

**THE ROLE OF COURTS IN ENVIRONMENTAL MANAGEMENT:
THE CASE OF KENYA**

**BY
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REQUIREMENTS FOR THE DEGREE OF MASTERS OF LAWS OF
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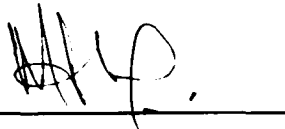


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DECLARATION

I **ODHIAMBO MAURICE** do hereby declare that this thesis is my original work and has not been submitted and is not currently being submitted for a degree in any other University.

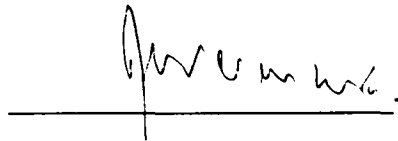
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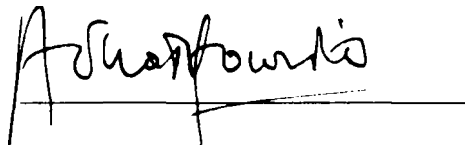
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DEDICATION

To my parents for their constant prayers, encouragement and sacrifice to enable me get the best that education had to offer.

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This thesis owes its conceptualization and eventual completion to a number of persons. I am grateful to all of them. However, some deserve special mention herein.

Firstly, my supervisors, Dr Albert Oduor Mumma and Arthur Okoth Owiro who critically and diligently guided me through the process of writing. They sometime even had more faith in me than I did. I am very grateful.

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My final thanks go to Mrs. Beatrice Mwangi a.k.a 'Sura' who painfully reduced my 'hieroglyphics' into this neatly readable piece of work.

Despite, the assistance and support I received from all the above individuals, and many more not mentioned, the responsibility for the final document rests entirely with me. I therefore take sole responsibility for any errors either of omission or commission that might be contained herein.

ABSTRACT

The very existence of a scheme of rights and duties is reason enough to expect that claims will rise in the one case for violations and, in the other for malfeasance or dereliction of duty. Such claims may either be anticipatory or based on actual damage or injury. Since constitutionalism requires government to behave according to the law, there must be an organ to decide whether in fact the government is abiding by the law of the land. Many modern constitutional systems routinely give this power to the judiciary. Courts, therefore, in their generic existence as the judiciary are part of the legitimate system of government. Over time it has now come to be accepted that in addition to individual rights as has been traditionally held by law, there are other entities which are of sufficient juridical character and thus capable of possessing rights. In this latter category falls artificial persons such as limited liability companies, non-governmental organizations local communities, among others. This is particularly true in the emerging and growing arena of environmental management. Indeed, the hitherto no-recognized environmental rights is now an admitted reality.

But one may pause to wonder about the concern with the courts. For many legal systems, courts are a refuge to those who are unable to obtain satisfaction from administrative or other alternative channels of review and appeal and for those who feel that their interests are of special importance in need of the types of sanctions or remedies which only a court of law can invoke. Often, the court is the last resort by which they preserve their allegedly violated rights. Other times, courts are consulted merely because they are the ^{only} institution available for settlement of disputes.

In this thesis we examine the role of courts of law in environmental management using the illustration of Kenya. Thus, we explore the concept of environmental management and associated concepts. It is argued that there are various ways in which a country may achieve good environmental management- the avenue of law and particularly the institution of the court is but just one of them. It is, however, argued that the court has certain unique characteristics that make it more amenable to ensuring a proper functioning system of environmental management.

In this respect, the thesis explores this uniqueness of the court. We also explore the impediments that stand on the way of the court performing this function diligently and seek ways of addressing them.

The thesis is divided into five chapters. In Chapter One we discuss the fundamental underpinnings of the study. It offers the background to the thesis by dealing with the definition of the problem and clarifying the objectives of the study. It also identifies the methodology used in the inquiry and discusses the conceptual framework.

In Chapter Two we examine the concepts that are central to this study. These include environment, environmental management, sustainable development, environmental rights and duties. It is posited that the concept of environment as now understood goes beyond the previous understanding. Thus, now it is understood to encompass the totality of nature and the natural resources, but also includes the cultural heritage and the infrastructure constructed by human beings to facilitate socio-economic activities. Fundamentally, environmental management can be achieved *inter alia* through the medium of law, specifically environmental law.

It is also argued in this chapter that development is very closely intertwined with the environment. It is in this respect that sustainable development as a concept was developed and has now been in vogue, dictating how governments shape their development policies.

In the chapter we also discussed the twin concepts of environmental rights and duties. In our analysis, this formulation showed that the quest for environmental rights has necessitated a departure from the definitions of 'right' as hitherto known to law. Unlike environmental rights, environmental duties are not entitlements. Rather, they are action requirements intended to ensure that entitlements generated by a regime of rights are not only protected and respected but also in fact, achievable.

Our analysis of data led us to draw a conclusion that the interplay between environmental rights and duties necessitate third party intervention. Often, the recourse is to the courts of law.

In Chapter Three we analyse the court as an institution in environmental management in Kenya. The court scenario presents certainty and predictability. One of the ways in which this is achieved is through the doctrines of *stare decisis* and precedent.

Our further analysis in this chapter reveals that the courts in Kenya are created by the constitution and indeed get all their powers from the constitution. Courts are integral in a nation's life as the central agency of horizontal accountability in society.

In our legal system, courts deal with matters as and when they are taken to them. They do not act on their own motion. Accessibility to the courts is therefore crucial. Access to the courts is one way of providing justice to society. In this respect, it may be clogging this justice process to put impediments on access to court.

In Chapter Four the role that the court plays in environmental management is discussed in greater detail. This is done through a comparative study of how different courts of different jurisdictions have dealt with the twin issues of *locus standi* and costs. It is our position that how the court deals with these two issues will show how it is likely to deal with other environmental concerns that may arise. It is found that the courts have contributed to the understanding and development of environmental law and management by among other things enlarging the definition of the concept of *locus standi*. Thus, from a purely technical and narrow interpretation of the concept, a new test of 'sufficient interest' has emerged.

The last chapter is on Conclusions and Recommendations. We conclude that the courts have done and in deed can do a lot in environmental management in Kenya, as well as in other jurisdictions.

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ABBREVIATIONS

ACTS	African Centre for Technology Studies
CBD	Convention on Biological Diversity
CBO	Community Based Organization
EMCA	Environmental Management and Co-ordination Act
GOK	Government of Kenya
HC	High Court
HCCC	High Court Civil Case
NAALAS	North Australian Aboriginal Aid Service Inc.
NGO	Non- Governmental Organization
OWC	Ogiek Welfare Council
UDHR	Universal Declaration of Human Rights
UN	United Nations
UNCED	United Nations Conference on Environment and Development
UNCHE	United Nations Conference on the Human Environment 2
UNEP	United Nations Environment Programme
JR	Unreported
WCED	World Commission on Environment and Development

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CHAPTER ONE

INTRODUCTION

1.1 Background

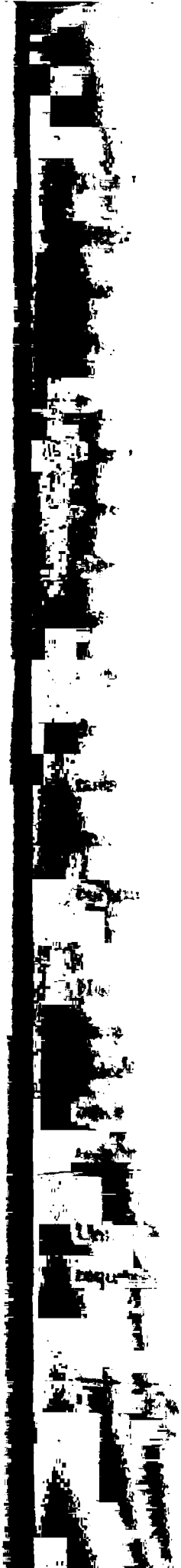
On the 6th January, 2000, the President of Kenya gave his assent to the Environmental Management and Co-ordination Bill thereby making it an Act of Parliament. The Environmental Management and Co-ordination Act became operative on 14th January, 2000. Under Section 3 (3), the Act provides that anybody who alleges that his entitlement to a clean and healthy environment has been, is being, or is likely to be contravened may apply to the High Court for redress. Further, Part XIII of the Act creates a number of environmental offences. It is also noteworthy that the Act is expressed to be “An Act of Parliament to provide for the establishment of an appropriate legal and institutional framework for the management of the environment...”

The import of the foregoing is to tacitly acknowledge the role of courts in environmental management. The underlying reason presumably is that the courts have been found equal to this task.

The basis of a civil law claim is a cause of action which arises when an injury has been caused to a person or property. A cause of action is defined as “... an act or omission of one party in violation of the legal right or rights of the other; and its essential elements are legal right of the Plaintiff, correlative obligation of the Defendant, and act or omission of the Defendant”¹. Arising from this therefore, judicial decisions show that the courts prefer to deal with “the best” Plaintiff - that is the notion that only a person who is directly affected by an action has a right to complain.

As early as 1972 there was thought that a distinct body of environmental or “ecological rights” already existed in international law. The problem then, was how to define those rights, identify their holders and evaluate their utility in a dynamic social context. Thus an “environmental right” came to be described as freedom to exploit the environment adequately but responsibly for long-term survival.

¹ Marao Sugar Central Company vs. Barrios, 79, Phil. 666 (1947)



That formulation, however, leaves an important question unanswered. In whom or what entities are environmental rights vested? The dominant ideology in Western jurisprudence is that rights exist only as properties of individuals. They alone are capable of enjoying them in a legal sense. That, however, is too narrow a view, at least with respect to environmental management. This is because this conception of 'right' did not take account of what was later to emerge as the concept of 'collective or group rights'. Because the segments of environment are common goods each person has interests in it that do not necessarily supersede the rights of the other which dynamics come into play when one is dealing with individual rights. It is now widely accepted that communities, whether or not organized, and corporate entities, associations or groups, defined simply by social and cultural ties, can and do have and enjoy rights by reason of their collective character. Thus, when the EMCA talks of "anybody" it must mean more than the individual natural person. It also refers to the unnatural persons such as the corporation, non-governmental organization (NGO), community based organization (CBO) and such other associated collectivity.

Hohfeld argued that rights and duties are jural correlatives. This means that for every right there must be a corresponding duty, and vice versa. If environmental rights exist - as, indeed, we think they do - what duties derive from them? On whom are they imposed? Since the performance of duties often requires supervision, what is the nature of that responsibility?

Unlike rights, environmental duties are not entitlements.² Rather, they are action requirements intended to ensure that entitlements generated by a regime of rights are, not

² H.W. O. Okoth-Ogendo "The Juridical Framework of Environmental Governance" in H.W.O. Okoth - Ogendo & Godbert Governing the Environment ACTS Press 1999 p.41

only expected and protected, but also, in fact, achievable. For this reason, we cannot talk of a single category of duties. The literature identifies at least four sets of duties.

The first is to refrain from activities injurious to the environment or any component of it. The second is to perform specific tasks on a regular basis to ensure rational environmental management at all times. The third is to guarantee a floor of quality enough to ensure that all survive, especially the human species- i.e assure intergenerational equity. Unlike the second, there is no call to enhance environmental quality. Rather, the focus is to prevent loss of quality. The fourth duty is to police, supervise, monitor and evaluate the performance of individuals and all agencies on which the first three or any other duties are imposed. A number of institutional models have been developed whose functions and powers vary both from one jurisdiction to another and with their specific environmental mandates. In the case of Kenya, one such institution is the courts.

In pristine times and settings, the environment and its components interacted, including in terms of consumption and qualitatively, while maintain a general ecological balance. Overtime the situation changed and in the last half a century the changes have been dramatic. The increasing human population and associated consumption patterns have impacted on the environment and the natural resources quantitatively and have threatened the threshold of sustainability. Population has also impacted on the quality of environment especially in aspects related to settlement, urbanization and associated squalor which have generated wastes and sewage with deleterious impact on the environment and different natural resource sectors. Similarly, application of increasingly complex technological packages to consumption and general management of the natural resources, especially through industrialization, has increased the pressure on the environment and the natural resources. Particularly acute has been the uncontrolled disposal of industrial discharges which have grossly adverse impact on the environment and natural resource sectors. Most of the negative impacts affect the innocent population and their basic needs. These trends

have necessitated legal and management interventions to regulate different forms of activities described above.

Thus, today, no one doubts the necessity for management and legal arrangements which ensure protection of the balance in the environment; to ensure sustainability in utilization of the natural resource components; to ensure that selected areas of environment, which are considered particularly fragile or endangered are accorded special protection; and to ensure that the interests of the present generation, are met without jeopardizing the needs of future generations. Indeed one can safely argue that intra and inter-generational equity is at the heart of environmental management and therefore the fundamental duty.

To achieve fulfill this necessarily requires a system of public participation as well as access to justice. If citizens are to have the requisite sense of responsibility towards the environment, they must become increasingly involved, through individual and group inputs, in the decision-making processes in matters that affect them. In this way not only will the public become committed to the well being of the environment, but also it will understand more fully the implications of environmental quality. The right of public participation can take many forms including the right to know about pending government decisions (including legislative, administrative and policy decisions), public hearings, the opportunity to present written or oral comments and evidence, the requirement that government consider citizen comments and the opportunity to present petitions, complaints, or grievances to administrative authorities.

Ultimately, this is tied to access to justice a mechanism through which disaffected citizens seek to vindicate their rights. Citizen access to administrative and judicial review mechanisms- commonly referred to as 'access to justice'- provides one of the three pillars in the governance of the environment- the others are access to information and public participation in decision-making on matters with significant environmental consequences. Access to information and public participation depend on enforcement and review mechanisms for their guarantee. Additionally, these review mechanisms can ensure that substantive norms are complied with, for instance that there is no undue degradation of

water quality or forests excision. This has seen the concept of Public Interest Litigation emerge and grow in leaps and bounds.

Although we are going to discuss Public Interest Litigation later on it will suffice here to quote the Indian Court³ in defining the concept when it was stated that 'public interest litigation' meant nothing more than it stated, namely that it is a litigation in the interest of the public. It is not the type of litigation which is meant to satisfy the curiosity of the people, but it a litigation which is instituted with a desire that the court would be able to give relief to the whole or a section of the society. It is emphasized in that case that the condition which must be fulfilled before public interest litigation is entertained by the court is that the court should be in a position to give effective and complete relief. If no effective or complete relief can be granted, the court should not entertain public interest litigation.

In most jurisdictions, the primary and most direct subject of environmental duty is the state. For the state not only controls enormous resources but also is the best placed to take measures that raise macro-level appreciation of multiple activities and outcomes. Environmental duties are also imposed on individuals, communities and other private or non-state agencies who are often the direct users of environmental resources. The content of duty at this level is determined by reference not only to the rights invested in other individuals, agencies or other species, but also the overall goals of environmental management in a specific national context. Thus, as duties relating specifically to the environment, however, they become subject to public oversight, *inter alia*, through third party intervention. Often, the recourse is to the courts of law. Indeed, the very existence of a scheme of rights and duties is reason enough to expect that claims will arise in the one case for violations and, in the other, for dereliction or malfeasance.

It would therefore be correct to say that the whole regime of environmental management is interwoven with the concept of constitutionalism. Constitutionalism recognizes the necessity for government but insists upon a limitation being placed upon its powers. This limitation is often achieved through the doctrines of the Rule of Law and Separation of Powers.

According to Dicey, the Rule of Law lay in three principles which he enunciated in his classic, The Law of the Constitutions, written in 1885. The three principles were:

- “The absolute supremacy or predominance of regular law as opposed to the influence of arbitrary power” excluding “the existence of arbitrariness, or prerogative, or even of wide discretionary authority on the part of the government”;
- “Equality before the law, or the equal subjection of all classes to the ordinary law administered by the ordinary law courts; and
- “The law of constitution, the rules which in foreign countries naturally form part of a constitutional code, are not the source but the consequence of the rights of individuals, as defined and enforced by the courts”.

As regards separation of powers, Montesquieu in his book The Spirit of the Laws Book XI written in 1749 argued that in every government there should be three sorts of power; the legislative, the executive and the judicial powers. It may be concluded that constitutionalism requires for its efficacy a differentiation of governmental functions and a separation of agencies which exercise them. It must of course be admitted that, in the light of the practice and exigencies of modern government, governmental agencies are multifunctional; some overlapping in the functions of the various agencies is inevitable.

The Brundtland Report⁴ states that the management of the environment has become imperative if the world is to sustain itself both for the present and future generations. This means that natural resources and the ecosystems must be used in a sustainable manner. Thus “sustainable development” is defined as development that meets the needs of the present without compromising the ability of future generations to meet their own needs and the United Nations Environment Programme (UNEP) has since added that it requires “:the maintenance, rational use and enhancement of the natural resource base that underpins ecological resilience and economic growth” and “implies progress towards international equity⁵.”

³ In the case of Peoples Union for Democratic Rights Vs Minister for Home Affairs AIR 1985 Delhi 268

⁴ Our Common Future by World Commission on Environment and Development, 1987.

⁵ Quoted from Kaniaru, D. “A lecture on Law as an Instrument for Promoting Sustainable

One way of achieving environmental management is through the medium of law, specifically environmental law. Environmental law consists of the ensemble of rules and norms that govern the care and concern for the environment.

The role of law in the development process is three dimensional⁶. First, it can provide institutional mechanisms for the allocation of natural resources, norms regulating the use and development of these resources and sanctions attendant upon violations. At this level, the primary concern of the law is to ensure that development and use are accompanied with appropriate resource management measures which will pre-empt waste and the environmental degradation resultant upon waste.

Secondly, it can set standards and provide sanctions in respect of the disposal of the deleterious by-products of the development process as well as the sale and use of new technology in the production process. The objectives at this level are to ensure that the by-products are subjected to appropriate and adequate waste treatment process before being discharged into the environment, and that the introduction of new technology in production does not impinge upon the quality of the environment.

Lastly, it can institute anticipatory mechanisms for the assessment and control of the programs on the environment. At this level, the law creates institutions and confers power on them to examine the nature of the proposed development projects, assess their possible impact on the environment and ensure that the appropriate and adequate measures for environmental protection are built into such projects before they are operationalised⁷.

One such institution created by the law is the Court. There are many different types of courts and many ways to classify and describe them. In the scheme of the Environmental Management and Co-ordination Act, the High Court is specifically identified as the Court to determine the violation of environmental entitlements. However, part XIII of the Act

Development". 1995 (unpublished)

⁶ Ogolla Bondi, The Role of Environmental Law in Development in Contemporary Conceptions of Social-Philosophy, edited by E. Parou et al (AR SP SUPP. Vol. V) Stuttgart, Franz Steiner Wisebaden P.120

⁷ Ibid

creates a number of environmental offences. This suggests that the trial court need not necessarily be the High Court. An examination of the role of courts in Kenya in environmental management must therefore deal with the Court of Appeal, the High Court and the subordinate courts. However, since most environmental cases revolve around enforcement of environmental rights and duties, emphasis will be placed in the examination of the High Court. Thus, the focus of this thesis will be the examination of the High Court of Kenya.

1.2 The Problem

The purpose of this study is to inquire into the role of the courts in the protection, management and conservation of the environment, and at that, conservation of the environment in legal theory and in the experience of Kenya. Many a legislative instrument on the environment places a lot of emphasis on litigation, or resort to courts as the most convenient strategy. This may be judged to be so from the manner in which almost all environment-related statutes delineate sections on the courts. More often the provisions relating to courts are of two kinds. The first kind is that which provides that any party who feels aggrieved may seek redress in the courts. The second kind deals with sanctions. These sections create environmental offences and prescribe punishments that may be meted out by the courts.

A number of reasons may explain this development. The basis of a civil law claim is a cause of action which arises when an injury has been caused to a person or property. In other words, it is based on the interference with the rights of one person by another. Our legal system places a lot of emphasis on rights and duties.

Legal instruments concerned with environmental protection, co-ordination or conservation assume that the courts will play a central role in the schemes of regulation that they propose. They then proceed to attribute functions and duties on the courts such as the right to seek redress, or deal with a range of environmental offences.

However, the inherent or regime capacity of the courts to perform these functions is not automatic – either conceptually or empirically. This means that the impact of the courts on

environmental management and /or conservation cannot be assumed or pre-defined. It is therefore necessary to investigate the capacity of the courts to perform the functions frequently ascribed in order to reach informed conclusions and inferences on the appropriate roles of courts in environmental conservation and management.

As a forum for dispute settlement it must be noted that Courts, however, do not spend all their time deciding controversies. Many cases brought before them are not contested. They represent potential rather than actual controversies in which the court's role is more administrative than adjudicatory. The mere existence of a court renders unnecessary any frequent exercise of its powers. The fact that it operates by known rules and procedures leads those who might otherwise engage in controversies to compose their differences.

Another function of courts is judicial law-making. As courts decide controversies they create an important by-product at, i.e. the development of rules for future cases. This is what is called Judicial Precedent.

Courts also administer criminal justice pursuant to the Due Process of Law. This constitutes a constitutional provision of fundamental importance that guarantees a defendant a fair and impartial trial according to applicable procedures and that requires that the law shall not be unreasonable, arbitrary or capricious.

Kenya's Environmental Management and Co-Ordination Act has substantive references to the court. At section 3 (3) it states thus:-

“if a person alleges that the entitlement conferred under subsection (1) has been, is being or is likely to be contravened in relation to him, then without prejudice to any other action with respect to the same matter which is lawfully available, that person may apply to the High Court for redress and the High Court may make such orders, issue such writs or give such directions as it may deem appropriate...” (emphasis added).

Thus, section together with its succeeding sections deal with the real “substance” of environmental management. The Act further adds the general guidelines to be followed by the High Court in arriving at its decision.⁸

But one may pose here to ask why the concern with the courts? For many legal systems, courts are a refuge for those who are unable to obtain satisfaction with administrative or other collateral channels of review or appeal and for those who feel their interests are of special importance in need of the types of sanctions or remedies which only a court can invoke. Often, the courts are the last resort by which they can preserve their allegedly violated rights. Other times, courts are consulted merely because they are the only institution available for settlement of disputes⁹

1.3 Objectives of the Study

To address the problem identified above, the study will:

- (i) Attempt an overview of the principles of environmental management.
- (ii) Outline and offer a critical analysis of the role of courts in environmental management.
- (iii) Analyze recent juridical development in legal systems comparable to Kenya.
- (iv) And finally offer practical and acceptable proposals for reforms towards greater efficiency and utility of litigation (court) in environmental management.

1.4 Justification

The very existence of a scheme of rights and duties is reason enough to expect that claims will arise in the one case for violations and, in the other for dereliction or malfeasance. Such claims may be anticipatory or based on actual damage or injury.

⁸

Section 3 (5).

⁹

Luta, R. F. “The Laws of Environmental Management: A comparative Study” (1976) 24 American Journal of International Law 447 at 514.

Traditionally legal systems have been ready to come to the aid of individuals suffering damage or loss whether of a personal or of a proprietary nature where the activities of others may have occasioned such loss or damage.

In relation to individual activities occasioning environmental damage or harm legal systems have been ready to provide compensation or some other appropriate remedy to aggrieved parties under certain well defined conditions.

Under the system of the common law, actions sounding in trespass, negligence, nuisance, or founded on the doctrine of RYLANDS VS FLETCHER (strict liability) may be available. Yet, as already mentioned these common law actions have been lamentably found to be irrelevant and unsuited to modern needs for purposes of ensuring a more effective protection of the environment.

The development of environmental law in national jurisdictions is thus now firmly established either in terms of constitutional principles or as a manifestation of political sovereignty. Specific environmental statutes now emerging in Africa address three general concerns: to elaborate standards; to design a framework for decision – making; and to set up autonomous management organs.

