ACCESS TO ENVIRONMENTAL JUSTICE IN KENYA:

AN ANALYSIS OF THE MECHANISMS IN THE ENVIRONMENTAL MANAGEMENT AND COORDINATION ACT

BY

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DECLARATION

I KAMUNGE IRENE WANJIRU do hereby declare that this is my original work and has not been submitted for a degree in any other university.

KAMUNGE IRENE WANJIRU

This thesis has been submitted for examination with his approval as a university supervisor.

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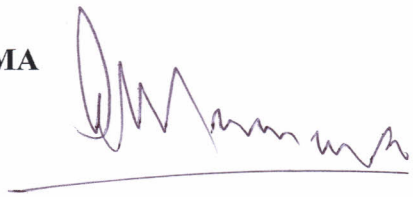

DEDICATION

To the entire Kamunge's family whose diligence, fortitude and unity are always a source of inspiration.

Last but not least, to my husband John Muiga Wanjohi, without whose care and affection I would not be who I am.

ACKNOWLEDGEMENT

I am indebted to Prof. Albert Mumma whose dedicated and diligent supervision made this thesis to take an intelligible form.

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Those who provided much needed support are not forgotten.

However, I am responsible for any shortcomings in this thesis.

TABLE OF STATUTES

1. The Constitution of Kenya, Act No. 5 of 1969 (last amended in 1992 and rev in 1998)
2. The Environmental Management and Coordination Act, No. 8 of 1999
3. The Civil Procedure Act, Chapter 21 of the Laws of Kenya
4. The Evidence Act, Chapter 80 of the Laws of Kenya

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1. Oposa v Factoran GR No. 101083, 224, SCRA 793(1993)
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3. Wangari Maathai v. Kenya Times Media Trust HCCC No. 5403 of 1989
4. Lawrence Nginyo Kariuki v. County Council of Kiambu Misc. App. No. 446 of 1994
5. Maina Kamanda & Another v. Nairobi City Council & Another HCCC No. 6153 of 1991
6. IRC v. National Federation of Self Employed and Small Business Ltd 1982 AC 617 at 740
7. Wangari Maathai and 2 Others v. City Council of Nairobi and 2 Others HCCC No. 72 of 1994
8. Gouriet v. Union of Post Office Workers [1978] AC 435
9. Paul Nderitu Ndungu and 2 Others v. Pashito Holdings Limited and Another HCCC No. 3063 of 1996
10. Law Society of Kenya v. Commissioner of Lands and Others HCCC No. 464 of 2000
11. Donald Campbell & Co. Ltd v. Pollack (1927) AC 432
12. Latoudis v. Casey (1990) 170 CLR 534
13. Minister for Finance & Others ex parte Kenya Bankers Association HCCC No. 1294 of 2001
14. Oshlack v. Richmond Rivers Council (1998) HCA 11
15. Wethall v. Harrison [1976] QB 773

16. Mtilika v Attorney General (1993) Civil Case No. 5 of High Court of Tanzania at Dodoma

LIST OF ABBREVIATIONS

1. DRSRS- Department of Resource Survey and Remote Sensing
2. EMCA – Environmental Management and Coordination Act
3. KWS- Kenya Wildlife Service
4. NEMA- National Environment Management Authority
5. NET- National Environment Tribunal
6. NEC- National Environment Council
7. PCC- Public Complaints Committee on the Environment

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CHAPTER ONE

MECHANISMS FOR ACCESS TO ENVIRONMENTAL JUSTICE IN KENYA

1.0 INTRODUCTION

Access to justice is a very broad notion. The right of justice guarantees that every person has access to an independent and impartial court and the opportunity to receive a fair and just trial when that individual's liberty is at stake. Access to justice is also linked to judicial independence and legal literacy.[1]

Access to environmental justice can mean two things. In a broad sense it means ensuring that everyone has an equal right to a clean and healthy environment regardless of his or her means, where they live or their background. Access to environmental justice also means being able to secure access to law in resolving environmental concerns.

Access to environmental justice encompasses the right for everyone to receive environmental information that is held by public bodies. This includes information on the state of human health and safety where this can be affected by the state of the environment. It also encompasses the right to participate from an early stage in environmental decision making. Citizens and environmental organizations should for example, be in a position to comment on proposals affecting the environment, plans and programmes relating to the environment. These comments should be taken in due account in decision making and information should be provided on the final decisions and reasons

[1] Edwin R, Kyra B, and Vessela T, *Pursuing the Public Interest: A Handbook for Legal Professionals and Activists,* (Columbia Law School, New York, 2001) p. 214

thereof. This implies that access to environmental justice can only be secured where environmental substantive and procedural rights exist in the legislation and regulatory regimes. Procedural rights must of course assume prominence over substantive rights since they are the vehicle through which substantive rights are articulated.

In this regard, environmental justice can only be achieved where there is fair treatment and meaningful involvement of all people regardless of race, colour, national origin, or income with respect to the development, implementation, and enforcement of environmental laws, regulations, and policies. No group of people, including a racial, ethnic, or a socioeconomic group, should bear a disproportionate share of the negative environmental consequences resulting from any operations or the execution of local programs and policies.

Some of the main significant barriers for access to environmental justice include the costs of legal action, lack of a judicial understanding of environmental issues, restrictive jurisdictional rules, overly complex regulations, ineffective enforcement mechanisms and corruption.

The Environmental Management and Co-ordination Act[2] (EMCA) fundamentally changed the legal landscape for environmental conservation, management and dispute resolution mechanisms and processes in Kenya. Before the enactment of this statute, the normative framework for environmental conservation and management was largely based on sectoral pieces of legislation and Common law jurisprudence. Environmental disputes

[2] No. 8 of 1999

could only be litigated in ordinary courts of law. Any private individual wishing to vindicate an environmental right or seeking redress for an environmental wrong had to satisfy both the substantive and procedural requirements of the court system.

Apart from proceeding by way of an ordinary tortiuous action, the litigant had to surmount the rigours of the doctrine of *locus standi*.[3] These legal phenomena had far-reaching implications on the ability of the citizen to access environmental justice. As relevant case law will show, access to environmental justice in Kenya was so constrained by the strictures of the Common law as to be non-existent.

EMCA introduces a comprehensive, normative and institutional framework for the conservation and management of the environment in Kenya. While the Act does not purport to replace the existing legislation, it prevails over any other Act in the event of conflict.

The Act establishes institutions for the monitoring and enforcement of environmental duties and rights. Some of these institutions are administrative in character; others quasi-judicial; yet others, are judicial. The administrative institutions include Provincial and District Environment Committees which are established under section 29 of the Act. The quasi-judicial institutions include the Public Complaints Committee on the Environment (PCC) which is established under Section 31 of the Act and the National Environment

[3]The term *'locus standi'* means capacity to sue. In the context of environmental cases, the general rule has been that in order for a person to take a case to court, he has to show that he suffered some direct personal interest on the matter. For more details, see Cheryl loots, "Locus to Claim Relief in the Public Interest in Matters Involving the Enforcement of Legislation", *The South African law Journal*, (1987), pp 131-147 at 131-2

Tribunal (NET) which is established under section 125 of the Act. The judicial institutions are the Courts of law.

EMCA also abolishes the doctrine of *locus standi* as far as environmental cases are concerned. Under section 3(3), the Act provides that anybody who alleges that his entitlement to a clean and healthy environment has been or is likely to be contravened may apply to the High Court for redress.

This study is an inquiry into the functions, powers, workings and efficacy of the judicial and the quasi- judicial institutions. At the end of the study, the writer hopes to have exhaustively critiqued these institutions with a view to determining whether or not they have widened the scope of environmental justice in Kenya.

1.1 THE STATEMENT OF THE PROBLEM

Although EMCA establishes judicial and quasi- judicial institutions for the monitoring and enforcement of environmental duties and rights and also abolishes the doctrine of *locus standi,* it is uncertain whether these institutions have expanded the scope of environmental justice in Kenya. The positions of these institutions within EMCA do not appear legally secure. It is also a fact that some of these institutions such as the PCC are the first of their kind in this region, which means therefore that they must work through experimentation, trial and error. One cannot therefore assume that the mere fact that the institutions have been established in law, they will expand the avenues of environmental justice in Kenya.

In this regard, this study seeks to answer a number of questions. First, what does access to environmental justice mean? Second, in what way has a particular institution advanced access to environmental justice? Third, in what way is the particular institution limited in its ability to advance access to justice and finally, in what way can the particular institution advance access to environmental justice?

1.2 JUSTIFICATION

The justification for this study is in two folds. First, since the establishment of the judicial and quasi- judicial institutions under EMCA and the abolishment of the doctrine of *locus standi* were geared to making environmental justice more accessible, it can be asserted that access to environmental justice in the country has expanded. However, one cannot assume that the mere fact that institutions have been established in law and that the doctrine of *locus standi* has been abolished, that the avenues of environmental justice in Kenya have expanded.

Second, if these institutions are properly established, they can serve as models to other countries in the continent which are yet to set up similar mechanisms in their territories.

1.3 THEORETICAL/ CONCEPTUAL FRAMEWORK

This study relies on the Sociological School of Law.[4] Those who adopt a Sociological approach have a number of ideas. They believe in the non-uniqueness of the law: a vision

[4] For details on the Sociological School of Law, see Lord Lloyd and M. D. A. Freeman, *Introduction to Jurisprudence*, 7th Edition (Sweet & Maxwell, London, 2001), p. 659-700

of law as one but one method of social control. They also reject a "jurisprudence of concepts," the view of law as a closed logical order.

Sociological jurists tend to be skeptical of the rules presented in the textbooks and are concerned to see what really happens, "the law in action." They see reality as socially construed with no natural guide to the solution of many conflicts.

