ibid

<sup>65</sup> Ibid

<sup>66</sup>Ite AE, Ibok UJ, Ite MU and Petters SW, "Petroleum Exploration and Production: Past and Present Environmental Issues in the Nigeria's Niger Delta" (2013) 1 American Journal of Environmental Protection 78  
<[https://www.researchgate.net/publication/256834670\\_Petroleum\\_Exploration\\_and\\_Production\\_Past\\_and\\_Present\\_Environmental\\_Issues\\_in\\_the\\_Nigeria's\\_Niger\\_Delta](https://www.researchgate.net/publication/256834670_Petroleum_Exploration_and_Production_Past_and_Present_Environmental_Issues_in_the_Nigeria's_Niger_Delta) > accessed 1 July 2019

<sup>67</sup> "Kenya Petroleum Technical Assistance Report (KETAP): Strategic Environmental and Social Assessment" (Ministry of Energy and Petroleum) <<http://ices.or.ke/wp-content/uploads/2016/11/SESA-Draft-Report-for-Petroleum-Sector-in-Kenya.pdf>> accessed 30 April 2019

<sup>68</sup> Ibid



**FIGURE 1: A Map showing Oil and Gas Exploration Blocks and drilled wells in Kenya courtesy of the National Oil Corporation of Kenya.<sup>69</sup>**

## **2.2. Environmental Risks Associated with the Oil and Gas Operations in Kenya**

Kenya prides itself in having in place a rich biodiversity as well as a good climate due to its geographical location on the African Continent, all of which contribute immensely to the growth and sustainability of its economy and nationals.<sup>70</sup>

Despite the county being lavished with such immense natural occurring beauty, many environmental challenges lie in the way of Kenya’s development in the petroleum industry such as air pollution, water, soil, contribution to biodiversity loss, the destruction of the ecosystems and consequently to the living beings.<sup>71</sup>

The country has experienced its own share of petroleum related accidents and incidents that have adversely affected the lives of the people, animals and the environment at large. Some of the reported accidents and incidents are:

- i. Oil and Gas spills. This mostly results from accidents or leakages from the pipelines. Some of the documented oil spills in Kenya are;

<sup>69</sup><https://nationaloil.co.ke/opportunities-for-oil-exploration/> accessed 30 April 2019

<sup>70</sup>Ibid

<sup>71</sup>Ibid



- a) Kibarani area oil spill. In 2018, a cargo train ferrying oil and petrol products derailed and caused oil and petrol spills in the Kibarani Changamwe area of Mombasa County Government where at least 250,000 liters of petrol spilled into the nearby Indian Ocean.<sup>72</sup>
- b) Sinai Tanker Accident. In 2011, a leak from the Kenya Pipeline Company (KPC) sent fuel gushing out of the pipeline caused by a broken gasket that is used to join two or more pipes and whose work is to prevent leaks where there is high pressure in the pipeline. The fuel gushed out into the storm drains which carried it into the nearby Sinai Slum and river resulting into deaths of more than 100 people who were burnt and many others seriously injured when the fuel burst into flames.<sup>73</sup>
- c) Sachangwan Accident. In 2009, a tanker transporting petroleum products from Nakuru to Eldoret overturned at the Sachangwan trading center along the Nakuru-Eldoret Highway spilling all its contents in the area and the adjacent forest. As the locals scampered to siphon petrol, the tanker burst into flames killing and injuring more than 130 people. The spill and fire also went deep into the nearby forest burning down trees, grass and other animals residing therein.<sup>74</sup>
- d) Thange River oil spill. In 2015, a leakage occurred on the KPC's Mombasa-Nairobi oil pipeline resulting to oil flowin into Thange River in Makueni County polluting the river and its adjacent environs altogether.<sup>75</sup>
- ii. Land Acquisition, Displacements and Land Use Changes. A good example of land displacement, change of use and disputes is the Turkana residents' disputes with Tullow Oil. Between 2012 and April 2015 a total of 14 demonstrations, road blocks and attacks have been witnessed in Lokichar

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<sup>72</sup>Orinde H, 'Changamwe on Lockdown after Train Carrying Fuel Plunges into Sea' *The standard* (2018) <<https://www.standardmedia.co.ke/article/2001281072/changamwe-on-lockdown-after-train-carrying-fuel-plunges-into-sea>> accessed 8 May 2019

<sup>73</sup>Mutiga M, 'No Mask Can Ever Hide My Agony' *Daily Nation* (2012) <<https://www.nation.co.ke/lifestyle/dn2/Sinai-tragedy-a-year-later/957860-1503458-baio42/index.html>> accessed 8 May 2019

<sup>74</sup>Mkawale S, 'Over 100 Dead in Nakuru Oil Tanker' *The Standard* (2009) <<https://www.standardmedia.co.ke/article/1144005519/over-100-dead-in-nakuru-oil-tanker-accident>> accessed 8 May 2019

<sup>75</sup>'Lessons from KPC Clean Up of the Makueni Oil Spill' *Business Daily* (29 February 2016) <<https://www.businessdailyafrica.com/analysis/Lessons-from-KPC-clean-up-of-Makueni-oil-spill/539548-3097106-1pxxb6/index.html>> accessed 11 July 2019

town.<sup>76</sup> It is said that the County Government had illegally given out land belonging to the pastoral community in the area to Tullow Oil and yet the land had been set aside as grazing land for the community. The community further alleged that they had not been consulted by the County Government hence the reason they reacted the way they did.<sup>77</sup>

### **2.3. Conclusion**

It emerges from the discussion above that Kenya despite the good news of having hit rich oil and gas gold mine, and also having entered into several petroleum exploration contracts with promising exploration companies, serious environmental challenges and concerns continue to lie in the way of the development of the petroleum industry such as the documented and reported accidents and spillage cases that have caused serious damage that have resulted to loss of life and vegetation, land alienation and degradation cases among others. These challenges can be attributed to the lack of proper environmental management systems in the country such as lack of proper monitoring and surveillance of the operations of the exploration companies, lack of proper disaster management and response systems, among others. This therefore calls for the need to ensure proper measures and systems are put in place to ensure that the dangers that are posed to the environment by the sensitive operations of the oil and gas industry are well governed.

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<sup>76</sup>Mkutu K and Wandera G, “Conflict, Security and the Extractive Industries in Turkana, Kenya” (2016) <<http://crimeresearch.go.ke/wp-content/uploads/2018/02/Conflict-and-Extractive-Industries-in-Turkana.pdf>> accessed 2 July 2019

<sup>77</sup>Ibid

## **CHAPTER THREE: POLICY, LEGAL AND INSTITUTIONAL FRAMEWORK GOVERNING THE UPSTREAM OIL AND GAS INDUSTRY IN KENYA AND COMPARABLE JURISDICTION (NIGERIA)**

### **3.1 Introduction**

Concerns relating to the environment from the petroleum industry have continued to rise due to the unending environmental degradation and impacts.<sup>78</sup> The impact of the environmental issues has continued to remain such a big problem that countries have continued to ensure effective environmental protection and management.<sup>79</sup> Despite efforts to address these challenges over time, the operations of the industry have continued to pose great danger to the environment and also the people that rely on it.<sup>80</sup> To this effect, governments have set up agencies and laws to effectively address the environmental concerns.<sup>81</sup>

### **3.2 The Situation of Kenya**

Since the 1950s when the first oil and gas well was drilled in Kenya, the country did not have any form of laws to govern or regulate the industry. It was not until the year 1984 that Kenya enacted the now repealed Petroleum (Exploration and Production) Act<sup>82</sup> that was later revised in the year 1986 that became the fundamental law that governed the upstream petroleum industry in Kenya. Some of the salient features of the now repealed law were; the regulation of the negotiations and conclusion of petroleum agreements between the government and prospective investors through the Cabinet Secretary in charge of Energy and Petroleum<sup>83</sup> and issuance of licenses to any persons who wished to engage in any petroleum operations in Kenya.<sup>84</sup>

As time went by, new trends and developments regarding environmental concerns were noted in the industry that called for the need to put in place environmental laws that govern and regulate industry, and as a result, EMCA<sup>85</sup> came into existence.

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<sup>78</sup>Orji FM, "Management of environmental issues in the Nigerian oil-producing region: A framework for stakeholders' collaboration" (2018) <<https://pdfs.semanticscholar.org/8358/b2a3d82a16f8913ef7ac23efe07b88235596.pdf>> Accessed 24 July 2019

<sup>79</sup>Ibid

<sup>80</sup>Ibid

<sup>81</sup>Ibid

<sup>82</sup>CAP 308

<sup>83</sup>Section 5 of CAP 308

<sup>84</sup>Ibid

<sup>85</sup>1999

In 2010, there was a great shift in the way the environment was to be utilized and managed. This shift came about as a result of the promulgation of the Constitution of Kenya<sup>86</sup> which laid down clear guidelines and principles on the use the environment. The Constitution further required Parliament to ensure that all environmental laws were aligned with its provisions and this called for the revision, amendment and repealing of all environmental and oil and gas laws in Kenya.

This chapter therefore analyses the key provisions of the legal and institutional framework governing the environment in the petroleum sector in Kenya.

### **3.2.1 Legislative Framework**

The environment in Kenya is governed by a myriad of laws that range from constitutional provisions to statutory ones that touch on both natural resources and environmental matters. The legislative instruments on environmental governance in the country generally seek to not only regulate how natural resources are exploited for purposes of sustainability but also strives to strike a balance between such exploitation and protecting the environment from adverse effects. This subsection examines these provisions and how the same can and have influenced the petroleum industry in the country in a bid to protect the environment from potentially harm arising from these operations.

#### **a) The Constitution of Kenya<sup>87</sup>**

The Constitution brought about a new breath of fresh air on the use and management of the environment. Some of the key provisions are:

Chapter Four on the Bill of Rights<sup>88</sup> recognizes a clean environment among the crucial rights that accrue to any human being. Notably, the Constitution not only guarantees this right for all persons but also under Article 70 thereof, anyone who alleges that this right is likely to be violated can move the courts for redress.

Article 42<sup>89</sup> provides that:

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<sup>86</sup>2010

<sup>87</sup> 2010

<sup>88</sup> Article 42

<sup>89</sup> Constitution of Kenya 2010

*“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 legislative and other measures, particularly those contemplated in Article 69; and*

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

Article 60(1)<sup>90</sup> provides for the principles which should govern the use and management of land and the environment in Kenya *inter alia*; “equitable, efficient, productive and sustainable with great emphasis on sustainable and productive management of land resources,<sup>91</sup> transparent and cost-effective administration of land<sup>92</sup> and sound conservation and protection of ecological sensitive areas”.<sup>93</sup>

Notably, all land, minerals and oils in Kenya are under the direct managed of the National Government through National Land Commission whose task is to ensure they are well administered.<sup>94</sup> This places an obligation on the State through its institutions to ensure that land under minerals and mineral oils is protected from degradation before, during and after exploration activities.

Article 69(1)<sup>95</sup> provides for the State’s duties on the environment namely; “to ensure sustainable exploitation, utilization and management and conservation of the environment and natural resources,<sup>96</sup> encourage public participation in the management, protection and conservation of the environment,<sup>97</sup> establish systems of environmental impact assessment, environmental audit and monitoring of the environment<sup>98</sup> and eliminate processes and activities that are likely to endanger the environment.”<sup>99</sup>

The provisions of Article 69 have a direct implication on the oil and gas sector in its relation to environmental matters especially in such State obligations as “encouraging public

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<sup>90</sup> Ibid

<sup>91</sup> Article 61(1)(c)

<sup>92</sup> Article 61(1)(d)

<sup>93</sup> Article 61(1)(e)

<sup>94</sup> Article 62(1)(f);(3).