Thus, given the centrality of law and legal institutions, norms and procedures for better protection of the environment cannot be gainsaid. Courts are an integral part of the set bureaucratic systems. It is therefore imperative to determine their suitability and/or capacity for jobs that are too often ascribed to them.

In several jurisdictions (such as Sweden, Finland, Japan, Australia) special courts have been created to deal with water and environmental disputes¹⁰. They characteristically have highly specialized and technical expertise built in them enabling them to deal with the complexities of environmental problems and provide decisional uniformity and consistency.

¹⁰ See Jessup, "Do New Problems Need New Courts?" 65 Proceedings of American Society of International Law 261 (1971)

Environmental law as imported into Kenya borrows heavily from the common law. Under the common law the traditional authority may take action explicitly to protect the environment a private litigant instituting a suit had first to establish his *locus standi* – i.e. his interest in the matter. Judicial decisions show that the courts prefer to deal with the best Plaintiff – this is the notion that only a person who is directly affected by an action has a right to complain. In the case of environmental issues these have proved to be highly restrictive and as a result only minority of such cases are actionable (at least so far). That would be so because public duties, like the protection of environment, were not owed to the citizens, and would not be enforced by them.

In our legal system, courts deal with matters as they are brought to them, by others. Accessibility to the courts is therefore crucial. Access to the courts is one aspect of providing justice for a society. And it is not helped much by legal rules that may lock out otherwise worthy litigants.

Nevertheless, having accessed the courts, the litigant encounters new impediments. In the typical environment litigation the aroused citizen group turns to the court as a last resort after every political measure has failed. The suit is usually begun figuratively speaking in the shadow of the bulldozer: the pressure of time is upon the Plaintiff. A preliminary injunction motion must be brought¹¹.

The disadvantages of the conservationist continue into the discovery and trial proceedings. Most of the information relating to the particular project or other matter in controversy is in the possession of the adverse party. The trial may be lengthy and complex. Its trial is a difficult burden for attorneys having the burden of proof assigned to them by the substantial evidence rational basis rule. For the Plaintiffs and their attorneys to secure expert witnesses and the presentation of their testimony is difficult because of the general lack of means to pay them adequately.

¹¹ Sive David, "Some thoughts of an Environmental Lawyer in the Wilderness of Administrative Law (1970) Vo. 70 Part I Columbia Law Review, 612 at 618.

The fundamental question that arises from the foregoing is how the problems identified impact on or compromise the efficacy of the courts to fulfil their functions in environmental management. This is particularly critical in light of the centrality given to the courts as strategy for environmental management.

1.5 Conceptual Framework

The complexity of environmental problems dictates for any given country that a well-designed scheme of environmental management, with clear policy and implementation machinery should be in place. The primary duty of regulation and policing in respect of such activities must lie with the state's authorities as defined in public law, and must be conducted on the basis of detailed laws and regulations founded on a constitutional mandate.

The extent to which law can serve as a tool of environmental conservation is in the first place a question of policy - the determination of options to be fulfilled, through law making, administration and judicial vindication. By validating the broad-based policies and even politics of the decision - makers, the law sustains the chosen options through its legitimating effect. Indeed, the law does more to fulfil those options; it creates the machinery or establishes the authoritative procedures to effect the policy choices.¹²

The law can do still more. It is able to sustain a policy environment which has the effect of establishing a particular line of social orientation.¹³ This point is clearly made by Robert Seidman:

"Law enters the process of development in two ways. First, today the state usually has the burden of trying purposively to induce social change. Only the state ordinarily has sufficient capacity, resources or legitimacy to undertake such a formidable task. Typically, the state tries to induce development by changing the rules defining repetitive patterns of behaviour, and by directing its officials to act in new ways - that is, by changing the legal

¹² Ojwang, J.B. Environmental Law and Political Change in Kenya Acts Press, Nairobi 1992 p.9

¹³ Ibid.

order. Demands for development therefore appear as demands for new law...."¹⁴

The law, thus, runs alongside the state's authority, and is the state's versatile and ultimate device for fulfilling and conveying policy. The central position of law in environmental protection is thus acknowledged. The law thus creates institutions for effective implementation of policies geared towards environmental sustainability. Among such institutions are the courts.

The role of the courts is clearly discernible. However, so far, the Kenyan public - and this is true of other African countries too - have barely been litigious in environmental matters. The courts therefore have not been much involved in environmental rights - claims. But examples from other countries depict this as a potential area of activity in environmental management.

The doctrines of stare decisis and precedent are core to judicial activity. The effect of stare decisis may be seen in two respects. First, it confirms the importance that must be attached to courts. Secondly, it could have a negative impact (on environmental management) if the first case was "wrongly" decided. The converse must then also be true. These two concepts do however, have a point of confluence which is that inasmuch as courts are required to follow precedents, they are also required to make new ones. This latter observation cannot be overemphasized with respect to an evolving field such as environmental management is.

As regards precedent, it is well-known that a large part of the law of England (which is also now part of Kenyan law) consists of rules to be collected from judgments of the courts. Then too, some statutes, though, originally introduced some new rule, or principle into the law, have been the subject of so much judicial interpretation as to derive nearly all their real significance from the sense put upon them by the courts.

Indeed, it cannot be imagined that judicial legislation is a kind of law-making which belongs wholly to the past and which has been put to an end by the meetings and legislative activity

¹⁴R.B. Seidmann, *The State, Law and Development* (London Croom Helm, 1978 p.17).

of modern parliaments. New combinations of circumstances, i.e. new cases - constantly call for the application, which means in truth, the extension of old principles, or, it may be, even for the thinking out of some new principle, in harmony with the general spirit of the law, fitted to meet the novel requirements of the time.¹⁵ The courts or the judges, when acting as legislators are influenced by the beliefs and feelings of their time, and are guided to a considerable extent by the dominant current of public opinion.¹⁶ But they are also guided by professional opinions and ways of thinking which are to a certain extent independent of and possibly opposed to the general tone of public opinion.

Traditionally, the courts have protected individual, that is, private - law rights. With the development of public law and public law rights (e.g. in terms of education, employment, environment, development, etc), the courts were, nevertheless, reluctant to recognize individual or group public law rights and continued to rely on the infringement or threatened encroachment of private law right. Consequently, many good cases were lost as a result of the narrow interpretation of legal requirements such as *locus standi*.

The dominant Western jurisprudence, which was transposed to most developing countries emphasises the centrality of rights in its legal philosophy. New developments, while still retaining "right" as the "centre of action" have, however, expanded its applicability from the initial 'individual' to 'community' or 'collective' rights and generally bestowed "rights" upon entities other than the individual. This is the right that courts either declare or enforce. Thus, the effective enforcement of rights and duties through the court process can contribute to sound environmental management.

1.6 Hypothesis

The thesis proceeds on the premise of a number of hypotheses. One such hypothesis is that law is effectively the tool for sustainable environmental management.

¹⁵ Dicey, A.V. "Judicial Legislation" in Lectures on the Relation between Law and Public Opinion in England during the 19th C. Macmillan & Co Ltd. London 1963 p.361.

¹⁶ Ibid p. 363

We hypothesize further that the courts, as institutions in environmental management have possess the potential to promote sound environmental management.

It is a hypothesis in this work that the non-realization of a "clean" environment also owes to want of innovation of the judges and other judicial officers which in turn stems from judicial tradition.

Lastly, we proceed on the hypothesis that the conservationist or environmentalist seeking to overturn an administrative decision has several handicaps.

1.7 Research Methodology

Given the nature of the subject under inquiry the study will primarily require library research. Textbooks will be important especially more recent texts that address changes in environmental management techniques. Treaties, conventions, protocols, declarations, international and regional resolutions will be examined.

Articles by authoritative writers both published and unpublished will be sourced. To a good extent we will also rely on papers and discussions in various national, regional and international fora, where environmental management has been discussed. 2

However, for purposes of clarity and seeking judicial perception of environmental management we propose to interview judges who have handled such matters, whether retired or otherwise. Much of what has been written on public interest litigation is of recent authorship. It is expected therefore, and already experienced thus far that libraries will be germane to our research purposes. The libraries of the Faculty of Law, University of Nairobi, the United Nations Environment Programme (UNEP), the British Council Library and the American Cultural Centre will be available. We will also endeavour to get materials from the Ministry of Environment and Natural Resources. Additionally we shall source

from various books, documents and articles held in our home libraries and latest materials posted on the internet.

Given the nature of this work, a great deal of effort will be spent on review of judicial decisions on matters related to the environment both nationally and internationally.

1.8 Summary

The broad government mandate, which is first and foremost a “development mandate” should anticipate environmental protection as a central element in policy-making and as an aspect of an appropriate law making and of good administration under the law. Its due discharge is destined to inure to the Public as a matter of vital interest and in certain cases as a matter of constitutional and legal rights.

There is thus a dynamic relationship between environmental goals and the operations of governmental machinery (which constitute the main public interest apparatus). The public interest in the environment arises too by dint of the interplay between inter-generational equity and sustainable development.

”

CHAPTER TWO

ENVIRONMENTAL MANAGEMENT IN THE PRESENT CENTURY

2.1 Introduction

The late twentieth century witnessed an unprecedented increase in legal claims for both human rights and environmental goods. Never before, have so many people raised so many demands relating to such a wide range of environmental and human matters. And never before have legal remedies stood so squarely in the center of wider social movements for human and environmental protection. In recent years law-making activities in these areas, at both the international and domestic level, have been marked not only by speed and proliferation, but also by remarkable innovation. Such innovation has also grown in response to myriad threats to the environment.

3

Kenya, like many other developing countries faces an array of serious environmental challenges. Unsustainable exploitation and degradation of forests, soils, wildlife, fresh water, and other natural resources threaten to undermine the national, economic development prospects as well as the ability of the country to meet commitments to international conservation objectives.

The country's economic and political stability are critically dependent on maintaining her ecological integrity. Agriculture and tourism, the two largest sectors of the economy, are

both directly dependent on environmental goods and services.¹⁷ In addition, Kenyan cultural and political structures are closely tied to the natural resource base, linking the erosion of ecological systems to the erosion of social and political systems as well.

Recognition by the Kenyan government of the importance of the environment in economic prosperity came as early as 1965¹⁸. Therein the government recognized the need to conserve natural resources for all future generations and also that the concern with the quality of the environment must be placed on equal footing with the need to exploit natural resources for national development. The government has subsequently been grappling with this issue in its various National Development Plans. The apex of these efforts was the drafting and circulation of the National Environmental Enhancement and Management Bill in 1982 by the National Environment Secretariat (NES). This provided *inter alia* for an environmental impact assessment as a requirement for all private and public projects. However, for reasons that still remain unclear, the bill never reached Parliament.

The history of Kenya has witnessed two epochs in the global environmental movement. In 1972, the United Nations Conference on the Human Environment, held in Stockholm, defined the general principles and recommendations for environmental management, at the national and international planes. The conference also galvanized the opinion of the international community on the imperatives of environmental protection as a global priority issue. The second epoch was in 1992 when the UNCED what is now well known as the

¹⁷ See generally Government of Kenya, National Development Plan 1997 – 2001.

¹⁸ Government of Kenya “African Socialism and its Application to Planning in Kenya.” Sessional Paper no.10 of 1965, Government Printer, 1965.

Agenda 21: those policies and strategies on environment and development, intended for action as the global community ushers in the 21st century.

The failures of previous attempts to address Kenya's environmental challenges stemmed in part to weak institutional arrangements. It did appear that while the top policy organs were committed, there was weakness at the technical level. Thankfully, ten years later the process picked up again. The government has as a consequence moved and enacted an all-encompassing Environmental Management & Co-ordination Act.¹⁹

Concomitant with what has been settled on the international arena, the EMCA declares the entitlement of every person in Kenya to a clean and healthy environment. The Act also identifies the court as fundamental in the realization of that entitlement.²⁰

To be able to understand Kenya's efforts to stem its environmental morass, the proper starting point is no doubt to understand the various concepts as are applicable to this endeavour and as used in this discourse. This must be our take off point because law is a craft, and a lawyer is a craftsman. As a craftsman he should know the art of using his tools efficiently. As a lawyer learns his craft and improves upon his skill, he improves upon his knowledge of his tools. To be a good craftsman the knowledge of law and the use of tools of his profession are thus essential. These tools of a lawyer are concepts, logic and language²¹. The analysis and knowledge of legal concepts is essential to the understanding of

¹⁹ Act No. 8 of 1999 of the Laws of Kenya.

²⁰ Ibid

²¹ Rheinstein, M. "Education for Legal Craftsmanship," 30 Iowa Law Review,

the legal nature of the problematic situations of law and their presentation in solving them. Keeping this in mind, Cook states:-

“One function of jurisprudence is to examine critically the terms used in lawyer’s statements of his rules and principles, and the concepts for which these terms stand. The object of such a critical examination may be purely intellectual satisfaction; on the other hand, it may be a practical one to find out whether the conceptual tools the lawyer and the judges are using are adequate to their needs.”²²

2.2 Principles of Environmental Management

The decision that the global community should commence development of fundamental principles to combat environmental degradation came with the 1968 U.N. General Assembly Resolution which convened the U.N. Conference on the Human Environment (UNCHE), eventually held in Stockholm in June 1972. The Conference was the first time to see the articulation and adoption by global consensus, a set of 26 Principles with supporting recommendations to guide environmental management. December 1983 saw the beginning of a systematic and deliberate process when the now- famous Brundtland Commission was initiated. It was mandated to study the links between environmental science, law and development, in preparation for the 1992 U.N. Conference on Environment and Development (UNCED). The Expert Group on Environmental Law of the Brundtland Commission, which was representative of different regions and development philosophies,

(1944) p.408.

²² Cook, W. W, “The utility of Jurisprudence in the solution of Legal Problems,” in Lectures on Legal Topics (New York: Macmillan, 1928) p. 338.

helped synthesize the necessary legal principles which were to support development of Agenda 21 as the set of recommended action plan on environment and development. The celebrated Rio Declaration on Environment and Development adopted by the UNCED comprises 27 Principles which have now had the largest impact on development of philosophy and law in environmental field in terms of global acceptance.

Rio Principles are widely and intensely quoted and invoked. Many of the principles have been incorporated into global and regional treaties, as well as in soft law instruments. Similarly, some have been incorporated into national Constitutions and statutes. Both developments lead to enforceability of the principles, now in form of law, at all the three levels. In the case of Kenya, these have found expression in the Environmental Management and Co-ordination Act. Among the key principles are the following:

- (a) The principle of transparency, uninhibited access to justice and public participation in the development of policies, projects plans and processes for the management of the environment.
- (b) The principle of inter-generational equity and sustainable utilization, ensuring that the present generation utilizes and enjoys environment and natural resources but without jeopardizing the interests of future generations.
- (c) The polluter-pays principle which requires that those responsible for the degradation of environment and natural resources are responsible for the costs of the corrective measures, including reparation.
- (d) The principle that social and cultural values, traditionally applied by any community in Kenya for the management of environment or natural

resources, be observed in so far as the same are relevant and are not repugnant to justice and morality or with any written law.

- (e) The principle of international cooperation in the management of environment and natural resources where such resources are shared with other states or where management measures in one state may have adverse or positive consequences in another state.
- (f) The precautionary approach which requires application of precautionary principle, environmental impact assessment and that where there are threats of serious or irreversible damage, lack of full scientific certainty shall not be used as a reason for postponing cost-effective measures to prevent new or continuing environmental degradation.
- (g) The principle that exigencies of sound environmental protection should be integrated in all development planning and management.
- (h) The principle that for every aspect of environmental planning, policy and management must be identified with specific legal and institutional framework, whether existing or new, for its implementation and that Parliament is obliged to enact one where none exists. Such an institution is facilitative and not a bar to application of the principle.

Section 3 of EMCA requires that these principles should guide all decisions made in administrative and judicial domains on matters related to environment and natural resources to ensure sustainable development.

2.3 Environmental Management

The environmental concern with nature's role in human, economic and social development readily makes an agenda for political business. But more specifically, problems related to the environment have turned out to be inextricably linked to immediate concerns of government, such as types, varieties and levels of national resources; operative modes of resource use and development; productive capacity (for instance in relation to irrigated agriculture, soil fertility, forest and genetic resources, wildlife resources, fisheries, water resources, hydro-electric power capacity). All these concerns determine the level of national development.

“Environment” has been defined in various words by various authors. One such definition is thus:-

“...the surface area of the earth made up of the atmosphere, the oceans, the upper surfaces of the land areas of the continents and islands associated with them and the living things that inhabit this area.”²³

Prof. Okidi also reflects this broad notion of environment when he defines it to

“include land/soil, water, forests and vegetation cover, livestock, fish and other wildlife; the minerals under the land and the air which envelopes the earth's surface; and human beings. Then the artificial infrastructures include

²³ Dasmann, R. KF, 1972. Environmental Conservation 3rd ed: New York John Wiley & Sons, p.13.

the intrusion into that natural setting in the form of human constructions for human settlement.”²⁴

The Environmental Management and Co-ordination Act itself defines environment as follows:-

“environment includes the physical factors of the surroundings of human beings including land, water, atmosphere, climate, sound, odour, taste, the biological factors of animals and plants and the social factor of aesthetics and includes both the natural and built environment.”²⁵

For the purposes of this thesis, “environment is understood as the totality of nature and the natural resources, but includes the cultural heritage and the infrastructure constructed by humans to facilitate socio-economic activities.²⁶ Thus the concept of environment is actually the complete context comprising nature and natural resources, and not only specific resource sector. The various sectors such as water, forests, human beings, minerals, fish, air and energy are simply components of the environment. Within that definition, the infrastructure constructed to facilitate socio-economic activities such as settlements, factories and transport

²⁴ Okidi C. O., “Reflections on Teaching and Research on Environmental Law in African Universities.” (1988) 18 Journal of Eastern African Research and Development 128 at p. 130.

²⁵ Section 2

²⁶ A working Group of the IUCN’s Commission on Environmental Law (CEL) defined it as the totality of nature and natural resources as well as cultural heritage and the infrastructure essential for socio-economic activities. While agreeing with the general spirit of the former definition, the majority of the Working Group opined that central to the notion of environment was nature, encompassing the earth’s geosphere, biosphere and associated processes, while natural resources are the components of nature which can be used for socio-economic activities by man and other species. The meeting was held in Bonn, Germany between 14-16 March 1991.

infrastructure are all parts of the environment.²⁷ All in all, the definitions employ different phraseology, but amount to the same thing. This environment is what is sought to be managed sustainably.

Environmental issues are quite complex. For this reason, every country should have an effective framework for environmental management. This should center on policy, law and implementation machinery. Environmental management, in this sense, may be defined thus:-

“The control or management of the environment essentially means measures taken to balance natural resources. The measures may be of two kinds; one aspect may be to ensure.... balanced utilization so as to prevent over-exploitation, or to restore those that have been utilized to strenuous levels. The other aspect may be measures taken to prevent the introduction of any substances or energy which might immediately or in the long run, cause deleterious consequences to the natural resources.”²⁸

The concept thus focuses on natural resources, in their quantity and quality as well as with reference to the overall medium in which they exist and are utilized the concern here being the suitability of that medium for the regeneration of humans and fauna and flora species. Environmental conservation is thus concerned with the stability of the ecological cycles that

²⁷ UNEP, The Making of a Framework Environmental Law in Kenya ACTS Press Nairobi, 2001 at p.5.

²⁸ Okidi C. O., “Management of Natural Resources and the Environment for Self-Reliance” (1984) Journal of Eastern African Research and Development Vol. 14, p. 92 at p. 97.

sustain the symbiotic relationship between the natural resources and the species that survive upon them.²⁹

In other words, environmental management includes the measures taken by the state in order to regulate the use and development of natural resources and secondly to anticipate and control the environmentally undesirable consequences that arise from the development process.

Section 2 of the EMCA defines environmental management in the following terms:-

“Environmental management includes the protection, conservation and sustainable use of the various elements or components of the environment.”

The same section also then defines “sustainable use” as “present use of the environment as natural resources which does not compromise the ability to use the same by future generations or degrade the carrying capacity of supporting ecosystems.”

Environmental management does not denote that the environment should be managed. It is the activities which impact on the environment that have to be managed and kept within tolerable constraints.

Measures to achieve environmental management include economic instruments such as taxation, permits, standards, tax incentives to reduce pollution, financial incentives in the

²⁹ Ojwang, J. B., (1992) Environmental Law and Political Change in Kenya Nbi, ACTS Press, p.5.

form of subsidies for polluters who modify the environmental impact of their activities among others.³⁰

Environmental management can also be achieved through the medium of law, specifically environmental law. Environmental law has been defined as:

“...the ensemble of norms, statutes, treaties and administrative regulations to ensure or facilitate the rational management of the natural resources and human intervention in the management of such resources for sustainable development.”³¹

The emphasis on law is because it is possessed of certain inherent advantages which are likely to render it more successful than other devices in the task of management.³² Law is, in many cases, the best way of implementing policy. It does this by creating the machinery, or procedures for implementing the policy choices.³³ This means law will employ appropriate statutes, policing personnel, courts and devices such as permits, and ultimately sanctions to serve social policies. Furthermore, since the law can sustain a policy environment which has

³⁰ Organisation for Economic Co-operation and Development (OECD), Economic Instruments for Environmental Protection. Paris, 1989 pp.12 -14.

³¹ Okidi, 1988 p.130.

³² Andrew, W. Law of Industrial Pollution Control George Godwin Ltd, London 1978 at pp. 5-6.

³³ Ojwang, 1992, p. 9.

the effect of establishing a particular line of social orientation, it is the state's ultimate device of fulfilling and conveying policy.³⁴

In this context, law will provide policies and legislation that will regulate and maintain the stability of the natural resources and ecosystems. Ultimately the law will employ sanctions to punish those who do not comply with it.

The law will establish a framework of rules and procedures designed to guide action for resolving environmental problems as well as preventing adverse changes.³⁵ However, to be effective environmental law should not be seen as just another new system of rules and agencies. Rather, it must be viewed as part of the eco-management, **“...a comprehensive process of resource management informed by eco-systematic knowledge and progressively integrated with economic development planning...”**³⁶ Eco-management has been defined as management of the human environment according to ecological principles.³⁷

It is not difficult to see why environmental management is important. Kenya, as indeed many developing countries, faces an array of serious environmental challenges. Unsustainable exploitation and degradation threaten to undermine the nations economic

³⁴ Ibid.

³⁵ Dyreck, J. Rational Ecology: Environmental and Political Economy Blackwell Inc. Oxford 1987 at p.137.

³⁶ Mayda, Jaro “Environmental Legislation in developing Countries: Some Parameters and Constraints 1985 Ecology Law Quarterly 997 Dyreck, J. Rational Ecology: Environmental and Political Economy Blackwell Inc. Oxford 1987 at p.137. Ibid p. 1028

³⁷ Ibid p. 1028

development prospects as well as its ability to meet commitments to international conservation objectives. Such as those embodied in the Convention on Biological Diversity.³⁸

The country's economic and political stability are critically dependent on maintaining her ecological integrity. Agriculture and tourism, traditionally the two largest sectors of the economy, are both directly dependent on environmental goods and services.³⁹ In addition, Kenyan cultural and political structures are closely tied to the natural resource base, linking the erosion of ecological systems to the erosion of social and political systems as well.

2.4 Sustainable Development

In as much as there are successes and signs of hope in the world, the same processes that have created the gains have given rise to trends that the planet and its people cannot long bear. These have traditionally been divided into failures of development and failures in the management of our human environment.

On the development side, in terms of absolute numbers there are more hungry people in the world than ever before, and the numbers who cannot read or write, the numbers without safe water or safe and sound homes, and the numbers short of wood fuel with which to cook and warm themselves. The gap between the rich and poor nations is widening – not

³⁸ The Convention was adopted on 22nd May, 1991 in Nairobi (Kenya) and was opened for signature at the UN Conference on Environment and Development (UNCED) held in Rio de Janeiro (Brazil) from 3rd to 14th June, 1992.