Sociological jurists believe in the importance of harnessing the techniques of the social sciences, as well as the knowledge culled from social research, towards the erection of a more effective science of law. There is also a binding concern with social justice.

Access to environmental justice in this study therefore implies that the establishment of judicial and quasi- judicial institutions in law is by itself insufficient to guarantee access to environmental justice. The efficacy of law is a function of diverse factors such as the knowledge of law, capacity of a party to litigate and the availability of a forum to adjudicate disputes in the implementation of law when these arise.

Accordingly, the study implies that the PCC can only be an effective mechanism if members of the Public from all walks of life can ventilate their grievances without being inhibited by complexities and technicalities of procedure. It also implies that the NET processes should be clear to the users, the parties, the advocates and the society at large if it is to discharge its work effectively.

The study also implies that the society must be literate enough to appropriately articulate environmental matters. A literate society is able to appreciate its rights and know when they are violated and therefore seek redress when the same is violated.

Judicial understanding of environmental issues is also very crucial in access to environmental justice. A lack of comprehension of key principles of environmental law will lead to environmental injustice.

Poverty is also a draw back in access to environmental justice. Litigation can be prohibitively expensive for most people unless legal aid is provided. The NET should therefore be less costly than courts of law in order to enhance access to justice and the PCC can only be effective if it is cost free.

The study also implies that mechanisms for access to environmental justice should be decentralized and located nearer to the people in order to enhance access to justice They should not only be located in urban centres but also in rural areas in order to reach out to the common people.

1.4 LITERATURE REVIEW

From review of the literature it became apparent that this study focuses on a problem that has never been investigated before. There has been no comprehensive study that critically analyses the mechanisms for access to environmental justice in Kenya and this literature is therefore intended to make a unique contribution in this area.

This finding is demonstrated by Dr Kameri Mbote's paper titled, "Towards Greater Access to Justice in Environmental Disputes in Kenya: Opportunities for Intervention."[5] The paper approach is very different. It discusses the relationship between environmental rights and access to justice. The paper argues that the promotion of access to justice and participation in the resolution of environmental disputes in Kenya is intrinsically intertwined with the human rights implementation context. In this regard, it is argued in the paper that access to environmental justice can only be secured where environmental substantive and procedural rights exist in the legislation and regulatory regimes. It is also argued that procedural rights must of course assume prominence over substantive rights since they are the vehicle through which substantive rights are articulated.

Geographically, there exist gaps in the literature review pertaining to mechanisms for access to environmental justice in Kenya. In one article, access to environmental justice and existing mechanisms for the settlement of environmental disputes is discussed within the context of the Caribbean Court of Justice.[6]

Other writers discuss access to justice generally without focusing on mechanisms for access to environmental justice in EMCA.[7]

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[5] For details pertaining to this Article see http:// www. Ielrc.org/ content/w0501.pdf

[6] Winston Anderson, *Access to Environmental Justice and Existing Mechanisms for Settlement of Environmental Disputes : The Caribbean Court of Justice,* 2004 http://www.caricom.org /speeches/environmental justice-ccj-anderson.htm (2004-11-12 June)

[7] See for instance, Rekosh, Buchko and Terzieva, *Pursuing the Public Interest: A Handbook for Legal Professionals and Activists,* (Columbia Law School, New York, 2001)

1.5 OBJECTIVE OF THE STUDY

The objective of this study is in four-folds. First, is to establish what is meant by the term" access to justice. Second, is to establish how judicial and quasi-judicial institutions established under EMCA have advanced access to environmental justice in Kenya. Third, is to establish how these institutions are limited in their ability to advance access to environmental justice and finally, to make recommendations where weaknesses exist.

1.6 HYPOTHESES

This study tests two hypotheses. First, that the judicial and quasi-judicial institutions established under EMCA have been ineffective in expanding the scope of environmental justice in Kenya. Second, that the ineffectiveness of these institutions in expanding the scope of environmental justice in Kenya have been due to lack of a conducive legal environment and structural and mechanistic barriers.

1.7 METHODOLOGY

This study relied heavily on secondary research. The writer conducted her research mainly from libraries, which include the United Nations Environment Programme (UNEP) library and the University of Nairobi, Faculty of Law Library. The writer also conducted her research from the internet.

1.8 CHAPTER BREAKDOWN

The study contains five chapters. The first is an introduction of the study. It defines the conceptual framework upon which this study is premised. It states the statement of the

problem and methodology used in the study. The chapter also states the objectives and the justification of the study. Most importantly, the chapter defines the term "Access to Environmental justice"

The second chapter is primarily concerned with access to environmental justice in the Courts of law. Of particular importance, the chapter establishes whether the incorporation of environmental rights in the legislation has enhanced access to environmental justice in Kenya.

The third chapter is mainly concerned with access to environmental justice in the National Environment Tribunal. It examines the characteristics and functions of the Tribunal. It also examines the various factors, which hinder or enhance access to environmental justice in the Tribunal, key among them being, the procedures which assist in the settlement of disputes between the citizens and the administration.

The fourth chapter critically analyses the Public Complaints Committee on the Environment. It examines the functions, powers, workings and efficacy of the Committee. In examining the said issues, the chapter brings out the key issues, which foster or impede access to environmental justice in the Committee.

Finally, the conclusions and recommendations arising out of the study are discussed in the fifth chapter.

CHAPTER TWO

THE COURTS OF LAW

2.0 INTRODUCTION

The first mechanism for access to environmental justice in Kenya is the Court of Law. A Court is a judicial institution created to decide legal disputes authoritatively. It falls under one of the three arms of Government, called the Judiciary. The others are the Executive and the Legislature. Courts are independent of other branches of Government.

The organization and hierarchical structure of courts in Kenya is given in chapter IV of the constitution.[8] At the top is the Court of Appeal followed by the High Court and then other courts, which are at various ranks of the magistrate. There are also Kadhis courts.

In our legal system, courts deal with matters as are brought to them by others. Accessibility to courts is therefore crucial and is dependent on a number of issues. They include the costs of legal action, lack of an understanding of environmental issues, and the inability to secure access to law in resolving environmental concerns.

This chapter is primarily concerned with access to environmental justice in the Courts of law. Of particular importance, the chapter establishes whether the incorporation of environmental rights in the legislation has enhanced access to environmental justice in Kenya.

[8] Act No. 5 of 1969(last amended and revised in 1998)

2.1 ENVIRONMENTAL RIGHTS

It is trite law that in order for you to enforce a right, the right must be provided for in the legislation. This is accurate even for environmental rights. Kenya's constitution does not contain explicit environmental provisions. However, it protects individual fundamental rights and freedoms which are relevant in accessing justice in environmental matters. These include freedom of speech, assembly and association, the right to life and the right to protection of law, which appear in chapter five of the constitution. Of particular significance, is the right to access to the High Court for redress regarding the enforcement of fundamental individual rights and freedoms

EMCA provides that every person in Kenya is entitled to a clean and healthy environment and has a duty to safeguard and enhance the environment.[9] The entitlement to a clean and healthy environment includes the access by every person in Kenya to the various elements of the environment for recreational, educational, health, spiritual and cultural purposes.[10]

Section 3(3) of EMCA 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. This section is not only concerned with enforcement of the right after it has been violated; it offers redress even for a continuing violation and for an anticipated violation. Above all, the section abolishes the doctrine of *locus standi*.

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[9] Section 3(1)
[10] *ibid*, (2)

The right to a clean and healthy environment entails a number of things. It entails freedom from pollution, environment degradation, and activities that affect the environment or threaten life, health, livelihood, well-being or sustainable development. It also entails protection and preservation of the air, soil, water, flora and fauna and the essential processes and areas necessary for biodiversity and ecosystems. The right denotes that there is the highest attainable standard of health as well as safe and healthy food, water and working environment.

In exercise of the jurisdiction conferred upon it, the High Court is to be guided by principles of sustainable development.[11] Sustainable development is development that meets the needs of the present without compromising the ability of the future generations to meet their own needs. These principles include the principle of public participation in the development of policies, plans and processes for the management of the environment; the cultural and social principles traditionally applied by any community in Kenya for the management of environment or natural resources in so far as the same are not repugnant to justice and morality or with any written law; the principle of international co-operation in the management of environmental resources; the principles of intergenerational and intragenerational equity; the polluter-pays principle which requires that those responsible for environmental degradation of the environment and natural resources are responsible for the costs of the corrective measures, including repariation; and the pre-cautionary principle which requires prevention of damage to the environment, and otherwise to reduce, limit or control activities which might cause or risk such damage .

[11] Section 3(5)

EMCA does not embody all conceivable principles necessary for access to environmental justice. For instance, the Act does not provide for the principle of transparency and uninhibited access to justice; the principle that exigencies of sound environmental protection should be integrated in all development planning and management; and the principle that 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 non exists.

The High Court is with no doubt the Court that is granted original jurisdiction to superintend over the right to clean and healthy environment. There is no other purpose of the jurisdiction under section 3(3) other than the enforcement of this right.

The fact that section 3(3) is couched in very broad terms suggests the intention of the drafters was never to restrict or otherwise curtail access to the High Court where issues of the enforcement of this right are involved.

It is important to note that even as the Act widens the scope and meaning of *locus standi,* it also provides that the case must not be frivolous or vexatious.[12] In other words, the case must not be one that has no merits and which is merely meant to waste the time of the court. The intention of this provision is to provide minimum standards that have to be met before a case is heard by the Court.

While EMCA provides for the right to a clean and healthy environment, the question that then arises is whether the promulgation of this right is by itself sufficient to guarantee the

[12] Section 3 (4)

enjoyment of this right in the absence of supporting constitutional provision. It has been argued that the right to a clean and healthy environment is a fundamental right, which should be entrenched in the Constitution and not in an Act of Parliament. This is because the constitution is the highest legal order in the country.