<sup>95</sup> Constitution of Kenya 2010

<sup>96</sup> Article 69(1)(a)

<sup>97</sup> Article 69(1)(d)

<sup>98</sup> Article 69(1)(f)

<sup>99</sup> Article 69(1)(g)

participation in the management of the environment, establishing systems of environmental impact assessment, environmental audit and monitoring of the environment and eliminating processes and activities that are likely to endanger the environment.” This is because the State is the main duty bearer in protecting the environment through its main institutions. In the case of “Mohamed Ali Baadi and others v Attorney General & 11 others [2018] eKLR”<sup>100</sup>, the Court seemed to have been inspired by Article 69 when it firmly stated that “*the state is obliged to play a proactive and prominent role in ensuring that the public who are likely to be affected by a proposed project, plan or development are provided with all the relevant information relating to the project including the environmental impact assessment report, which must contain all information that is necessary for the competent authority to consider the application, and to reach a decision.*”<sup>101</sup>

Notably, the duty to protect the environment extends to every person to offer maximum support to state organs to protect and conserve the environment.<sup>102</sup> The implication here is that this provision, read together with articles 22, 42 and 70, empowers any person to lodge a case to stop activities that are likely to violate their rights accruing to the environment, including in petroleum sector. To overcome the challenge of *locus standi*, Courts have pronounced themselves. In “John Mining Temoi & Another v Governor of County Of Bungoma & 17 Others,”<sup>103</sup> Mabeya J held that “Articles 22(1) and (2) and 258<sup>104</sup> of the Constitution had expanded the horizons of **locus standi** in matters of enforcement of fundamental rights and freedoms.” This was also affirmed in “Joseph Leboo & 2 others v Director Kenya Forest Services & another”<sup>105</sup> where the Court stated as follows:

“26. A reading of Articles 42 and 70 of the Constitution, above, make it clear, that one does not have to demonstrate personal loss or injury, in order to institute a cause aimed at the protection of the environment.”

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<sup>100</sup> *Mohamed Ali Baadi and others v Attorney General & 11 others* [2018] Petition 22 of 2012 eKLR (High Court of Kenya at Malindi)

<sup>101</sup> *Ibid*, para. 257.

<sup>102</sup> Article 69(2).

<sup>103</sup> (2014) eKLR

<sup>104</sup> 22(1) Every person has the right to institute court proceedings claiming that a right or fundamental freedom in the Bill of Rights has been denied, violated or infringed, or is threatened.

<sup>105</sup> (2013) eKLR

*“27. This position was in fact the applicable position, and still is the position, under the Environment Coordination and Management Act (EMCA), 1999, which preceded the Constitution of Kenya, 2010.”*

This approach is very useful in tackling environmental damage emanating from oil and gas exploration activities where the affected persons may not be able to seek justice for one reason or the other.

Article 70(1)<sup>106</sup> establishes an avenue through which grievances relating to the violation of environmental rights can be addressed. In order to put this provision into perspective, the government established the Environment and Land Court whose mandate is to hear and determine disputes relating to the environment and land.<sup>107</sup> The court has jurisdiction to hear a dispute on whether or not the right of a person to a clean and healthy environment has been violated, which jurisdiction, is explicitly set out in Section 13 (3) of Act.

In line with Article 70 amongst other constitutional and statutory provisions, courts have a duty to protect the environment through their decisions as has been confirmed in some cases. In the case of **“Kenya Association of Manufacturers & 2 others v Cabinet Secretary - Ministry of Environment and Natural Resources & 3 others [2017] eKLR”**<sup>108</sup>, the Court stated as follows:

22. **“Besides the above general guiding principles, a court seized of an environmental dispute, whether at the interlocutory stage or at the substantive hearing, is to bear in mind that, through their judgments and rulings, courts play a crucial role in promoting environmental governance, upholding the rule of law, and in ensuring a fair balance between competing environmental, social, developmental and commercial interests.”**

**“23. Thirdly, in determining environmental disputes at any stage, Kenyan courts are obliged to be guided by and promote the constitutional framework on the environment as spelt out in Articles 42, 69 and 70 of the Constitution and the legislative framework set out in the EMCA. In this regard, Articles 42, 69 and 70 of the Constitution and the broad environmental principles set out in Section 3 of the**

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<sup>106</sup> Article 69(1)(g).

<sup>107</sup> Section 13.

<sup>108</sup> *Kenya Association of Manufacturers & 2 others v Cabinet Secretary - Ministry of Environment and Natural Resources & 3 others* [2017] Petition 32 of 2017 eKLR (Environment and Land Court at Nairobi)

*EMCA are important tools in the interpretation of the law and adjudication of environmental disputes. Invariably, the environmental governance legal framework and any other relevant legislative instrument [substantive or subsidiary], ought to be construed in a manner that promotes the letter and spirit of the above constitutional underpinnings and general principles in Section 3 of the EMCA.”*

Article 70(2)<sup>109</sup> provides for some of the remedies and orders that can be sought from the Environment and Land Court such as “the prevention or discontinuance of any activities that are harmful to the environment,<sup>110</sup> compelling any public officer to take measures to prevent any harm to the environment,<sup>111</sup> and providing compensation for any harm caused to the environment.”<sup>112</sup>

A positive duty on the courts to proactively protect the environment coupled with the rights of any person to protect the environment is a step towards the right direction in the context of sustainability. Thus, while the Constitution may not have specific provisions on oil and gas exploration and the resultant environmental effects, the foregoing provisions can go a long way in regulating how these activities are carried out and even stopping them where the environment is at risk of suffering damage.

The Constitution thus sets out the ideal situation that should inform the other sectoral laws governing the environmental and natural resources sector by requiring that all these laws must ascribe to the ideals of sustainable development of the environment. It seeks to ensure that the fundamental rights of all people are upheld and protected especially in relation to the environment. This is the ideal envisaged by the sociological theory of interest that views law as a tool of social control and should be made responsive to the needs of the society it is serving.

It seeks to strengthen the Environmental Rule of Law in the country and this ought to be captured in all post-Constitution Statutes and requires the existing ones to conform. It therefore envisages that all activities on the environment, including those from the petroleum industry, must also conform to these ideals of protecting the environment for the current and future generations.

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<sup>109</sup>Section 13.

<sup>110</sup> Article 70(2)(a)

<sup>111</sup> Article 70(2)(b)

<sup>112</sup> Article 70(2)(c)



The place of the Constitution in setting governance ideals was aptly captured by Justice G.V. Odunga in “**Republic v Council of Legal Education Ex-parte Nyabira Oguta**”<sup>113</sup> as follows:

*“Our Constitution embodies the values of the Kenyan Society, as well as the aspirations, dreams and fears of our nation as espoused in Article 10. It is not focused on presenting an organization of Government, but rather is a value system itself hence not concerned only with defining human rights and duties of individuals and state organs but goes further to find values and goals in the Constitution and to transform them into reality”.*

This was also well captured in the case of “**Mohamed Ali Baadi and others v Attorney General & 11 others**”<sup>114</sup> where the Court stated as follows:

194. *“We begin by pointing out, as we elaborate in detail below, that our Constitution contains a number of robust procedural (due process) as well as substantive environmental governance principles as part of its structural foundation (in Article 10 of the Constitution which spells out the values of the Constitution), as well as the Bill of Rights (in Articles 69 and 70 of the Constitution). As our decisional law has now made clear, all these articles are justifiable, and any citizen is at liberty to approach this Court for their enforcement where those rights are either violated or even threatened with violation (see Article 258 of the Constitution).”*

228. *“Secondly, developing environmental laws and policies is a very resource-intensive area. Hence, the public input comes in handy, especially in developing countries, in supplementing scarce government resources for developing laws and policies. In addition, at the implementation stage, public vigilance is critical for monitoring, inspection and enforcement of environmental laws and policies by identifying and raising with appropriate authorities, environmental threats and violations.”*

277. *“Article 70 of the Constitution confers standing upon a person who alleges violation of rights to a clean and healthy environment. This means that “the environmental right is sufficiently comprehensive and all-encompassing to provide ‘everyone’ with the possibility of seeking judicial recourse in the event that any of*

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<sup>113</sup>(2016) eKLR

<sup>114</sup>(2018) eKLR

*several potential aspects related to the right or guarantee derived there from is infringed. From the foregoing, it is clear that protection of the environment has now become an urgent responsibility to which our legal system responds to inadequately. It is undisputed that environmental protection in Kenya has constitutional protection.”*

**b) The Environmental Management and Coordination Act<sup>115</sup>**

This law governs the environmental management and conservation in Kenya. It establishes different organs whose mandate is to aid in the effective management of the environment and the key organ is NEMA<sup>116</sup> the lead government agency tasked with overseeing all activities on the environment.

Some of the key sections that relevant to this research paper include;

Section 3(1)<sup>117</sup> provides that “every person has the right to a clean and healthy environment and has the duty to safeguard and protect the environment.”

Section 3(2)<sup>118</sup> provides for an avenue through which legal redress may be sought in the event the rights that accrue to the environment are threatened to be violated. That is, to the Employment and Land Court.

Section 7<sup>119</sup> establishes NEMA and Section 9 provides for its powers inter alia; “co-ordinate the various environmental management activities being undertaken by the lead agencies and promote the integration of environmental considerations into development policies, plans, programmes and projects with a view to ensuring the proper management and rational utilization of environmental resources on a sustainable yield basis for the improvement of the quality of human life in Kenya, identify projects and programmes or types of projects and programmes, plans and policies for which environmental audit or environmental monitoring must be conducted under this Act, initiate and evolve procedures and safeguards for the prevention of accidents which may cause environmental degradation and evolve remedial measures where accidents occur.”

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<sup>115</sup> 1999 and as Amended in 2015

<sup>116</sup> Section 7(1)

<sup>117</sup>Section 7(1).

<sup>118</sup>Ibid

<sup>119</sup>EMCA1999 and as Amended in 2015

Section 57A (1)<sup>120</sup> provides that “all Policies, Plans and Programmes for implementation shall be subject to Strategic Environmental Assessment.”

In the case of “Mohamed Ali Baadi and others v Attorney General & 11 others”<sup>121</sup>, the Court observed that:

175. “The innovation behind the ESIA and SEA process is the systematic use of the best objective sources of information and emphasizes on the use of best techniques to gather information. The ideal ESIA and SEA process would involve a totally bias free collation of information about environmental impact, produced in a coherent, sound and complete form, considering impact in an integrated manner. It should then allow the decision maker and members of the public to scrutinize the proposal, assess the weight of predicted effects and suggest modifications or mitigation where appropriate. Thus, environmental assessment is both a technique, and a (physical and social) scientific process.”

177. “On the other hand, NEMA Guidelines define Strategic Environmental Assessment (SEA) as “a range of analytical and participatory approaches to integrate environmental consideration into policies, plans, or programs (PPP) and evaluate the interlinkages with economic and social considerations.” SEA is a family of approaches that uses a variety of tools, rather than a single, fixed, prescriptive approach. The SEA process extends the aims and principles of Environmental Impact Assessment (EIA) upstream in the decision-making process, beyond the project level, when major alternatives are still possible. As NEMA states in its guidelines, “SEA is a proactive approach to integrate environmental considerations into the higher levels of decision-making.”

178. “Hence, during a SEA process, the likely significant effects of a Policy, Plan, or Program (PPP) on the environment are identified, described, evaluated, and reported. The full range of potential effects and impacts are covered, including secondary, cumulative, synergistic, short, medium, and long-term, permanent, and/or temporary impacts.”