³⁹ See generally Government of Kenya National Development Plan 1997-2001, Government Press, Nairobi 1997.

shrinking – and there is little prospect, given present trends and institutional arrangements that this process will be reversed.⁴⁰

In the early 1970's, especially in the run-up to the Stockholm Declaration of the United Nations Conference on the Human Environment (1972), it was acknowledged that, whereas the outstanding environmental issues in the developed countries were mainly pollution and deterioration of settlements, the developing countries were primarily concerned with the environment as a medium for and a factor in resource use for sustainable development. Their concern was poverty- how to lift themselves from this scourge through more intensive use of resources which did not destroy nature's supporting systems for such undertakings.⁴¹

Development, which is at the very core of the new nations, has been defined thus:-

“Firstly, development is the process by which a country provides for its entire population all the basic needs of life, such as good health and nutrition, education and shelter, and provides every one of its population with opportunities to contribute to that very process, through employment as well as scientific and technological construction. Secondly, it is the process by which national government authorities construct and maintain productive mechanisms and infrastructure which diversify and perpetuate the productive base of the country, such as agriculture and industries, so as to ensure the

⁴⁰ Our Common Future. P.2

⁴¹ Ojwang J. B., 1993, Environmental Law and the Constitutional Order, Nairobi, ACTS Press p.4.

pressures and necessities of the national and related economic system for the present and for all future times.”⁴²

Thus development as defined above, is intimately intertwined with the environment. It is for this reason that it is acknowledged that the ultimate concerns of environmental law are two-fold:

“to provide a regulatory framework for those human activities which may undermine the vital natural assets that support the normal economic and social life; and to provide the appropriate legal theory to explain and guide the path of law in environmental management.”⁴³

The Brundtland Report⁴⁴ states that the management of the environment has become imperative if the world is to sustain itself both for the present and future generations. This means that natural resources must be used in a sustainable manner. The Report states thus,

“...sustainable development is not a fixed state of harmony, but rather a process of change in which the exploitation of resources, the direction of investments, the orientation of technological development, and institutional change are made consistent with future as well as present needs.”⁴⁵

⁴² Okidi, C. O., 1984 “Management of Natural Resources and the Environment for Self-Reliance” Journal of Eastern African Research and Development Vol. 14, pp. 92-111, at p. 93

⁴³ Ojwang J. B. 1993 p.1.

⁴⁴ Our Common Future

⁴⁵ Ibid p.9

Thus, sustainable development is meant to reduce the conflicts that cause environmental degradation by providing a vehicle for integrating the environment and the economy.

Kenya's own principal legislation on the environment defines sustainable development as follows:-

“sustainable development means development that meets the needs of the present generation without compromising the ability of future generations to meet their needs by maintaining the carrying capacity of the supporting ecosystems.”⁴⁶

The concept of sustainable development does imply limits – not absolute limits but limitations imposed by the present state of technology and social organization on environmental resources and by the ability of the biosphere to absorb the effects of human activities. It recognizes that technological innovation and social re-organization are indispensable to ensure that growing productivity does not push the ecological resilience of the biosphere beyond its limit. That limit is not comprised only by the capacity of the biosphere to absorb waste generated in the production process, but also in the vast but finite quantity of natural resources on which economic growth depends.

Secondly, it requires poverty alleviation. This could be attained by *inter alia*, population control and economic growth pursued through environmentally non-destructive means, more equitable distribution of the fruits of economic growth, and abandonment of

⁴⁶ EMCA, Act No. 8 of 1999, S.2

excessively affluent lifestyles. In the context of Kenya, this could not be more apt in light of the poverty alleviation policy being implemented.

Thirdly, sustainable development requires the pursuit of growth patterns that secure the needs of the present generation and do not compromise the ability of future generations to secure their own needs. The concept requires both global and national efforts for integrated management of natural resources, limits on exploitation of such resources, and control of degrading activities. These must be sensitive to the interests of the individual states.⁴⁷

While the principle has had a long existence, its practical contours are still unclear. Its main achievement, however, has been to embrace economic development as more or less prior to but in tandem with, and necessary for, environmental protection.⁴⁸ But, for individual states, this emphasis does not yield clear workable prescriptions for determining how much economic growth should be allowed to operate on pure market considerations in the face of development induced ecological degradation.⁴⁹ To accommodate the latter, more so because environmental protection by “clean technology” is known to be economically profitable, concession is made for governments to balance the development-environment scale by employing a range of regulatory and other measures. These include establishing

⁴⁷ See generally *Our Common Future*... pp. 8-9, 45-65, 89-90 (1987).

⁴⁸ This position is emphasized by WCED when it argues that, since uneven development, poverty and population growth” exert “unprecedented pressures” on the world’s natural resources, “not least in the developing countries ... what is needed ... is a new era of economic growth... that is both forceful and ... socially and environmentally sustainable WCED, *Our Common Future* at p. xii.

⁴⁹ Dzidzornu, D. M. “Four Principles in Marine Environment Protection: A Comparative Analysis,” Vol. 29 No. 2 *Ocean Development & International Law* 1998 pp. 91-122, at p. 95.

environmental standards to be enforced by, *inter alia*, tradable permits enabling industrial establishments to buy and sell allocated quotas for effluent emissions and discharges, taxes to be used for environmental improvement or restoration, exaction of liability for specific environmental damage, recognition of rural poverty as a species of environmental degradation to be alleviated by creating improved economic conditions, or proper valuation of natural resources and adequate payment therefor in order to discourage profligate consumption. This puts governments in the forefront of environmental policy formulation and execution as an ethical commitment of political will.⁵⁰ In the developing countries, that commitment has been almost routinely compromised for investment capital and projects, and the continued pursuit of development models long proved as unsustainable.⁵¹

Beyond the central issue of the economy–environment balance, domestically and internationally, sustainable development's core element is inter-generational equity. This requires the use of natural resources in such ways that their diversity and quality are conserved and their accessibility guaranteed equitably to facilitate meeting the needs of present and future generations. Whether for the interest of the present or future, inter-generational equity reiterates the need to take an inter-temporal stance toward environmental protection and conservation both as a matter of ethics and legal development.⁵² It is in this

⁵⁰ Ibid

⁵¹ See also M. Adams, Green Development: Environment and Sustainability in the Third World (1990); Michael Redclift, Sustainable Development: Exploring the Contradictions, (1980). The World Bank and other financial institutions that fund projects in the developing countries continue to be criticized for ensuring the observance of their funding terms but paying only perfunctory attention to environmental issues connected with these projects.

⁵² See Lothar Gundling, "Our Responsibility to Future Generations" 84 *American Journal of International Law* 207 (1990).

respect that Agenda 21⁵³ lays emphasis on governments' responsibilities to involve their publics at large, and particular groups, in their environmental protection programmes. They are to co-operate in science and technology development, development of local capacity and institutions, and development of environmental education, and to pursue integrated, rather than discreet, sectorally independent management of the environment, using the latter as the basis for developing environmentally sound policies and relevant national and international legal instruments. Although Agenda 21 itself is not legally binding, its elaboration of sustainability in its comprehensive principles and predatory norm constitutes a minefield for the development of new rules setting out enforceable thresholds for permissible environmental conduct.

2.5 Environmental Rights vis-à-vis Environmental Duties

At the UN conference on the Human Environment in Stockholm in 1972, a number of delegations thought a distinct body of environmental or "ecological" rights already existed in international law. The problem then, was how to define those rights, identify their holders and evaluate their utility in a dynamic social context.

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There have been as many definitions of the term "right" in as much as there have been jurists.

⁵³ The detailed programmatic, non-binding prescription of the 1992 United Nations Conference on Environment and Development (UNCED) for achieving holistic sustainable development in the use of all biosphere resources for social and economic purposes. See Lothar Gundling, "Our Responsibility to Future Generations" 84 *American Journal of International Law* 207 (1990).

Vinogradoff⁵⁴ defines right as an attitude of demand. But this is not very true since it can be argued that it is not every person who can form an attitude of demand- cases in point are for example children and lunatics. Yet children and lunatics have rights.

Gray⁵⁵ defines right as a power of enforcing the correlative duty. However, there are limitations to this definition. For instance, in case of a qualified right, such as a right of imperfect obligation, right cannot be enforced in a court of law. Moreover, it is not always possible that a right must be correlative to a duty.

Some other definitions have been given by such eminent jurists as Allen⁵⁶, Holmes⁵⁷, Salmond⁵⁸ and Holland⁵⁹. According to Holland, every legal right has the following characteristics: the person entitled; the object of a right; the act or forbearance; and the person obliged.

The definitions of right discussed above refer to the meaning of right in its strict sense. By strict sense it is meant that “right” constitutes the correlative of legal duty. In addition to this strict sense it is also used in a wider sense to include other legally recognized benefits, advantages, interests without considering whether they have a corresponding legal duty or

⁵⁴ Vinogradoff, P. “The Foundation of a Theory of Rights, in Collected Papers, Oxford, 1928, p. 367.

⁵⁵ Gray, J. C. The Nature and Sources of the Law, New York: Macmillan 1924 at p. 29.

⁵⁶ Allen C. K., Legal Duties, Oxford: Clarendon Press, 1931 p.183.

⁵⁷ Holmes, O. W, Common Law, Boston: Little Brown & Co, 1945 p. 214.

⁵⁸ Salmond J. W, Jurisprudence London Sweet & Maxwell, 1966 p. 217.

⁵⁹ Holland T. E, Jurisprudence Oxford: Clarendon Press, 1900, p. 85

not.⁶⁰ Right – duty is sometimes used to indicate a relation which in reality does not refer to the meaning as one generally understands by right-duty. For example, a man says that he has a right to trade and if this right implies duty, it means that others are bound by duty either to assist him or refrain from impeding his business activities. But in this example, right implies some other benefits or advantages given by a rule of law to an individual which are free from duty.⁶¹

To clear this confusion in the use of the word 'right' in legal relationships, Hohfeld distinguished four senses of legal right and established their logical relationship. He carried the analysis of right into four pairs of correlatives and opposites.⁶² Hohfeld (as quoted by Corbin in the writing aforementioned) defined a right as an enforceable claim to performance (action or forbearance) by another; a duty as the legal relationship of a person, B, who is commanded by society to act or to forbear for the benefit of another person A, either immediately or in the future, who will be penalized by society for disobedience.⁶³

In Hohfeld's scheme, legal relations only exist between legal persons, and right is always followed by duty, i.e one implies the other. Thus, when one is entitled by legal process to compel another person to act in a certain way, either to do or refrain from doing, right-duty relationship comes into existence. Right and duty are correlative in the Hohfeldian matrix

⁶⁰ Bhalla, R. S., Concepts of Jurisprudence Nairobi, Nairobi University Press 1990, p. 72.

⁶¹ Ibid, p. 73.

⁶² See Corbin, A-L "Legal Analysis and Terminology" 29 Y.L. J (1919) pp. 167-170.

⁶³ Ibid

but as soon as one establishes unenforceable rights or impersonal duties or absolute duties Hohfeld's scheme of right-duty fails.⁶⁴ The relation of right and duty is not perfect in all cases involving either a right or a duty.

From the foregoing discourse, one may ask what it meant to say that contemporary jurisprudence recognized environmental rights? Since all rights must be founded on basic social values, then the question becomes: on which values were the assertions of environmental rights founded?⁶⁵

Our position is that such assertions were not derived from any one value. Environmental rights are clearly a composite product of older and more recent value systems. Specifically, they are founded, *inter alia*, on systems of theology, property, social welfare and democratic governance.⁶⁶ From theology they are increasingly focused on the centrality of human life in all decisions affecting the environment, a factor which has led many scholars to argue that environmental rights are in essence a part of human rights. The notion that survival substantially depends on the quality of environmental resources is an established tenet of environmentalism. From property, especially common property regimes, they take concern for an essential part of an individual and collective stewardship.

⁶⁴ Bhalla, 1990, p. 75

⁶⁵ Okoth-Ogendo, H. W. O., "The Juridical Framework of Environmental Governance": in Okoth-Ogendo, H. W. O., & Tumushabe, G. W. (eds) Governing the Environment ACTS Press Nairobi, 1999, p. 45.

⁶⁶ Ibid

More recently, the rise of welfare state and of democratic ideals have added voice to environmental rights. From social welfare values, these assertions have derived the need for intra and inter-generational equity and sustainability in the management of nature. Hence their commitment to defending it as a public good- which defence is effected through public interest litigation. The extension of the police power of the state beyond the confines of land use to the protection of nature, in general, is essentially a welfare state ideology. And finally, political principles emphasizing on open decision-making process and people-based initiatives and dynamism to the notion of environmental rights, namely that they embody democratic governance. Thus an “environmental right” may be described as freedom to exploit an environment adequately but responsibly for long-term equity. In Kenya, this is embodied in the entitlement to “a clean and healthy environment”,⁶⁷ and inter-generational equity as one of the fundamental principles.

The foregoing formulation clearly shows that the quest for environmental rights has necessitated a departure from definitions of a “right” as hitherto known to law. As we saw in the examples of definitions of “right” the dominant ideology in Western Jurisprudence is that rights exist only as properties of individuals. They alone are capable of enjoying them in a legal sense. That, however, is too narrow a view at least with respect to environmental management. It is now widely accepted that communities, whether organized or not, and corporate entities, associations, or groups defined simply by social and cultural ties, can and do have and enjoy rights by reason of their collective characters. Thus when the EMCA talks of “every person” it must mean more than the individual natural person.⁶⁸

⁶⁷ Section 3, Environmental Management and Co-ordination Act, Act No. 8 of 1999.

⁶⁸ Ibid.

In the Hohfeldian Matrix, rights and duties are correlative. This means that for every right there must be a corresponding duty and vice versa. Several questions abound with respect to environmental rights, as if environmental rights exist in fact, they do – what duties derive from them? On who are they imposed? Since performance of duties often requires supervision, what is the nature of that responsibility?

Unlike rights, environmental duties are not entitlements.⁶⁹ Rather, they are action requirements intended to ensure that entitlements generated by a regime of rights are not only expected and protected but also in fact, achievable. For this reason, one cannot talk of a single category of duties. The literature identifies at least four sets of duties.

The first is to refrain from activities injurious to the environment or any component of it. The second is to perform specific tasks on a regular basis to ensure environmental quality at all times. The third is to guarantee a floor of quality enough to ensure that all survive, especially the human species. Unlike the second, there is no call to enhance environmental quality. Rather, the focus is to prevent loss of quality.

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The fourth duty is to police, supervise, monitor and evaluate the performance of individuals and all agencies on which the first three or any other duties are imposed. A number of institutional models have been developed whose functions and powers vary both from, one jurisdiction to another and with their specific environmental mandates. In the case of Kenya, one such institution is the courts.

In most jurisdictions, the primary and most direct subject of environmental duty is the state. This is because the state not only controls enormous resources but also is the best placed to

⁶⁹ Supra Note 50 p. 47

take measures that raise macro-level appreciation of multiple activities and outcomes. Thus, at the national level statutes designate specific institutions to be responsible. In Kenya this has been placed upon a body called the National Environment Management Authority (NEMA). Uganda equally has a similar institution going by exactly the same name.

Environmental duties are also imposed on individuals, communities and other private or non-state agencies who are often the direct users of environmental resources. Usually in this bracket fall the project proponents. The content of duty at this level is determined by reference not only to the rights invested in other individuals, agencies or other species, but also the overall goals of environmental management in a specific national context. Thus, as duties relating specifically to the environment, however, they become subject to public oversight, *inter alia*, through third party intervention. This oversight is assured through the process of Environmental Impact Assessment or by plaintiffs seeking cessation of environmental degradation. Often, the recourse is to the courts of law.

2.6 Summary

In a number of developing countries, governmental implementation of national (and international) objectives and obligations are hamstrung by lack of institutions, legislation, policy documents, public ideologies, human resources and other operational constraints, leading to inability to cope with the numerous environmental challenges posed.

There is the critical need for the creation of a legal framework for the sustainable management of the environment and natural resources. This legal framework must necessarily espouse the various principles of environmental management as discussed beforehand- namely the protection of the threshold of sustainability, inter-generational equity, public participation, access to justice and the courts of law and their resultant remedies, among others. Even where environmental legislation is in place, the enforcement of legal provisions is hampered by the absence of organizations and mechanisms for judicial redress. Most African governments lack the resources and personnel to take up court cases in the protection of the environment. In any case, in many instances the governments are part of the problem.

It can therefore not be overemphasized that the interplay between environmental rights and duties necessitate third-party intervention. Often, the recourse is to the courts of law. With the benefit of good understanding of the concepts as discussed in this chapter, our debate must shift to a higher gear in the next chapter.

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CHAPTER THREE

THE COURT AS AN INSTITUTION FOR ENVIRONMENTAL MANAGEMENT IN KENYA

3.1 Introduction

The very existence of a scheme of rights and duties is reason enough to expect that claims will arise in the one case for violations and, in the other for dereliction or malfeasance. Such claims may be anticipatory or based on actual damage or injury.

Traditionally legal systems have been ready to come to the aid of individuals suffering damage or loss whether of a personal or of a proprietary nature where the activities of others may have occasioned such loss or damage. Legal systems have been ready to provide compensation or some other appropriate remedy to aggrieved parties under certain well defined conditions in relation to individual activities occasioning environmental damage or harm.

Under the system of the common law, actions sounding in trespass, negligence, nuisance, or founded on the doctrine of RYLANDS VS FLETCHER (strict liability) may be available. Yet for purpose of ensuring a more effective protection of the environment these common law actions have been lamentably found to be either irrelevant and/or unsuited to modern needs.

The development of environmental law in national jurisdictions is thus now firmly established either in terms of constitutional principles or as a manifestation of political

sovereignty. Specific environmental statutes now emerging in Africa address three general concerns. The first is to elaborate standards, the second, to design a framework for decision-making, and the third to set up autonomous management organs.

Thus, given the centrality of law and legal institutions, norms and procedures for better protection of the environment cannot be gainsaid. Courts are an integral part of the bureaucratic systems designed to ensure predictability and rationality. It is therefore imperative to determine their suitability and/or capacity for jobs that are too often ascribed to them.

3.2 The Constitution and the Courts

A court is a judicial institution created to decide a legal disputes authoritatively.⁷⁰ Modern courts are usually independent of other branches of government, but in historical perspective many of the attributes associated with judicial independence, legal professional competence and objectivity were absent or considerably modified during the many centuries of judicial institutional development which preceded the emergence of courts in the variety of contemporary legal systems of the world. Martin Shapiro has observed that analysts of the attributes of courts frequently employ some sort of a model of an ideal judicial system (Shapiro 1981:1) Of these Max Weber's conceptual model is seminal. In accordance with the major elements of his ideal model, a court will be staffed by specially trained judges whose professional integrity and independence is ensured by fundamental constitutional

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Schmidhanser, J. (1992). "Courts" in Mary H & Maurice K. Encyclopaedia of Government and Politics Vol. 1 London & New York. Rontledge P. 293

safeguards. Such courts are integral parts of bureaucratic systems designed to ensure predictability and rationality.⁷¹

Authority must be exercised according to the law. And this law itself must be made according to the procedures allowed by the constitution. Constitutionalism also requires that the power of government be divided between different organs and branches of government - the doctrine of separation of powers.

Since constitutionalism requires government to behave according to the law, there must be an organ to decide whether in fact the government is obeying the law of the land. Many modern constitutional systems routinely give this power to the judiciary. Courts, therefore, in their generic existence as the judiciary are part of the legitimate machinery of government.

The unique virtue of the separate procedure of the courts is that, **“being unaffected by the self-interest and consequent bias of the legislature or the executive in upholding their action, it can be expected to apply to the interpretation of the constitution or a statute an impartiality of mind which inhibits any inclination to vary the law to suit the whims or personal interests of either the judge or a party to a dispute, thus ensuring stability and predictability of the rules which is the core of constitutionalism.”**⁷²

Court organization may mirror not only certain basic characteristics of the family of law, but of the fundamental political organization and historical experience of each nation as well.

⁷¹ Ibid.

Thus the hierarchy of courts in Great Britain embodies organizational principles which reflect centuries of monarchical efforts at national unification, while the court system of Canada incorporates most elements of its colonial British heritage modified in certain limited aspects by its national commitment to federalism.⁷³

Whether a nation experienced long colonial domination (as Kenya did) or not is a key question in the determination of the organization and structure of courts, family of law, mode of training of judges and lawyers and supporting court personnel, and scope of judicial power or jurisdictional characteristics.

The organization of Kenyan Courts system is given by the Constitution of Kenya. At the helm is the Court of Appeal followed by the High Court and then other "other courts". Section 60 of the Constitution confers the High Court with original unlimited jurisdiction. The Court of Appeal is created by the Appellate Jurisdiction Act⁷⁴ and has no jurisdiction except as conferred by the statute. Section 65 of the Constitution provides that the "other Courts" are subject to direction by the High Court. They are subordinate to it. Except for distinctions made for administrative convenience, all courts of Kenya exercise both criminal and civil jurisdictions.

Criminal courts deal with persons accused of crime, deciding whether they are guilty and if so, determining the consequences they should suffer. Civil courts deal with "private" controversies, as where two individuals (or corporations) are in dispute over the terms of a

⁷² Nwabueze, B.O. Constitutionalism in the Emergent States. C: Hurst & Co. London, 1973 p. 15

⁷³ Supra Note 8 p. 295

⁷⁴ Chapter 9, Laws of Kenya

contract. The objective of a civil action is not punishment or correction of the defendant or the setting of an example to others, but rather to restore the parties so far as possible to the positions they would have occupied had no wrong been committed.

What then are the functions of the courts in general? The second paragraph of Section One of Article VIII of the Constitution of the Philippines states that:

“Judicial power includes the duty of the courts of justice to settle actual controversies involving rights which are legally demandable and enforceable, and to determine whether or not there has been a grave abuse of discretion amounting to lack of or excess of jurisdiction on the part of any branch or instrumentality of the government.

Commenting on this provision in his book, Philippine Political Law, Mr. Justice Isagani A. Cruz, a distinguished member of the Philippine Supreme Court says:

“The first part of the authority represents the traditional concept of judicial power, involving the settlement of conflicting rights as conferred by law. The second part of the authority represents a broadening of judicial power to enable the courts of justice to review what was before forbidden territory, to wit the discretion of the political departments of the government. As worded, the new provision vests in the judiciary, and particularly the Supreme Court, the power to rule upon over the wisdom of the decisions of the executive and the legislature to declare their acts invalid for lack or excess of jurisdiction because they are tainted with grave abuse of discretion. The catch, of course,

is the meaning of “grave abuse of discretion”, which is a very elastic phrase that can expand or contract according to the disposition of the judiciary”.⁷⁵

The above commentary captures the instrumentality of the courts. Justice Isagani’s comments also brings out the court (or generically as the judiciary) as the central agency of horizontal accountability in society. Horizontal accountability refers to the capacity of governmental institutions to check abuses by other public agencies and branches of government. The governmental institutions in question include such agencies of restraint such as independent electoral tribunals, anti-corruption bodies, central banks, auditing agencies, ombudsman, and of course, courts.

Horizontal accountability is to be distinguished from and complements “vertical accountability” through which public officials are held accountable by free elections, a free press and an active civil society.

As a forum for dispute settlement it must be noted that Courts, however, do not spend all their time deciding controversies. Many cases brought before them are not ²contested. They represent potential rather than actual controversies in which the court’s role is more administrative than adjudicatory. The mere existence of a court renders unnecessary any frequent exercise of its powers. The fact that it operates by known rules and with reasonably predictable results leads those who might otherwise engage in controversies to compose their differences.