The Supreme Court of Pakistan, in *Sheila Zia v. WAPDA,* [13] for instance, stated:

> "life... does not mean nor can it be restricted to the vegetative or animal life or mere existence from conception to death. Life includes all such amenities and facilities which a person born in a free country is entitled to enjoy with dignity, legally and constitutionally."

The Court therefore, acknowledged that a threat to the environment is in fact a threat to life and the two deserve equal protection in the Constitution.

In referring to the right to a healthy environment, the Supreme Court of the Republic of Philippines in *Oposa v Factoran* [14] stated:

> "Such a right belongs to a different category of rights altogether for it concerns nothing less than self preservation and self perpetuation.... Aptly and fittingly stressed by the petitioners.... the advancement of which may even be said to predate all governments and constitutions. As a matter of fact, these basic rights need not even be written in the Constitution for they are assumed to exist from the inception of humankind. If they are

[13] PLD 1994 Supreme Court 693
[14] GR No. 101083, 224, SCRA 793 (1993)

now explicitly mentioned in the fundamental character, it is because of the well founded fear of the framers that unless the rights to a balanced and healthful ecology and health are mandated as state policies by the Constitution itself thereby highlighting their continuing importance and imposing upon the state a solemn obligation to preserve the first and protect and advance the second, the day would not be too far when all else would be lost not only for the present generation, but also for those to come generations which stand to inherit nothing but perched earth incapable of sustaining life."

The right to a clean and healthy environment being a creature of statute is also susceptible to the whims of the legislature. Prof. Okidi in a memorandum presented to the Constitution of Kenya Review Commission noted that:

"Superior legal rights and protections are properly entrenched in the Constitution because of the stability and enduring nature of that legal regime. It is not subject to the whims of simple parliamentary majority. Amendment or other forms of withdrawal of rights in the Constitution usually require at least two-thirds majority of the total membership of parliament. Therefore any debate challenging the rights so entrenched will usually attract a massive national attention."[15]

In this regard, it is arguable that lack of environmental rights in the constitution impedes access to environmental justice in Kenya since the right is not accorded prominence in

[15] C.O Okidi, *Environment, Natural resources and Sustainable Development in Kenya's Constitution-Making,* (Institute for Law and Environmental Governance, Nairobi, 2003), p. 11

the highest law of the land. Nevertheless, issues classified as fundamental are not in the same plane of significance, even if they are all classified under Bill of Rights. The right to life is evidently superior to freedom of association or expression because only in the exercise of the right to life can one enjoy the freedom of expression and association.

2.2 JUDICIAL PRONOUNCEMENTS

Judicial pronouncements on environmental decision making have not helped remedy the absence of explicit provisions in the constitution. For instance, the courts in Kenya have not established a clear jurisprudence on matters of *locus standi*. The courts have continued to rely on the traditional approach to *locus standi*, requiring that the litigant should demonstrate that he or she has been "sufficiently and personally injured" in order to acquire sufficient legal standing to pursue a claim. This position was more pronounced before the enactment of the EMCA when the normative framework for environmental conservation and management was largely based on sectoral pieces of legislation and Common law jurisprudence. This observation can be demonstrated by the following cases:

In *Wangari Maathai v. Kenya Times Media Trust*[16], the plaintiff applicant, being the co-ordinator of Green Belt Movement, an environmental pressure group, sought to stop the defendant from constructing a building complex on a piece of land adjacent to Nairobi's central business district. The land is reserved for public utility. She argued that it would be preferable if the building of the complex never took place in the "interest of the many people

[16] HCCC No. 5403 of 1989

who had not been consulted." The Court rejected the plaintiff's assertion that she had legal standing to sue. According to the Court, "only the Attorney General can sue on behalf of the public."

Dismissing the case on grounds of lack of locus standi, the trial judge, Dugdale, J., said:

> "The plaintiff has strong views that it would be preferable if the building of the complex never took place in the interests of many people who had not been directly consulted. Of course many buildings are being put up in Nairobi without many people being consulted. Professor Maathai apparently thinks this, is a special case. Her Personal views are immaterial. The Court finds that the Plaintiff has no right of action against the defendant company and hence she has no *locus standi.*"

In the case of *Lawrence Nginyo Kariuki v. County Council of Kiambu*[17] the Court dismissed the plaintiff's application of the basis of *locus standi.* The plaintiff's argument was 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.

However, a few years later, in the case of *Maina Kamanda & Another V. Nairobi City Council & Another*[18], the Court held that the plaintiff had *locus standi.* The applicants in this case had brought a suit in their capacity as ratepayers to the Nairobi City Council

[17] Misc. App. No. 446 of 1994
[18] HCCC No. 6153 of 1991

objecting to the action of the Council extending its facilities, namely, houses to the second respondent when the latter had ceased to be the Chairman of Nairobi City Commission. The applicants argued that this action amounted to a misuse of the funds of the Council and as ratepayers they had an interest to bring the action. The argument was advanced in answer to the objection lodged against them that they lacked *locus standi* as the matter they were complaining about was in the realm of a public wrong and they needed authority of the Attorney General to bring it.

Justice Akiwumi ruled that the applicants had *locus standi* to bring the action pointing out in the process that:

> " it is now well settled that a ratepayer as opposed to a tax payer, has sufficient interest as such, to challenge in Court the action of a public body to whose expenses he contributes."

The judge was guided by a passage from the speech of Lord Diplock in the case of *IRC V. National Federation of Self-Employed and Small Business Ltd*[19] where it was stated:

> "It would, in my view, be a grave lacuna in our system of public law if a pressure group, like the federation, or even a single public-spirited taxpayer, were prevented by outdated technical rules of *locus standi* from bringing the matter to the attention of the Court to vindicate the rule of law and get the unlawful conduct stopped. The Attorney General, although he occasionally applies for prerogative orders against public authorities that do not form part of central government, in practice, he never does so against government

[19] 1982 AC 617 at 740

> departments. It is not, in my view, a sufficient answer to say that judicial review of the actions of officers or departments of central government is unnecessary because they are accountable to parliament for the way in which they carry out their functions. They are accountable to parliament for what they do so far as regards efficiency and policy, and of that parliament is the only judge; they are responsible to a Court of justice for the lawfulness of what they do, and of that the Court is the only judge."

This position was, however, not followed in the case, *Wangari Maathai and 2 Others v. City Council of Nairobi and 2 Others.*[20] The plaintiffs sued the defendants and sought declarations that the sub-division, sale and transfer of a piece of land was irregular and ultra vires the powers of Nairobi City Council, and that the subsequent issuance of a Certificate of Title for the said piece of land by the Commissioner of Lands was irregular and contrary to law. Further, they sought a permanent injunction to restrain the 3rd defendant, the beneficiary of the allocation, from carrying out any construction work on the plot in question.

The defendants resisted the plaintiffs' claims, arguing that the plaintiffs had no *locus standi* to bring the proceedings before the Court since they (the plaintiffs) had not shown that they would suffer any "private injury."

Denying the plaintiffs' right to sue, the Court stated:

[20] HCCC No. 72 of 1994

> "Whereas a public authority may take action explicitly to protect the environment, a private litigant might only take court action to seek redress for a private injury. Any environmentally protective effect resulting from the private action would be purely incidental. Where a private individual wishes to bring action to redress private injury to the public, he has to seek permission of the Attorney General to use his name in an action known as a "relator action."

The Court followed the traditional approach to litigation expressed in the case of *Gouriet v. Union of Post Office Workers*.[21] In this case, the House of Lords stated:

> "...the jurisdiction of a civil court to grant remedies in private law is confined to the grant of remedies to litigants whose rights in private law have been infringed or are threatened with infringement. To extend that jurisdiction to the grant of remedies to unlawful conduct which does not infringe any rights of the plaintiff in private law is to move out of the field of private law into that of public law with which analogies may be deceptive and where different principles apply."

Thus the Court dismissed *Maathai's Case* on the basis of standing to sue and justified its decision on the grounds that only the Attorney General had the authority to file suit in the public interest. Ole Keiwua, J., stated:

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[21] [1978] AC 435

against any person or organization who is doing harm to the environment. It is not necessary to show that the right has been directly violated or is likely to be violated.

Following the enactment of the EMCA, one would have expected that the jurisprudence on *locus standi* would henceforth be clear and unambiguous. However, this has not been the case. The Courts have since the enactment of the Act continued with their conflicting judgements, although the number of rulings in favour of granting *locus standi* has increased. Two cases will illustrate this conflicting reasoning.

In the case of *Rodgers Muema Nzioka & Others vs. Tiomin Kenya Limited,*[24] the plaintiffs, local residents of Kwale District filed a suit against the defendant, a local subsidiary of a fully owned subsidiary of a Tiomin Incorporated of Canada, which had taken up a license to prospect for and mine Titanium in Kwale. The plaintiffs' sought for, firstly, an injunction to restrain the defendant from carrying out mining activities in the area, secondly, a declaratory order that the mining activity by the defendant in Kwale were illegal and thirdly, an award for general damages.

The plaintiffs averred that the defendants had taken their land and arm-twisted them into taking very low compensation for the land. They also argued that the activities of the defendant would lead to serious environmental and health problems.

[24] Mombasa HCCC No. 97 of 2001 (unreported)

The Court stated that in determining whether the plaintiffs were entitled to an injunction the Court had to satisfy itself as to whether the plaintiffs were entitled to bring the action. The Court held that the plaintiffs were entitled to bring an action. The Court was categorical that:

> "... more ... EMCA says 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."