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<sup>120</sup>Ibid

<sup>121</sup>(2018) eKLR

183. *“It seems clear to us that NEMA envisaged that SEA will be required for some Projects with significant environmental and cumulative impacts where Policies, Plans and Programmes are implicated. There was no need to have specific backing in the text of the statute for this aspect of the regulations to be effective....”*

195. *“Looking at the broad and progressive definitions and processes of ESIA and SEA included in EMCA, its Regulations and Guidelines, it seems obvious to us that the drafters were alive to these environmental governance principles. In our view, the most telling evidence that this is so is given in the definition of SEA contained in the NEMA Guidelines which we reproduced in paragraph 173 of this judgment. That definition makes it clear that in designing and carrying out SEA, the project proponent will go far beyond what is considered “traditional” environmental impacts of a project. Rather, there is an expectation that the project proponent will assess, consider and report on the “true” costs of a project, policy, plan or program. These “true” costs include a reflection of the extent of impacts on health, welfare loss (including both monetary losses associated with lost opportunities for community members directly and indirectly associated with the project, policy, plan or program as well as losses which cannot be monetarily measured); reduction of life expectancy associated with increased diseases resulting from air and water pollution; a decrease in the quality of life associated with these same toxins, and so forth.”*

In this case, it was argued that “no SEA was conducted but instead the LAPSSET Project was started with an EIA License which addressed the first three berths of the Lamu Port, yet the Project involved other components such as construction of an oil pipeline, railway and coal power plant.”

The Court held that “SEA is a necessary and mandatory exercise in activities such as LAPSSET thus making it an important exercise in oil and gas exploration activities.” The Court found that “the process of Strategic Environmental Assessment (SEA) was a required legal step prior to embarking on the Environmental and Social Impact Assessment (ESIA) process or implementation of any of the individual components of the LAPSSET Project. This is by virtue of Regulation 42 of the Environmental (Impact Assessment and Audit) Regulations, 2003 as well as the magnitude of the LAPSSET Project, and the

significant environmental and cumulative impacts of the Project which implicated Policies, Plans and Programmes.”<sup>122</sup>

Part of NEMA’s mandate is to grant Environmental Impact Assessment (EIA) licenses, for under Section 58 of EMCA, no person should proceed with a project before first obtaining an EIA license. NEMA can grant or decline to issue an EIA license. In granting EIA licenses, NEMA exercises the State’s powers and obligations under Article 69(1) of the Constitution to “establish systems of environmental impact assessment, environmental audit and monitoring of the environment.”

Section 58<sup>123</sup> provides that before an entity can be issued with an operating license by NEMA, the entity must undertake and submit an Environmental Impact Assessment Report to NEMA. As recently demonstrated in the NET decision in “*Save Lamu & 5 others v National Environmental Management Authority (NEMA) & another*”<sup>124</sup>, it is possible for any person who feels a certain project is likely to affect them in one way or the other to approach the courts and successfully petition to have the project stopped on account of flouting environmental law licensing requirements regardless of the state’s interests in the project in question. The Tribunal, in the Save Lamu case, ruled that NEMA’s approval of the EIA and ESIA Study and report and the consequent issue of the ESIA License and its conditions failed to meet the requirements of the law. It is thus possible for the same approach to be applied as far as upstream petroleum operations are concerned. This gets its basis under Article 70 of the Constitution that provides for an avenue for redress where the right protected under Article 42 is under threat.

Section 69<sup>125</sup> provides that NEMA in consultation with other key agencies shall monitor the activities of any project to ensure that there are no possible impacts on the environment. It is possible that NEMA has not been keen in undertaking this assignment, if some of the media reports are anything to go by. For instance, in March, 2017, there reports that communities living around Twiga 1 site, Turkana South, where Tullow Oil was undertaking exploration

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<sup>122</sup>*Mohamed Ali Baadi and others v Attorney General & 11 others*[2018] Petition 22 of 2012 eKLR (High Court of Kenya at Malindi)

<sup>123</sup>EMCA1999 and as Amended in 2015.

<sup>124</sup>(2019) eKLR

<sup>125</sup>EMCA1999 and as Amended in 2015.

activities demonstrated to force the company to abandon its activities of dumping drilling wastes in the area.<sup>126</sup>

Section 69 (1A)<sup>127</sup> requires all other key agencies to ensure that they establish a monitoring unit which should conduct its operations and activities within the confines of this Act. Considering that wastes from oil and gas are likely to increase as the companies go full blown on oil and gas extraction<sup>128</sup>, there is a need for NEMA to become more proactive in ensuring that these companies uphold the law and discharge their environmental obligations effectively without necessarily waiting for the communities to protest where there is a violation. It is imperative to avoid the Nigerian experience where the Ogoni people around Niger Delta were let down by their own government as far as environmental conservation and protection was concerned.

EMCA has also established key Regulations to also govern the environment from the day to day activities and operations of the oil and gas industry in Kenya and these include;

*i. Environmental Management and Coordination (Water Quality) Regulations<sup>129</sup>*

These Regulations oversee the manner in which discharge of effluent is done ensuring that the environment is not in any way threatened. The Regulations further under the Third Schedule establish the guidelines, standards and limits for any form of discharge into the environment.<sup>130</sup>

Among the listed effluents are those from the Gas and Oil industry whose discharge parameters and or limits to the environment are not provided for. Notably, in Uganda, where the upstream petroleum segment is also at a nascent stage, while the operative law generally bans the “disposal of drilling mud into any lake, river, stream, pond or other body of water”, the Petroleum (Exploration and Production) (Conduct of Exploration Operations)

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<sup>126</sup>Okoth, E., “Tullow Oil protests Nema's order on waste disposal,” *Daily Nation*, Sunday December 16 2018. Available at <https://www.nation.co.ke/news/Tullow-protests-Nema-order/1056-4896978-48hctbz/index.html> [Accessed on 20/9/2019].

<sup>127</sup>EMCA 1999 and as Amended in 2015

<sup>128</sup> See generally, “Kenya Petroleum Technical Assistance Report (KETAP): Strategic Environmental and Social Assessment” (Ministry of Energy and Petroleum) <<http://ices.or.ke/wp-content/uploads/2016/11/SESA-Draft-Report-for-Petroleum-Sector-in-Kenya.pdf>> accessed 30 April 2019.

<sup>129</sup>2006

<sup>130</sup>Nema.go.ke. (n.d.). *National Environment Management Authority (NEMA) - Water Quality Regulations* <[https://www.nema.go.ke/index.php?option=com\\_content&view=article&id=28&Itemid=168](https://www.nema.go.ke/index.php?option=com_content&view=article&id=28&Itemid=168)> accessed 8 May 2019

Regulations<sup>131</sup> provide that “*produced water may be disposed into an operating area after satisfying, with the commissioner’s approval, that the oil content of produced waters discharged from offshore platforms has been reduced to an average of not more than 10mg/l during normal operation*”.<sup>132</sup> This standard is also reflected in the “National Environment (Standards for Discharge of Effluent into Water or on Land) Regulations.”<sup>133</sup> Such specific standards are missing under the Kenyan laws.

**ii. *Environmental Management and Coordination (Waste Management) Regulations***<sup>134</sup>

These Regulations provide guidelines on waste management and in particular “the management of solid waste, industrial waste, hazardous waste, pesticides and toxic substances, biomedical waste and radioactive substances.” Among the listed waste materials under the Regulations, oil and gas related waste is not mentioned. In the absence of specific regulations to address oil and gas waste management, the Petroleum Act<sup>135</sup> provides that “a contractor should ensure that the management of production, transportation, storage, treatment and disposal of waste arising out of upstream petroleum operations is carried out in accordance with all the applicable environmental, health, safety and maritime laws and best petroleum industry practices.”<sup>136</sup> This is a general approach to management of these wastes that creates a lacuna that is likely to be exploited by the multinational companies. This is especially likely to happen where NEMA fails to offer guidelines or designate areas where such wastes should be disposed.

**iii. *Environmental (Impact Assessment and Audit) Regulations***<sup>137</sup>

The main objective of an EIA is to ensure policy and decision makers make decisions with respect to the environment that are sound and do not pose any threat to the

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<sup>131</sup>1993

<sup>132</sup> Regulation 56 (2), “Petroleum (Exploration and Production) (Conduct of Exploration Operations) Regulations, 1993.”

<sup>133</sup>1999

<sup>134</sup>2006

<sup>135</sup>2019

<sup>136</sup>Section 60 (1).

<sup>137</sup>2003

environment.<sup>138</sup> The Court in **“Save Lamu & 5 others v National Environmental Management Authority (NEMA) & another [2019] eKLR”**<sup>139</sup> noted as follows:

*“16. The purpose of the Environment Impact Assessment (EIA) process is to assist a country in attaining sustainable development when commissioning projects. The United Nations has set Sustainable Development Goals (SDGs), which are an urgent call for action by all countries recognizing that ending poverty and other deprivations must go hand-in-hand with strategies that improve health and education, reduce inequality, and spur economic growth – all while tackling climate change and working to preserve our oceans and forests.”*

*“17. Accordingly, contrary to popular belief the purpose of environmental audits are not meant to hinder development but to ensure economic progress in a country takes into account environmental impacts of such proposed economic activity....”*

Regulation 4(2)<sup>140</sup> provides that “no licensing authority in Kenya shall issue a license for any project for which an EIA is required unless the applicant produces to the licensing authority a license of EIA issued by NEMA.” In **“Cortec Mining Kenya Limited, Cortec (Pty) Limited and Stirling Capital Limited v. Republic of Kenya”**<sup>141</sup>, the Tribunal seemed to adopt the position that where statutory requirements on environmental protection in the process of granting an investment, any violation of these statutory requirements would render such an investment non-protected under the international investments law.<sup>142</sup> This is a clear demonstration that domestic laws and especially those on environmental laws are treated seriously even at the international level. This may be for the reason that it is at the national level that international laws including those addressing environmental challenges are to be implemented.

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<sup>138</sup>National Environment Management Authority (NEMA) - Environmental Regulations (EIA/EA)' (*Nema.go.ke*) <[https://www.nema.go.ke/index.php?option=com\\_content&view=article&id=27&Itemid=167](https://www.nema.go.ke/index.php?option=com_content&view=article&id=27&Itemid=167)> accessed 8 May 2019

<sup>139</sup>“*Save Lamu & 5 others v National Environmental Management Authority (NEMA) & another* [2019] Tribunal Appeal Net 196 of 2016 eKLR (National Environmental Tribunal at Nairobi)”

<sup>140</sup>Environmental (Impact Assessment and Audit) Regulations, 2003.

<sup>141</sup>“*Cortec Mining Kenya Limited, Cortec (Pty) Limited and Stirling Capital Limited v. Republic of Kenya*, ICSID Case No. ARB/15/29.”

<sup>142</sup> *Ibid*, Paras 385-387.



Regulation 31<sup>143</sup> provides that “Environmental Audit Studies must be undertaken on development activities likely to have adverse environmental impact.” It is however not clear as to whether these audits should be carried out at the beginning of the exploration stage or after. The emphasis seems to be on duration by requiring audits to be yearly. This confusion is well captured by the timing of the environmental audit as captured in the “*Tullow Oil Environmental Impact Assessment Project Report For Proposed Exploratory Oil And Natural Gas Well Drilling Programme in Block 10a: Parts Of Marsabit North (Chalbi) And Loyangalani Districts By Tullow Kenya B.V.*”<sup>144</sup> The Report stated that “*the proposed exploratory drilling project was, however, of a much shorter duration. Auditing would, therefore, be done upon completion of the project activities.*” The effect of the carried-out activities seems to have received little or no attention in such an approach. It is therefore possible to have some of the adverse effects overlooked or the company ensuring that there is no full disclosure when reporting.