⁷⁵ Quoted in *Oposa vs. Factoran* G.R No. 101083.(Philippines).

Another function of courts is judicial law-making. As courts decide controversies they create an important by-product at, i.e. the development of rules for future cases- which then requires consistency and credibility. This is what is called Judicial Precedent.

Courts also administer criminal justice pursuant to the Due Process of Law. This constitutes a constitutional provision of fundamental importance that guarantees a defendant a fair and impartial trial according to applicable procedures and that requires that the law shall not be unreasonable, arbitrary or capricious.

In our legal system, courts deal with matters as they are brought to them, by others. Accessibility to the courts is therefore crucial. Access to the courts is one aspect of providing justice for a society. And it is not helped much by legal rules that may lock out otherwise worthy litigants.

The complexity of environmental problems dictates for any given country that a well-designed scheme of environmental management, with clear policy, implementation and policy machinery should be in place. The primary duty of regulation and polic^{ing} in respect of such activities must lie with the state's authorities as defined in public law, and must be conducted on the basis of detailed laws and regulations founded on a constitutional mandate.

The state is governed by three arms of the government - viz the Legislature, the Executive and the Judiciary. Each of these organs has power to perform specific functions in the state as assigned by the Constitution. The Legislature has the power to pass laws; discuss and

review major national policies; control public expenditure; criticize and evaluate the conduct of government and thus exercise a moderating function over the Executive and the Judiciary. The Executive's power and function is to formulate, design and initiate policy, and to implement programmes approved by the Legislature or ordered by the Judiciary. The Judiciary, which comprises courts, has the power and function to interpret and apply the laws of the country, to adjudicate and make the final determination on questions of a civil, criminal and admiralty nature. Because of this function, the Judiciary is referred to as the custodian of justice. It is the final arbiter in all matters touching and concerning the exercise of power, the protection of legal rights and the enforcement of duty.⁷⁶

Courts (in Kenya) are manned by judges and Magistrates or Kadhis who are specially trained and qualified to interpret the law, investigate and determine legal questions and administer justice according to the law of the Land. Their powers derive from the constitution (of Kenya), specific laws passed or recognized by parliament, and from their very nature as courts. They decide on disputes between the subjects themselves and between the state and the subjects.

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According to Richard Kuloba, the task of performing this function divides into two main parts, namely:

- " (i) the finding of the facts of a case from a mass of evidence given by the parties to the disputes and by their witnesses (if any) as allowed by rules of procedure known to law; and

⁷⁶ R. Kuloba, Courts of Justice in Kenya. Oxford University Press, Nairobi 1997 p.

- (ii) determine what substantive legal rule covers those facts which are taken as established or admitted, and accordingly announcing publicly the court's decision".⁷⁷

Whereas it is true that courts settle disputes, this is not true of all cases and matters which come to the courts. Courts are sometimes called upon to declare the correct legal position for all parties who, not being in disagreement, merely seek to act safely.

The keystone of the rule of law is the absolute independence of judges and Magistrates. Courts must be detached from politics and be free from parliamentary administrative or executive interference. It is hoped that in a legal system characterised by the independence of the Judiciary, Judges and Magistrates do their duty fearlessly, holding the scales of justice evenly, not only between man and man but also between man and state.

The role of the courts is clearly discernible. However, so far, the Kenyan public - and this is true of other African countries too - have barely been litigious in environmental matters. The courts therefore have not been much involved in environmental rights - claims. But examples from other countries depict this as a potential area of activity in environmental management.

The doctrines of stare decisis and precedent are core to judicial activity. The effect of stare decisis may be seen in two respects. First, it confirms the importance that must be attached to courts. Secondly, it could have a negative impact (on environmental management) if the first case was "wrongly" decided. The converse must then also be true.

⁷⁷ Ibid.

As regards precedent, it is well-known that a large part of the law of England (which is also now part of Kenyan law) consists of rules to be collected from judgments of the courts. Then too, some statutes, though, they originally introduced some new rule, or principle into the law, have been the subject of so much judicial interpretation as to derive nearly all their real significance from the sense put upon them by the courts.

Indeed, it cannot be imagined that judicial legislation is a kind of law-making which belongs wholly to the past and which has been put to an end by the meetings and legislative activity of modern parliaments. New combinations of circumstances, i.e. new cases - constantly call for the application, which means in truth, the extension of old principles, or, it may be, even for the thinking out of some new principle, in harmony with the general spirit of the law, fitted to meet the novel requirements of the time.⁷⁸ The courts or the judges, when acting as legislators are influenced by the beliefs and feelings of their time, and are guided to a considerable extent by the dominant current of public opinion.⁷⁹ But they are also guided by professional opinions and ways of thinking which are to a certain extent independent of and possibly opposed to the general tone of public opinion.

Traditionally, the courts have protected individual, that is, private - law rights. With the development of public law and public law rights (e.g. in terms of education, employment, environment, development, etc), the courts were, nevertheless, reluctant to recognize individual or group public law rights and continued to rely on the infringement or threatened

⁷⁸ Dicey, A.V. "Judicial Legislation" in Lectures on the Relation between Law and Public Opinion in England during the 19th C. Macmillan & Co Ltd. London 1963 p.361.

⁷⁹ Ibid p. 363

encroachment of private law right. Consequently, many good cases were lost as a result of the narrow interpretation of legal requirements such as *locus standi*.

The dominant Western jurisprudence, which was transposed to most developing countries emphasises the centrality of rights in its legal philosophy. New developments, while still retaining "right" as the "centre of action" have however expanded its applicability from the initial 'individual' to 'community' or 'collective' rights and generally bestowed "rights" upon entities other than the individual. This is the right that courts either declare or enforce.

All courts, in Kenya as indeed in any other legal system derive their existence and powers from the Constitution. This is the subject of the whole of Chapter IV of the Constitution of Kenya.

3.3 The Structure of the Courts

The Administration of justice in Kenya is done at various levels. There are levels at which parties appear in Court for the first time and there are other levels at which parties dissatisfied with decisions at the lower levels appear to challenge the happenings below. Similarly, there are certain disputes which the law requires to be dealt with at certain levels only.⁸⁰ Each level of court is allocated certain powers and functions.

In Kenya, courts are organized hierarchically, with the Court of Appeal at the apex, the High Court, the Magistrate's Courts and Kadhis' Courts below it, in a descending order.

⁸⁰ Issues such as constitutional references under Sections 67 or 84 of the Constitution or election

3.3.1 The Court of Appeal in Kenya

The Kenya Court of Appeal is a descendant of the defunct East African Court of Appeal. It is a creature of statute.⁸¹ It was established in 1977 as the highest court of appellate jurisdiction in the country. It is the final court from which there is no further appeal.

The Court of Appeal is a superior court of record (i.e. it is required to keep a record of its proceedings). It has no original jurisdiction, except on an application for a stay of execution pending appeal to it or in contempt of proceedings.⁸² While the provisions conferring appellate jurisdiction on the Court of Appeal should not be construed in a restrictive but rather in a most liberal manner, the Court can only exercise appellate jurisdiction where that jurisdiction is given by law; for appellate jurisdiction springs from a statute. There is no such thing as inherent appellate jurisdiction. However, the court, like all other courts has inherent powers which may be exercised in appeals before the court to give effect to the orders of the Court. On occasions, judges of appeal invoke equity so as to do justice.

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In hearing and determining an appeal, the Court of Appeal has power, authority and jurisdiction vested in the High Court. It exercises its jurisdiction in conformity to the Constitution of Kenya, Acts of Parliament, African Customary Law and Islamic Law and where the local circumstances permit, the substance of the English Common Law, doctrines of equity and some English Statutes.

petitions can only be canvassed in the High Court.

⁸¹ Appellate Jurisdiction Act, Chapter 9, Laws of Kenya, also Section 64 of the Constitution.

⁸² Critics, however, argue that being the final court in Kenya, it is not right or just to commence contempt proceedings in the Court of Appeal with no chance of appeal if convicted.

As a general rule, an appeal lies in the Court of Appeal from any decision of the High Court in its original jurisdiction. In limited circumstances a case decided by the High Court on an appeal from a subordinate court may go on a second appeal to the Court of Appeal.

Where a question on the interpretation of the Constitution is referred to the High Court by a subordinate court, there is not appeal from the decision of the High Court..⁸³

As an appellate Court, the Court of Appeal has wide powers. They include the power to:-

- (i) determine a case finally;
- (ii) remand a case;
- (iii) frame issues and refer them for trial;
- (iv) take additional evidence or require such evidence to be taken by the Court of first instance; or
- (v) order a new trial.

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3.3.2 The High Court of Kenya

Immediately below the Court of Appeal in the order of authority is the High Court of Kenya. It is established by the Constitution as a superior court of record. Section 60 (i) of the Constitution states thus:

⁸³ This is what is commonly known as a constitutional reference. But if an appeal lies from any

“There shall be a High Court, which shall be a superior court of record, and which shall have unlimited original jurisdiction in civil and criminal matters and such other jurisdiction and powers as may be conferred on it by this Constitution or any other law.”

The High Court began as Her Majesty’s Court for East Africa in 1897, and in 1902 it became known as the High Court of East Africa Protectorate with its seat at Mombasa where it remained until the creation of the Kenya colony in 1920. In 1921 a new Supreme Court was constituted when the territory was designated as the colony and Protectorate in Kenya. The seat of the Court was moved to Nairobi in 1921. When Kenya became a republic in 1964, the Supreme Court was renamed the High Court of Kenya.⁸⁴

The High Court has an “unlimited” original jurisdiction in civil and criminal matters and such other jurisdiction and powers as may be conferred on it by the Constitution or any other law. Any statute said to limit the jurisdiction of the High court is very narrowly and strictly interpreted as unlimited jurisdiction is generally preferred. This view has found judicial confirmation in several decided cases. For instance in the case of Davis & Another – vs- Mistry,⁸⁵ Spry, V. P. said thus;

“I would adopt those words substituting only “the courts of the Republic” for “Her Majesty’s Courts”, to Kenya and hold that the right of access to the

decision reached in the proceedings, there is nothing to prevent the Court of Appeal reviewing the decision on a Constitutional reference so far as it is relevant to the appeal. See further Kuloba, R. Courts of Justice in Kenya. 1997.

⁸⁴ See Kuloba, R. The Courts of Justice in Kenya, Oxford University Press. Nairobi 1997 at pp.29-30; Ghai & McAuslan Public Administration and ...East Africa. court

Courts of the Republic may only be taken away by clear and unambiguous words of the Parliament of Kenya.”

In the foregoing case, the Judges referred to and approved similar sentiments expressed by the English Court in the case of Pyx Granite Co. -vs- Ministry of Housing⁸⁶ whereat the Court stated that;

“it is a principle not by any means to be whittled down that the subject’s recourse to Her Majesty’s Courts for the determination of his rights is not to be excluded except by clear words.”

Similarly, in Chite -vs- East African Community,⁸⁷ the High Court of Kenya sitting at Nairobi ruled that **“if the legislature intends to exclude the jurisdiction of all courts, including Superior ones, express words or necessary implication are necessary.”**

The Court possesses a dual jurisdiction, original and appellate. In its original jurisdiction it also deals with specialized matters such as admiralty, and constitutional refer²ences. The Court may try any criminal case, although the practise is that the High Court should try the more serious and difficult cases.

⁸⁵ (1973) EA 463, 466

⁸⁶ (1960) AC, 260

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Any civil action may be begun in the High Court. There is an overlap in the jurisdiction of the High Court and of the lower courts where small claims are concerned. In these cases, litigants are encouraged to use subordinate courts.

The ordinary jurisdiction of the High Court covers the legal power of the Court to deal with any civil and criminal matters as well as to do original and appellate work. But certain matters have been singled out and specifically placed in the exclusive power of the High Court as a first instance. These matters include constitutional references, election petitions; succession and admiralty (maritime matters). In some of them the decision of the High Court is final.

The High Court also has a general power of supervision over all subordinate courts. It is also empowered to exercise judicial control over the Executive arm of the government. It does this by issuing writs of *habeas corpus*, *mandamus*, prohibition and *certiorari*, issued under a process known as judicial review.

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3.3.3 Subordinate Courts

Sections 65 and 66 of the Constitution of Kenya authorize Parliament to establish courts subordinate to the High Court with jurisdiction and powers as may be conferred on them by law. Pursuant to that Constitutional authority, Parliament has established the constitutional courts – of the magistrates and Kadhis – to provide a simple and inexpensive forum where there would be a multiplicity of interlocutory proceedings and where the practice and procedure would be as flexible as possible, for expeditious disposal of burning matters which

would take a long time to decide if they were to be adjudicated upon in the High Court under its relatively complex and arduous procedures.⁸⁸

3.4 The Law, Procedure and Decisions of the Courts.

Whatever the nature of claims, there are issues of procedure and process to consider in pursuing this. The main procedural question is usually about *locus standi*, i.e. the right, in law, to demand a hearing in the first place.

The basis of a civil law claim is a cause of action which arises when an injury has been caused to a person or property. A cause of action is defined as **“...an act or omission of one partying violation of the legal right or rights of the other; and its essential elements are legal right of the Plaintiff, correlative obligation of the Defendant, and an act or omission of the Defendant.”**⁸⁹

In most legal systems, Kenya included, the development of environmental law started in the private law area with a number of environmental law provisions scattered over a number of conventional law subjects. Then, the protection and conservation of the environment and the implementation and enforcement of environmental law provisions were left to private law rights. Suits alleging nuisance and/or trespass to land were quite common. Such approach was therefore subject to the rules that govern suits by private individuals including the requirement that such individual must have *locus standi* to bring the suit.

⁸⁸ For a more detailed discussion of the subordinate courts and Kadhi's court see Kuloba R. supra.
⁸⁹ Marao Sugar Central Company –vs- Barrios 79 Phl.666 (1947).

The courts would then impose sanctions and award remedies based on the facts before them that establish the liability of the offender - such as a polluter. Imposing liability on the polluter for damage resulting from his polluting activities can prove a useful approach for compensating pollution victims (which can include private victims and the public as well) and may also serve as an effective deterrent against continued pollution activities. Utilizing the liability approach, of course has its difficulties. These include the following: problems of proof, standing to sue, fault, causation and damage – all of which must be established. Thus, it is usually necessary to show that particular damage was the result of pollutants from a specific source, and that the victim has a right to safe possession or enjoyment under a statute or some other legal arrangement.

Many laws create a public right, enforceable only by public authorities, while others allow “any person” injured to obtain remedies against the party causing the injury.⁹⁰ Occasionally, both a public and private rights are present. Most laws still refrain from no fault proof, preferring to have negligence or intent as a basis of liability. There are accusation difficulties, especially where the polluter is one of many. The injured must prove that the particular polluter is the liable one.

Additionally, unless specified by a statute, the amount of compensation is difficult to determine. For example, a continuing offence may be treated as one offence, or as separate offences for each day the violation persists. Environmental damage is also often not amenable to monetary valuation; the sale value of a tree is hardly an expression of the true

⁹⁰ Section 3 (4) of the Environmental Management and Co-ordination Act, Act No. 8 of 1999 is clear on this latter position.

value of a tree in terms of the loss of its beauty and value to the ecosystem.⁹¹ However, before the issue of compensation is reached, a number of procedural issues first need to be considered.

The main procedural question is usually about *locus standi*. The traditional position in common law jurisdictions is that only those with a proprietary interest and are personally injured by infractions have a *locus standi* to pursue claims. This question and its emerging trends are discussed in greater detail in the next chapter.

Apart from issues of procedures there are also at least three process questions to consider. The first relates to how and when claims can be lodged, the second the forum appropriate for such claims and the third the remedies or modes of redress. As regards timing and modality of claims, this can entirely be anticipatory.⁹² All that is required is sufficient evidence to justify anticipation of injury. Such evidence can be obtained in a number of ways, among which are rigorous environmental impact assessments (EIA) or periodic environmental audits at any stage in the life-style of a particular activity. If the precautionary principle is accepted in international law, it suggests that claims could be justified even if no clear and unambiguous scientific evidence is available.⁹³

⁹¹ Lutz, R. E., "The Laws of Environmental Management: A comparative study," Vol.24 (1976) *American Journal of Comparative Law*. 447, at 511.

⁹² See for instance Section 3 (3) of Kenya's Environmental Management and Co-ordination Act which states in part thus: "if a person alleges that the entitlement conferred under subsection (1) has been, is being or is likely to be contravened in relation to him..." (emphasis added).

⁹³ The precautionary principle is the principle that where there are threats of damage to the environment, whether serious or irreversible, lack of full scientific certainty shall not be used as a reason for postponing cost-effective measures to prevent environmental degradation. The principle came in vogue at and after the UNCED in Brazil in 1992. It has found ground particularly relating to those cases where the available scientific knowledge has not warranted immediate action.

Because the level of “proof” required in environmental claims is imprecise and cumbersome, it is not unusual to create special forums to handle them.⁹⁴ The most often used are administrative (or quasi judicial tribunals, advisory agencies or special institutions, such as an environmental ombudsman or commissioner⁹⁵ with jurisdiction to hear claims. Claims not determined at that level would proceed on appeal (usually only in matters of law) to the ordinary courts. Because of their relative accessibility, these tribunals, if properly organized, are cost-effective protection of local environmental resources.⁹⁶ Thus such forums, when fortified by community organs and development support systems, also serve as instruments of community empowerment and democratic decision-making.⁹⁷

The question of remedies or modes of redress upon successful or satisfactory proof of claims can be fairly complex. Apart from the relatively straightforward situation involving the pursuit of narrow individual claims, who would be entitled to redress where the injury compromises the lifestyles of a class of people or a species or is so extensive as to make it impossible to identify victims accurately? What counts as sufficient remedy for individuals, communities or even societies where damage to the environment is irreversible?

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The rules of procedure for any particular legal system would determine how and which court is to be approached and for what remedy. For, it is trite law that certain remedies can only be available from specific courts and also depending on the means via which the jurisdiction of the court is invoked.

Okoth-Ogendo, H. W. O., “The Juridical Framework of Environmental Governance.” In Okoth Ogendo, H. W. O. & G. W. Tumushabe (eds) Governing the Environment pp. 41-62 at 50.

⁹⁵ Special Courts and other specialized institutions are now found in Sweden, Japan, Denmark and the USA.

⁹⁶ Okoth Ogendo, H.W.O. supra.

As already discussed in the preceding paragraphs, the basis of a civil law claim is a cause of action. This arises when an injury is caused to a person or property. If the injury is caused by a public body in the context of the exercise of public powers or the performance of a public duty the cause of action is in public law, whereas if it is caused by a private person the cause of action is in private law. The causes of action in public law are *ultra vires*, natural justice and error of law. The remedies for their redress are *certiorari*, prohibition, *mandamus*, and declaration. The causes of action in private law are trespass, nuisance, the rule in **Rylands v Fletcher** (the strict liability rule) and negligence. The remedies for their redress are an award of damages, injunction and a declaratory judgement.

A civil law action in public law is designated for challenging the legal validity of the decisions and actions of public bodies. This is the common law process of “judicial review.” It is now largely provided for by statute. Judicial review is not to be confused with action taken in private law to redress private wrongs, and one may not seek judicial review instead of taking action in private law simply because the defendant happens to be a public authority. The remedy is specifically designed for challenging the exercise of public power or the performance or failure to perform a public duty. Where the dispute with the public body does not relate to the exercise of public power (or the performance of a public duty), redress cannot be sought through a judicial review application; the public body must be sued through an action in private law, like any other wrongdoer.

⁹⁷ Ibid

3.4.1 Judicial Review

Judicial Review is a remedy that may be used to:-

- (i) quash a decision (*certiorari*)
- (ii) stop unlawful action (*prohibition*).
- (iii) Require the performance of a public duty (*mandamus*)
- (iv) Declare the legal position of the litigants (declaration)
- (v) Give monetary compensation
- (vi) Maintain the *status quo* (injunction).

Judicial review may be awarded where a public body has committed the following wrongful acts or omissions:-

- (i) where it has acted beyond its legal powers (i.e. *ultra vires*); a decision or an act of a public body may be *ultra vires* for reasons such as the failure to take into account relevant matters or taking into account irrelevant matters.
- (ii) Where it has acted contrary to the principles of natural justice, which require an absence of bias and a fair hearing in decision making.
- (iii) Where it has acted in error of law.

Judicial review is a remedy under both statute and the common law, and has been adopted by all the common law jurisdictions.

(a) Judicial Review as a statutory remedy

Statutes typically provide that persons who are aggrieved with the decision of a public body may apply for a review to the courts. "Person aggrieved" was defined in a leading English authority *A. G. (Gambia) v Njie*⁹⁸ in which Lord Denning said:-

"the words "persons aggrieved" are of a wide import and should not be subjected to a restricted interpretation. They do not include, of course, a mere busybody who is interfering in things that do not concern him, but they do include a person who has a genuine grievance because an order has been made which prejudicially affects his interests."

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(b) Judicial review as a common law remedy

Quite apart from, and independently of, statutory provisions, judicial review is available as a common law remedy to which resort may always be had to challenge the decisions and actions of public bodies. In England, the Supreme Court Act 1981 and Order 53 of the Rules of the Supreme Court stipulate the procedure to be adopted in such cases. Similar procedures have been adopted by

other common law jurisdictions. In Kenya, applications for judicial review are guided by the Judicature Act 9 (Cap 8) and Order 53 of the Civil Procedure Rules. These rules are themselves made pursuant to Section 81 of the Civil Procedure Act (Cap 21).

Order 53 requires that the applicant seeks leave of the court before filing the application. Leave is only granted if the court considers that the applicant has “sufficient interest “*or locus standi*” in the matter in issue. Courts around the world have given varying interpretations to this concept, particularly in the context of environmental litigation. Examples of these decisions from countries such as Uganda, Tanzania, South Africa, India and Philippines among others will be discussed in the next chapter. This has led to a number of countries introducing provisions in the Constitutions or elsewhere, widening the opportunities for access to the courts.

3.4.2 Action in Private law

The private law causes of action are trespass, nuisance, the rule in *Rylands v Fletcher*⁹⁸ (the strict liability rule) and negligence.

(a) *Trespass*

Trespass arises where a person causes physical matter to come into contact with another’s land. Trespass, therefore, protects an occupier’s right to enjoy his or her land without unjustified interference. It is limited, however, to

⁹⁸ (1961) 2 All ER 540.

direct, rather than indirect, interferences.

(b) Nuisance

There are two types of nuisance; public nuisance and private nuisance. Often the same act gives rise to both types of nuisance at the same time.

A public nuisance is an interference with the public's reasonable comfort and convenience. It is an interference with public right and constitutes a common law criminal offence, quite apart from providing a cause of action in private law. In the English case of *Attorney General v. P. Y.A. Quarries Ltd.*⁹⁹

Lord Denning said of public nuisance:

“It is a nuisance which is so widespread in its range and so indiscriminate in its effect that it would not be reasonable to expect one person to take proceedings on his own responsibility to put a stop to it, but that it should be taken on the responsibility of the community at large.”

∴

A private nuisance is an interference with an occupier's use and enjoyment of his land. Not all interferences, however, amount to a nuisance. Nuisances are those interferences which are unreasonable, causing material and substantial injury to property or unreasonable discomfort to those living on the property. The liability of the defendant arises from using land in such a manner as to injure a neighbouring occupier. Thus nuisance imposes the duty

of reasonable use on neighbouring occupiers of land. It is the cause of action most suited to resolving environmentally related disputes between neighbouring landowners.