In essence, the Court affirmed the provisions of the EMCA, which relax the rules on *locus standi*. The case was later resolved extra- judicially with allegations that some of the parties had been bought of. While NEMA had a basis for pursuing the issue, it is important to note that the Minister of Environment and Natural Resources proceeded to deal with the issue directly. This denied the regulatory body and the courts an opportunity to determine a very critical issue relating to EIA as a tool for facilitating the citizenry access to justice in development project.

In the *Law Society of Kenya v. Commissioner of Lands and Others*,[25] the Judge delivered a ruling in which he adopted a highly restrictive construction of *locus standi*. The matter involved public land and the Law Society argued that it had been improperly allocated.

The Judge opined that matters of public interest are the exclusive domain of the Attorney General. He stated that:

> "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

[25] HCCC No. 464 of 2000

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 is litigated upon by the Attorney-General or such other body as the law sets out."

The point to observe is the obvious inconsistencies in the jurisprudence related to locus standi. The cases point to the fact that the Courts still do not clearly follow the legislative position expressed in EMCA. This has continued to impede access to environmental justice since very important cases have been dismissed on the ground of lack of *locus standi.*

The right of access to justice requires a broadminded approach to the question of *locus standi.* The Court in a ruling on the so-called "Donde Act" Case made this remark.[26] The Court stated:

"We state with firm conviction that as part of the reasonable, fair and just procedure to uphold constitutional guarantees, the right of access to justice entails a liberal approach to the question of *locus standi.* Accordingly, in constitutional questions, human rights cases, and public interest litigation and class actions, the ordinary rule of Anglo-Saxon jurisprudence, that action can be brought only by a person to whom a legal injury is caused, must be departed from. In these type of cases, any person or social groups, acting in good faith, can approach the Court seeking judicial

[26] Misc. Civil App. No. 908 of 2001

redress for a legal injury caused or threatened to be caused to a defined class of persons represented...."

2.3 COURT PROCESSES

In addition to judicial pronouncements, the complexity of court processes has continued to hinder access to environmental justice in the Kenyan courts. For instance, one way of bringing an environmental action in the High Court is by lodging an application for judicial review. This application is governed by Order LIII of the Civil Procedure Act.[27] In order for an applicant to lodge this application, he must file an application for leave to apply for judicial review which must be supported by his affidavit. The application must state the grounds upon which the application is sought and the affidavit must contain facts within the applicant's knowledge. The drafting of this application is very complicated especially for litigants who are unrepresented.

Another way of bringing an environmental action in court is by way of a plaint. There are special rules in the Civil Procedure Act which govern the drafting of plaints. For example, a plaint must state concisely the material facts upon which plaintiff relies, but not the evidence by which those facts are to be proved. The facts relied on must show a reasonable cause of action against the defendant and it must show the contact addresses of the parties. The drafting of this plaint is also quite difficult especially for litigants who are not trained in law and this may lead to a suit being dismissed for non- compliance with the rules.

[27] Chapter 21, of the Laws of Kenya

Other than the drafting of the pleadings, the complexity of court processes is also evident at the hearing of a matter. The procedure at the hearing involves the examination in chief, cross- examination and re-examination of witnesses. This is a difficult task as it is also governed by rules which must be adhered to the letter and failure to do so implies that some facts which may be favorable to the case of the litigant may not be elicited. In other words, strict evidential rules hamper access to environmental justice.

Other issues that complicate the court processes include rules that govern parties to a suit, service of summons and the time within which an action may be brought to a court of law. The language used in the courts is also very difficult for the ordinary citizen to understand and this impedes access to justice.

2.4 COSTS

In 1999, in an article about Environmental Litigation, Sir Robert Carnwath remarked:

"Litigation through the Courts is prohibitively expensive for most people, unless they are either poor enough to qualify for legal aid, or rich enough to be able to undertake an open-ended commitment to expenditure running into tens or hundreds of thousands of pounds."[28]

The issue of costs both as paid to the court in terms of filing fees and other associated costs such as fines, cost paid to a losing litigant and as paid to advocates limits access to

[28] Sir Edward Carnwarth, Environmental Litigation-A way through Maze? *Journal of Environmental Law* Vol. 11 No. 1 (1999) Oxford University Press

environmental justice in the Kenyan courts. This has been mainly caused by poverty in the country.

A recent survey [29]of the incidence of poverty throughout the country indicates that the prevalence of poverty at the national level stands at 52.2 % meaning that this proportion of Kenyans cannot achieve the minimum expenditure needed to acquire basic food and non- food items. If the majority of Kenyans cannot afford basic items, then it is obvious that access to environmental justice in the Courts of law will remain a nightmare due to the costs involved unless something is done to avert this situation. The problem of costs is compounded further by exposure and uncertainty, that is, the risk of paying the legal costs of other party or parties combined with the fact that it is impossible to know at the outset of a legal challenge how much those costs might be.

The normal rule on costs is that it follows the event. Viscount Case LC clearly captured this sentiment in the case of *Donald Campbell & Co. Ltd vs. Pollack*[30] when he stated that:

> "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

[29] *Poverty Reduction Strategy Paper for the period 2001-2004,* Volume 1, Government of Kenya, Nairobi, June 2000
[30] (1927) AC 732

judicially, and the judge ought not to exercise it against the successful party except for some reason connected with the case"

This general rule is true of all cases in Kenya including environmental cases. The Civil Procedure Act reaffirms this general rule in Section 27(1), which provides:

"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 powers 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 direct."

Hence, the courts are in normal circumstances expected to award costs to the successful litigant.

The reason for the rule that costs follow the event is due to the fact that costs are compensatory in nature. McHugh J in the case of *Latoudis vs. Casey*[31] stated:

"an order for costs indemnifies the successful party in litigious proceedings in respect of liability for professional fees and out-of-pocket

[31] (1990) 170 CLR 534, at 566-7

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 liability incurred. The order is not made to punish the unsuccessful party. Its function is compensatory."

Courts, however, have discretionary powers to go against the rule in certain circumstances. For example, in public interest litigation, where the prime motivation is to uphold public interest and the rule of law, the Court may depart from the rule.[32] Similarly, the Court may depart from the general rule in instances where the party who brought the action may have won and lost on some of the issues. A good illustration is the case of R. *vs. Minister for Finance& Others ex parte Kenya Bankers Association*[33] where the Court held that "with regard to the costs of these proceedings, we consider that each party has won and lost on substantial, and the only fair order is that each party bears its own costs."

Courts must therefore treat the issue of costs liberally so that when a defendant loses he is not saddled with the costs of the action in order to enhance access to environmental justice.

[32] See the case of *Oshlack vs. Richmond Rivers Council* (1998) HCA 11
[33] HCCC No. 1294 of 2001

2.5 LEGAL AID

Closely allied to the question of costs is the further question of legal aid. Lack of legal aid for citizens appearing before the Kenyan courts hinders access to environmental justice.

2.6 LOCATION

The geographical location of courts is indeed a structural barrier of access to justice. The High Court of Kenya is situated in mainly major towns of the country, away from the rural poor. These towns include Nairobi, Mombasa, Kisumu, Nakuru and Meru. This therefore implies that the essential judicial services are not available to the common people and this hinders access to environmental justice.

2.7 DELAYS IN THE DETERMINATION OF SUITS

Access to environmental justice in Kenyan courts is also limited by the delay in the determination of suits. According to the Report of the Committee on the Administration of Justice it was noted that, " Currently no system is in place to monitor the progress of a case; that judges and magistrates are passive when it comes to case management"... "that Courts throughout the Republic are plagued with delays and backlog of cases," and further that, " the issue of corruption has taken center stage."[34]

2.8 AWARENESS OF ENVIRONMENTAL MATTERS

There is also the lack of awareness of environmental issues provided for under EMCA and other laws, both on the part of citizens and legal practitioners. Most lawyers, magistrates and judges went to Law School before environmental law was taught as a

[34] Report on the Committee on the Administration of Justice, 1998, at pages 9, 40 and 47.

discipline. Moreover, precedents on environmental law from the courts have been very reductionists in their interpretations of concepts such as *locus standi.* Lack of awareness of EMCA has limited access to environmental justice.

2.9 MODES OF REDRESS

Once the Courts have heard the suit, they would then impose sanctions and award remedies based on the facts before them. Section 3(3) of EMCA states the orders that the High Court may grant to ensure environmental protection. These include orders to prevent, stop or discontinue any act or omission deleterious to the environment; to compel any public officer to take measures to prevent or discontinue any act or omission deleterious to the environment; to require that an on going activity be subjected to an environment audit; to compel the persons responsible for the environmental degradation to restore the degraded environment as far as practicable to its immediate condition prior to the damage; and to provide for compensation for any victim of pollution and the cost of beneficial uses lost as a result of an act of pollution.

2.10 CONCLUSION

From the foregoing, it is clear that the Courts of law have been ineffective in fostering access to justice in Kenya. This has been mainly due to structural and mechanistic barriers which include complexity of court processes and procedures, costs of litigation, geographical location of the courts and lack of awareness of environmental matters both on the part of the citizens and legal practitioners.

CHAPTER THREE

THE NATIONAL ENVIRONMENT TRIBUNAL

3.0 INTRODUCTION

The second mechanism for access to environmental justice in Kenya is the National Environment Tribunal (hereafter the Tribunal). The Tribunal is established under section 125 of the EMCA and it seeks to offer expeditious and cheaper justice than ordinary Courts of law.

A Tribunal is a body convened to hear and determine once and for all times (subject, of course, to any possible appeal), the matter in dispute or the grave men of the complaint. It is expected to come to a decision on the subject matter presented before it and in coming to its decision it may be entitled or required to take into consideration matters of policy or general considerations that would not be the concern of a Court of law. In most cases however, any such rules of policy or other considerations will have been laid down before hand and will be known to the parties before the tribunal.[35]

Tribunals function as court-substitute forums for administrative review and dispute resolution. They enjoy certain advantages over courts. They are cheap, accessible, are free from technicality and have expert knowledge of their particular subject.