### c) **The Petroleum Act**<sup>145</sup>

This Act came into force on 28<sup>th</sup> March 2019 and it repealed the Petroleum (Exploration and Production) Act<sup>146</sup> to become the fundamental law governing all the upstream petroleum activities and operations in Kenya.

Section 8, Section 16 and Section 24(1)<sup>147</sup> provide that “no person shall engage in any petroleum operations in Kenya without having previously obtained the approval and a petroleum agreement from the Cabinet Secretary in charge of Energy and Petroleum or a non-exclusive exploration permit or an operational permit from the Energy and Petroleum Regulatory Authority.” However, before the said petroleum agreement, permits and approvals can be issued, the contractors must meet the following legal requirements;

- a) “The contractors must submit a formal application to the Cabinet Secretary in charge of Energy and Petroleum for the issuance of a petroleum agreement.”<sup>148</sup>

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<sup>144</sup><https://www.tulloil.com/Media/docs/default-source/operations/kenya-eia/final-environmental-impact-assessment-project-report-for-block-10a.pdf?sfvrsn=2> [ Accessed on 22/9/2019].

<sup>145</sup> No. 2 of 2019

<sup>146</sup> CAP 308

<sup>147</sup> Petroleum Act No. 2 of 2019

<sup>148</sup> Section 16 (1a)

- b) “The contractors must have the financial, technical and professional capacity necessary to fulfill its obligations under the petroleum agreement.”<sup>149</sup>
- c) “The contractors in collaboration with the Energy and Petroleum Regulatory Authority and other relevant stakeholders must give the local community in a place where upstream petroleum operations are to be permitted adequate opportunity to participate in the process of reviewing and awarding permits.”<sup>150</sup>
- d) “The contractor must provide a security to the National Government in a form prescribed in the petroleum agreement guaranteeing the contractor’s minimum work and expenditure obligations.”<sup>151</sup>
- e) “The contractor’s application to the Energy and Petroleum Regulatory Authority for a production permit must be accompanied by;<sup>152</sup>
  - i. A report on the petroleum reservoir.<sup>153</sup>
  - ii. A field development plan approved by the Cabinet Secretary in charge of Energy and Petroleum.<sup>154</sup>
  - iii. An environmental impact assessment study report of the upstream petroleum operations.<sup>155</sup>
  - iv. A field decommissioning plan.<sup>156</sup>
  - v. All relevant environmental licenses and reports.”<sup>157</sup>
- f) “A contractor must submit to the Energy and Petroleum Regulatory Authority a field decommissioning plan before a production permit to install and operate a facility is issued.”<sup>158</sup>

Section 19 (1f)<sup>159</sup> provides that “every petroleum agreement requires the contractors to adopt measures necessary for the conservation of petroleum and other resources as well as protect the environment.”

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<sup>149</sup>Section 17 (1)

<sup>150</sup>Section 24 (8)

<sup>151</sup>Section 25 (1)

<sup>152</sup>Section 32

<sup>153</sup>Section 32(a)

<sup>154</sup>Section 32(b)

<sup>155</sup>Section 32(c)

<sup>156</sup>Section 32(f)

<sup>157</sup>Section 32(g)

<sup>158</sup>Section 39(1).

Section 60 (1)<sup>160</sup> provides that “a contractor must ensure there is effective management of waste during the production, transportation, storage, treatment and disposal of upstream petroleum operations.”

Section 66 and Section 67<sup>161</sup> provides that “contractors must put in place safety precautions and emergency measures with a view of properly dealing with incidents which may lead to the loss of life, personal injury, pollution or damage to property. Such measures must ensure that the environment is restored as much as possible to its original condition prior to commencement of operations.”

Section 72<sup>162</sup> provides that “the contractors shall be liable for any damage due to pollution related to the upstream petroleum operations.”

While all these provisions on environmental conservation and waste disposal are commendable, the same are largely left to the good will of the target companies to comply with the law. NEMA may have capacity challenges in ensuring compliance with the EMCA and the associated regulations on EIA and environmental audit especially in relation to oil and gas activities.<sup>163</sup>

The fact that NEMA accredited waste disposal handling companies are few in the country means that the exercise is not only expensive for the oil and gas exploring companies but there is also the risk of more pollution along the way during handling and transportation of the waste. This is especially risky due to the high statistics of accidents on the Kenyan roads. While the Act is clear on who will be responsible for pollution in upstream petroleum activities, the question that would arise is who would be held responsible in case of an accident involving the trucks in transit to dispose the waste, especially if it is proved that the driver of the truck was not at fault. This long-distance transportation may also not be sustainable when the production increases due to more discoveries.

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<sup>159</sup>Petroleum Act No. 2 of 2019

<sup>160</sup>Ibid

<sup>161</sup>Ibid

<sup>162</sup>Ibid

<sup>163</sup>Mohamud, Hashir Ali. "Factors influencing compliance to Environment Impact Assessment/Environment Audit Regulation 2003 in Kenya, a case of Garissa Central Division." (2012).

#### **d) The Energy Act<sup>164</sup>**

This Act was enacted and came into force on 28<sup>th</sup> March 2019. The Act brings together all the laws relating to energy and further provides the National Government and the County Government responsibilities and among them is the “establishment of regulation of the upstream, midstream and downstream petroleum and coal activities.”

Section 9 (1)<sup>165</sup> establishes the Energy and Petroleum Regulatory Authority that replaced the Energy Regulation Commission and among its functions with respect to the upstream petroleum industry include but are not limited to;

- a) “Regulate, monitor and supervise upstream petroleum operations in Kenya.”<sup>166</sup>
- b) “Collect, maintain and manage upstream petroleum data.”<sup>167</sup>
- c) “Receive, review and grant an application for a non-exclusive exploration permit.”<sup>168</sup>
- d) “Work with the relevant statutory authorities to formulate, enforce and review environmental health, safety and quality standards for the upstream sector.”<sup>169</sup>

Section 11<sup>170</sup> provides for the powers of the Authority and among them “formulate, set, enforce and review environmental, health, safety and quality standards for the energy sector in coordination with other statutory authorities.”

Section 25<sup>171</sup> establishes the Energy and Petroleum Tribunal whose function is “to hear and determine all disputes and appeals referred to relating to the energy and petroleum sector.”

Section 99 of the Act requires that “an application for a license must be accompanied with such environmental liability policy as shall be prescribed by the Cabinet Secretary.”

Notably, this Act recognizes the importance of environment and thus places specific obligations on the relevant authorities as well as license holders to ensure that the environment is taken care of in the face of energy generation activities.

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<sup>164</sup> No. 1 of 2019

<sup>165</sup> Ibid

<sup>166</sup> Section 10(b)

<sup>167</sup> Section 10(d)

<sup>168</sup> Section 10(e)

<sup>169</sup> Section 10(q)

<sup>170</sup> Ibid

<sup>171</sup> Ibid

It is thus worth pointing out that both the Petroleum Act, 2019 and the Energy Act, 2019 have some provisions albeit coined in general terms, requiring companies that wish to acquire operation licenses to provide evidence on how they will protect the environment and especially water resources from pollution.

**e) The National Land Commission Act<sup>172</sup>**

This is the law that is given the full mandate by the Constitution of Kenya<sup>173</sup> to monitor and oversee the general management and administration of all the land and land related resources in the country, which include oil and gas exploration and production activities.

Section 6(2)(a)<sup>174</sup> provides that the Commission has “the powers to gather by such means as it considers appropriate, any relevant information including requisition of reports, records, documents or any information from any source, including any State organ, and to compel the production of such information where it considers necessary.”

Section 14<sup>175</sup> gives the NLC the powers to review any grants and dispositions with regard to the use of land even those grants and dispositions issued by other authorities to ensure that they comply with all environmental requirements as provided for under the law.

The National Land Commission not only has a duty to oversee management of public land, but also ensuring that ecologically sensitive areas are protected from degradation and adverse use that may be detrimental, as envisaged under Section 11 of the Land Act.<sup>176</sup> This makes it a key player during the licensing processes and acquisition of land by the oil and gas exploring companies. NLC has a role in not only ensuring that land is acquired through the right procedures but also that such procedures pay due attention to the environmental rule of law in the country. This is important in ensuring that oil and gas activities do not lead to situations such as those witnessed in Nigeria, Niger Delta where there was deterioration of the environment, loss of biological diversity and adverse effects on the lives of the Ogoni

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<sup>172</sup>Act No. 5 of 2012

<sup>173</sup>2010

<sup>174</sup>Ibid

<sup>175</sup>National Land Commission Act No 5 of 2012

<sup>176</sup>2012

people.<sup>177</sup> Striking a balance between development and protection of the environmental conservation is at the core of the sustainable development agenda.

### 3.2.2 Institutional Framework

The oil and gas industry cannot function on its own and this therefore calls for checks and balances in its day to day operations by competent oversight authorities and or institutions. The environmental and petroleum laws in Kenya establish key institutions to help in the implementation of the law. These institutions and or government implementing bodies include but are not limited to;

#### a) The National Government

The Fourth Schedule of the Constitution of Kenya 2010<sup>178</sup> provides for the functions of the National Government in as far as the use, and management of the environment is concerned, *inter alia*, “the general principles of land planning and the coordination of planning by the counties,<sup>179</sup> the protection of the environment and natural resources with a view of establishing a durable and sustainable system of development including energy policy,<sup>180</sup> disaster management<sup>181</sup> and energy policy including electricity and gas reticulation and energy regulation.”<sup>182</sup>

Notably, these are general obligations of the State in relation to environmental management that ought to be followed by specific statutory enactments to give meaning to them.

NEMA was established as the lead agency to oversee all matters relating to the environment.<sup>183</sup> Thus ensuring the proper management of environment.<sup>184</sup>

In “*Martin Osano Rabera & another v Municipal Council of Nakuru & 2 others*”<sup>185</sup>, the Environment and Land Court at Nakuru pointed out that: “*NEMA is not just an investigator and a prosecutor. Its success cannot be measured in terms of successful investigations and*

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<sup>177</sup>Ite AE, Ibok UJ, Ite MU and Petters SW, “Petroleum Exploration and Production: Past and Present Environmental Issues in the Nigeria’s Niger Delta” (2013) 1 American Journal of Environmental Protection 78 <[https://www.researchgate.net/publication/256834670\\_Petroleum\\_Exploration\\_and\\_Production\\_Past\\_and\\_Present\\_Environmental\\_Issues\\_in\\_the\\_Nigeria's\\_Niger\\_Delta](https://www.researchgate.net/publication/256834670_Petroleum_Exploration_and_Production_Past_and_Present_Environmental_Issues_in_the_Nigeria's_Niger_Delta) > accessed 1 July 2019

<sup>178</sup>Part I

<sup>179</sup>Section 21

<sup>180</sup>Section 22(d)

<sup>181</sup>Section 24

<sup>182</sup>Section 31

<sup>183</sup>Sec. 9 (1), EMCA.

<sup>184</sup>Sec. 9(2), EMCA.

<sup>185</sup>(2018) eKLR

*prosecutions. It has a bigger mandate: to be the principal instrument of government and the people of Kenya in the implementation of all policies relating to the environment. In deed under section 9 (2), NEMA has mandatory obligations to among others co-ordinate with lead agencies to ensure the proper management and rational utilization of environmental resources on a sustainable yield basis for the improvement of the quality of human life in Kenya and to render advice and technical support, where possible, to entities engaged in natural resources management and environmental protection.*”<sup>186</sup>

In “**Republic v National Environment Management Authority & another Ex-Parte Philip Kisia & City Council of Nairobi [2013] eKLR**”<sup>187</sup>, the Court observed that “the role of the DPP when it comes to the prosecution of matters under NEMA is supervisory in nature. The actual prosecution is left to an environmental inspector but the DPP can, if necessary, exercise the powers granted under Article 157(6) of the Constitution. If indeed Parliament had intended that the consent of the DPP was required before prosecution of offences under EMCA, then Parliament would have clearly said so. The “directions and control” referred to in Section 118 is meant to ensure that an environmental inspector does not become an untamable monster.”