The reasonableness, or unreasonableness, of the use giving rise to complaint is determined on the basis of the locality in which the activity in issue is carried out. The English case of **Sturges v Bridgeman**¹⁰⁰ is illustrative of this point. A confectioner had for more than twenty years used a pestle and a mortar in his back premises which abutted on the garden of a physician. The noise and vibration were not felt as a nuisance and were not complained of. But in 1973 the physician erected a consulting room at the end of his garden, and then the noise and vibration became a nuisance to him. His action for an injunction was granted, the court holding that “whether anything is a nuisance or not is a question to be determined, not merely by an abstract consideration of the thing itself, but by reference to its circumstances.”

(c) Strict Liability: the Rule in *Rylands v Fletcher*¹⁰¹

This rule is based on the facts of the English case after which it is named. The defendant had constructed a reservoir to collect and hold water for his mill. Under his land were underground workings of an abandoned coal mine whose existence he was unaware of. After the reservoir had been filled the water escaped down the underground workings through some old shafts, and flooded the Plaintiff's colliery. The Plaintiff filed suit and the court decided that:-

⁹⁹ (1957) 2 QB 169.

¹⁰⁰ (1879) 1 Ch.D 852.

¹⁰¹ (1868) LR 3 HL 330.

“the person who for his own purposes brings on his land and collects and keeps there anything likely to do mischief if it escapes must keep it in at his peril, and if he does not do so, is *prima facie* answerable for all the damage which is the natural consequence of all escape.

The case was appealed to the English House of Lords which upheld the decision with one of the judges adding that the defendant was liable because he had engaged in a “non-natural use of his land.”

The rule makes an occupier strictly liable for the consequences of escapes from his land. However, this cause of action has not been relied upon a great deal partly because of difficulties in ascertaining the true meaning of “non-natural use.” Some have argued that “non-natural use” refers to the conduct of ultra-hazardous activities on land, while others hold that it means no more than bringing onto land things “not naturally there.”

(d) Negligence

Negligence arises from a failure to exercise the care demanded by the circumstances with the result that the Plaintiff suffers an injury. In contrast to the three other causes of action, the basis for the action is not the occupation of property. A plaintiff needs to show that he is owed a “duty of care”, and that the defendant has breached that duty of care, with consequent injury to the plaintiff.

The leading authority on negligence is the English case of **Donoghue v Stevenson**.¹⁰² Lord Atkinson said in that case that the duty of care is owed to “persons so closely and directly affected by the defendant’s act that he ought reasonably to have them in contemplation as being so affected when directing his mind to the acts or omissions which are called into question.” In other words, the duty of care is owed to those whom the Defendant could *foresee* might suffer injury as a result of the defendant’s act or omission.

3.5 The Remedies

The three remedies in private law are damages, injunction, and declaratory judgement.

An award of *damages* is compensation given to a party who has suffered an injury. The sum awarded is based on the principle that the injured person should be placed in the position he or she would have been if he had not been injured.

An *injunction* is an order from the court directing a party either to do or to refrain from doing something. It is granted to stop a continuing or recurring injury or in circumstances where damages would not be an adequate compensation. Typically, an injunction will not be granted unless the damage is serious. The Court will balance the inconvenience which declining to grant the injunction would cause the Plaintiff against the inconvenience which granting it would cause the defendant.

A declaratory judgement is the court’s declaration of the rights and duties of the parties before it. Its value lies in resolving a dispute by setting out clearly the legal position. Most

¹⁰² (1932) AC 562

litigants will act in accordance with the Court's declaration without the need for further orders. However, as the House of Lords stated in the English case of **Gouriet v Union of Post Office Workers**¹⁰³ "the jurisdiction of the Court is not to declare the law generally or to give advisory opinions; it is confined to declaring contested legal rights, subsisting or future, of the parties represented in the litigation before it and not those of anyone else." (p.519).

3.6 The Protection of the riparian owner's right to water

There is one other entitlement under the common law which can form a basis of environmental litigation: the riparian owner's right to water.

Under the English common law a landowner is presumed to own everything on the land up to the sky and down to the center of the earth. However, running water, air and light are considered to be "things the property of which belongs to no person but the use to all"¹⁰⁴. Therefore, a landowner has no property in running water, air and light; all that his proprietorship entitles him to, as an incident of such proprietorship, is a "natural right" to use these elements.

Thus a landowner whose land abuts running water, i.e. a *riparian* owner, has a natural right to water. The riparian owner is able to exercise, as of right, the right available to all members of the public to use running water since he has an access to the water which non-riparian owners do not have. The right to use is available equally to all riparian owners and therefore any one riparian owner must use it reasonably. No one riparian owner may use the water in

¹⁰³ (1978) AC 435.

¹⁰⁴ See *Liggins vs Inge* (1831) 131 ER 263, 268

such a way as to prejudice the right of other riparian owners.¹⁰⁵ Other riparian owners have a cause of action if there is unreasonable use by any one owner.

The scope of the riparian owner's rights extends to access, quantity and quality. Access enables the riparian owner to navigate, embark and disembark on his land. Quantity enables the riparian owner to abstract, divert, obstruct or impound the water to the extent of its natural quantity. He may use the water abstracted for ordinary (domestic) purposes such as drinking, cooking and washing and for these purposes may abstract as much as he needs without restriction. Secondly, he may use it for "extraordinary" purposes such as irrigation, but in this case must restrict the quantity he abstracts to that which does not prejudice the rights of other riparian owners. Thirdly, a riparian owner may attempt to abstract water for use outside of his land, but the common law disallows such "foreign" use of water. On quality the riparian owner is entitled to have the water in its natural state of purity.

If any of these rights are interfered with, the riparian owner has a cause of action. However, as the House of Lords held in the English case of **Cambridge Water Company v Eastern Counties Leather plc**¹⁰⁶ the suit itself must be based on the traditional common law causes of action: trespass, nuisance, **Rylands v Fletcher** (strict liability) and negligence. It is the injury suffered which arises out of riparian ownership.

3.7 The Courts and the Environment

The best way to understand the courts and their role in environmental management is first and foremost to see them as part of the government. In a constitutionalist government,

¹⁰⁵ See *Embrey v Owen* (1851) 155 E. R. 579.

authority must be exercised according to law. And this law itself must be made according to the procedures allowed by the Constitution. Constitutionalism also requires that the power of government be divided between different organs and branches of government – otherwise called separation of powers. Since Constitutionalism requires government to behave according to the law, there must be an organ to decide whether in fact the government is obeying the law of the land. Many modern Constitutional systems routinely give this power to the judiciary. Courts, therefore, in their generic existence as the judiciary are part of the legitimate machinery of government- they being one of the three arms of government.

Despite their importance, the courts have nevertheless been faced with several accusations. First, that, courts carve up and treat as separate transactions that are intertwined. Second, it is also stated that judges are also preoccupied with individual cases, and thus do not think about whether the cases before them represent a typical situation, from which precedent for later cases might be properly derived or are extremes and thus to be confined to their facts. Furthermore, attention to individual cases is said to produce piecemeal policy-making.

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The third accusation is that courts cannot effectively make advance estimates of the magnitude or direction of the effects of their decisions.¹⁰⁷ Lastly, it is argued that judicial correction of policy is intermittent.

¹⁰⁶ (1994) 1 Al ER 910

¹⁰⁷ Wasby, S. L. "Arrogation of power or Accountability" Vol. 65 No. 4 Judicature P.209. See also Horowitz, The Courts and Social Policy. The Bookings Institution, Washington, D. C., 1977 at p.40.

When it comes to environmental conservation and management, the challenge for courts is quite formidable. This is because, as already discussed in the preceding sections of this chapter, environmental law has had its roots in the common law. However, the parameters of the common law have been found to be too limiting for environmental cases. This has seen the development of public interest litigation.

3.8 The Concept and Nature of Public Interest Litigation

One of the hallmarks of the development of environmental law and litigation is the change in emphasis from private rights to public rights. Indeed, the protection of environmental rights is much about the protection of public rights and interest inasmuch as it is about private rights and interest. This shift has brought to the fore the concept and practice of public interest litigation and brought new meaning to litigation. The traditional function of a lawsuit as understood in common law jurisprudence is that it is a vehicle for settling disputes between private parties about private rights. Accordingly, common law legal systems have always been ready to come to the aid of individuals suffering damage, whether of a personal proprietary nature, where the activities of others may have caused damage or loss. The lawsuit is initiated by individual parties on whom judgment will be confined. In addition, the litigation is retrospective, that is, the controversy is about an identified set of complete events, whether they occurred, and if so, with what consequences for the legal relations of the parties. Relief derives more or less logically from the harm.

In contrast to traditional common law litigation and what it provided for environmental protection, public interest litigation is more complex and amorphous and does not necessarily look to particular individuals or specific parties seeking to vindicate their

respective claims based on a right-remedy arrangement. The Black's law dictionary defines public interest litigation as a legal action initiated in a court of law for the enforcement of public interest or general interest in which the public or class of the community has pecuniary interest or some interest by which their legal rights or liabilities are affected. Public interest litigation is one that raises matters of broad public concern which impact especially on disadvantaged or marginalized groups in society and their issues to be addressed are for the common good.

In Public interest litigation, a public-spirited individual(s), association(s) or a group brings an action on behalf of the general public for the purpose of protecting, that which is deemed to be in the general interest of the community. The plaintiff here seeks to speak on behalf of the community and to protect a particular interest of the community. In most cases the individual or individuals do not have any special and peculiar interests in the subject matter over and above other members of society- they only seek to protect what is a common public interest or right.

Public interest law takes the form of relaxing or interpreting both substantive and procedural rules to enable the courts to intervene on behalf of large, especially disadvantaged groups of people¹⁰⁸.

In sum the following fundamental issues distinguish public interest litigation from traditional private litigation. First, it characteristically involves multiple parties; it is predicated upon doctrines of legal standing and ripeness, which permit an individual or interest

group to challenge activities and decisions that can actually or potentially cause injury to members of the community.¹⁰⁹ The parties may be involved directly or indirectly. Secondly, as opposed to private litigation where the focus is often upon some past event primarily affecting two parties or at least two unitary interests, public interest litigation is often not rigidly bilateral but sprawling and amorphous.¹¹⁰ Probably the most distinctive feature of public interest litigation is the remedy. In public interest litigation, relief is not always conceived as compensation for past wrong in a form logically derived from the substantive liability and confined in its impact to the immediate parties. Instead, it is forward looking, often having important consequences for many persons including absentees. Owing to the institutional setting and the remedial rather than compensatory nature of the relief, a chief characteristic of public interest litigation is the lack of a tight fit between right and remedy.¹¹¹

However, Pollack¹¹² contends that the restrictions of the law of public nuisance caused by the damage proving requirements gave rise to two developments: courts began to find damage to the public by taking “judicial notice” that impure air was harmful; and legislatures

¹⁰⁸ Harding, A “Do Public Interest Law and The Common Law have a future together?” Robinson, D. & Dunkley, J. (ed) In *Public Interest Perspectives in Environmental Law*, Wiley Chancery, 1995 218-226 at 219

¹⁰⁹ Chayes, A. 1976. *The Role of the Judge in Public Law Litigation*. 89 HARV. L. REV. 1281; Tobias, C. 1987. *Rule 19 and the Public Rights Exception to Party Joinder*. 65 N. C. L. REV. 745.

¹¹⁰ Ibid. P.1302

¹¹¹ Fiss, O. M. 1979 *Foreword: the Forms of Justice*. 93 HARV. L. REV. 1, 22-23, 46-50; Marcus, R. L. 1988. *Public Law Litigation and Legal Scholarship*. 21 U. MICH. J. L. REF. 647, 653-59.

¹¹² Pollack L. W, “Legal Boundaries of Pollution Control – State and Local Legislative Purpose and Techniques 1968 Contemporary Legal Problems 331.

declared dense smoke a public nuisance as a matter of law. Often judicial notice of damage was used as a basis for upholding the legislation.

Prof. G. L. Peiris writing on "*Public Interest Litigation in the Indian Sub-continent: Current Dimensions*,"¹¹³ affirms that the emergence of the concept of public interest litigation, and even more striking its unrepentant dimensions in the current practice of Indian courts, clearly in conflict and objectivity, represent a bold but controversial response to the perceived implications of social inequality and economic deprivation. He further observes that at the core of the concern consistently shown by Indian courts for fostering public interest litigation in the conditions of contemporary life in the sub-continent, is candid recognition that, in the absence of innovative mechanisms of this nature, substantive rights central to human dignity cannot but assume an illusory character in the eyes of large sections of the population.

A tacit recognition of this concept was given by Lugakingira, J in the Tanzanian case of *Rev. Christopher Mtikila Vs AG*¹¹⁴ when he said thus:

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"the relevance of public interest litigation in Tanzania cannot be overemphasized. Having regard to our socio-economic conditions, this development promises more hope to our people than any other strategy currently in place. First of all, illiteracy is still rampant...By reason of this illiteracy a greater part of the population is unaware of their rights, let alone how the same can be realized. Secondly, Tanzanians are massively poor...By reason of limited

¹¹³ 1991(40) ICLQ 66.

¹¹⁴ 1995 (T.L.R) 31, at pp 42- 34

resources the vast majority of our people cannot afford to engage lawyers even where they were aware of the infringement of their rights and the perversion of the Constitution...”

If references to Tanzania were removed from the above quote, the words would ring the same of Kenya as indeed of most other African countries.

3.9 Why Public Interest Litigation in Environmental Cases?

That there are rules of law for the protection of the environment is evidence of the capacity of the law to address itself to the felt needs of the society. It is, after all, a primary characteristic of the law that it defines those values that a society holds in the highest esteem, and to which it accords special protection. The demands of community living must be credited with the evolution of simple rules of reciprocity based on control and use of environmental resources.¹¹⁵ In the Anglo-Saxon tradition some of these rules were later crystallized into the principle of *sic utere tuo ut alienum non laedas*,¹¹⁶ and the doctrine of private (and later public) nuisance.¹¹⁷ These and other common law causes of action such as trespass, negligence, nuisance or actions based on the rule in *Rylands v. Fletcher* became important in settling disputes, including disputes that directly or indirectly affected the environment

¹¹⁵ Okoth-Ogendo. H. W. O. 1999. “The Juridical Framework for Environmental Governance.” In *Governing the Environment: Political Change and Natural resources Management in Eastern and Southern Africa*, edited by H. W. O Okoth-Ogendo and G. Tumushabe. Nairobi: Acts Press.

¹¹⁶ *sic utere tuo* is a Latin maxim which enjoins states to consider the rights of other states in conducting their domestic affairs.

¹¹⁷ Okoth-Ogendo, *supra*

Yet those common law causes of action were ill suited to dealing with general issues or questions of environmental degradation (.) in view of the fact that they require some direct physical interference with the person or the property of another person. The common law action of trespass, for instance, requires an aggrieved party to establish direct physical interference with his or her person or property by another person. In view of the fact that environmental degradation tends, generally, to be indirect in its nature and effect, individual persons feeling aggrieved by it may be hard put to it to establish a successful legal action for trespass. Nor could associations or groups of individuals fare any better in that context. Common law actions were founded on property theory/law wherein the owner was the aggrieved, which is not the position with PII.; a lot of PII. arguments are based on group/collective rights whereas in traditional Anglo-Saxon jurisprudence right could only repose in an individual, the remedies available under common law do not meet the challenges posed by PIEL.

The common law action of negligence could neither be of much help to environmentalists. The fact that an aggrieved party needs to prove that, for example, an environmental polluter may have acted without due care, may make it extremely difficult for the former³ to succeed in a claim for negligence. Unless, of course, there is evidence of lack of due care on the part of the polluter, an aggrieved party may find it virtually impossible to prosecute a claim based on negligence. The difficulty is compounded by the fact that it may not be easy to establish direct consequential damage to particular individuals in environmental matters. In the face of these difficulties, it is clear that negligence at common law was (and still is) not appropriate for prosecuting general environmental suits.

Other common law causes of action such as nuisance and that based on the rule in *Rylands v. Fletcher*,¹¹⁸ though somehow capable of availing individual aggrieved parties of some prosecutable remedy, cannot be said to be appropriate for environmental protection. The fact that each of those two common law causes of action are confined to or available only to persons who happen to own or be in possession of land or of some direct proprietary interest renders them inappropriate for dealing effectively with environmental matters.¹¹⁹ In fact, even the common law action of nuisance which tends to be somehow considered as a more viable means for securing environmental protection, may prove to be something of a disappointment in practice. That may be so with respect to both private and public nuisance actions at common law. The idea that public nuisance actions may have tended to offer a more potent and better means of ensuring environmental protection, in contrast to private nuisance actions, would not seem to have been borne out.¹²⁰

In light of the foregoing, it is clear that even persons aggrieved in their individual capacities may experience considerable difficulties in prosecuting environmental claims based on common law causes of action. For environmentalist groups, the chance of successfully prosecuting common law claims of this kind with a view to ensuring environmental protection, may be even more limited or virtually non-existent. For such environmentalist groups do not generally have any direct proprietary interest in the particular aspects of the

¹¹⁸ *supra*

¹¹⁹ See e.g., Estay. 1972. "Public Nuisance and Standing to Sue." 10 *Osgood Hall Law Journal* 563; McLaren. 1972. "The Common Law Nuisance Action and the Environmental Battle." 10 *Osgood Hall Law Journal* 505; Bryson and MacBeath. 1972. "Public Nuisance, the Restatement (Second) and Environmental Law." 2 *Ecology Law Quarterly* 241; Juergensmeyer. 1971. "Common Law Remedies and Protection of the Environment" 6 *University of British Columbia Law Review* 215; Ellickson. 1972. "Alternatives to Zoning Covenants, Nuisance Rules Fines and Land Use Control." 40 *U. Chi. L. Rev.* 681; Eldee. 1973. "Environmental Protection Through the Common Law." 12 *Western Ontario Law Review* 107; Brenner. 1974. "Nuisance Law and the Industrial Revolution." 3 *Journal of Legal Studies* 403.

environment they may seek to protect. In addition, it is usually hard for such environmentalists to establish some direct injury or loss resulting from the environmentally polluting activities they complain about. Indeed, the hitherto restrictive adherence by the courts of law to the requirements of legal standing or *locus standi* may have tended to render the task of such environmentalists impossible.

Underlying the attitude of the courts in not being particularly receptive to legal suits brought by environmentalists is the idea that they traditionally deal with legally enforceable rights or interests. Consequently, since the rights usually sought to be protected by environmentalists relate to general claims suffused with some moral content, the courts were inclined to look askance at purported claims in that context. In response, litigants had to resort to some legal-moral basis for prosecuting environmental claims. In that respect the idea of treating an imagined general public interest in a clean environment such as in unpolluted air and water, or in the maintenance of some beautiful scenery, has sought to be erected into a legally protected right or interest.

Kodwo Bentil writing on Environmental Suits Before the Courts: Prospects² for Pressure Groups¹²¹ contends that underlying the attitudes of the courts of law, in not being particularly enthusiastic about sustaining actions or legal suits brought by conservationists or environmentalists is the idea that the courts are only meant and equipped to dealing with rights or interests which are legally enforceable or protectable. Consequently, since the kind of interest or right usually sought to be espoused by conservationists or environmentalists tends to relate to rather general claims suffused with a high moral content; the courts have

¹²⁰ See e.g., McLaren, *supra*

been inclined generally, to look askance at purported claims in that context. That has meant that conservationists or environmentalist associations have had to resort to some kind of a legal- cum-moral basis for prosecuting claims in relation to environmental quality and improvement. In that respect, the idea of treating an imagined general public interest in a clean environment such as unpolluted air and water, or in the maintenance of some beautiful scenery, has been sought to be erected into some legally protectable right of interest.

However, it must be appreciated that the broad government mandate, which is first and foremost a “development mandate,” should anticipate environmental protection as a central element in policy making and as an aspect of an appropriate law-making and of good administration under the law. Its due discharge is destined to inure to the public as a matter of vital interest and in certain cases as a matter of constitutional and legal right.¹²²

There is thus a dynamic relationship between environmental goals and the operations of governmental machinery (which constitute the main public interest apparatus). Public interest in the environment arises too by dint of the natural interplay of the environment and inter-generational equity and sustainable development. ʔ

Thus, if the courts see themselves as part of the governmental machinery, for indeed they are, they are beholden to discharge their duties as to give effect to the government’s policies of the day. This, however, must not mean that the courts are to further the agenda of the executive. Rather, they must hold the scales between man and the executive in the same vein

¹²¹ 1981 *Journal of Planning Environmental Law* 374.

¹²² Ojwang, J. B., “Environmental Law and the Constitutional Order” *Ecopolicy Series*. No.3 ACTS Press 1993.

that they do between man and man. For the courts are enforcers of the law, they are interpreters of constitutions and other laws and “declarers” of rights. As was stated by Rubama, J of Tanzania: “...my powers and my interpretation role are circumscribed by the law. I must take the law as it is, not as I might personally wish it to be...”¹²³ There is therefore the need for “judicial activism” at least with respect to environmental matters if we are to give real meaning to environmental management.

The hallmark of support for public interest litigation in India is the case of *Gupta V. Union of India*.¹²⁴ Justice Bhagwati speaking of public interest litigation stated that:

“If public duties are to be enforced and social collective ‘diffused’ rights and interests are to be protected, we have to utilize the initiative and zeal of public-minded persons and organizations by allowing them to move the court and act for a general or group interest, even though they may not be directly injured in their own rights.”

Indian courts have also encouraged public interest litigation through their ruling that promote dealing with real issues and discouraging use of procedural shortcomings to bypass real issues. Justice Bhagwati expressed a view that reflects the thinking and practice in India when he stated that

“Where ... the court is moved for this purpose by a member of a public by addressing a letter drawing the attention of the court to such to such legal injury or legal wrong... the court would cast aside all technical rules of

¹²³ Festo Balegele & Others Vs Dar-es- Salaam City Council High Court of Tanzania Misc. Civil Cause No. 90 of 1991

¹²⁴ AIR 1982 SC 149

procedure and entertain the letter as a writ petition on the judicial side and take action upon it.”¹²⁵

The case of *Rural Litigation and Entitlement Kendra v. State of U.P.*¹²⁶ was one of the first notable public interest litigation cases to come to the Supreme Court of India. In this case, a group of citizens moved the court complaining about their right to life under Article 21 of India's constitution¹²⁷ They complained that limestone mining in Doon Valley caused air pollution in the form of dust and debris which, because of the peculiar wind currents and conditions, was causing harmful and choking smog. Upon acknowledging the citizens right to bring forth the case, the Supreme Court closed most of the quarries and imposed stringent conditions on others not to pollute the environment.

Indian courts have continually abandoned formalities applying to the commencement of proceedings and even listen to cases *suo moto* on the basis of newspaper reports. Their reliance on even letters to commence proceedings is developed into the epistolary jurisdiction for which India is the pioneer. The case of *Rural Litigation and Entitlement Kendra, Dehradun v. State of Uttar Pradesh* discussed above was commenced by way of a letter. The court even got involved with gathering and presenting evidence in efforts to relieve the public interest applicants the cost associated with gathering and collecting evidence. The court instructed an expert committee to inspect all limestone-quarrying operations in the Mussoorie-Dehradun region, to investigate whether the Mining Acts were being observed

¹²⁵ Peoples Union for Democratic rights v. Union of India AIR 1982 SC 1473 at 1483

¹²⁶ AIR 1985 Supreme Court 652

31. Article 21 of India's Constitution protects the right to life as a fundamental right.

and to report on the hazards they posed to people, cattle and their ecological impact. This flexibility has also led to the transformation of judges into social auditors.

The precedent we are aware of in constitutional entrenchment of the powers to act *suo motto* is Article 184(3) of the 1973 Constitution of Pakistan which empowers the Supreme Court to investigate into questions of fact, by recording evidence, appointing a commission or any other reasonable and legal manner to ascertain the correct position on a matter that present violation of fundamental rights. The previous constitution for Pakistan did not have a parallel provision, though.