It is not easy to draw a sharp line between those bodies, which may be classified as tribunals, and those, which may not. One writer states that it is possible to group tribunals

[35] J. F Garner, *Administrative Law,* 3rd Edition, (Butterworths, London, 1970), p.190

by their subject matter such as social security and social services, land, property and housing and economic activities, licensing and taxation.[36] He also states that tribunals may be classified in terms of what he refers to as "general considerations." General considerations include the composition of the tribunal, the appointment and dismissal of members of the tribunal, the powers and jurisdiction of the tribunal and the procedure followed by the tribunal.[37]

This chapter is primarily concerned with access to environmental justice in the Tribunal. It examines the characteristics and functions of the Tribunal. It also examines the various factors, which hinder or enhance access to environmental justice in the Tribunal, key among them being the procedures which assist in the settlement of disputes between the citizens and the administration.

3.1 JURISDICTION OF THE TRIBUNAL

The Tribunal is set up to hear appeals from administrative decisions taken by organs responsible for enforcement of environmental standards which include decisions of the Director General, NEMA and the Committees.[38] An appeal may be launched by the proponent of a project against the rejection of an environment impact assessment and against a denial of a licence. It may also be launched by a local community against a grant of licence by an administrative body such as NEMA to project developer.[39]

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[36] Wade, E. C. S, *Constitutional and Administrative Law,* 9th Edition (Longman Inc., New York, 1977) p. 639
[37] *ibid*
[38] These include Provincial and District Environment Committees
[39] Section 129(1)

The Tribunal is also empowered to deal with complex matters. NEMA may refer any matter to the Tribunal where the matter appears to involve a point of law or to be of unusual importance or complexity.[40] NEMA and the parties concerned are entitled to be heard by the Tribunal before any decision is made in respect of such matter.[41]

Access to justice is limited in the Tribunal since it lacks original jurisdiction and must wait for appeals from the decisions of administrative organs under EMCA. This denies the people a chance to go directly to the Tribunal when they have environmental issues to be resolved. The result is that the Tribunal has not had much work whereas there may be many people that may have gone to it to lodge issues owing to its cheaper, simpler and more user friendly procedure.

3.2 EXPERT KNOWLEDGE

The Tribunal consists of five members some of whom possess expert knowledge in environmental issues. The members of the Tribunal consists of: a Chairman nominated by the Judicial Service Commission who shall be a person qualified for appointment as a judge of the High Court of Kenya; an Advocate of the High Court of Kenya nominated by the Law Society of Kenya; A lawyer with professional qualifications in environmental law appointed by the Minister; and two persons who have demonstrated exemplary academic competence in the field of environmental management, appointed by the

[40] Section 132(1)
[41] Section 132 (2)

Minister.[42] The Minister shall determine the remuneration and allowances of the members of the Tribunal.[43]

Access to justice is enhanced because of the availability of experts in the Tribunal. Many of the questions that have to be decided at the Tribunal, call for an expert knowledge of environmental matters falling outside the training of a lawyer and also an understanding of the policy of the legislature and experience of administration. They are not primarily legal questions, although at some stage a judicial habit of mind may be required. In addition, a specialized adjudication forum does not need lengthy or any explanations of the matter at hand and this enhances access to environmental justice since the matter is disposed of expeditiously.

The quality of the Chairman also fosters access to environmental justice. The Chairman ought to have legal qualifications because the Tribunal is required to administer law that is too often complex. In addition, the Tribunal may have qualified advocates appearing before it and for that reason it must know the elements of procedure.

However, the professional qualifications of the environmental experts in the Tribunal are not clear. It is also not clear how one can determine who has contributed what in environmental matters. This may limit access to environmental justice if the "experts" so appointed possess very little knowledge of the environmental matters and thus unable to carry out their mandate effectively.

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[42] Section 125(1)
[43] Section 134

Environmental assessors also enhance access to environmental justice in the Tribunal.[44] The Chairman of the Tribunal may appoint any persons with special skills or knowledge on environmental issues which are subject matter of any proceedings or inquiry before the Tribunal to act as assessors in the advisory capacity in any case where it appears to the Tribunal that such special skills or knowledge are required for the proper determination of any matter.[45]

However, access to justice may be limited since the Chairman wields a lot of power in the appointment of assessors. What amounts to "special skills" or "knowledge on environmental issues" is not defined. This implies that the Chairman may appoint assessors who have very little knowledge of environmental issues and consequently be unable to advise the Tribunal accordingly.

It is important to note that access to justice is limited by the lack of an understanding of environmental issues on the part of the citizens and this may water down the advantages that accrue as a result of the experts in the Tribunal.

3.3 RULES OF PROCEDURE

The Tribunal has power to regulate its own proceedings.[46]In this regard, The Tribunal has made rules known as the National Environment Tribunal Procedure Rules.[47] The basic procedure adopted by the Tribunal is similar to that utilized by the courts and they

[44] An assessor is a person usually with technical expertise invited to advise a court or tribunal but have no voice in the decision. The court or tribunal is not bound to take his advice.
[45] Section 131
[46] Section 126 (5)
[47] Legal Notice Number 191 of 2003(Kenya Gazette Supplement No 92 of 21st November 2003)

incorporate the principles of natural justice. For instance, there are rules relating to the way in which an appeal should be lodged. An appeal to the Tribunal should be made by written notice, and where the Tribunal has approved a form of notice for the purpose, in the form so approved.[48] The notice should include the name and addresses of the appellant, the particulars of the disputed decision, a statement of the purpose of the hearing and a short statement of the grounds of the appellant's dissatisfaction with the decision which is the subject of the appeal.[49] There are also rules relating to the time limit upon which an appeal should be lodged. Appeals to the Tribunal must be preferred within 60 days after the occurrence of the event.[50] Access to justice is limited in the Tribunal especially where the litigants are unrepresented and therefore, unable to draft a notice of appeal as required by the Rules.

Any person who is a party to proceedings before the Tribunal may appear in person or be represented by an Advocate.[51] Advocates can indeed complicate a process, which in the first place, is preferred for simplicity. Representation in the Tribunal should thus include lay representation, that is, representation by persons other than advocates who have acquired or have special knowledge in relation to environmental matters.

However, there are certain differences in the procedure of the Tribunal which enhance access to justice. For example, the strict rules of evidence one would expect to see

[48] Rule 4(1)
[49] *ibid*, (2)
[50] *ibid*
[51] Section 132(3)

applied in a court of law are not binding on the Tribunal. Section126 (1) of EMCA states that the Tribunal shall not be bound by the rules of evidence as set in the Evidence Act[52].

In *Wetherall v Harrison*[53] it was held that it was acceptable for a tribunal member to rely on his own personal knowledge when coming to a decision provided he used it as a means of interpreting the evidence given in court and not as a replacement for it.

As Lord Widgery C J observed:

> "Laymen... considering a case which has just been heard before them lack the ability to put out of their minds certain features of the case. In particular, if the justice is a specialist, be he a doctor, or an engineer or an accountant, or what you will, it is not possible for him to approach the decision in the case as though he had not got that training, and indeed I think it would be a very bad thing if he had to. In a sense, the breaches of justices are like jury, they are a cross section of people, and one of the advantages, which they have is that they bring a lot of varied experience into the court room and use it."

The language used in the Tribunal also fosters access to environmental justice especially for citizens who cannot write English or Swahili. The Tribunal may at its discretion allow an appeal in any local language spoken in Kenya by persons or a community directly

[52] Cap 80, Laws of Kenya
[53] [1976] QB 773

affected by the subject matter of the appeal, if such persons or community cannot immediately obtain translation but undertake to do so within a reasonable time.[54]

The fact that lay people sit in the Tribunal also fosters access to environmental justice since it creates a friendly atmosphere as opposed to the courts of law where judges always wear serious and frightening faces which scares away members of the Public.

3.4 INDEPENDENCE OF THE TRIBUNAL

Access to environmental justice is limited by lack of the Tribunal's independence. The Tribunal is still anchored to the Ministry of Environment and Natural Resources and lacks the requisite independence even to hire its own staff. It has to rely on staff from NEMA who may not be skilled to discharge the functions of the Tribunal.[55]

In the past, its funds were channeled through NEMA, but after much effort, this position changed and they are now voted directly to the Tribunal. This was a barrier to access to environmental justice.[56]

The Tribunal operates at the same premises as NEMA and this limits access to environmental justice. The danger in keeping the Tribunal in close proximity to NEMA whose decisions it has to review or consider is that the public will always tend to see it as

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[54] Rule 46(1)
[55] Kameri Mbote, *Towards Greater Access to Justice in Environmental Disputes in Kenya: Opportunities for Intervention,* 2005, Geneva. <http://www.ielc.org/content/w0501.pdf (last accessed on June16, 2005)
[56] *ibid*

an appendage of NEMA. This will lead to claims of bias or lack of independence or outright complicity against appellants.

The Minister also exercises considerable power by appointing some members and deciding not to reappoint members when their periods of service expire. There is no express provision permitting for the re-appointment of members of the Tribunal and this impedes justice since the Minister is likely to appoint members who are loyal to him as opposed to members who can carry out the functions of the Tribunal effectively. The appointments of members of the Tribunal must be by name and by Gazette Notice issued by the Minister.[57]

The members of the Tribunal are to be appointed at different times so that the respective expiry dates of their terms of office shall fall at different times.[58] The continuity of the Tribunal is thus definite and this fosters access to environmental justice since at no time will the Tribunal be unable to sit owing to lack of membership.