The National Government may therefore discharge its duties under Article 69 of the Constitution through mobilizing all its organs and institutions in bringing violators of environmental standards to book.

#### **b) The County Governments**

The Fourth Schedule of the Constitution of Kenya 2010<sup>188</sup> provides for the functions of the County Governments in as far as the environment is concerned, *inter alia*, “county planning and development including electricity and gas reticulation and energy regulation,<sup>189</sup> control of air pollution, noise pollution and other public nuisance.”<sup>190</sup>

Article 185(4) of the Constitution of Kenya further provides for legislative authority of the County Assemblies and among them is to “receive and approve plans and policies for the management and exploitation of the County’s resources.”

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<sup>186</sup>Para. 72.

<sup>187</sup> JR Case 251 of 2011.

<sup>188</sup>Part II

<sup>189</sup>Section 8(e)

<sup>190</sup>Section 3

To affirm the need to involve county government in mineral and mineral oil exploration activities, the Court in “Mohamed Ali Baadi and others v Attorney General & 11 others”<sup>191</sup> observed that:

203. *The County Government of Lamu asserts that under Article 6 of the Constitution and the Fourth Schedule, its functions include county planning and development yet it was sidelined and kept in the dark in the implementation of the project to the extent that public land was allocated to the project without its consent, a violation of Article 6(2) of the Constitution.*

204. *As will become clearer in this judgment we cannot over emphasize the need for participation of all stakeholders in decisions affecting them. It is not sufficient for the Respondents to state that county governments did not exist at the time the Project commenced. The Lamu County Government, ought to have been involved and provided with all relevant information relating to the LAPSSET Project.*

205. *We also hasten to add that even though the LAPSSET Project is an initiative of the National Government, the Constitution requires consultation, cooperation and co-ordination between the two levels of government in the performance of their functions. (See Article 189 of the Constitution). This Constitutional commandment is not merely pedantic. Rather, this is the subsidiarity principle: a recognition that the County Government more closely reflects the concerns, preferences and choices of the local population. Further, it puts in action the constitutional requirement that "those most affected by a policy, legislation, or action must have a bigger say in that policy, legislation or action and their views must be more deliberately sought and taken into account." (See *In the Matter of the Mui Coal Basin Local Community* <sup>1711</sup>)*

206. *The LAPSSET Project is being implemented in stages. We cannot fault the proponents for not having involved the 2<sup>nd</sup> Interested Party in the conceptualization of the Project as we are aware that the 2<sup>nd</sup> Interested Party came into being in 2013. We must however state that and we are led to the holding that there is need for involvement of County Governments through basic consultation and coordination by and with the National Government, where such mega infrastructural developments*

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<sup>191</sup>(2018) eKLR



*are being undertaken which transcend counties, so as to assist the county in its planning.*

This decision therefore solidifies the assertion that County Governments must be involved in oil and gas activities for two reasons: as the local representatives of the people and for planning purposes.

**c) The National Environmental Management Authority (NEMA)**

NEMA is established under Section 7(1)<sup>192</sup> and is the principal government agency tasked with ensuring that all environmental policies are well implemented. In as far as the environment, land and its use are concerned, in this case including the upstream petroleum segment in Kenya, is mandated by the law to “approve all policies, plans and programmes touching on the environment,<sup>193</sup> issue licenses to entities that which to undertake any activities on the environment and land in Kenya,<sup>194</sup> conduct environmental audits and monitoring for all activities that may have significant impact on the environment,<sup>195</sup> enact and establish environmental quality standards and regulations,<sup>196</sup> and issue environmental orders and conservation orders if there is damage to the environment.”<sup>197</sup>

Notably, lead agencies (government ministries; departments; parastatals and state corporations; and local authorities) which are per law mandated to manage the environment should work hand in hand with NEMA to conserve the environment. Courts have affirmed that “the buck stops with NEMA as regards environmental matters. NEMA assists and guides lead agencies in the preservation and protection of the environment but when a lead agency fails to comply with the directives given by NEMA then NEMA has no option but to engage the powers granted to it by EMCA.<sup>198</sup> NEMA is granted the option of directing a lead agency to perform a duty imposed on the lead agency by the EMCA. Where the lead agency fails to comply, NEMA can carry out the duty at the expense of the lead agency.”<sup>199</sup>

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<sup>192</sup>Environmental Management and Coordination Act 1999 and as Amended in 2015

<sup>193</sup>Section 57A

<sup>194</sup>Section 58

<sup>195</sup>Section 68

<sup>196</sup>Part VIII

<sup>197</sup>Section 108

<sup>198</sup>*Republic v National Environment Management Authority & another Ex-Parte Philip Kisia & City Council of Nairobi* [2013] JR Case 251 of 2011 eKLR (High Court of Kenya at Nairobi)

<sup>199</sup>*Ibid.*

#### **d) The Energy and Petroleum Regulatory Authority (EPRA)**

The EPRA is established under Section 9(1)<sup>200</sup> whose mandate is to “oversee the general management of the energy sector in Kenya independent in the performance of its functions and duties and exercise of its powers and is not subject to the direction or control of any person or authority.”

Some its functions in as far as the petroleum sector in Kenya is concerned is “regulate, monitor and supervise the upstream petroleum operations in Kenya,<sup>201</sup> receive, review and grant an application for a non-exclusive exploration permit,<sup>202</sup> as well as formulate, set, review and enforce environmental, health, safety and quality standards for the energy sector, in coordination with other statutory authorities.”<sup>203</sup> EPRA, in discharging its mandate, thus has an obligation to hand in hand with NEMA and other stakeholders in the sector to ensure that the environment is protected from possible harm from the petroleum industry.

#### **e) The National Land Commission (NLC)**

The NLC is established under Article 67(1)<sup>204</sup> to monitor and oversee the general management and administration of all the land and land related resources in the country as provided for under the Constitution of Kenya 2010 and the National Land Act.<sup>205</sup>

Section 6(2)(a)<sup>206</sup> gives the NLC powers to call for any information or documents relating from any state organ relating to land use and the resources therein for its approval. This is meant to establish whether any approvals given by whichever government organ are in compliance with the Constitution of Kenya. If it is established that such approvals were not in compliance with the guiding principles on land, natural resources and environment use, then Section 14<sup>207</sup> gives the NLC such powers to revoke such licenses or permits.

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<sup>200</sup>Energy Act No 1 of 2019

<sup>201</sup>Section 10(b)

<sup>202</sup>Section 10(e)

<sup>203</sup>Section 11(g)

<sup>204</sup>Constitution of Kenya 2010

<sup>205</sup>Act No 5 of 2012

<sup>206</sup>Ibid

<sup>207</sup>Ibid

Also relevant to environmental conservation and protection is the Commission's obligation "to ensure that public land and land under the management of designated state agencies are sustainably managed for their intended purpose and for future generations."<sup>208</sup>

Under the Land Act 2012, the Commission is equally obligated to "take appropriate action to maintain public land that has endangered or endemic species of flora and fauna, critical habitats or protected areas."<sup>209</sup> The question that arises therefore is whether, in exercise of this duty, the Commission can oppose oil and gas exploration and or extraction activities on land falling under this classification. The success of such opposition would however require collaboration with the other licensing bodies such as NEMA and EPRA. Public land is held and managed by the National Land Commission on behalf of the people and a County Government cannot embark on any development on public land without the necessary authorization by the National Land Commission. This was also affirmed in "*Betty Mbugua David Ndirangu & 100 others v Director General & 2 others [2019] eKLR*"<sup>210</sup> It is contemplated that such authorization would put into account the provisions of Section 11 of the Land Act, especially where the same would be required for petroleum sector.

#### **f) The National Environment Tribunal**

This Tribunal is established under Section 125(1)<sup>211</sup> and its mandate among others is to hear and determine any environmental disputes referred to it relating to the provisions of EMCA.<sup>212</sup> Its specific mandate was in question in the case of In Nairobi HCCC Petition No 22 of 2012 *Mohamed Ali Baadi And Others Vs The Hon. Attorney General and 7 others* where the Constitutional court in a matter dealing with the LAPSETT project made the following observations on the jurisdiction of the Tribunal:-

"93. In our view, the mandate of the Tribunal is limited to the matters provided for in Section 129 of EMCA. *Of all the functions of the Tribunal under Section 129 of EMCA, the only applicable one would **be Section 129(1)(a) to the extent that the Petitioners challenge the completeness and scientific sufficiency of the ESIA Report that resulted in the license issued***

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<sup>208</sup>Ibid, section 5(2)(c).

<sup>209</sup>Section 11 (1), Land Act, No. 6 of 2012.

<sup>210</sup>National Environment Tribunal Appeal 177 of 2016.

<sup>211</sup>EMCA 1999 and as Amended in 2015

<sup>212</sup>Section 126(2)

by NEMA to the LAPSSET Project's proponent. However, the scope and range of issues, rights and controversies involved in the present dispute surpasses the narrow question of the conditions which can be imposed as part of the EIA License.....”

In “Justus Kalii Makau & 3 others v Linnet Achieng Amalla & 2 others [2019] eKLR”<sup>213</sup>, the Environment and Land Court observed that “the jurisdiction of the Tribunal is not only limited to hearing appeals by a person aggrieved by the grant of a license or refusal to grant a license under the Environmental Management and Co-ordination Act, but also ought to be exercised within a period of time, which is sixty (60) days, from the day of the decision appealed from.”<sup>214</sup>

**g) The Environment and Land Court (ELC)**

This is a special Court established in the Judiciary under Section 4(1)<sup>215</sup> whose mandate is to hear and determine all disputes relating to the use of the environment and land in Kenya. Specifically, the disputes touching on “environmental planning and protection, climate issues, land use planning, title, tenure, boundaries, rates, rents, valuations, mining, minerals and other natural resources.”<sup>216</sup>

In exercising its jurisdiction, the Court is guided and directed by the environmental and land governing principles as provided for under Articles 69 and 70 of the Constitution of Kenya 2010.

In “African Centre for Rights and Governance (ACRAG) &3 others v Municipal Council of Naivasha [2017] eKLR”<sup>217</sup>, it was argued that “the continued operation of the dumpsite violated their right to a clean and healthy environment,” the Court stated that “ordering the closure of the dumpsite would probably bring more problems than good.” The Court, while citing the Tanzanian case of “Festo Balegele & 794 Others vs Dar es Salaam City Council”<sup>218</sup>, observed that “it would be easy to issue orders stopping any further dumping on the site; neither was it hard to order that the dumpsite should be closed forthwith, but then

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<sup>213</sup> Environment and Land Case Petition 14 of 2017.

<sup>214</sup> Paras. 13 & 14.

<sup>215</sup> Environment and Land Court Act No 19 of 2011

<sup>216</sup> Section 13(2)

<sup>217</sup> African Centre for Rights and Governance (ACRAG) &3 others v Municipal Council of Naivasha [2017] eKLR, Petition 50 of 2012.

<sup>218</sup> “Festo Balenge & 794 Others vs Dar-es-Salaam City Council, High Court of Tanzania at Dar es Salaam, Misc.Civil Cause No. 90 of 1991.”

had to ponder, where was the garbage that was going to be generated today be disposed off? The Judge in in *ACRAG* affirmed that it is the role of the courts, especially, the Environment and Land Court, to be a part of the solution and not part of the problem, in so far as tackling environmental challenges is concerned.”