It is expected that some people including judges in Kenya would consider this as an extreme case of judicial activism and thus to be frowned upon if not totally avoided. It is just possible that some Supreme Court judges in Pakistan feel the same way. Two Kenyan judges this writer discussed with expressed their serious reservations at such prospects partly because they are used to courts being moved. The greatest objection expressed by them which is likely to be echoed by many people is that it would set in motion several rogue judges pursuing cases and offenders. This fear in our view is misplaced and not borne out of the historical development of the Kenyan judiciary nor the developments of the *Suo Motto* jurisdiction in other parts of the world. The judiciary is fairly known for its restraint and careful exercise of discretion. Moreover, it cannot be expected that the Kenyan judiciary which currently shies from judicial activism would suddenly break loose and become reckless. In Pakistan only four cases have been taken up by the Supreme Court on the basis of *suo moto* jurisdiction. Only one of the cases has been environmental. In **Re: Human Rights Case (Environmental Pollution in Balochistan)** No. 31-K92(Q), decided on 27th

September 1992, the Supreme Court having noticed a daily newspaper report that nuclear and industrial waste was to be dumped in Balochistan in violation of Article 9 of the Constitution, ordered for an investigation and facts presented. The Supreme Court eventually issued an order against such a move. The others have to do with other human rights violations.

Thus the time has come for such a provision to be made in Kenya. The question that this also brings is as to the propriety and affordability of the same. It seems to us that the proper place for that provision is in the Constitution. This would be an option which the constitution makes available for all future times. As regards propriety and affordability, this will be a discretionary power accorded to courts as partners in protection of environmental rights and duties as well as promotion of sustainable development.

3.10 Summary

That courts can and in fact do play an important role in environmental management is now given. It is for these reasons, among others that a number of legal systems have developed constitutional and statutory provisions to deal with the deficiencies cited above; but most importantly to fulfill the principles of environmental management. These latter laws have also ably spelt out the powers of the courts in dealing with environmental issues.

It does appear however, that the courts still have to contend with certain obstacles in the discharge of their duties. So far it is not clear if some of these hurdles are inherent in the institution of the court as a court, or whether they are dependent on some other factors.

CHAPTER FOUR

CASE STUDY OF COURT TREATMENT OF THE ISSUES OF LOCUS STANDI AND COSTS IN ENVIRONMENTAL LITIGATION

4.1 Introduction

Unlike some other areas of comparative legal analysis which may be primarily of academic value comparative studies of environmental approaches often have practical application notwithstanding that each country bases its legislation on its own political, economic, cultural and social experiences. Beyond the truism that similar problems frequently find similar solutions and therefore may make those solutions valuable to our own national efforts, comparative analysis may also guide attempts to find adequate multinational and international responses to environmental problems.

In the preceding chapter we discussed how the courts can be one of the effective players in the game of environmental governance. That they may, however, not have played (or play) this expected role very efficiently may be due to several reasons. In this section we wish to explore in greater depth than previously how the courts in Kenya have sought to make their contribution and what it can learn from other jurisdictions that have trodden the path that Kenya hopes to walk. It is not therefore strictly speaking a comparative study of one judicial system or the other (for that is so wide in itself that it is beyond the scope of this present study). Nevertheless, other countries having walked certain routes, and Kenya need not necessarily re-invent the wheel. In this regard we have to look at how our legal system has treated some of the most commonly encountered problems in environmental litigation and juxtapose that against some other jurisdictions dealing with similar concerns. In this regard we shall look at the questions of *locus standi* and the costs associated with environmental litigation.

The choice of these particular issues is deliberate. Whereas recent developments in the field of environmental management has brought forth several principles of good environmental governance which courts have sought to enforce the twin issues of *locus standi* and costs are possibly to be encountered in every suit. In deed, they will determine whether any suit may be filed at all; or having been filed, whether and in what manner it is continued. Similarly,

they involve a determination by the court, which means that they involve the active participation of the court, an action, which will either allow or kill existing or contemplated suits in the area of environmental conservation. How courts deal with these issues, therefore, represent to us a fairly good assessment of how it would deal with other issues generally in the quest for enforcement of provisions meant to protect the environment. And the two are not far apart either. In the words of Kirby, J in **Oshlack -vs- Richmond River Council** ¹²⁸

“I suppose the issue is whether there is a divorce between standing and costs. If, you come you do not have the impediments that used to exist, but you have got to conform to the normal rule. If you come you are going to impose costs on somebody, and if that is what you want to do, you have got to make sure that you can pay for it if you lose.”

In agreeing with the Honourable Judge in that case, Mr. J Basten, one of the counsels for the appellant in the said case argued thus:

‘ ...I think that we say there is a link and the link is that in giving effect to the statutory policy, it is, in effect, inconsistent and undermining of that statutory policy if one fails to take account of the way in which the costs rule may operate as a disincentive to persons pursuing their mandate under the open standing provisions...’

”

4.2 THE JINX THAT IS LOCUS STANDI

One of the concerns in any legal proceedings is the question of *locus standi*. Most provisions in law for Judicial Review for instance, make it mandatory that all applications pass through the leave stage as a way of vetting them for seriousness of issues deserving devotion of time. Among the justifications for this requirement is that the engine of justice is too crucial that it must not be unnecessarily clogged by “nothings”- only real controversies presented by real persons concerned must therefore be entertained. Nevertheless, care must also be taken not to exclude worthy and necessary parties from the process of justice.

¹²⁸ Sydney No. S208 of 1996, High Court of Australia Transcripts, p. 6

The traditional position on *locus standi* was articulated in the American case of **Sierra Club – vs- Morton**.¹²⁹ Sierra Club, a membership corporation with “a special interest in the conservation and sound maintenance of the national parks, game refuges and forests of the country”, brought a suit for a declaratory judgment and for an injunction to restrain federal officials from approving an extensive skiing development in the Mineral King Valley in Sequoia National Forest. It relied on the Administrative Procedure Act which accorded judicial review to a “person suffering legal wrong because of agency action, or [who is] adversely affected or aggrieved by agency action within the meaning of a relevant statute.” The Club based its case on the fact that the project would change the area’s aesthetics and ecology. It did not allege that the development would affect it or its members in their activities, or that they used Mineral King.

The Supreme Court observed that earlier decisions had held that persons had standing to obtain judicial review of federal agency action where they alleged that the challenged action had caused them “Injury in fact.” This case raised the question whether injury of a non-economic nature to interests that were widely shared could found a claim for judicial review. For instance, in reference to the road to be built through Sequoia National Park, the complaint alleged that the development “would destroy or otherwise adversely affect the scenery, natural and historic objects and wildlife of the park and would impair the enjoyment of the park for future generations.” The Court held that this type of harm could amount to an “injury in fact” sufficient to lay a basis for standing: aesthetic and environmental well-being, like economic well-being, were important ingredients of the quality of life, and the fact that particular environmental interests were shared by the many rather than the few did not make them less deserving of legal protection through the judicial process.

But, the Court also observed that the “injury in fact” test required more than an injury to a cognizable interest. The party seeking review had himself to be among the injured. In this instance, the impact of the proposed changes in the environment of the Mineral King would not fall indiscriminately upon every citizen. It would be felt directly only by those who used Mineral King, and for whom the aesthetic and recreational values of the area would be lessened by the development. The Sierra Club had not alleged that it or its members would be

¹²⁹ 92 Supreme Court 1361 (1972) (USA)

affected in their activities or pastimes by the development, that its members used Mineral King for any purpose, or that they used it in any way that would significantly be affected by the proposed actions. It had not done so deliberately in order to test the theory that the fact that this was a public action involving questions as to the use of natural resources, and that it had a longstanding concern with, and expertise in, such matters were sufficient to give it standing as a "representative of the public." The Court held, however, that a mere interest in a problem, no matter how longstanding the interest and no matter how qualified the organization was in evacuating the problem, was not sufficient by itself to render the organization adversely affected or aggrieved. Therefore, the Sierra Club lacked standing to maintain this action.

In a dissenting opinion Justice Douglas argued that there was need for a rule that allowed environmental issues to be litigated in the name of the inanimate object about to be despoiled; contemporary public concern for protecting nature's ecological equilibrium should lead to the conferral of standing upon environmental objects to sue for their own preservation.

A South African court came to a similar decision in *Von Moltke v Costa Areosa (Pty) Ltd*¹³⁰ the facts of which were comparable to *Sierra Club v Morton*. The applicant had been residing at Llandudno and subsequently purchased property there because "he disliked crowded city life, and wished to live in a peaceful and quiet area, which was close to nature and to its natural condition." The house which he purchased was about a mile from Sandy Bay. He became aware that Sandy Bay was to be developed as a township and that an application had been submitted by the respondent company to the Divisional Council of the Cape. He filed his written objection with the Secretary of the Provincial Administration, and organized a petition for which he collected 4000 signatures, and a protest meeting. Subsequently, he ascertained that bulldozing operations had already commenced and that the indigenous vegetation was being destroyed.

¹³⁰ (1975) 1 (C.P.D) 255 (South Africa)

The applicant alleged that the bulldozing would constitute a nuisance to his enjoyment of the property as well as the surrounding area and that irreparable damage was being done to the natural vegetation and that the sand dunes were being disturbed. The applicant further contended that, by destroying the vegetation and interfering with the ecology, the respondent was committing a public nuisance. He sought an interdict to restrain the respondent from carrying on further operations and for an order directing the restoration of the property to the condition it had been in before the operations commenced. The respondent challenged the applicant's *locus standi* to bring the application.

The Court held that, assuming that the destruction of the vegetation constituted a public nuisance, what rights had the applicant in the matter? The party seeking relief had to show that he was suffering or would suffer some injury, prejudice or damage, or invasion of right peculiar to himself, and over and above that sustained by the members of the public in general. It was not enough to allege that he had a special reason for coming to court. As this applicant had failed to allege special damage or peculiar injury beyond that which he might sustain in common with other citizens he had failed to show that he had *locus standi* to come to court.

This traditional position was upheld by the Kenyan courts in **Wangari Maathai v Kenya Times Media Trust**¹³¹ in which the Plaintiff sought a temporary injunction restraining the defendant from constructing a proposed complex at a recreational park in the center of Nairobi. The Plaintiff was the Co-ordinator of the Greenbelt Movement, an environmental non-governmental organization, but brought the suit on her own behalf. The defendant raised the objection that the Plaintiff lacked *locus standi* to bring the suit, and this was upheld by the Court which pointed out that the applicant would not be affected more than any other resident of Nairobi. It was upheld again in **Wangari Maathai v Nairobi City Council**¹³² in which the Plaintiff sued for a declaration that the subdivision, sale and transfer of lands belonging to the local authority, was unlawful. The Court held that the Plaintiff had no particular interest in the matter. The application in **Lawrence Ngingyo Kariuki v County**

¹³¹ HCCC No. 5403 of 1989

¹³² HCC No. 72 of 1994

Council of Kiambu¹³³ was also dismissed on the basis of *locus*. The Plaintiff had argued that, because he was a shareholder of a farming company that owned land adjacent to a forest, which the respondent proposed to alienate, he had sufficient interest to maintain a suit for restraining orders.

Oposa v Factoran¹³⁴ and **Dr. Mohiuddin Farooque v Bangladesh**¹³⁵ provide an interesting contrast to the above decisions.

Oposa v Factoran raised the issue whether the petitioners, some of whom were minors had a cause of action to prevent the misappropriation or impairment of Philippine rainforests. The complaint was instituted as a taxpayers' class suit. It alleged that the Plaintiffs "[were] all citizens of the Republic of the Philippines, taxpayers and entitled to the full benefit, use and enjoyment of the natural resource treasure that is the country's virgin tropical rainforests."

The suit was said to be filed for the petitioners and others equally concerned but "so numerous that it [was] impracticable to bring them all before the court." The minors asserted that they "represent[ed] their generations as well as generations yet unborn." They sought orders to (1) cancel all existing timber licence agreements in the country; and (2) stop approving new timber licence agreements.

The Defendant sought a dismissal of the suit on the grounds that (1) there was no cause of action as the petitioners had not alleged a specific legal right violated by the respondent, and (2) the issue raised was a political question which properly pertained to the legislative and executive branches of government. But the petitioners asserted that granting timber licence agreements to cover more areas for logging than what was available was a judicial question as it involved an abuse of discretion.

¹³³ HC Misc. App. No. 446 of 1994.

¹³⁴ G. R. No. 101083 of 1993 (Philippines)

¹³⁵ Civil Appeal No. 24 of 1995, (Bangladesh)

The Court held that the case was a class suit as the subject matter of the complaint was of common and general interest not just to several, but to all, citizens of the Philippines. Consequently, since the parties were so numerous, it was impracticable, if not impossible to bring all of them before the court. The Plaintiffs were numerous and representative enough to ensure the full protection of all concerned interests. The Court held further that the petitioners could for themselves, for others of their generation and for the succeeding generations file a class suit. Their personality to sue on behalf of succeeding generations could only be based on the concept of intergenerational responsibility in so far as the right to a balanced and healthful ecology was concerned.

The Court held that the complaint focused on one specific fundamental legal right, the right to a balanced and healthful ecology, which was incorporated in the Constitution.

In **Dr. Mohiuddin Farooque v Bangladesh** the appellant was the Secretary General of the Bangladesh Environmental Lawyers Association (BELA), an organization working in the field of environment and ecology. The Court held that it was an aggrieved person because the cause it espoused, both in respect of a fundamental rights and constitutional remedies, was a cause of an indeterminate number of people in respect of a subject matter of public concern. Further, the organization was acting *bona fide* and did not seek to serve an oblique purpose. However, the Court rejected the submission that the Association represented not only the present generation but also the generation yet unborn. It stated that this finding in the **Oposa Case** had been based on constitutional provisions in the Philippines, which did not exist in Bangladesh.

In environmental discourse, a narrow interpretation of the *locus standi* rule could disqualify all but all claims founded on the violation of personal and proprietary enjoyment of environmental phenomena. But as Bray¹³⁶ indicates, many jurisdictions have abandoned that narrow perspective and adopted more or less open standing on environmental claims. The

¹³⁶ Bray, E "Locus Standi: Its development in South African environmental law" in Okoth-Ogendo, H. W. O & G. W. Tumushabe (eds) Governing the Environment: Political Change and Natural Resources Management in Eastern and South Africa. ACTS press Nairobi, 1999 at p123 -159. See also Mutacha, J. K, "The *locus standi* of the Environmentalist to protect the Natural Environment

rationale is that, apart from being of public concern, environmental issues are often incapable of adequate resolution except through indirect intervention.

Defining and giving content to this concept of *locus standi* has for a long time and in many legal systems given a lot of problems to both scholars and courts. Various definitions have been attempted. But almost all have one salient feature; that which would enable one to bring that dispute to court for settlement. For instance Andrew Rabie and Cor Eckard as long ago as 1976 talked about *locus standi* by way of definition in the following manner:-

“The Kingpin around which the whole question of the applicant’s *locus standi* hinges, is his interest in the administrative action that he complains of. If this interest is sufficiently protected in the eyes of the law, the applicant will be granted *locus standi*. Otherwise interest can only be likened to the interest of a reader of daily news in newspapers. Consequently he will then be afforded *locus standi*. Without a legally recognized interest there can be no question of an applicant’s *locus standi*.”¹³⁷

Cheryl Loots on the other hand stated that:-

“The term “*locus standi*” is difficult to define, as it has been used to refer to different factors that affect a party’s right to claim relief from civil court.”

In the first instance, the term is used to refer to the capacity of a party to litigate. A minor, for instance, who is not assisted by his guardian, lacks *locus standi*. An association may lack *locus standi* because its constitution

viewed from the Emerging Public Law Character of Environmental Law in South Africa.” 1999 Journal of Environmental Policy and Law in Africa, pp.61-76.

¹³⁷ See Andrew Rabie & Cor Eckard: “Locus Standi: The Administration’s shield and the Environmentalist’s Shackle.” IX CILSA (1976) 141-160 at 143.

does not give it the power to litigate. *Locus standi* in this sense has been well documented in the law of persons, corporations, associations and partnerships. I shall not deal with it, save to endorse the suggestion made by Beck, that it would be less confusing if this concept were referred to as “capacity to sue” rather than “*locus standi*.”

Secondly, the term is used to refer to Plaintiff's or applicant's right to claim the relief that he seeks. In this sense a Plaintiff or an applicant would be said to lack *locus standi* if he did not base his claim on a legal right enforceable. Consideration of this statement makes it obvious that there are two inquiries; first, is the claim based on a legally enforceable right? and secondly, is the particular plaintiff or applicant who has brought the claim entitled to enforce that right? It is only the second inquiry that concerns *locus standi* or standing. In other words, standing is in issue when, having established that a legally enforceable right exists, the court asks at whose instance the right is enforceable. Unfortunately, our courts have often failed to separate the two inquiries, and in many cases *locus standi* has been said to be in issue when in fact the issue was whether a right of action existed.”¹³⁸

Finally Professor Elmene Bray has as recently as 1994 commented that:-

“For many years the exact content of *locus standi* phenomenon has been baffling academics and judges. As a result, many good cases have failed because the party approaching the court could not prove that he or she had a “legally enforceable right” or so-called “sufficient interest” in the case. To complicate matters the interest of the Plaintiff or applicant had to be direct and personal, although it did not need to be special interest, but rather a

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Cheryl Loots: “Locus to claim relief in the public interest in matter involving the enforcement of legislation.” 1987. The South African Law Journal 131-147 at 131-132.

recognized personal interest even if it was not shared by members of the public.”¹³⁹

From the foregoing it is clear that the most important factor that seems to have been captured by every attempted definition is the concept of a “sufficient interest” and/or a “right to litigate.” For purposes of environmental law the definition of *locus standi* shall be restricted to the concept of “sufficient interest” and the “right to litigate” excluding the concept of capacity to sue as explained by Loots above.

It does appear from recent judicial pronouncements and legislative enactments that Kenya is taking this emerging direction. The Environmental Management and Co-ordination Act¹⁴⁰ is one of the country’s first legislations in that regard. Later statutes such as the Water Act, Act No. 8 of 2002 follow this trend. EMCA provides at Section 3 that every person in Kenya is entitled to a clean and healthy environment and does provide access to the courts in the event of an infringement of that entitlement. With respect to *locus standi* the Act has been expressed to be revolutionary- in the sense that it is the first time that persons in Kenya have been specifically accorded that entitlement. Previously, it was a matter of robust interpretation of the law that one would perhaps come to this conclusion. The new law now states at Section 3(4) thus:

- ‘ A person proceeding under subsection (3) of this section shall have the capacity to bring an action notwithstanding that such a person cannot show that the defendant’s act or omission has caused or is likely to cause him any personal loss or injury provided that such action –
- (a) is not frivolous or vexatious; or
 - (b) is not an abuse of the court process.’

Nevertheless, it is fair to say that this provision largely remains untested as can be seen from most recent judicial decisions. More recently, in the *Law Society of Kenya versus Commissioner of*

¹³⁹ Bray, E, “The Liberations of *locus standi* in the Interim Constitution: An Environmental Angle” 1994 (57) THRHR 481-487 at 483.

¹⁴⁰ Act no. 8 of 1999 which received presidential assent on 6th January 2000 and commenced operation on 14th January, 2002.

*Lands and others*¹⁴¹ Justice N.R.O. Ombija delivered a ruling on 19th December 2001, in which he adopted a highly restrictive construction. In a matter involving public land, which the Law Society had argued to have been improperly allocated, the Judge opined that matters of public interest are the domain of the Attorney General. He explained as follows:

"If the interest issue is a public one, then the litigant must show that the matter complained of has injured him over and above injury, loss or prejudice suffered by the rest of the public in order to have a right to appear in court and to be heard on the matter. Otherwise public interest are litigated upon by the Attorney-General or such other body as the law sets out".

That argument is in stark contrast to the Ruling of the Constitutional Court on the so-called "Donde Act"¹⁴² delivered on 24th January 2002. Two specific observations of the court deserve to be quoted in full:

"In our considered opinion carefully reached during our retirement to consider this case, like in human rights cases, public interest litigation, including lawsuits challenging the constitutionality of an Act of Parliament, the procedural trappings and restrictions, the precondition of being an aggrieved person and other similar technical objections, cannot bar the jurisdiction of the court, or let justice bleed on the alter of technicality. This court has vast powers under Section 60 of the Constitution of Kenya, to do justice without technical restrictions and restraints, and procedures and reliefs have to be moulded".

With an unequivocal and instructive language the Court added that where an authority expected to move the court drags its feet any person acting in good faith may approach the court to seek judicial intervention. The Court was clear: **"We state with firm conviction that as part of the reasonable, fair and just procedure to uphold constitutional**

¹⁴¹ HCCC NO. 464 of 2000 (Unreported)

¹⁴² HC Misc. Civil Application No. 908 of 2001 R vs Minister for Finance & Others ex parte Kenya Bankers Association (unreported)

guarantees, the right of access to justice entails a liberal approach to the question of *locus standi*. Accordingly, in constitutional questions, human rights cases, public interest litigation and class actions, the ordinary rule of Anglo-Saxon jurisprudence, that an action can be brought only by a person to whom legal injury is caused, must be departed from. In this type of cases, any person or social groups, acting in good faith, can approach the court seeking judicial redress for a legal injury caused or threatened to be caused to a defined class of persons represented ... In such cases, the court shall not insist on such public spirited individual or social action group espousing their cause, to show his or their standing to sue in the original Anglo-Saxon conception".

On the other hand, there is also the very serious and recent issue of forestry excisions. The latest of this phenomenon was experienced some time last year when the then government expressed through various gazette notices its intention to excise over 167,000 acres of forests. A number of organizations opposed to this move by the government filed objections with the ministry but this did not mean much to the government. Some of the organizations concerned therefore resorted to court action and filed a representative suit; being **High Court of Kenya Misc. Civil Application Number 421 of 2002, R Vs MIMISTER FOR ENVIRONMENT AND NATURAL RESOURCES AND OTHERS EX PARTE KENYA ALLIANCE OF RESIDENTS ASSOCIATIONS AND OTHERS** (a judicial review application). The application sought various orders among which were writs of *certiorari* to quash those gazette notices, several orders of prohibition to stop the government from dealing with those forest areas in a manner that is detrimental to the country's health. The Law Society of Kenya applied through the writer of this thesis and was made a party to the proceedings. The matter is still pending in court. The most important thing to mention now about this case is that the court found that the applicants, namely, an association of residents' associations, an environmental non-governmental organization, and two individuals, and later on the Law Society of Kenya, had *locus standi* to bring the matter to court and otherwise to be heard notwithstanding that they may not have been directly injured by the governmental action.

The case was based on, among other laws, the Constitution of Kenya, and the Environmental Management and Co-ordination Act. Under the Constitution, the applicants argue *inter alia* that the Constitution has a Bill of Rights under which the right to life is protected and guaranteed. The argument is constructed along the rulings of courts in jurisdictions such as India and Pakistan on the robust interpretation of the right to life.

Similarly, in the case of Rodgers Muema Nzioka and 2 Others Versus Tiomin Kenya Limited¹⁴³, the High Court found that the plaintiffs, who were but a few of the people to be affected by a proposed mining activity within their area, had a right to bring the suit and seek the orders they sought. The court had this to say:

“...It means that anybody who is entitled to these elements have a right to prosecute his cause in court. It would therefore not support the argument that some of the plaintiffs do not have sufficient entitlement to bring the case to court or that they have not title deeds or that they are squatters. More section 11 (2) of the EMCA say that the plaintiff does not need to show that he has a right or interest in the property environment or land alleged to be invaded. That seems to be the law.”