The Minister also exercises control over the Tribunal through his powers to dismiss members of the Tribunal.[59] A member may be removed by the Minister from the membership of a Tribunal for the failure to discharge the functions of his office (whether arising from infirmity of body or mind from any other cause) or for misbehaviour. The term "from any other cause" gives the Minister too much power in the dismissal of the members. A member, for example, will too easily be capable of being dismissed if he is

[57] Section 125(2)
[58] *ibid*, (3)
[59] Section 125(4)

not in agreement with the decisions of the Minister. This limits access to justice since the tenure of the members is not guaranteed and quite often most of them will want to carry out their mandate in a manner that pleases the Minister.

The office of a member of a Tribunal also becomes vacant at the expiration of three years from the date the member was appointed, if the member accepts any office the holding of which, if he were not a member of the Tribunal, would make him ineligible for appointment to the office of the Tribunal and when a member resigns[60]

The Minister is also empowered by the Act to appoint a public officer to be the Secretary of the Tribunal and the Secretary shall be paid such allowances, as the Minister shall determine.[61] The fact that the Minister is given the authority to appoint the Secretary is a barrier to access to justice as it may lead parties to suspect that the Ministry is undermining the independence of the Tribunal by influencing it through the Secretary, particularly where the Secretary is strong and the Chairman is weak.

The independence of the Tribunal is nevertheless enhanced secured in the immunity that is accorded to the members of the Tribunal. All members and officers of the Tribunal are not liable to be sued in a civil court for any acts, omission or orders done by them in the discharge of their duties as members and officers of the Tribunal provided that the acts,

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[60] *ibid*
[61] Section 135

omission, or orders are done in good faith.[62]It is an offence for any person to engage in acts or make omissions amounting to contempt of the Tribunal and the Tribunal may punish such person for contempt.[63] This enhances access to environmental justice since members are able to determine a matter without any fear or favour.

3.5 COSTS

As was stated in the previous chapter, in the Courts of law, costs usually "follow the event"; this is also true in the Tribunal. This therefore, implies that access to justice in the Tribunal is limited especially because of poverty in the Country.

Rule 39(1) states however, that the Tribunal will not normally make an order awarding costs and expenses unless the suit was frivolous or vexatious, or unless the decision of the NEMA was unreasonable or unless the costs and expenses incurred resulted from postponement or adjournment of the hearing at the request of a party. This rule fosters access to justice since citizens are to a certain extent sure that they will not bear costs of litigation should they succeed in their matter.

In comparison with the courts, the Tribunal procedure is far less expensive than that of courts. Savings result partly from the speed and brevity of proceedings and by the fact that only the Chairman and the Secretary are full-time members of the Tribunal. The Tribunal therefore achieves a combination of impartiality with economy by drawing upon

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[62] Section 133(1)
[63] *ibid,* (2)

the ordinary citizen's willingness to do part-time public service of more or less voluntary character.

3.6 LEGAL AID

Closely allied to the question of costs is the further question of legal aid. Lack of legal aid for citizens appearing before the Tribunal hinders access to environmental justice. While it may be argued that in most times applicants for licences or proponents of projects are persons with almost unlimited financial resources, the same is incorrect for public-spirited citizens who may want to enforce their right to a clean and healthy environment. It would be a no- contest when these applicants for licences or proponents of projects are pitted against communities or groups that have no funds or are poorly financed.

3.7 REPORTING AND REVIEW OF THE DECISIONS OF THE TRIBUNAL

One of the opportunities that enhance people's access to justice in the Tribunal is through the reporting of the decisions of the Tribunal. Rule 36(7) provides that where the Tribunal has made a final decision or order, it shall within thirty days thereafter, cause the decision to be published and where the matter is of public importance, in at least one newspaper of national circulation.

Access to justice is however limited since the Tribunal is not empowered to review, revoke or vary any decision. If for example, a wrong decision was arrived at because of an error on the staff of the Tribunal or if the interests of justice require it, the Tribunal may not review its decision.

3.8 OTHER NATIONAL TRIBUNALS

Section 136 of EMCA empowers the Minister to establish other Tribunals in any part of Kenya as he deems fit. In other words, the Minister can establish National Environment Tribunals. Whether they would each have similar or co-extensive jurisdiction is not clear, but there is nothing to suggest that any Tribunal so established will be subordinate to the first one already established and in place. If this comes to be, the present and other national Tribunals will presumably have jurisdictions like those of the High Court established under the Constitution. Multiple Tribunals with concurrent powers could lead to many conflicting rulings which may hinder access to environmental justice.

3.9 MODES OF REDRESS

3.9.1 At the Tribunal

Upon any appeal, the Tribunal may confirm, set aside, or vary the order or decision in question. It may also exercise any of the powers, which could have been exercised by NEMA in the proceedings in connection with which the appeal is brought or it may make such other order, including an order for costs, as it may deem just.[64] The *status quo* of any matter or activity, which is the subject of the appeal, shall be maintained until the appeal is determined.[65]

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[64] *ibid*, (3)
[65] *ibid*, (4)

Access to justice is limited since EMCA is silent on the enforcement orders of the Tribunal. It is necessary that the Tribunal gets powers to enforce its orders rather than being required to file these in formal courts.

3.9.2 Appeals to the High Court

The right of appeal enhances environmental justice. Any citizen must be in a position to challenge the decisions of the Tribunal. Any person who is aggrieved by the decision or order of the Tribunal may within thirty days appeal to the High Court.[66] No decision or order of the Tribunal shall be enforced until the time for lodging an appeal has expired or where the appeal has been commenced, until the appeal has been determined.[67] However, where the Director General is satisfied that immediate action must be taken to avert serious injuries to the environment, he shall have power to take such reasonable action to stop, alleviate, or reduce such injury, including the power to close down the undertaking until the appeal is finalized or the time for appeal has expired.[68]

Upon the hearing of an appeal, the High Court may confirm, set aside, or vary the decision or order in question.[69] It may also remit the proceedings to the Tribunal with such instructions for further consideration, report, proceedings or evidence as the court may deem to give.[70] Further, the High Court may also exercise any of the powers, which could have been exercised by the Tribunal in connection with which the appeal is

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[66] Section 130 (1)
[67] *ibid,* (2)
[68] *ibid,* (3)
[69] *ibid,* (4) (a)
[70] *ibid,* (b)

brought.[71] It may also make such orders as it may deem just, including an order as to costs of the appeal or of earlier proceedings in the matter before the Tribunal.[72]The decision of the High Court on any appeal shall be final.[73]

3.9.3 Judicial Review

Judicial review is available generally as a way of challenging the Tribunal's decisions in a Court of law. It is a common law remedy that may be used to quash a decision (*certiorari*); stop unlawful action (prohibition); require the performance of a public duty (mandamus); declare the legal position of the litigants (declaration); give monetary compensation; and maintain the *status quo*. However, as was noted in the previous chapter, an application for judicial review is governed by very complex rules and this limits access to environmental justice.

3.10 CONCLUSION

Even though the Tribunal has not determined any matter since its inception, this chapter has indicated that the Tribunal, it possesses a number of advantages over Courts of law. Whilst the basic procedure adopted by the Tribunal is similar to that utilized by Courts of law, there are certain differences. In particular, the Tribunal is somewhat less formal, than courts of law, with less reliance on detailed rules of procedure. However, a number of significant criticisms can still be aimed at the Tribunal system. The non-availability of

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[71] *ibid,* (c)
[72] *ibid,* (d)
[73] *ibid,* (5)

legal aid must undoubtedly prejudice the less able litigants. There is also the concern over the extent to which the Tribunal can truly be said to be independent of government departments, when it holds its sittings in the same building as occupied by NEMA and are staffed by staff from the same. The Minister still exercises considerable control over the Tribunal by appointing some members, and deciding not to re-appoint members when their periods of service expire.

CHAPTER FOUR

THE PUBLIC COMPLAINTS COMMITTEE ON THE ENVIRONMENT

4.0 INTRODUCTION

The Public Complaints Committee on the Environment (hereinafter the Committee) is the third mechanism for access to environmental justice in Kenya. It is established under section 31 EMCA as a Committee of the Authority, meaning NEMA. The Committee was constituted on 13th July 2001 with the appointment of seven members who were gazetted vide Gazette Notice No. 4577.The Minister for Environment and Natural Resources officially launched the Committee on 23rd August 2001.

The Committee is in the nature of an environmental ombudsman and its main function is to receive complaints and petitions of technical and non-technical character, from members of the public. One commentary stated:

> "A common factor is that the Ombudsman procedure is invariably inquisitorial. All the complainant has to do is to complain; no expensive lawyers are necessary, no evidence has to be amassed and no case has to be proved. The Ombudsman takes control of the investigation, typically possessing powers to trawl through government documents and offices and question officials informally in their offices."[74]

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[74] Cesare P. R. Romano, *A proposal to Enhance the Effectiveness of International Environmental Law " The International Environmental Ombudsman"*, http:// www.earthsummmitwatch. Org(last accessed on January 27, 2005)

The Committee should therefore be a forum to which all members of the public from all walks of life can ventilate their grievances without being inhibited by the complexities and technicalities of procedure, which are a daily nightmare in the courts.

This chapter is mainly concerned with access to environmental justice in the Committee. The chapter examines the functions, powers, workings and efficacy of the Committee. In examining the said issues, the chapter brings out the key issues, which improve or impede access to environmental justice in the Committee.

4.1 EXPERT KNOWLEDGE

The membership of the Committee comprises of a Chairman, appointed by the Minister and who shall be a person qualified for appointment as a judge of the High Court of Kenya; A representative of the Attorney General; A representative of the Law Society of Kenya; A representative of Non-governmental Organizations appointed by the National Council of non- governmental organizations and who shall be the secretary; A representative of the business community appointed by the Minister; and two members appointed by the Minister for their active role in environmental management.[75]

Access to justice is enhanced since the Tribunal is composed of members some of whom possess expert knowledge in environmental matters. This does not only improve an understanding of environmental issues within the Committee but also reduces the time spent in hearing and determining a matter. A specialized adjudication forum does not need lengthy or any explanations on the matter at hand and this saves time.