Acknowledging that waste disposal was a serious problem (and this is relevant to this paper albeit with reference to oil and gas waste), Munyao Sila, J, proceeded to direct that “NEMA should carry out relevant audits and also directed that the County Government of Nakuru (and also advising others too) should work closely with the National Government to obtain all the relevant approvals and come up with proper waste management strategies.” The Court was thus more concerned with ensuring that environmental rule of law is respected and entrenched through obtaining all the relevant approvals rather than making temporary measures which would please a group of people without necessarily promoting long-term development of the rule of law.

This decision is relevant as far as entrenching the Environmental Rule of Law in the area of oil and gas is concerned. This was also affirmed in “***Martin Osano Rabera & another v Municipal Council of Nakuru & 2 others [2018] eKLR***”<sup>219</sup> where the Court underscored the importance placed by the Constitution and statute law on protection of the right to a clean and healthy environment and conservation of the environment generally. To enable the Court, make its decision, the Petitioners convincingly directed the Court to look at pages 196 to 197 of the book “*The Constitution of Kenya, 2010: An Introductory Commentary* (Strathmore University Press, 2014)” by P.L.O Lumumba and Luis Franceschi where the authors quote J. B Ojwang SCJ as stating as follows:

*“The environment is accorded an eminent place in the governance agenda of the Constitution. Governance, which is required to be performed as a service to the people, must comply with ‘national values and principles’ one of which is sustainable development. It is common knowledge that the first principles of sustainable development relate to the basic elements that sustain life: and the conservation of the environment is invariably the first component of this principle. **The complexities of the environment, and its vulnerability to inappropriate human activity, render it a***

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<sup>219</sup> Martin Osano Rabera & another v Municipal Council of Nakuru & 2 others [2018] eKLR, Petition 53 of 2012.

**sensitive sphere of disputes in respect of which the judicial role is mandatory. A constitution so pre-occupied with safeguards for social welfare has necessarily to accord primacy to the environment and to the judicial role therein....**

*(i) Prudence in the use of environment resources – to the intent that they may, as the capital base for the economy, not be exhausted; (ii) Effective control and management of social and economic activities – so that they may not generate harmful levels of pollution and waste; and (iii) Ecological planning and management – so as to achieve and maintain an aesthetic and healthful arrangement of the structures, features, assets and resources surrounding us to such extent as we achieve those goals, so much is the quality of life for humanity enhanced; and so the constant concern for the sustenance of the integrity of the environment, is a fundamental dimension in the quest for greater civilization in the human environment, is a fundamental dimension in the quest for greater civilization in the human world; it bears on the very principle of governance in quest of the welfare of the people.”*

In the case of “**County Government of Kitui v Sonata Kenya Limited & 2 others [2018] eKLR**”<sup>220</sup>, the Court made several notable observations that are relevant to this research. The Court observed that under Section 129(1) of the Environmental Management and Co-ordination Act, the National Environment Tribunal (NET) is empowered to hear and determine appeals arising from persons aggrieved by decisions of National Environmental Management Authority (NEMA), such as the issuance of a license by the 3<sup>rd</sup> Respondent to the 1<sup>st</sup> Respondent.<sup>221</sup> It is therefore this court, and not the National Environment Tribunal, that has the jurisdiction to hear and determine any dispute under Article 70 of the Constitution.<sup>222</sup>

An Environmental Impact Assessment license can only be issued after a successful Environmental Impact Assessment process, which envisages two modes of processes: that is, an Environmental Impact Assessment Project Report or an Environmental Impact Assessment Study Report.<sup>223</sup> However, the Court highlighted the important role of public participation in these processes by citing with approval the holding in the case of **Ken**

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<sup>220</sup> Environment and Land Petition 2 of 2018.

<sup>221</sup> Para. 28.

<sup>222</sup> Para. 30.

<sup>223</sup> Para. 36.

*Kasinga vs. Daniel Kiplagat Kirui & 5 others*<sup>224</sup>, “that where the procedures for the protection of the environment are not followed, including the process of public participation, then an assumption may be drawn that the right to a clean and healthy environment is under threat.”<sup>225</sup> The Court went on to state that ‘it is on the basis of the principle of prevention that a properly conducted Environmental Impact Assessment (EIA) might serve as a standard for determining whether or not due diligence was exercised. Preventive mechanisms also include monitoring, notification and exchange of information with the public and the lead agencies, especially when dealing with hazardous waste, or any other project that is likely to have an environmental impact.’<sup>226</sup>

In *Douglas Onyancha Omboga & 3 others v Joseph Karanja Wamugi & 4 others [2019] eKLR*<sup>227</sup>, the Court pointed out the following:

40. *“Environmental Impact Assessment (E.I.A) Project Reports and Environmental Impact Assessment (E.I.A) Study Reports are tools for environmental management. The Environmental Impact Assessment (E.I.A) exists to help to ensure that in designing and undertaking developments, environmental considerations are taken into account and integrated in the entire process.” In the case of “Kwanza Estates Limited vs. Kenya Wildlife Services, (2013) eKLR,” this court held as follows:*

*“Environmental Impact Assessment (E.I.A) is a tool that helps those involved in decision making concerning development programmes or projects to make their decisions based on knowledge of the likely impacts that will be caused on the environment... The Projects that are potentially subject to Environmental Impact Assessment (E.I.A) are specified in the second Schedule of EMCA and they include an activity out of character with its surrounding, any structure of a scale not in keeping with its surrounding and change in land use...”*

44. *“Procedural rights by individuals who are likely to be affected by a project which is out of character with its surrounding are critical in realizing the right to a clean and healthy environment. Indeed, the failure to involve the public in environmental*

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<sup>224</sup>(2015) eKLR

<sup>225</sup>Para. 41.

<sup>226</sup>Para. 49.

<sup>227</sup> Environment and Land Case 102 of 2017.

*decisions or to provide access to environmental information is a violation of environmental rights of individuals.”*

These are some of the decisions that highlight the important role that courts, especially Environment and Land Court have, in not only safeguarding the rights accruing to the environment but also entrenching the Environmental Rule of Law in the country through ensuring that the laid out environmental laws and principles are respected and observed by all.

### **3.3 Comparative Jurisdiction: The Case of Nigeria**

Nigeria is Africa’s oldest country to tap into the rich gold mine of the petroleum industry in its Niger Delta region and has greatly developed its economy.<sup>228</sup> This development has however come with its own share of evil causing serious harm to the environment as a result of the many reported and documented unregulated waste discharge, oil spills, and gas leakages.<sup>229</sup>

Examples of these include: “the Shell–BP Bomu II well blowout of 1970, the SAFRAP (now Elf) Obagi 21 well blowout of 1972, the Texaco Faniwa oil well blowout of 1980, and the Agip Oyakama pipeline leakage of 1980” just to mention but a few.<sup>230</sup>

It is argued that the early Nigerian legislations were not environmentally friendly, and the country did not have any general or specific legal framework to address the concerns of the petroleum sector.<sup>231</sup>

Additionally, the legal framework then was very general making it impossible to be enforced and or complied with. The country then developed other approaches to protect and manage the environmental challenges posed by the petroleum industry operations.<sup>232</sup>

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<sup>228</sup>Ite AE, Ibok UJ, Ite MU and Petters SW, “Petroleum Exploration and Production: Past and Present Environmental Issues in the Nigeria’s Niger Delta” (2013) 1 American Journal of Environmental Protection 78 <[https://www.researchgate.net/publication/256834670\\_Petroleum\\_Exploration\\_and\\_Production\\_Past\\_and\\_Present\\_Environmental\\_Issues\\_in\\_the\\_Nigeria’s\\_Niger\\_Delta](https://www.researchgate.net/publication/256834670_Petroleum_Exploration_and_Production_Past_and_Present_Environmental_Issues_in_the_Nigeria’s_Niger_Delta) > accessed 1 July 2019

<sup>229</sup>Ibid

<sup>230</sup>Ibid

<sup>231</sup>Ite AE, Ufot UF, Ite MU, Isaac IO and Ibok UJ, “Petroleum Industry in Nigeria: Environmental Issues, National Environmental Legislation and Implementation of International Environmental Law” (2016) 4 American Journal of Environmental Protection 21 <[https://www.researchgate.net/publication/304355407\\_Petroleum\\_Industry\\_in\\_Nigeria\\_Environmental\\_Issues\\_National\\_Environmental\\_Legislation\\_and\\_Implementation\\_of\\_International\\_Environmental\\_Law](https://www.researchgate.net/publication/304355407_Petroleum_Industry_in_Nigeria_Environmental_Issues_National_Environmental_Legislation_and_Implementation_of_International_Environmental_Law)> Accessed 22 July 2019

<sup>232</sup>Ibid



Research shows that overlapping of mandates amongst the key institutions mandated to oversee effective management and protection of the environment has greatly contributed to Nigeria's environmental woes including unenforceability of the relevant environmental laws.<sup>233</sup> "A good example is a scenario where an environmental consultant or project proponent/operator is required as a result of the policies of the individual agencies and ministries to obtain same environmental permits in different institutions simultaneously." This puts a lot of pressure on the project contractor wondering which entity to approach for assistance and at the same time resulting to a costly and time-consuming process which may result to evasion of the relevant permits.<sup>234</sup>

In order to address the key challenges discussed above, Nigeria has put in place stringent measures through the enactment of specific laws and regulations as well as the establishment of specific institutions and agencies to govern and regulate the operations of the petroleum industry:

- i. Establishment of specific sector laws, guidelines and agencies to deal with specific oil and gas concerns to the environment. For example;
  - a) The Harmful Waste (Special Criminal Provisions) Act, 1988, that specifically deals with illegal dumping of harmful and hazardous waste.<sup>235</sup>
  - b) The Oil Pollution Act of 2004, that specifically addresses matters to do with oil spillage, prevention and control.<sup>236</sup>
  - c) The Environmental Guidelines and Standards for the Petroleum Industry in Nigeria (EGASPIN) of 2002 that regulate and manage waste discharge and pollution from the industry.<sup>237</sup>

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<sup>233</sup>Elenwo EI, Akankali JA, "Environmental Policies and Strategies in Nigeria Oil and Gas Industry: Gains, Challenges and Prospects" (2014) 5 *Natural Resources* 884  
<[https://file.scirp.org/pdf/NR\\_2014112715232278.pdf](https://file.scirp.org/pdf/NR_2014112715232278.pdf)> accessed on 22 July 2019

<sup>234</sup>Ibid

<sup>235</sup>Olujobi OJ, Oyewunmi OA and Oyewunmi AE "Oil Spillage in Nigeria's Upstream Petroleum Sector: Beyond the Legal Frameworks" (2018) 8 *International Journals of Energy and Policy*<[https://www.researchgate.net/publication/322959236\\_Oil\\_Spillage\\_in\\_Nigeria's\\_Upstream\\_Petroleum\\_Sector\\_Beyond\\_the\\_Legal\\_Frameworks](https://www.researchgate.net/publication/322959236_Oil_Spillage_in_Nigeria's_Upstream_Petroleum_Sector_Beyond_the_Legal_Frameworks)> accessed 9 May 2019

<sup>236</sup>Ibid

<sup>237</sup>Olujobi OJ, Oyewunmi OA and Oyewunmi AE "Oil Spillage in Nigeria's Upstream Petroleum Sector: Beyond the Legal Frameworks" (2018) 8 *International Journals of Energy and Policy*<[https://www.researchgate.net/publication/322959236\\_Oil\\_Spillage\\_in\\_Nigeria's\\_Upstream\\_Petroleum\\_Sector\\_Beyond\\_the\\_Legal\\_Frameworks](https://www.researchgate.net/publication/322959236_Oil_Spillage_in_Nigeria's_Upstream_Petroleum_Sector_Beyond_the_Legal_Frameworks)> accessed 9 May 2019

- d) The Oil Spill and Oily Waste Management Regulations (OSOWMR) of 2011 that are meant to improve the oil spill responses by oil companies in Nigeria.<sup>238</sup>
- e) Oil Spill, Recovery, Clean-up, Remediation and Damage Assessment (OSRCRDA) Regulations of 2011, which establish measures and procedures of detection, response and clean up among other measures where there is spillage or leakage of petroleum products anywhere in Nigeria.<sup>239</sup>
- f) The National Oil Spill, Detection and Response Agency the country's dedicated disaster management and response unit specifically for the petroleum industry.<sup>240</sup>

### **3.4 Conclusion**

As already pointed out in the theoretical framework supporting this research, under the Sociological Theory of Interest, law as a tool of social control should be made responsive to the needs of the society it is serving. Anything less than this ideal makes such a law inefficient and infective and renders it irrelevant and a subject for review. The policy and law makers are expected to respond to specific problems and take any special measures where a situation so requires.