Thus, even in this case the court was ready and did accept the enlarged parameters of *locus standi* as provided in the new law. It is, a matter of conjecture as to whether the judge may have arrived at a different conclusion were it not for the provisions of the law that he relied on. He proceeded to grant the injunction as was sought by the Plaintiffs.

The writer of this thesis did also have a discussion with two High Court Judges, one of whom has since been promoted to the Court of Appeal, (Justice Philip Waki) and the other who also sits in the East African Court of Justice (Justice Kassanga Mulwa). Similarly, the writer talked to a retired judge, Justice Edward Torgbor. We sought to gain some insights into how the judges treat environmental cases when they go before them.

¹⁴³ HCCC No. 97 of 2001 (unreported)

In the case of Justice Waki, he declared that in his view, there exist sufficient grounds to treat environmental cases somewhat differently from other 'conventional' cases. He did, however, add that it takes a personal decision to grant certain orders or to arrive at certain interpretations of the law that may either work for the environment or not. As for him, he stated that he would be able to find in most cases except the most vexatious of them, that the applicant has the right to be in court. Previously, he had made a ruling with environmental significance, in the case of Niaz Mohamed Jan Mohamed vs Commissioner of Lands and Others.¹⁴⁴ In this case, objections were raised that the plaintiff had no *locus standi* to protect the public rights that he purports to in alleging that a public road was unlawfully alienated. Dismissing that objection the judge stated as follows:

"As I said in this court in the case of HCCC No. 1 of 1996 Babu Omar & Others Vs Edward Mwarania & Another (UR), there is nothing in the statutes relating to Local Authorities to exclude the courts ordinary jurisdiction to restrain ultra vires acts or nuisance or prevent breaches of trust. No authority has been cited to me to the contrary and I am not aware of one...The applicants are members of the public. They reside and pay their rates to the Mombasa Municipal Council. They would be entitled to vote here. And they have a right to question the propriety or otherwise of the dealings of the Council of the public land which the Council holds in trust for the public. They may well be right that the Council is alienating a public road reserve, contrary to law. I would apply the same principles here in granting the orders sought even on this limb of the application.

Similarly, Justice Mulwa also took the view that where a violation of right to a clean and healthy environment or such other similar breach is alleged he would find that the applicant has the *locus standi* to bring the case to court. Justice (Rtd) Torgbor, while echoing the sentiments of Justices Waki and Mulwa added that quite often, judges handle environmental cases without realizing that they are actually dealing with such cases. This is because most of the cases allege some right or other normally of a proprietary interest kind which the courts have treated as such without looking at their environmental components. One thing that can be mentioned about all these three judges is that they have all at various times participated in

¹⁴⁴ HCCC No. 423 of 1996 (unreported)

judicial training symposia on environmental law. It is therefore, arguable that such trainings have opened their eyes to environmental law and given them an edge of their colleagues, and that this may have helped change their thinking and approaches to environmental issues.

From the above, it is possible to indicate that the tide appears to be shifting in favour of an expanded definition of *locus standi*. Nevertheless, the blatant inconsistencies in the foregoing Kenyan cases underscore the need to provide a basis for a stable evolution of jurisprudence relating to, *locus standi*, in public interest causes in general, and environmental matters, in particular. It is the kind of stability, which a constitutional entrenchment can properly provide. In deed, as was noted in **Farooque**, the court rejected a submission on behalf of the applicant on the ground that Bangladesh had no equivalent constitutional provision on the particular issue as the Phillipines.

It is, thus, evident that notwithstanding the provisions of any written law in Kenya, the new Constitution must have provisions on environment¹⁴⁵. Evident is the fact that the constitution should protect the general environment within which people enjoy life, as expressed in *Shehla Zia* case as well as the natural resources and their sustainable use as enunciated in our definition and argued by *Oposa* Court. Evident too is the fact that the constitution must offer clear access to justice if the protection is to be actualised. For indeed, apart from the possible 'bravery and robustness' of a judge, quite often they need such constitutional backing for their actions.

2

4.3 THE QUESTION OF COSTS

While there remains work to be done to improve the transparency and participatory nature of governments and international institutions, discussions surrounding the environment increasingly turn to implementation and enforcement. It is not enough to provide information, to allow the public to participate, or to have strong norms; these legal

¹⁴⁵ In deed, this has been provided in chapter 12 of the draft Constitution. If these provisions are maintained as in fact there is firm indication that they will, then for the first time in Kenya's constitutional history, the country will have a right to a clean and healthy environment enshrined in her constitution.

obligations and rights must be backed by enforcement mechanisms that provide recourse for violations.

Citizens may be able to use their domestic laws, courts, and administrative bodies to challenge activities in environmental degradation. In addition to utilizing domestic avenues, citizens may be able to participate in judicial and administrative proceedings of another country either as intervenors or affected parties (plaintiffs). This, however, can be quite complex. Cases involving transboundary harm often require complicated procedural and political issues to be addressed, such as sovereignty, the presumption against extraterritorial application of national laws, jurisdiction, and forum *non conveniens*.

In the long run, however, both these two processes have to contend with the issue of costs. The general rule is that costs follow the event. However, this is not an absolute rule. In the absence of special circumstances justifying some other order, a successful litigant is entitled to receive his costs. In *Donald Campbell & Co. Ltd vs Pollak*¹⁴⁶, Viscount Cave LC observed at 811-812:

“ A successful defendant in a non-jury case has, no doubt, in the absence of special circumstances, a reasonable expectation of obtaining an order for the payment of his costs by the plaintiff; but he has no right to the costs unless and until the court awards them to him, and the court has an absolute and unfettered discretion to award or not to award them. This discretion, like any other discretion, must of course be exercised judicially, and the judge ought not to exercise it against the successful party except for some reason connected with the case.”

The above quotation reveals four very important things with respect to the award of costs in a suit. First, that the successful party is entitled to receive his costs all things remaining equal; secondly, that the said entitlement is only so far as the court itself has deemed it necessary so to order; thirdly that in making the order the court would be exercising a discretion; and fourthly, that it is possible that the discretion could be exercised even against the winning party.

In Kenya, the issue of costs is dealt with by the Civil Procedure Act¹⁴⁷. Section 27 (1) states thus:

“ Subject to such conditions and limitations as may be prescribed, and to the provisions of any law for the time being in force, the costs of and incidental to shall be in the discretion of the court or judge, and the court or judge shall have full power to determine by whom and out of what property and to what extent such costs are to be paid, and to give all necessary directions for the purposes aforesaid; and the fact that the court or judge has no jurisdiction to try the suit shall be no bar to the exercise of those powers: Provided that the costs of any action, cause or other matter or issue shall follow the event unless the court or judge shall for good reason otherwise order.”

The proviso above merely helps to confirm that there could be variations to the general rule including an order that the costs be paid before the event, i.e. before the determination of the suit.

Discretionary power is a controversial issue and has been challenged in many court decisions. This is because by its very nature it involves of high standard of objectivity and impartiality by the person/authority upon whom the power is bestowed. Most discretionary powers are arguably, unfettered, basically to give the wielder of power latitude to exercise its duty without much restraint.

Discretion is the right to act in certain circumstances and within given limits and principles on the basis of one's judgment and conscience.¹⁴⁸ An element which is essential to the lawful exercise of discretion, and in deed all powers, judicial or administrative, is that it should be exercised by the authority upon whom it is conferred, and by no one else.

¹⁴⁶ (1927) AC 732

¹⁴⁷ Chapter 21, Laws of Kenya.

¹⁴⁸ L. B. Curzon, *Dictionary of Law*, 4th ed., London: Pitman. 1988, p.120

Classical constitutional puritans appeared to posit that wide discretionary power was incompatible with the rule of law.¹⁴⁹ But in the words of Wade¹⁵⁰,

“ ...This dogma cannot be taken seriously today, and indeed it never contained much truth. What the rule of law demands is not that wide discretionary power should be eliminated, but the law should be able to control its exercise. Modern government demands wide discretionary powers which as wide as they are numerous. Parliamentary draftsmen strive to find new forms of words, which will make discretion even wider, and parliament all too readily enacts them. It is the attitude of the courts to such seemingly unbounded powers which is perhaps the most revealing feature of a system of administrative law.”

The first requirement is the recognition that all power has legal limits. The second requirement no less vital is that the courts should draw those limits in a way, which strikes the most suitable balance between executive efficiency and the legal protection of the citizen. Paradoxically, the process of ensuring proper exercise of discretion is itself discretionary-judicial discretion.¹⁵¹

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The leading principle on the exercise of the court's discretion is that the discretion is intended to be exercised to avoid injustice or hardship resulting from accident, inadvertence, or excusable mistake or error, but is not designed to assist a person who has deliberately sought, whether by evasion or otherwise, to obstruct the course of justice. One of the leading judicial decisions on this point is the case of **Mbogo & Another -vs- Shah**.¹⁵² This case, although not of public interest or environmental management specifically, is germane to this point. The respondent was knocked down and injured by a vehicle, which was owned

¹⁴⁹ See for instance A. V. Dicey, *Law of the Constitution*, 9th ed. London, Macmillan, 1939, p.202

¹⁵⁰ H. W. R Wade, *Administrative Law*, 5th. Ed. Oxford University Press, 1982, p.347

¹⁵¹ P. L. O Lumumba, *An Outline of Judicial Review in Kenya*, Nairobi, Miyami Investment Limited, 1999, p.60.

¹⁵² 1968 (EA) 93

by the first appellant and driven at the time by the second appellant. The respondent notified the vehicle's insurer that he intended to hold that company liable to compensate him and served it with the requisite notice. The company in correspondence denied liability. The company's advocate, however, refused to accept service of the proceedings filed by the respondents against the appellants and service was effected by advertisement. No appearance was entered and no defense was filed and the respondent obtained *ex parte* judgement against the appellants, which the insurance company then applied to set aside. Its application was refused by the High Court and it appealed. The Court of Appeal dismissed the appeal saying *inter alia* that in the circumstances, the judge exercised his discretion properly to refuse the application to set aside the judgement. In the words of Sir Clement De Lestang, VP:

“ I think that it is well settled that this court will not interfere with the exercise of discretion by an inferior court unless it is satisfied that its decision is clearly wrong, because it has misdirected itself or because it has acted on matters on which it should not have acted or because it has failed to take into consideration matters which it should have taken into consideration and in doing so arrived at a wrong conclusion ”¹⁵³

Similarly, in the same case Sir Charles Newbold, said;

“... a court of Appeal should not interfere with the exercise of the discretion of a judge unless it is satisfied that the judge in exercising his discretion has misdirected himself in some matter and as a result has arrived at a wrong decision, or unless it is manifest from the case as a whole that the judge has been clearly wrong in the exercise of his discretion and that as a result there has been injustice. ”¹⁵⁴

The above quoted case has been cited with approval in many other subsequent cases and is the *locus classicus* on the proposition of law that even judicial discretion must be exercised judicially. In consonance with this position, Kely, J stated;

¹⁵³ *ibid*, p.94

¹⁵⁴ *ibid*, p.96

‘ The award of costs is in my discretion. However, the discretion must be exercised judicially, and there are authorities which provide guidance as to its exercise. By far the most important factor which courts have viewed as guiding the exercise of the costs discretion is the result of the litigation. A successful litigant is generally entitled to an award of costs, unless for some reason connected with the case, a different order is required.’¹⁵⁵

One of the grounds for the proposition of law that costs follow the event is the fact that costs are compensatory in nature. As McHugh J said in *Latoudis –vs- Casey*¹⁵⁶ ‘ *an order for costs indemnifies the successful party in litigious proceedings in respect of liability for professional fees and out-of-pocket expenses reasonably incurred in connection with the litigation... The rationale of the order is that it is just and reasonable that the party who has caused the other party to incur the costs of litigation should reimburse that party for the liability incurred. The order is not made to punish the unsuccessful party. Its function is compensatory.*’

In *Hughes –vs- Western Australian Cricket Association (Inc.)*¹⁵⁷ Toohey J summarised the effect of decisions of Australian and English courts on apportionment of costs thus:

- ordinarily, costs follow the event and a successful litigant receives costs in the absence of special circumstances justifying some other order;
- where a litigant has succeeded only on a portion of the claim, the circumstances may make it reasonable that the litigant bear the cost of litigating that portion upon which it has failed;
- a successful party who has failed on certain issues may not only be deprived of the costs of those issues but may be ordered as well to pay the costs of the party. ‘ Issue’ in that sense does not mean a precise issue in the technical pleading sense, but any disputed question of law or fact.

¹⁵⁵ *Hayle Holdings Pty –vs- Australian Technology Group Ltd* (2000) FCA1699, p. 4

¹⁵⁶ (1990) 170 CLR 534, at 566-7 (another Australian decision)

¹⁵⁷ (1986) ATPR 40- 748, at 48,136

This summary has often been referred to in subsequent decisions on the issue with approval. **Forster –vs- Farquhar**¹⁵⁸ was a case in which a successful plaintiff was ordered to pay the defendant’s costs of the items of special damage, which the plaintiff failed to recover. The claims were not vexatious or oppressive- they merely failed. At page 570 Bowen, LJ said:

“ The real controversy in the present action was as to the damage suffered, and the question as to damage, though not an issue in the pleader’s sense of the word, was a matter in controversy and one which could be split up into separate heads, each involving a different class of evidence. For all purposes of justice these separate heads of controversy were different issues, though neither different issues, nor even issues at all, in the sense in which pleaders use the term. Why should the defendants, whose defense has succeeded on the most expensive and the most important of these heads of controversy, bear the cost of litigating it? If by making a special order as to costs the judge could apply distributively to these heads of controversy the maxim that he who loses pays, was it not fair and reasonable so to direct? It seems to us that it was. So far from thinking that Cave, J., had no good cause for making the order he did, what he has directed appears to us, on the contrary, to be an exact and admirable instance of the way in which, in the hands of a competent and accurate judge, the rule as to good cause can be usefully applied.”

Nevertheless, the mere fact that the party against whom the judgment goes is successful on particular issues, does not of itself mean that this party should receive the costs of those issues. This point, however, shows that at least to some extent, decisions of courts on costs reflect established practice, and the practice of the courts does evolve.

The third of the principles enunciated by Toohy, J in **Hughes**, is that a successful party who fails on certain issues may be deprived of the costs of those issues, and may also be ordered to pay the other party’s costs of those issues. When is it appropriate to order that a successful party should not merely be deprived of its costs of an issue on which it failed, but

¹⁵⁸ (1893) 1QB 564

should also pay the other side's costs of that issue? *Re Elgindata Ltd (No. 2)*¹⁵⁹, in the judgment of Nourse LJ, contains a statement of applicable principles. Principle (3) is that if a successful party has caused a significant increase in the length or cost of proceedings by raising issues or making allegations on which he fails, then he may be deprived of the whole or part of his costs. Principle (4) is:

“Where the successful party raises issues or makes allegations improperly or unreasonably, the court may not only deprive him of his costs but order him to pay the whole or part of the unsuccessful party's costs.”

A successful party who neither improperly nor unreasonably raises issues nor makes allegations on which he fails ought not to, in the judgement of the English Court of Appeal, be ordered to pay any part of the unsuccessful party's costs. The Principle (4) flows from the terms of Order 62 rule 10 of the English Rules of the Supreme Court as they then stood; a provision which has no equivalent in the Civil Procedure rules of Kenya. Nevertheless, the courts have described the traditional rule as being one in which a successful plaintiff ought not to be made to pay the costs of the other side unless he has been guilty of some sort of misconduct.

4.4 DEPARTURE FROM THE RULE

The order for award of costs is in the discretion of the judge. A corollary interpretation of this is that the judge can and in deed, judges have departed from the traditional rule as discussed in this chapter. There is therefore no doubt that there could arise situations that could call for a departure from that rule. An expression of this departure takes a number of forms including for instance an order that there be no order as to costs, or that each party bears its own costs. The same result would obtain where the judgement or ruling is silent on the issue of costs. This is not unique to Kenya.

In exercising the discretion conferred by section 69 (2)¹⁶⁰ of the Court Act by a determination that there be no order as to costs, despite the dismissal of the appellant's

¹⁵⁹ (1993) 1 All ER 232, at 237

¹⁶⁰ The equivalent of section 27 of the Civil Procedure Act, Cap 21 Laws of Kenya

application for injunctive and declaratory relief, the primary judge took various matters into account. They included the following:

- “ (i) The ‘traditional rule’ that, despite the general discretion as to costs being ‘ absolute and unfettered’, costs should follow the event of the litigation ‘ grew up in an era of private litigation’. There is need to distinguish applications to enforce ‘public law obligations’ which arise under environmental laws lest the relaxation of standing by s.123¹⁶¹ have little significance.
- (ii) The characterization of proceedings as ‘ public interest litigation’ with the ‘prime motivation’ being the upholding of ‘ the public interest and the rule of law’ may be a factor which contributes to a finding of ‘ special circumstances’ but is not, of itself, enough to constitute special circumstances warranting departure from ‘usual rule’; something more is required.
- (iii) The appellant’s pursuit of the litigation was motivated by his desire to ensure obedience to environmental law ..., he had nothing to gain from the litigation ‘ other than the worthy motive of seeking to uphold environmental law and the preservation of endangered fauna’.
- (iv) In the present case, ‘a significant number of members of the public’ shared the stance of the appellant as to the development to take place on the site, the preservation of the natural features and flora of the site, and the impact on the endangered fauna... In that sense there was a ‘public interest’ in the outcome of the litigation.
- (v) The basis of the challenge was arguable and had raised and resolved ‘ significant issues’ as to the interpretation and future administration of statutory provisions relating to the protection of endangered fauna and relating to the ambit and future administration of the subject development consent; these issues had ‘implications’ for the Council, the developer and the public.

¹⁶¹ The equivalent of section 3 of the Environmental management and Co-ordination Act, Act No. 8 of 1999, Laws of Kenya.

(vi) It followed that there were ‘ sufficient special circumstances to justify a departure from the ordinary rule as to costs’.¹⁶²

The only issue that went on appeal in that case was not on the basis of the matters taken into account but the refusal to award costs to one of the parties. On the appeal the costs were awarded to that party as well. In a nutshell, the highest court in Australia found that where the litigation properly could be characterized as ‘public interest litigation’ by applying these tests to the facts, a costs order against the public interest applicant may not be appropriate.

It does follow that the foregoing factors may occasion a departure from the traditional rule as to costs.

The issue of departure from the rule was later to be discussed in another Australian case four years later in the case of **North Australian Aboriginal Legal Aid Service Inc. –vs- Hugh Burton Bradley (no. 2) FCA 564 (7 May 2002)**. North Australian Aboriginal Legal Aid Service (NAALAS) had brought an application to have the appointment of one Hugh Bradley as Chief Magistrate of the Northern Territory declared invalid. This application was dismissed. However, the judge did not deal with the costs and instead acceded to an application by the parties that they be permitted to file and serve written submissions regarding that issue.

NAALAS contended that although its application had been dismissed, it ought not be required to pay the respondents’ costs. In deed, it submitted that the respondents should be ordered to pay its costs, and on an indemnity basis. Alternatively, NAALAS submitted that the respondents should pay its costs in respect of those issues on which it had succeeded, and on an indemnity basis, and that they should not have the benefit of a costs order in their favour in respect of the remainder of the proceedings. Again alternatively, it submitted that if neither of its primary contentions were accepted, there should be order as to costs. Finally, it submitted that whatever the outcome of its earlier submissions, Mr. Bradley was not entitled to his costs because the Northern Territory had indemnified him.

¹⁶² This extensive quote is from the High Court of Australia in *Oshlack –us- Richmond Rivers Council (1998) HCA 11*

The respondents submitted that costs should follow the event. NAALAS, having brought this proceeding, and having been unsuccessful, there should be an order that it pays the respondents' costs.

In addressing these issues the court first commented on the power of the court to award costs. Quoting from section 43 (2) of the Federal Court of Australia Act, 1976, the court agreed that the award of costs is in the discretion of the judge, although it must be exercised judicially. The court further stated' **Ordinarily, costs follow the event. However, this is not an absolute rule. In the absence of special circumstances justifying some other order, a successful litigant is entitled to receive his costs.**¹⁶³

In a nutshell, the court was stated that there are circumstances that allow the departure from the usual rule. We now discuss some of them here, some of which were dealt with in the NAALAS case.

4.4.1 Provocation Of The Plaintiff By The Defendant

In the NAALAS case the judge after receiving evidence and hearing arguments said: **'The evidence of Mr. Jones was received...because I accepted that there may be circumstances in which a defendant has conducted himself in such a manner that he has led the plaintiff erroneously to believe that he has a good cause of action, and so induced him to bring the proceeding. In such a case the court may order either that no costs be paid, or that a proportion only of the costs be awarded.'**¹⁶⁴

That proposition finds support in **Ritter – vs- Godfrey**¹⁶⁵; **Davey –vs- Bullock**¹⁶⁶; and **Merrett –vs- Schuster**¹⁶⁷. There may also be circumstances where the defendant has done something connected with the institution of, or conduct of, the proceeding, which is calculated to cause unnecessary litigation or expense. Again in such a case the same

¹⁶³ p.5 of the judgement

¹⁶⁴ *ibid*, p.13

¹⁶⁵ (1920) 2KB 47

¹⁶⁶ (1891) 17 VLR 3

¹⁶⁷ (1920) 2 Ch 240

consequences as stated by the judge in the NAALAS case may follow.¹⁶⁸ The running thread in all these cases is the recognition that the conduct of the successful party leading to the litigation may be relevant to whether or not that party receives costs. It would in those circumstances be concluded that the defendant had 'provoked' the plaintiff into instituting or continuing the proceeding. Whatever, can be properly described, as constituting provocation would, however, be determined in the circumstances of each case. They may nevertheless, include, comments made by the defendant affirming the course taken by itself which has precipitated the controversy; failure to offer explanations as required until ordered to do so by an order of court; failure to produce relevant documents until at last compelled to do so by a court order; and lies contained in a letter (s) in response to the plaintiff's letter of demand. In all these, however, there would have to be evidence that such action provoked or significantly contributed to the decision by the plaintiff to commence the litigation.

4.4.2 The 'Issues' Claim

Upon the institution of any proceeding, several questions will fall before the court for determination. In public interest cases one of the fundamental issues that is ordinarily raised by the defence, often, by way of preliminary objection is the standing of the plaintiff to bring the suit. Another issue that has arisen, and mostly raised by the plaintiff in proceedings against government officials or institutions, is the suitability of the Attorney-General representing such official or institution.¹⁶⁹ These issues have been determined one way or the other.

On this point, for instance, NAALAS submitted that, having been successful in resisting the challenges to its application based upon standing and justiciability raised by the Northern Territory, and the challenge based upon justiciability raised by Mr. Bradley, it should either receive costs associated with dealing with these issues, or at least not to have to pay the entirety of the respondents' costs. The court accepted this submission and stated thus:

¹⁶⁸ see *Bostock -vs Ramsley Urban Council* (1900) 2 QB 616; *Donald Campbell & Co. Ltd -vs- Pollak* (1927) AC 132. These principles are also discussed in N, Williams, *Supreme Court Civil Procedure*, Victoria, 1986 at 326.

¹⁶⁹ See for instance the ruling of the High Court that the AG could not act for the Irrigation Board of Kenya in HCCC..... The author, as part of the team that has brought the 'Forests' suit' i.e HC Misc. App. No. 132.

“A successful party who has failed on certain issues may not only be deprived of the costs of those issues, but also ordered to pay the other party’s costs in relation to them. In this context, ‘ issue’ is not used in the technical pleading sense, but refers to any disputed question of fact or of law...In my view, NAALAS is entitled to some reduction in the amount of costs which it would otherwise be required to pay the respondents by reason of its having had a measure of success, on these issues, in this proceeding.”