[75] Section 31(1)

However, just like in the NET, the professional qualifications of the two members appointed by the Minister for their active role in environmental management are ambiguous. It is also not clear how one can determine who has contributed what in environmental matters. This may impede access to justice since the Minister may appoint members who possess very little knowledge of environmental matters and who therefore, may be unable to carry out their mandate effectively.

Access to justice in the Committee is also limited in view of the fact that the terms of service of the members of the Committee are not clearly stipulated in the Act. Most of the members are permanently employed elsewhere and they cannot therefore be expected to devote all their time to the activities of the Committee. This impedes access to environmental justice especially in cases where there may be lack of a quorum to hear a matter that is under investigation.

It is important to note that access to justice is limited by the lack of an understanding of environmental issues on the part of the citizens and this may water down the advantages that accrue as a result of the experts in the Committee.

4.2 FUNCTIONS OF THE COMMITTEE

The functions of the Committee are stated under section 32 of EMCA. The Committee is mandated to investigate any allegations or complaints against any person or Authority, meaning NEMA, in relation to the condition of the environment in Kenya. It is also mandated, on its motion, to investigate any case of environmental degradation.

The Committee is also required to make a report of its findings together with its recommendations to the Council, meaning NEC, and to prepare and submit to the Council, periodic reports that become part of the annual reports on the state of the environment.

The Minister is then expected to lay such annual report before the National Assembly as soon as reasonably practicable after its publication where the National Assembly is in session. Where the National Assembly is not in session, the report should be tabled within twenty-one days of the day of its next sitting.[76] The Committee is also required to perform such other functions as may be assigned to it by the Council.

The publication of the annual state of environment reports has implications for access to environmental justice. It enhances access to environmental justice since it provides information which empowers the citizens to carry out the duty placed on them in section 3 of EMCA.

Access to justice is however, limited in view of the fact the report is published in a English which is a language that is not understood by most citizens. Where the report is published in English, it should be translated in Swahili and other languages local languages which are spoken in Kenya in order to make it more accessible.

The effectiveness of the Committee is doubtful since NEC is not required to work on the Committee's reports. Consequently, there may be no follow up after the reports are

[76] Section 9(3)

presented. On many occasions, there has been inordinate lapse of time between the Committee's findings and recommendations and their enforcement by NEMA.[77] There is also no system of receiving response from NEC on previously submitted submissions. This therefore means that the Committee is unable to measure its successes and failures.

The Committee has so far investigated cases of air pollution caused by uncontrolled burning of garbage, emission of noxious gases by factories and industries, emissions of dust through constructions and quarrying activities, fumes from un-roadworthy vehicles; water emission caused by discharge of untreated sewerage into water masses, discharge of industrial waste into water resources; noise pollution caused by earth moving equipment during construction and quarrying up of lakes due to diversion of rivers.[78]

The limitation on the use of the Committee's report denies the country an opportunity to deal with environmental issues that are very rampant and that impact significantly on people's enjoyment of the right to a healthy environment.

Access to justice may however be enhanced if the reports made by the Committee were made public. EMCA does not provide for the recommendations of the Committee to be made public, but there is no bar to making them public contemporaneously with the submission to NEC. This is very important in building the institutional profile and creating awareness of environmental issues on the part of the citizens.

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[77] According to section 6(1) of EMCA, the Council is required to meet at least four times in every financial year. At the time of writing this thesis, the Council had not met for a period of five months to act on the on the findings and recommendations of the Committee.

[78] For more details, see the Report of the Public Complaints Committee on the Environment on the State of the Environment for the year 2003/2004

4.3 INDEPENDENCE OF THE COMMITTEE

The lack of the requisite independence of the Committee impedes access to justice. A close look at the functions of the Committee discloses that the Committee is not autonomous. The Committee, which has powers to investigate NEMA, is established as a Committee of NEMA. It is therefore confusing as to how a Committee, which has the mandate to investigate the NEMA, can be established as a Committee of the same institution.

There has been an impression that the Committee is directly under or subordinate to the administrative structure of NEMA and this has created a lot of hostility between the Committee and NEMA. According to an Annual Report on the State of Environment prepared by the Committee for the year 2003/2004, it was stated at page 15:

> "Although the Committee does not report to NEMA, there has been a perception within NEMA establishment that somehow, the Committee is answerable to NEMA."

The Committee also lacks independence in hiring its own staff.[79] The Committee continues to rely on NEMA to supply it with the requisite personnel some of whom may not be equipped with skills required to carry out the functions of the Committee. The Committee is also housed in the same premise with NEMA. This has an implication on access to justice since the Public may tend to see it as an appendage of NEMA and this may lead to claims of bias or lack of independence of the Committee.

[79] Ibid, p. 16

The Minister still exercises considerable control over the Committee by appointing some members, and deciding not to re-appoint members when their periods of service expire.[80] Members of the Committee other than the representative of the Attorney General are to hold office for a period of three years and are eligible for reappointment provided that they do not hold office for more than two terms.[81] There is no express provision permitting for the re-appointment of members of the Committee and this impedes access to justice since a member may want to act in a manner that pleases the Minister in order to be reappointed when his term expires.

Access to justice is also limited by the fact that the expiry of tenure of office of the members of the Committee fall at the same time and thus there be a situation where citizens may be unable to access environmental justice due to non- existence of the members of the Committee.

The effectiveness of the Committee was hampered by its dependence on NEMA for purposes of funding its operations since financial provisions relating to the funds of the Committee are absent in EMCA. In the past, the funds were channeled through NEMA, but after much effort, this position changed and they are now voted directly to the Committee.

The independence of the Committee is nevertheless enhanced by the immunity that is accorded to the members of the Committee. Section 34 of EMCA states that no proceedings of the Committee shall lie against any member of the Committee in respect

[80] The new Minister for Environment and Natural Resources, Hon. Kalonzo Musyoka, recently appointed new members of the Committee

[81] *ibid,* (2)

of anything done in good faith in the performance of their duties. This is good protection for the individual members as it frees their hands to carry out their work without any fear or favour.

Once appointed, the members of the Committee enjoy a high degree of security of tenure and this fosters access to justice. A member of the Committee other than the representative of the Attorney General can at any time resign from office by notice in writing to the Minister or can be removed from office by the Minister on various grounds. Firstly, a member can be removed from office by the Minister if he has been absent for three consecutive meetings of the Committee without leave of the Chairman. Secondly, if he is convicted of a criminal offence and sentenced to imprisonment for a term exceeding six months or to a fine exceeding ten thousand shillings. Third, if he is incapacitated by prolonged physical or mental illness and finally, if he is unable or unfit to discharge his functions.[82] Unlike, in the NET, members of the Committee are thus able to carry out their work independently since they cannot be removed from office on flimsy grounds such as refusing to be in agreement with the decisions of the Minister.

4.4 POWERS OF THE COMMITTEE

In order for the Committee to effectively carry out its mandate and hence expand the horizons of environmental justice in Kenya, the Committee has a number of powers which are set out under section 33 of EMCA. The Committee may, by notice in writing require any person to give to it all reasonable assistance in connection with the

[82] Section 31(3)

investigation. The Committee may also, by notice in writing require any person to appear before it for examination concerning matters relevant to the investigation

A person who refuses or fails to comply with the Committee, obstructs or hinders the Committee or furnishes or makes a statement that is false or misleading to the Committee and, when appearing before the Committee, makes a false or, misleading statement is guilty of an offence punishable by a fine not exceeding Kenya shillings fifty thousand. Where the offence is continuing, in addition to the penalty, he will be liable to a fine of Kenya shillings one thousand for each day during which the offence continues.[83]

One of the most important powers that are not provided for in EMCA and limits access to justice is the power of the Committee to give interim orders pending investigations. This power is very vital especially where there is the likelihood of irreversible environmental damage.

4.5 RULES OF PROCEDURE

Under section 31(6), the Committee is empowered to regulate its own procedure. However, the Committee has not yet developed its rules of procedure. This hampers access to justice since the lack of a proper system leads to complication and therefore a lack of comprehension on the part of the ordinary citizens.

[83] Section 33(2) and (3)

4.6 OPERATIONS AND ACTIVITIES OF THE COMMITTEE

Even though the Committee has not yet developed its rules of procedure, it has nevertheless since inception, received about 300 cases and has conclusively handled and submitted over 150 cases reports to NEC. The remaining cases are at different stages of investigation.