It is clear from the discussion above that Kenya has taken big strides in ensuring that it has sufficient laws and institutions to govern the environment. There are however some serious concerns that need to be looked into; the fact that none of the laws provide for specific environmental laws, institutions and agencies to expressly govern the sensitive operations of the petroleum industry and the fact that the key regulations such as the Water and Waste Discharge Regulations established under EMCA were enacted in 2006 and despite the major shift brought about by the Constitution of Kenya 2010, and the new developments and trends in the world in as far as the utilization of the environment is concerned, they have not yet been updated and or revised and yet the mother Law, EMCA, was revised in 2015, which

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<sup>238</sup> Kadafa and Ayuba A, "Environmental Impacts of Oil Exploration and Exploitation in the Niger Delta of Nigeria" (2012) 12 Global Journal of Science Frontier Research Environment & Earth Sciences <[https://globaljournals.org/GJSFR\\_Volume12/2-Environmental-Impacts-of-Oil-Exploration.pdf](https://globaljournals.org/GJSFR_Volume12/2-Environmental-Impacts-of-Oil-Exploration.pdf)> accessed 6 May 2019

<sup>239</sup> Ibid

<sup>240</sup> Ibid

makes them outdated and insufficient. This therefore leaves it to the operators of the industry to fit themselves in whichever law that is more likely to apply to them.

Further, the laws establish general independent institutions that are autonomous in nature and independent whose mandate is more or less the same hence creating is a conflict, duplication of efforts and an overlap of mandates, which is not an ideal position for the country to be in especially when dealing with the sensitive operations of the oil and gas industry and having in mind the seriousness of any environmental damage that could result from the industry's operations.

There is therefore an urgent need to review and revise the existing environmental legal framework to ensure it expressly and specifically provides for and establishes key institutions and agencies to specifically deal with all petroleum industry related operations in the country. Further, there is the need to harmonize some of the roles and responsibilities that have been given to the various lead environmental institutions and agencies to avoid cases of duplication of efforts, conflict of interests and overlap of mandates.

For Environmental Rule of Law to take root in the country, there is a need to ensure that laws are developed to address specific gaps thus bridging the gap on paper and on the ground and ultimately achieving their very intended purpose. Addressing gaps in the existing laws is a sure step towards achieving environmental rule of law in the country; one that is respected by all including oil and gas sector players.

It is evident from the comparative discussion above that the environmental degradation challenges faced by Nigeria with respect to its well established oil and gas industry were fueled by weaknesses in its policy, legal and institutional framework, *inter alia* the absence of key specific laws to govern and regulate the various segments and operations of the oil and gas operations as well as an overlap of mandates and responsibilities amongst the various key sector agencies and institutions which resulted to duplication of efforts hence breeding distrust and lack of coordination amongst the institutions and as a result, the environment suffers. These problems were therefore solved when Nigeria decided to enact and put in place specific sector laws and institutions to regulate its petroleum industry.

Kenya should also consider doing it the Nigerian way by establishing specific sectoral laws and institutions to govern and regulate the operations of its oil and gas industry. Such specificity would ensure that the challenges that are germane to this sector are adequately

addressed through responses that put into consideration the unique circumstances that may prevail. Nigeria has been in the oil and gas business for longer and evidently took long to come up with the responsive laws and regulations. Kenya does not have to wait for that long. It can and should consider drawing lessons from Nigeria's experience in order to avoid the negative experiences witnessed in Nigeria.

## **CHAPTER FOUR: CHALLENGES AND BARRIERS LIMITING THE ABILITY OF THE LEGAL AND INSTITUTIONAL FRAMEWORK FROM ENSURING EFFECTIVE ENVIRONMENTAL PROTECTION DURING OIL AND GAS EXPLORATION AND PRODUCTION IN KENYA**

### **4.1. Introduction**

The discoveries of promising oil and gas deposits in Kenya by Tullow Oil Company Limited in Turkana is a good sign that it will immensely contribute to the economic development of the country. This development however, if not well regulated, governed and supervised, poses great risks to the environment and it may turn out to be a big curse rather than a blessing.

This chapter discusses the various challenges barring the effective management of the environment in the petroleum industry as discussed below.

### **4.2. Gaps and Challenges within the Institutional and Legal Frameworks**

#### **4.2.1 The Inadequacy of the Institutional Framework**

The oil and gas governing laws establish bodies and institutions whose mandate, powers and functions conflict and/or overlap. For example;

The Energy Act<sup>241</sup> gives exclusive powers to the EPRA to issue and revoke petroleum exploration licenses and permits. Similarly, the Petroleum Act<sup>242</sup> gives same powers to the Cabinet Secretary in charge of the Ministry of Energy and Petroleum to issue and revoke petroleum agreements. These challenges were experienced with the former regime where a Cabinet Secretary cancelled mining licenses and the action was challenged in Court, leading to protracted battles that resulted to delays in exploration of oil and gas in the county.<sup>243</sup>

Despite EPRA under the Energy Act and the Cabinet Secretary in charge of the Ministry of Energy and Petroleum Act having some independence in their day to day responsibilities, the National Land Commission Act<sup>244</sup> gives powers to the National Land Commission to review any grants and dispositions issued to any person on any land use or its resources anywhere in the country. If established that such grants were not issued within the confines and principles

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<sup>241</sup>No. 1 of 2019.

<sup>242</sup>No. 2 of 2019.

<sup>243</sup>“Cortec Mining Kenya Limited v Cabinet Secretary Ministry of Mining & 9 others [2017] eKLR, Civil Appeal 105 of 2015.”

<sup>244</sup>No. 5 of 2012

provided under the law on land and its resources use, as well as with respect to the environment, NLC has the powers to revoke such grants and or permits.

The powers and functions that have been given to both the National Government and the County government in regard to the energy sector and specifically enacting environmental policies brings about duplication of efforts and breeds confusion as to which policies are to be applied.

There should be a clarification of these mandates to eliminate the overlap and the potential confusion which often leads to inefficiency in the discharge of mandate. The *National Environment Policy, 2013* rightly points out that “the multi-faceted nature of the environment and the need to integrate environmental considerations in all development planning and activities calls for cooperation and consultation among responsible government agencies and stakeholders at all levels”.<sup>245</sup> The *Policy* goes on to state that “it is particularly important to recognize the existing institutional mechanisms and consider ways and means by which coordination and cooperation can be enhanced between the many institutions whose mandates relate to the environment”.<sup>246</sup>

#### **4.2.2 The Gaps and Inadequacy within the Legal Framework**

As already pointed out in the previous chapters, the framework governing the petroleum sector in Kenya can be found in the Constitution of Kenya 2010 as well as other sectoral statutes and regulations. These range from those governing the specific aspects of the petroleum industry and those dedicated to environmental management and conservation.

Other than Article 69 of the Constitution of Kenya and the Environmental Management and Coordination Act,<sup>247</sup> the other laws governing the petroleum industry lack provisions for environmental tools such as Environmental Audits and Monitoring and Strategic Environmental Assessment (SEA) which are the key tools that any law that seeks to promote the conservation and proper management of the environment should have in place in order to be able to measure any impact on the environment, not just at the inception of any project, but also during the lifetime of such projects, in order to hold contractors liable for their actions. The key petroleum laws namely; the Petroleum Act<sup>248</sup> and the Energy Act<sup>249</sup> only

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<sup>245</sup>*National Environment Policy, 2013*, para. 8.2.1.

<sup>246</sup>*Ibid*, para. 8.2.1.

<sup>247</sup>1999 and as Amended in 2015

<sup>248</sup>No. 2 of 2019

<sup>249</sup>No. 1 of 2019

focus on Environmental Impact Assessment (EIA) a tool that is only employed at the inception of any project.

The Court in **“Justus Mathumbi & 9 others v Cabinet Secretary, Ministry of Land, Housing and Urban Development & 4 others”**<sup>250</sup> correctly observed that “the SEA process extends the aims and principles of Environmental Impact Assessment (EIA) upstream in the decision-making process, beyond the project level, when major alternatives are still possible. Hence, during a SEA process, the likely significant effects of a Policy, Plan, or Program (PPP) on the environment are identified, described, evaluated, and reported. The full range of potential effects and impacts are covered, including secondary, cumulative, synergistic, short, medium, and long-term, permanent, and/or temporary impacts.”<sup>251</sup> Considering that the adverse effects from oil and gas industry are likely to be long lasting especially on the environment and communities’ livelihood, there was a need for the regulatory laws on the sector to include SEA as mandatory.

The current legal framework does not provide for clear environmental legal guidelines on how to go about handling waste that emanates from the petroleum processes which pose great risk to the environment such through dumping in most cases in water bodies resulting to pollution. Section 60(1) of the Petroleum Act<sup>252</sup> leaves it to the contractors to come up with the “measures” of ensuring there is proper waste management. The fact that the law does not categorically state any specific waste management measures it gives the contractors the leeway to exploit this loophole in law to their advantage. Indeed, this state of affairs was recently confirmed by the contentions between the British oil explorer Tullow Oil and the National Environment Management Authority (NEMA) over the disposal of hazardous waste in Turkana County. The dispute was on the methodology suggested by NEMA in getting rid of the drill cuttings laced with synthetic oil from Twiga 1 site near Lomokamor, Turkana South.<sup>253</sup> There have been past protests from the community living around Twiga 1 site to compel Tullow to stop dumping the waste in the area. NEMA had suggested that the Company should transport the waste for incineration to companies located in Migori,

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<sup>250</sup>(2018) eKLR

<sup>251</sup>“*Justus Mathumbi & 9 others v Cabinet Secretary, Ministry of Land, Housing and Urban Development & 4 others [2018] eKLR*, Petition 584 of 2014,” Paras 69 & 70.

<sup>252</sup>No. 2 of 2019

<sup>253</sup>Okoth, E., “Tullow Oil protests Nema's order on waste disposal,” *Daily Nation*, Sunday December 16 2018. Available at <https://www.nation.co.ke/news/Tullow-protests-Nema-order/1056-4896978-48hctbz/index.html> [Accessed on 20/9/2019].

Machakos and Mombasa counties. However, Tullow was hesitant for not only the potentially expensive exercise but also the likelihood of more protests from the residents and governments of these counties due to the adverse environmental impacts.<sup>254</sup> This is a clear demonstration of how unprepared the country has been as far as the disposal of oil and gas wastes is concerned. The challenge of waste disposal is likely to grow even bigger considering that the oil and gas exploration activities are still ongoing with more discoveries in the country expected.