In the Kenyan case of **R-vs-Minister for Finance & Others ex parte KBA**¹⁷⁰, a constitutional application seeking to annul an Act of Parliament, the court said that; ‘ **With regard to the costs of these proceedings, we consider that each party has won and lost on substantial points, and the only fair order is that each party bears its own costs.**’ The court was in effect acknowledging that in that case there existed sufficient facts to establish special circumstances to justify a departure from the traditional rule.

This was, however, in contrast to an earlier High Court of Kenya ruling in which costs were ordered to be paid by the respondents although there had been a mix of successes and failures on issues by the all parties to the proceedings.¹⁷¹ Popularly known as the **Kenya Roads Board case** the applicant had sought to have a whole Act of Parliament, the Kenya Roads Board Act declared null and void on grounds *inter alia* that it discriminated against the applicant and did not respect the doctrine of separation of powers as dictated by the constitution of Kenya. The Court ordered only parts of the Act to be unconstitutional.

4.4.3 Public Interest Nature of the Litigation

Public Interest Litigation means a legal action initiated in a court of law for the enforcement of public interest or general interest in which the public or class of the community has pecuniary interest or some interest by which their legal rights or liabilities are affected.¹⁷² In its scope and application Public Interest Litigation oversteps the boundaries of traditional

421 Of 2002, R-vs- Minister for the Environment & Others ex parte KARA discussed the strategy of objecting to the AG acting for some of the parties to that application.

¹⁷⁰ HC MISC. APPLI. NO. 908 OF 2001

¹⁷¹ R-vs-The Kenya Roads Board ex parte John Haroun Mwau, HC Misc. Appli. No. 43 of 2001

¹⁷² Black’s Law Dictionary

legal position. Traditionally, courts of law granted relief to persons whose rights were directly contravened or affected. This requires strict legal interpretation. Public Interest Litigation as a part of the process of participation in justice and standing in civil litigation of that pattern must have liberal reception at the Judicial doorsteps.

With regard to costs in public interest litigation the argument is that having enlarged the standing of many a citizen to institute an action against perceived breaches of law, it would amount to taking by the left hand what has been given by the right, if costs were awarded against a person proceeding in public interest. Nevertheless, what constitutes public interest would have to be determined in each case.

Thus, in the NAALAS case, NAALAS submitted that its challenge to the validity of Mr. Bradley' appointment should be regarded as ' public interest litigation' and, though unsuccessful, should be dealt with in accordance with the principles laid down by the majority in **Oshlack-vs-Richmond River Council**.¹⁷³

Oshlack was an appeal against a decision of the New South Wales Court of Appeal allowing an appeal against a costs order made in the Land and Environment Court of New South Wales (the Court). The costs order was made in a litigation in which the appellant, Mr. Oshlack, unsuccessfully claimed some relief in respect of consent granted on March 16th 1993 by the respondent, Richmond River Council, to a development application by Iron Gates Developments Property Ltd (the developer) for a subdivision of land at Evans Head in New South Wales. The appellant had sought a declaration that the consent was " void and of no effect" and an injunction restraining the developer from carrying out any development on the subject land without a valid development consent from the council. The land at Evan Head was within the area of application of the Richmond River Local Environmental Plan 1992, a local environment plan made by the Minister under powers conferred by section 70 of the *Environmental Planning and Assessment Act 1979 (NSW)* (the EPA Act). Within the relevant zone under that Plan, development was permissible with consent. The Council was the ' consent authority' for the purposes of the EPA Act (s.4 (1)).

Section 123 (1) of the EPA Act provided that “any person” may bring proceedings in the Court for an order to remedy or restrain breaches of the EPA Act. One of the principal grounds upon which the appellant sought to impugn the consent granted by the Council was that it had failed to properly exercise its decision-making power in unreasonably concluding that the development was not likely to have that effect and had wrongly failed to require the provision of a fauna impact assessment, with particular reference to the habitat of the ‘koala’, the development site. In a reserved judgment, the primary judge (Stein, J) dismissed the appellant’s application. The successful parties, the developer and the council, then sought orders that the appellant pays their costs. Stein, J reserved his decision upon these applications and determined that there be no order as to costs. The Court of Appeal reversed the judge’s with respect to the costs of the Council. It ordered that the appellant pay the Council’s costs, both at first instance and at the Court of Appeal.

In the High Court, Gaudron, Gummow and Kirby JJ determined that the appellant’s appeal should be allowed, and reinstated the costs order made at the first instance. Brennan CJ and McHugh J dissented. In their joint judgment, Gaudron and Gummow JJ noted that the primary judge had reasoned from a starting point, which favoured costs against the appellant, as the unsuccessful party. Having characterized the nature of the litigation as concerned with public rather than private rights, and having found that ‘something more’ than this characterization had been demonstrated, ‘special circumstances’ existed to justify a departure from the usual rule. Among the additional factors identified as amounting to that ‘something more’ were the following:

- The appellant’s pursuit of the litigation was motivated purely by his desire to ensure obedience to environmental law, and to preserve the habitat of the endangered fauna, a ‘worthy motive’;
- A significant number of members of the public shared his stance;
- The basis of the challenge was arguable and had raised and resolved “significant issues” as to the interpretation of statutory provisions relating to the protection of the endangered fauna.

¹⁷³ supra

The judges then concluded that Stein J had not taken into account any considerations extraneous to the sound exercise of discretion in relation to costs and that accordingly the Court of Appeal ought not to have reversed his decision.

Kirby J on the other hand concluded that it was a clear purpose of Parliament to permit, and even encourage, individuals and groups to exercise functions in the enforcement of environmental law before the Land and Environment Court. It followed that a rigid enforcement of the compensatory principle in the costs orders would 'discourage, frustrate or even prevent the achievement of that purpose'. The judge considered that it was legitimate to have regard to the fact that litigation was pursued in the public interest when determining whether to award costs to an unsuccessful applicant.

Another case that discussed this principle and that was referred to by NAALAS was the case of **Ruddock-vs-Vadarlis**.¹⁷⁴ Where it was recognized that public interest litigation could give rise to 'special circumstances' that justify a departure from the usual rule that the unsuccessful applicant pays the successful respondent's costs. The judges said at paragraph 13:

" ...Where, for example, a declaratory relief is sought because of genuine uncertainty about the interpretation of a document or a statute, it will not explain why the successful party should be reimbursed at the cost of its opponent where the legal issue is novel and has consequences extending beyond the particular litigation. The alternative rationale for the compensation principle is simply that the winner should not have to suffer financially for vindicating its rights. The criticism of this intuitively attractive approach is again that it does not necessarily follow that the obligation to compensate the winner should be placed on the losing party. For the losing party may have had very good legal grounds for its position and have conducted itself in the litigation in an entirely reasonable way. Where the case is close or difficult and involves no obvious element of fault on the part of the loser the proposition that costs automatically follow the event may work unfairness. Moreover, it may set up a significant barrier against parties of

modest means even if the contemplated claim has substantial merit... These criticisms will not justify a global modification, in public interest cases, of the usual rule that costs follow the event. They do, however, indicate the desirability of avoiding the calcification of the discretion with rigid rules governing its exercise.” (Emphasis added).

NAALAS submitted that an order that it pays the respondents’ costs might deter other parties in a similar position from bringing public interest cases. It submitted that the following factors, referred to in **Ruddock**, were equally applicable in its case:

- The proceedings raised a number of novel and important questions of law, including questions of standing, justiciability and constitutional law;
- Whether Mr. Bradley was appointed for what was, in effect, a fixed term had a tendency to affect judicial independence, a matter of high public importance;
- NAALAS had been justified in bringing and maintaining these proceedings on the basis of the facts known to it; and
- there was no financial gain to NAALAS in bringing its claim.

These arguments did carry some favour with the judge. For it was eventually decided that ‘an additional reduction is warranted by the fact that some aspects of this proceeding may be characterized as “public interest litigation”, including in particular, the constitutional arguments...’

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Thus, this is yet another ground upon which to base a departure from the traditional rule.

4.5 EMERGING TRENDS ON *LOCUS STANDI* AND COSTS

A look at most of the cases discussed in this chapter shows that a trend is emerging where the courts are increasingly willing to allow as many people as possible to come before to vindicate provisions of law that deal with the enhancement of the enjoyment of the right to a

¹⁷⁴ (2001) FCA 1865

clean and healthy environment. Moreover, a further trend appears to have developed where the courts are reluctant to saddle with costs public-spirited individuals in their noble recourse to the courts of law. But that has not always been the case. In a number of cases that have now dealt with the twin issues of standing and costs, it does appear that the willingness of the courts that we have referred to in this chapter has been a gradual development.

There are at least two important factors that this can be attributed to. Firstly, the influence of the development of international law culminating with the Rio Declaration in 1992 has been immense. Much of the discussions in the **Oposa**¹⁷⁵ and **Farooque**¹⁷⁶ cases centred on the international environmental law principles and as they relate to national environmental considerations. For instance, in **Farooque**, Latifur Rahman, J said:

“If we look to the cases recently disposed of by the supreme court of India then we find that there is a trend of judicial activism to protect the environment through public litigation in environmental cases. In Bangladesh such cases are knocking at the door of the court for environmental policy making and the court is being involved in this case. There is a trend to liberalise the rules of standing throughout the world in spite of the traditional view of the *locus standi*.”

It is our view that the same can be said of the costs orders. In the **Farooque** case, for instance, the judges said that there would be no order as to costs. Similarly, the court in the **Oposa** case did not order that costs be paid. /

The second factor in these instances appear to be the influence of the constitution in shaping the result of the litigation. Courts find it easier to interpret the constitution so as to protect the environment where there are clear constitutional provisions dealing with the issue. In the words of Rahman, J in **Farooque**, “ I also honestly feel that there is a positive duty on the judiciary to advance and secure the protection of the fundamental rights of its people as found in our constitution...”

¹⁷⁵ supra, note 7

¹⁷⁶ supra, note 8

Similarly, in **Oposa**, the Supreme Court of Phillipines in determining the application in favour of the applicants observed that “**the complaint focuses on one specific fundamental right- the right to a balanced and healthful ecology which, for the first time in our nation’s constitutional history, is solemnly incorporated in the fundamental law.**”

Unfortunately, Kenya as yet does not have a constitutional provision dealing with environmental protection.¹⁷⁷ The closest we have is the entitlement to a clean and healthy environment as given under section 3 of the Environmental Management and Co-ordination Act, which as we said previously in this chapter, remains largely untested.

In almost all the Kenya cases that have been discussed hereinabove, and especially those that were dismissed on account of locus, the court ordered that the unsuccessful applicants pay the costs of the defendants. And except for the **Donde**¹⁷⁸ and **Tiomin**¹⁷⁹ cases, even recent judicial pronouncements have not moved away from the traditional rule. In **R-vs-Hon. Francis Nyenze & Others ex parte Nixon Sifuna**¹⁸⁰ the applicant sought to have the court issue orders quashing specific legal notices in which the Minister for the environment had sought to excise large portions of forests and declare them to be no longer forests. The state raised objections to the proceedings by way of preliminary objection on a point of law, namely that the applicant had not complied with mandatory statutory requirements. This objection was upheld. The application was consequently dismissed with costs to the state. The writer, however, knows from personal knowledge that the state has not necessarily been keen on pursuing the costs.¹⁸¹

Similarly, in **Kemai**¹⁸² the applicants, members of a largely forest-dependent community known as the ‘Ogiek’ sought orders blocking the state from evicting them from the forest or otherwise interfering with their lives in the forests. Their application was equally dismissed

¹⁷⁷ There is, however, an on going process of reviewing the constitution which is expected to come up with some constitutional provision in this regard.

¹⁷⁸ Supra, note 15

¹⁷⁹ HCCC No. 97 of 2001

¹⁸⁰ HC Misc. Appli. No. 38 of 2001

¹⁸¹ This information has been found through conversation with one of the government lawyers involved in the case.

with costs. Reference has already been made to the **Kenya Roads Board**¹⁸³ case, where the partly unsuccessful respondents were ordered to pay costs to the partly successful applicant.

In all these cases, the court fully applied the traditional rule with respect to costs. Perhaps this was because the court found that there were no grounds to justify any departure from it. It did not escape observation that although the cases were public interest cases, the court failed to classify them as such. Not that it really had to. But perhaps in so doing it would have been possible to consider not imposing costs on the unsuccessful applicants. However, it must be equally observed that the plaintiff did not equally submit along these lines. This could be so, if the trend set by the constitutional court in the **Donde** case were to be followed. This trend is quite in consonance with developments in other parts of the world on this issue of costs orders. In the long run, these trends do offer good prospects for access to justice in environmental cases.

However, there is still a lot that needs to be done for this to be realized. The constitution may well provide for enforcement of the right to a healthy and sustainable environment but such rights are unlikely to be available to any or the majority of Kenyans if courts of law can require fees from those seeking to register cases for hearing. That would be tantamount to a denial of the constitutional right through statutory obstacles, which is manifestly mischievous. Rights conferred by the constitution must be totally unimpeded. 3

Secondly, it is fully understood that recourse to court to seek remedies protecting the environment is a public interest action and bad faith should not be presumed. Therefore, the petitioner/applicant must not be left under threat of court penalties or payment of costs after the full hearing. A *bona fide* emissary of public interest and intergenerational equity should be protected by the constitution from penalty for a *bona fide* effort.

¹⁸² HC Misc. Appli 323 of 1996

¹⁸³ *Supra*, note 41

Thirdly, as was observed in the **Mtikila** case many people with interest in environmental protection, as a public interest matter, do not have resources to pay for legal services. They may not necessarily be incapable of meeting the costs. Nevertheless the economic burden for hiring legal representation over the public interest matter seems absurd. This submission has accepted the premise that environmental is in the interest of inter-generational equity. Therefore, caring for interests of the future generations is a burden that must be shared by the society through a public agency.

In our view the foregoing discussion, together with that for *locus standi* would constitute an arrangement that enables citizens and public interest lawyers to protect their rights without fear of having to pay their opponent's legal fees if they bring the case in good faith. The provision would accordingly establish a presumption against awarding of lawyer's fees to the defendant in these cases.

4.6 SUMMARY

The twin issues of standing and costs in public interest litigation are very fundamental. They either make or break actions instituted in the name of vindication of public wrongs. Thankfully, however, one sees a trend where the courts, at least in other jurisdictions of the world have been willing to readily depart from traditional conceptions of *locus standi* and costs orders. Among the driving forces behind these developments, are the influence of international environmental law including the influence of one state practice upon another; and the existence of a clear constitutional and/or statutory provision on the right to a healthy and clean environment including provisions on recourse to justice.

CHAPTER FIVE

CONCLUSION AND RECOMMENDATIONS

5.1 RECAPITULATION OF THE RESEARCH OBJECTIVES

The overall goal of this study was to inquire into the role of the courts in the protection, management and conservation of the environment in legal theory and in the experience of Kenya.

In pursuing this goal, the study has been guided by a number of specific objectives. Briefly, the objectives of this study are to attempt an overview of the principles of environmental management, outline and offer a critical analysis of the role of courts in environmental management, analyze recent juridical developments in legal systems with similarities to Kenya with respect to the environment, and finally to offer practical and acceptable proposals for reforms towards greater efficiency and utility of the court in environmental management.

In dealing with the objectives of this study we were able to come up with a number of conclusions which go to support the hypotheses upon which the study had proceeded. The major hypothesis with which the study began was that courts, as institutions in environmental management have a great impact and that that impact can be measured.

Our analysis of the relevant data leads us to draw certain conclusions, and also to make certain recommendations which in our view, will help enhance the legal and institutional framework for environmental management in Kenya.

Below, we now summarise the analysis carried out in the dissertation and the specific findings, as well as the overall conclusions and recommendations.

5.2 SUMMARY AND CONCLUSIONS

In Chapter One we examined the concepts that are central to this study. These include environment, environmental management, sustainable development, environmental rights and duties. The major aim of this exercise was to find our bearings early on. For if we are to understand what role the court can play in environmental management, we have first to understand what the concept itself means.

We found that the concept of environment has been elastically defined beyond the previous understanding. Thus, now it is understood as the totality of nature and the natural resources, but also includes the cultural heritage and the infrastructure constructed by human beings to facilitate socio-economic activities.

In the same breath environmental management was then defined to include the protection, conservation and sustainable use of the various components of the environment. Fundamentally, environmental management can be achieved *inter alia* through the medium of law; specifically environmental law.

Our analysis also revealed that development is very closely intertwined with the environment. It is in this respect that sustainable development as a concept was developed and has now been in vogue, dictating how governments shape their development policies. Sustainable development was depicted as being meant to reduce the conflicts that cause environmental degradation by providing a vehicle for integrating the environment and the economy.

In the chapter we also discussed the twin concepts of environmental rights and duties. Thus, an environmental right was defined as the freedom to exploit an environment adequately built responsibly for long term survival. In Kenya, this has been embodied in the entitlement to 'a clean and healthy environment' as given in the statute. In our analysis, this formulation showed that the quest for environmental rights has necessitated a departure from the definitions of 'right' as hitherto known to law.

Unlike environmental rights, environmental duties were found not to be entitlements. Rather, they are action requirements intended to ensure that entitlements generated by a regime of rights are not only protected and respected but also in fact, achievable.

Our analysis of information led us to draw a conclusion that the interplay between environmental rights and duties necessitate third party intervention. Often, the recourse is to the courts of law.

In Chapter Two we analysed the court as an institution in environmental management in Kenya. We found that the very existence of a scheme of rights and duties was reason enough to expect that claims will arise in the one case for violations and, in the other for dereliction of duty. Such claims may be anticipatory or based on actual damage or injury. This scenario thus presents a case for certainty and predictability; something that courts have been known to provide. One of the ways in which this is achieved is through the doctrines of *stare decisis* and precedent. It was however, equally observed that the courts are also required to make new precedents in line with the changing times.

Our further analysis in this chapter revealed that the courts in Kenya are created by the constitution and indeed get all their powers from the constitution. Courts are integral in a nation's life as the central agency of horizontal accountability in society.

In our legal system, courts deal with matters as and when they are taken to them by others. Accessibility to the courts is therefore crucial. Access to the courts is one way of providing justice to society. In this respect, it may be clogging this justice process to put impediments on access to court.

In this chapter we also discussed the various avenues through which one may approach the courts. Among these are judicial review applications; actions in private law based on grounds of nuisance, negligence, trespass and the strict liability rule.

The evidence we had led us to conclude that courts are in deed very important in the management of the environment. One reason for this is that the court is part of the

government. It is therefore part of the governmental machinery that is employed to fulfill policy and law. Yet, despite this crucial role, it is not without criticisms. These criticisms were equally discussed. But a major part of the enquiry on this issue was left to the next chapter.

In Chapter Four is where we went to great lengths to try and quantify the role that the court plays in environmental management. This was done through a comparative study of how different courts of different jurisdictions have dealt with the twin issues of *locus standi* and costs. It was our position that how the court deals with these two issues will show how it is likely to deal with other environmental concerns that may arise.

The analysis of the data at our disposal revealed that the courts have contributed to the understanding and development of environmental law and management by among other things enlarging the definition of the concept of *locus standi*. Thus, from a purely technical and narrow interpretation of the concept, the concept has now acquired a new test of 'sufficient interest'. All this has been a milestone in the quest for better environmental management.

The courts under comparison with the Kenya's own were found to have done a sterling job. Thus, today courts are increasingly finding ways to deviate from the rule that the loser pays the costs of the winner in public interest cases generally and environmental suits in particular.

5.3 RECOMMENDATIONS

The foregoing conclusions, themselves based on our research findings have led us to make some recommendations that will help in better environmental management using the medium of the court.

The first recommendation is with respect to an entitlement to an environment that guarantees good health and development for the people. As was noted in the cases that were

reviewed from other jurisdictions, the courts have relied heavily on constitutional provisions in making orders that have been protective of the environment. It is universally recognized that a constitution is the supreme law of any country. Expression of environmental rights and duties in any constitution places such provisions above all laws in the land. Constitutional provisions *inter alia* underline national priorities and hence determine the direction and nature of future legislative policies and executive actions. Thus the elevation of environmental concerns to constitutional status no doubt enhances the priority likely to be conferred by Governments (of which the court is a branch) on sound national environmental management and sustainable development.

This elevation may take various forms. Some of the provisions are general declarations of public policy to protect the environment for the benefit of the country and a direction to the national legislature to pass laws for the execution of the policy. Others specifically provide that a clean and healthy environment is a fundamental right of the citizens and that every citizen has a right to defend such rights through administrative and judicial procedures.

Additionally, some countries have attempted to replace the top-down ² orientation in environmental protection by a bottom-up approach, which specifically empowers private individuals and interest groups to employ the state's legal machinery in the control of actions that are likely to lead to environmental degradation. This way, a constitutional right is thus created for the ordinary citizen to act in pursuit of a healthy environment which is conducive to sustainable development, alongside the various public initiatives in place.

The Environmental Management and Co-ordination Act at Section 3(1) provides that “Every person in Kenya is entitled to a clean and healthy environment and has the duty to safeguard and enhance the environment”. However, for greater protection, it is necessary to elevate this “entitlement” to the constitution as a justifiable “right”, i.e. as a direct fundamental right, which carries actionable obligations. Declarations of public policies or other forms of constitutional language which are not clearly self-executing may not be enforced by the courts. In other words, the constitutional language must be unequivocal in granting the right for public participation to protect the environment. We also recommend the use of the word “right” as opposed to “entitlement”. This is because in other discussions, the word “entitlement” has been said to have different meanings some of which carry less content than “right”. In making this recommendation the author is mindful of the fact that at the time of writing this thesis, Kenya is undergoing a process of constitutional reforms. In deed, suggestions have already been made in the draft constitution in this regard. It is desirable and hoped that this will be passed into law.

The recommendation above is further premised on the fact that the conferment of a right to a clean and healthy environment concomitantly comes with a widened provision on *locus standi*. Thus, while appreciating that the courts in Kenya are already showing their reception of a robust interpretation of the concept, such constitutional provisions would put the matter beyond doubt or any possible challenges. In addition, this will call for the creation of structures that enable democratic participation of the communities and their organizations in the decision - making process on all matters related to environmental management. Such structures should also give recognition to communities and their organizations as among parties with the requisite standing.

The second recommendation is that courts in Kenya should either adopt what in other jurisdictions such as India known as ‘Epistolary Jurisdiction’ or be seized of matters of environmental concern, *suo motto*. In the first instance, where it is practiced, judges have been seized of matters merely upon receipt of a letter of complaint about environmental damage. In the second scenario, the courts would themselves take personal cognizance of environmental damage and deal with the matter as though it had been filed by an applicant. In our view the best scenario is to include a provision to that effect within the Constitution. Kenya has a chance to do this as it grapples with the process of developing a new constitution. Relevant statutes such as the EMCA could also be amended to explicitly provide for this. For avoidance of doubt, and to further clarify the instances in which this option may be utilized, the operating Rules of Procedure need to be revised to accommodate this development.

The third recommendation is with respect to award of costs in public interest actions in general and environmental suits in particular. Environmental degradation affects to a very large extent the poor folk more than the rich. This poor lot at the same time suffers from other forms of poverty such as lack of education and general ignorance. Thus, even where they are aware that they have rights that they can enforce, they are not able to do so due to exorbitant costs of filing court actions- both in terms of actual court fees and a possible slap of costs in the event of loss of the suit to the defendant. Seen through this lens, costs act as a disincentive to public interest litigation generally and environmental suits in particular. It thus discourages or otherwise negatively impacts on the role of courts in environmental management. We therefore recommend that a constitutional provision be put in place that outlaws levying of fees or taxes against persons who seek recourse to the courts on public interest causes. In addition, we recommend an amendment of the Civil Procedure Act of Kenya to specifically provide that no costs shall be awarded against a losing public –interest litigation applicant.

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