There is no disaster management unit in place to deal with the emergencies that result from the operations of the industry namely; fire, oil and gas spills among others. Section 69(1)<sup>255</sup> mandates the Cabinet Secretary in charge of Energy and Petroleum to establish the unit which has not yet been established. The lack of disaster preparedness in Kenya was indeed highlighted in the “*Strategic Environmental and Social Assessment (SESA) For Petroleum Sector in Kenya*” report<sup>256</sup> which pointed out that whereas most of the emergencies occur in the downstream sector, Counties in Kenya have no disaster management kitty or a centralized fund to handle that. Disasters are handled as they come.<sup>257</sup> The Report recommended that statutory laws should be put in place on oil Spillage. This would see Kenya join countries such as Nigeria which has a dedicated law on oil spillage in the country.

The Petroleum Act<sup>258</sup> and the Energy Act<sup>259</sup> do not categorically provide for the various environmental standards relating to waste management, disaster management and pollution to the environment as far as the oil and gas industry is concerned. This silence and loop hole in law poses a risk in the sense that contractors may exploit it to their advantage. This is because they may argue that since such standards also lacking under EMCA, then any laws purporting to hold them in violation of non-existent standards would be ambiguous and thus inapplicable.

EMCA provides for very general provisions more so with regard to SEA and EIA. For example, Section 58 provides that before an entity can be issued with an operating license, it

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<sup>254</sup>Ibid.

<sup>255</sup>No. 2 of 2019.

<sup>256</sup>“Kenya Petroleum Technical Assistance Report (KETAP): Strategic Environmental and Social Assessment” (Ministry of Energy and Petroleum) <<http://ices.or.ke/wp-content/uploads/2016/11/SESA-Draft-Report-for-Petroleum-Sector-in-Kenya.pdf>> accessed 6 August 2018

<sup>257</sup>Ibid, p. 4.

<sup>258</sup>No. 2 of 2019.

<sup>259</sup>No. 1 of 2019.



must submit to NEMA a SEA and EIA report. The law gives potential contractors the leeway to conduct SEA and EIA on their own. It is possible for this loophole to be manipulated by the contractors by doctoring the SEA and EIA reports. These were the prevailing circumstances that led to the overturning of the EIA licence in the *Save Lamu* case.

The Environmental Management and Coordination (Waste Management) Regulations 2006 do not provide for the manner in which waste from oil and gas industry is to be managed. No specific provisions for waste generated from the oil and gas industries.

The Environmental Management and Coordination (Water Quality) Regulations 2006 under the Third Schedule provides for the various effluents that must be regulated and among them is gas and oil. The Regulations however do not provide for the parameters and or limits for the effluents from the oil and gas industry. This is also evidently missing from the provisions of the *Water Act, 2016*<sup>260</sup>.

The Environmental Regulations established under the EMCA were enacted between the years 2003 and 2006 which therefore makes them outdated as they have not been revised to conform to the principles established under the Constitution of Kenya 2010 as well as the new developments, trends and evolutions in the petroleum industry across the world. While the Environmental Management and Coordination Act (EMCA) of 1999 has already been reviewed by the EMCA (Amendment) Act, 2015 to bring it to conformity with the Constitution, most of the cross cutting sectoral laws and policies governing the industry are inadequate and some conflict with EMCA. This is despite some being made after the promulgation of the Constitution and amendment of EMCA. There is thus the need to review and harmonize EMCA and the sectoral laws and policies with the Constitution to clarify institutional mandates and environmental obligations, as contemplated by the *National Environment Policy, 2013*.

### **4.3. Conclusion**

The upstream segment of the petroleum industry in Kenya is still young but the country has taken bold steps in ensuring that the industry thrives and is sustainable. Several challenges however continue to loom the oil and gas industry and if these challenges are not properly

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<sup>260</sup>No. 43 of 2016, Laws of Kenya.

addressed at an earlier stage before actual commercial production of the commodity begins, Kenya environment will stand to suffer irreparably.

There is therefore an urgent need for the government of Kenya to put in place and ensure there is effective implementation of the existing legal and institutional regulatory framework. This calls for the streamlining of the country's petroleum industry by revising, updating and consolidating the existing petroleum legislation in Kenya. It also calls for review of the key institutions and agencies in the petroleum industry and streamline their responsibilities, powers and functions to avoid duplication of efforts.

## **CHAPTER FIVE: FINDINGS, CONCLUSION AND RECOMMENDATIONS**

### **5.1. Findings of the Study**

The research paper set out to answer the following questions:

- a) What is the current status of oil and gas exploration and production in Kenya?
- b) What is the legal and institutional framework governing the oil and gas industry in Kenya and comparable jurisdictions from which Kenya can draw lessons?
- c) What are the challenges and barriers limiting the ability of the legal framework from ensuring effective environmental protection during oil and gas exploration and production?
- d) What measures and mechanisms can be put in place to ensure the highest standards of environmental protection during oil and gas exploration and production?

In order to answer these questions, the paper mainly relied on qualitative research approach focusing on the analysis and evaluation of primary and secondary sources of data relating to evaluation of law and practice on environmental protection during exploration and production of oil and gas in Kenya.

The analysis mainly focused on the legal and institutional frameworks governing the petroleum sector in Kenya.

To this end, the research paper identifies the following gaps and challenges facing industry as far as environmental protection is concerned:

- a) Overlap and duplication of institutional mandates and functions as provided for under the relevant laws which makes it difficult or impossible to pinpoint which institution is responsible for curbing environmental degradation in the oil and gas sector;
- b) While the Constitution of Kenya 2010 and EMCA provide for effective albeit general environmental management tools such as SEA and EIA, the same are evidently lacking in other key sectoral laws;
- c) The current legal framework does not provide for clear legal guidelines and standards on waste disposal and management in the oil and gas sector. The law instead, leaves the decision to contractors and NEMA who occasionally issue temporary guidelines

from time to time based on knee-jerk reactions to public outcry whenever there are disasters and widespread pollution; and

- d) There is no disaster management unit in place to deal with emergencies that result from the operations of the industry.

The findings not only answered the research questions but also helped in meeting the objectives that informed this research paper.

These findings also prove the hypothesis that the legal and institutional framework in Kenya governing the environment with regard to the petroleum industry is inadequate to protect the environment from the adverse effects that the oil and gas industry pose to the environment.

It is from the foregoing findings that this paper offers a conclusion as well as recommendations that will hopefully be useful in addressing the gaps and challenges as identified.

## **5.2. Conclusion to the Study**

The focus of this study was to analyze the legal, policy and institutional framework governing the environment and to establish whether it is sufficient, fit and capable of addressing the serious environmental concerns and challenges posed by the operations of the petroleum industry in Kenya.

It has been demonstrated by the analysis of the existing legal and institutional framework governing the environment in the petroleum industry, that Kenya has taken bold steps in ensuring there is more than enough laws to govern and regulate the industry. This bold step came about as a result of coming into force of the Constitution of Kenya 2010 that brought about a paradigm shift in the way the environment and the natural resources therein were being exploited, used and managed.

The Constitution of Kenya 2010 laid down fundamental principles that were to govern the use of the environment and its resources. The Constitution called on Parliament to ensure revision and amendment all laws to align them with its provisions. This saw the following key laws revised; the Petroleum Act 2019, the Energy 2019 and the EMCA 2015.

Despite this major shift, the country continued and continues to face serious environmental concerns from the petroleum industry namely; oil and gas spills and leakages which have led to loss of lives and degradation of the environment.

This study has established that these challenges are mainly attributed to the ineffectiveness and insufficiency of the existing law to adequately address the environmental concerns from the oil and gas industry namely; absence of specific institutions, bodies and agencies to specifically regulate the operations the petroleum industry namely; disaster management and response units, specific oil and gas licensing bodies and a comprehensive law that deals with all matters oil and gas instead of the existing fragmented and sectoral laws that are applied across the board in all sectors including the oil and gas industry.

If adequate measures and prompt action is not taken to resolve these challenges, then Kenya will say good bye to sustainable environmental management and resource utilization. Thus there is the urgent need to review the existing legal and institutional framework governing the operations of the oil and gas industry to align them with the provisions of the Constitution of Kenya and the current trends in the oil and gas industries across the world in order to make them environmentally friendly, as the existing framework is far from being sufficient and fit to deal with and or address the serious environmental concerns that result from the petroleum industry.

### **5.3. Recommendations**

For Kenya to effectively govern and regulate the operations of the petroleum industry while at the same time ensuring optimum protection, conservation and management of the environment, the following recommendations are made with regard to the legal, policy and institutional framework;

<b>RECOMMENDATION</b>	<b>JUSTIFICATION</b>	<b>RESPONSIBLE ENTITY/BODY</b>	<b>TIMELINE</b>
Harmonize functions of the various sectoral institutions in the	This will avoid duplication of efforts and overlap	Parliament	Immediately

<p>petroleum industry. This can be achieved through the establishment of a fully structured single and specialized body to handle all matters pertaining to the industry such as licensing, auditing and monitoring among other mandates.</p>	<p>of mandates as well as ensure proper governance, accountability and liability.</p>		
<p>Establishment of a specialized national oil and gas disaster management and response unit and or agency to deal with all oil and gas related accidents and incidents</p>	<p>This will ensure proper, effective, and timely disaster prevention, mitigation, clean up, management, accountability and liability</p>	<p>MoEP in consultation with other key stakeholders such as EPRA and NEMA</p>	<p>Immediately</p>
<p>Revision and amendment of the EMCA EIA, Water and Waste Management Regulations that govern the discharge of effluents from all sorts of industries since they are not updated with the current trends and developments taking place on the environment as regards oil and gas discharge and effluents.</p>	<p>EMCA, the parent Act, was revised and amended in 2015 to conform with the Constitution. The Regulations thereunder have however not been revised and amended since when they were enacted in 2003 and 2006 making them</p>	<p>Parliament</p>	<p>Immediately</p>

	therefore outdated.		
Establishment of specific and strict Standards and Guidelines for the petroleum industry to govern and regulate the industry's waste and pollution.	This will ensure proper compliance by all oil and gas companies' failure to which tough sanctions are imposed on them such as the revoking of their exploitation and exploration permits	NEMA in consultation with other key stakeholders such as MoEP, EPRA and NLC	Immediately
Revision of the substantive oil and gas laws, that is, the Petroleum and Energy Act to make them more comprehensive to deal with all matters oil and gas. In so doing, this would also call for the establishment of specific subsidiary Oil and Gas Regulations.	The current position of the Petroleum and Energy Act is that they have focused more on the licensing processes of the oil and gas industry and totally failed to factor in other important environmental concerns such as pollution, oil and gas spills and flaring, transportation and shipment, waste and effluent limitation regulations, land use patterns, pollution	Parliament in consultation with other key stakeholders such as MoEP, EPRA, NEMA	Immediately

	<p>offences and sanctions, liability and compensation for damage etc. There is therefore the need to incorporate all these factors through specific provisions to make the oil and gas laws more comprehensive.</p> <p>Hence, avoidance of relying on the fragmented sectoral laws that are also not sufficient in handling oil and gas related issues.</p>		
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#### 5.4. Further Areas of Research

As already pointed out under section 1.10 of this study on limitations of the study, oil and gas sector exploitation and exploration activities have very wide implications which range from environmental degradation, humanitarian implications which involve human rights as well as commercial implications. A study on all these areas would require not only huge financial commitment but also time and fieldwork. This paper could thus not undertake such a huge exercise due to the limited time and financial resources unavailability for the same. Consequently, the research paper only focused on the adequacy and efficacy of the environmental aspects of the legal and institutional framework governing the operations of the oil and gas industry in Kenya.



There is therefore the need to carry out extensive research on the areas not covered by this research paper owing to the importance attached to this sector for national development but also bearing in mind the adverse effects that the same may pose to human life.

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