4.6.1 Investigation of Cases

According to the Report on the State of Environment for the year 2003/2004 prepared by the Committee (hereafter the Report),[84] the Committee can receive complaints either by written or oral submissions. However, the Committee encourages written complaints. The Committee has developed Standard Forms for registration of complaints.[85]

Complainants are expected to identify themselves in the cause of filing the complaints to the Committee. However, in certain situations the Committee accepts and investigates complaints from anonymous sources.[86]

The Report states that, upon receipt, a complaint is registered and acknowledged through writing. Based on the nature of the complaint, the Committee can organize for a site visit or *interpartes* hearing. If a hearing is preferred, the Committee summons all the relevant parties to a hearing before a Panel on a specific date. The Panel accords the parties a hearing. Where necessary, the Committee follows up the matter through onsite visits to

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[84] p.9
[85] *ibid*, p.7
[86] *ibid*

verify the issues on the ground. The Committee also collects samples such as water, soil, and air effluents for scientific analysis.[87]

The hearings of the Committee are public and are conducted in a non-adversarial and non-technical manner. Although the parties to a complaint have a right to appear through their advocate, the Committee has been steadfast in discouraging legal technicalities being introduced in the proceedings.[88]

The Report also states that the Committee has avoided taking punitive measures against persons who defy its summons by giving them a second opportunity to respond to the summons. However, where a person who is summoned defies the second summons, the Committee advises the Attorney General to commence prosecution in accordance with section 33 (a) of EMCA.[89]

Where the Committee investigates a complaint on its own motion, it tracks issues of environmental concerns from the print and electronic media and investigates them accordingly.[90] However, the Committee has used this power sparingly due to the fact that under EMCA, the main implementing agency is NEMA. The Authority premises, issue prohibition and environmental restoration order. The Authority has technical staff on the ground and is better placed to carry out investigation of this kind.[91]

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[87] *ibid,* p.9
[88] *ibid*
[89] *ibid*
[90] *ibid,* p. 8
[91] *ibid*

It is clear from the above that the process adopted by the Committee fosters access to justice. The procedure is invariably inquisitorial. All the complainant has to do is to complain. No expensive lawyers are necessary, no evidence has to be amassed and no case has to be proved. The Committee takes control of the investigation, typically possessing powers to trawl through government procedure and offices and questions officials informally in their offices.

4.6.2 Costs

Access to justice is also enhanced in the Committee since it does not charge any fees for the filing and hearing of cases.[92] Members of the public can thus access the Committee without being inhibited by the costs of litigations.

4.6.3 Awareness of Environmental Matters

The Rio Declaration recognizes the important role in public participation in environmental decision making and provides in Principle 10:

> "Environmental issues are best handled with the participation of all concerned citizens, at the relevant level..."

This implies that public education and awareness in environmental matters fosters access to justice since it enables the ordinary citizens to be vigilant about their own environment by reporting cases of environmental degradation to the Committee. The citizen is able to participate directly in the conservation and management of his or her own environment.

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[92] *ibid*, p.9

In order to educate the public and create awareness on environmental matters, the Committee has held a number of workshops since its inception. According to the Report, the first was a national workshop held on 24th April 2003 and its main objective was to kick-start the Committee awareness creation activities countrywide. Participants were drawn from Non- Governmental Organizations, the Government, public institutions and private sectors.[93]

The Committee has also held a number of joint workshops with the NET and the main objective of these workshops has been to sensitize and create awareness of the existence and functions of the Committee and the Tribunal.[94]

Apart from awareness creation, the Committee has held a few sector specific workshops. The first such workshop was held for officials of the Nairobi City Council. This is because many of the complaints reported to the Committee indicated the Nairobi City Council had abdicated its duty in enforcing City by-laws.[95]

The Committee has also held a consultative workshop with journalists from various media houses. The main objective of this workshop was to highlight the pivotal role of the media in enhancing the Committee's work.[96]

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[93] *ibid,* p.5
[94] *ibid*
[95] *ibid,* p.6
[96] *ibid,* p.7

The Committee has also held capacity building workshops and the main objective of these workshops has been to enable Committee's members and staff to more clearly, understand their role within the Committee's mandate.[97]

The raising of awareness on the Committee and the training of staff of the Committee to equip them with skills to handle various issues promotes access to justice.

4.6.4 Publicity Materials

To compliment its awareness creation activities, the Committee has designed, produced and disseminated a number of publicity materials. In this regard, the Committee has produced brochures, T- Shirts, banners, Newspaper Supplements and Newspaper Advertisements.[98] This also fosters access to justice.

4.6.5 Reconciliation/ Consultative Meetings

Access to environmental justice in the Committee is enhanced through diplomatic means of dispute settlement that have been adopted by the Committee. The Committee facilitates reconciliation/ consultative meetings, between various stakeholders.[99] The main objective of such meetings is to find solutions to environmental problems through debate and consensus. The Committee for example facilitated a meeting between various stakeholders around Lake Naivasha, NEMA and Kenya Wildlife Service. The meeting arose from complaints received by the Committee about activities that are degrading the environment around Lake Naivasha.

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[97] *ibid*
[98] *ibid*, p.10
[99] *ibid*, p.11

The dispute also revolved around the access and use of water resources around Lake Naivasha by the various communities. The meeting led to the adoption of a Management Plan of Lake Naivaisha. It is expected that once the Plan is gazetted, it will go a long way in providing long-term solutions to conflict that have so far arisen.

4.7 BUDGETARY ALLOCATIONS

Although the Committee has a nationwide mandate to investigate complaints relating to environmental degradation, its annual budgetary allocation is grossly inadequate. In the financial year 2004-2005, the Committee was allocated Kenya shillings fifteen million against a projected budget of thirty three million. This is a major shortcoming in access to environmental justice since the Committee is unable to investigate all the cases reported to it in good time.

4.8 PHYSICAL FACILITIES

Access to justice is limited by the physical facilities of the Committee. The Committee does not have office space of its own. At present, the Department of Resource Survey and Remote Sensing (DRSRS) house the Committee. Being a public watchdog on environmental matters, the facilities available are not adequate for the efficient carrying of the Committee's mandate.

4.9 CONCLUSION

This chapter has indicated that the Committee has made significant strides in carrying out its mandate during its short time in existence. The Committee has adopted a very simple

procedure of receiving, filing, investigating and concluding complaints. The proceedings are simple and differ substantially from rules of tribunals and courts of law. The proceedings are thus designed to allow members of the public an easy access to a remedial system.

The Committee has been involved in public education and awareness on environmental matters. This has fostered access to environmental justice. The Committee has also adopted diplomatic means of dispute settlement through consultative/reconciliation meetings which is also a tool for enhancing access to justice.

Given the fact that the Committee embarked upon uncharted course way, where the members had to steer through a trial and error strategy, the achievements highlighted are far from modest. If the challenges highlighted in this chapter can be comprehensively addressed, the Committee will be a very effective mechanism for access to environmental justice in Kenya.

CHAPTER FIVE

THE WAY FORWARD

5.0 INTRODUCTION

As indicated in the first chapter, this study tests two hypotheses. First, that the judicial and quasi-judicial institutions established under EMCA have been ineffective in expanding the scope of environmental justice in Kenya. Second, that the ineffectiveness of these institutions in expanding the scope of environmental justice in Kenya have been due to lack of a conducive legal environment and structural and mechanistic barriers.

From the analysis of these institutions, it is clear that this study has proved the hypotheses. Access to justice has been hampered by both structural and mechanistic barriers which include the costs of legal action, lack of an understanding of environmental issues, restrictive jurisdictional rules, overly complex regulations, ineffective enforcement mechanisms and corruption. The latter can be dealt with in the short term while the former require a longer time- frame.

5.1 RECOMMENDATIONS

The promotion of access to justice needs a multi- faceted approach so as to deal with supply and demand of issues. The first action that needs to be addressed is raising awareness of the EMCA provisions and in particular, provisions relating to the right to a clean and healthy environment and the mechanisms for access to environmental justice in Kenya. It is critical that the users of these mechanisms be well versed with the provisions. Access to justice provisions will remain inoperative if there is no critical mass of judicial

functionaries utilizing the provisions. Use of the provisions can be hampered by lack of understanding of the provisions.

Raising awareness of judges, magistrates and advocates can be done through short-term training courses on environmental matters. In the longer- term, awareness raising for the public is critical to access to justice since the law does not go to the people.

Public participation in environmental management could be improved through making environmental education, like mathematics, an integral part of the standard educational curriculum. It could also be improved through including regional and global issues and perspectives in environmental education syllabi. Public awareness and education programmes should also be expanded to target more groups in society, especially engineers and economists. The media should also be encouraged to devote as much attention to environmental issues as they do to crime, politics, sport and finance.

A related action is the training of staff working for the mechanisms of access to environmental justice in Kenya. The requirements in EMCA presuppose a cadre of trained staff to implement and enforce provisions. Training of staff to equip them with skills to handle various issues will promote access to environmental justice. Short- term training courses based on a needs assessment will facilitate access to justice.

Environmental law reporting should be established within the National Council for Law Reporting. In deed it would be useful to get at one place environmental decisions reached

by the courts and also before the NET and the PCC. This can be done within the realm of the National Council for Law Reporting.

Specialized environmental courts manned by qualified personnel could be established to deal with environmental disputes. To ensure access to justice, it is necessary that the courts have personnel that can competently handle environmental matters. Specialized environmental courts go a long way in helping achieve this.

Given the human resource problems currently plaguing the judiciary, a stop-gap measure would be to ensure that there are magistrates who have gone through the training on environmental matters.

Public interest litigation should be promoted to deal with demand side of access to justice. Public interest litigation is an effective medium for promoting access to justice since most environmental matters take a public character. It is also indispensable in a situation where the majority of the citizenry are illiterate and in most cases unaware of their rights. Moreover, most people live in abject poverty and do not have the resources to engage the services of advocates. The High Court of Tanzania in the case of *Chistopher Mtikila v. Attorney General* [100] holding that public interest litigation is allowed by the Tanzanian Constitution stated:

> "Other factors should be listed but perhaps the most painful of all is that over the years since independence Tanzanians have developed a culture of apathy and

[100] (1993) Civil Case No. 5 of 1995 High Court of Tanzania at Dodoma also reported in (1995) TLR

silence. This is large measure a product of institutionalized mono-party politics, which in impressive dimension, like detention without trial, supped up initiative and guts. The people found contentment in being receivers without seekers."

The situation in Kenya, though changing, has been one in which challenging the Government or Governmental institution has not been permitted. This impacts on access to justice and raises the need for public interest litigation to bridge the gap. A related mechanism is judicial activism which has worked well in countries such as India.

This can be catalysed through the establishment of legal aid clinics focusing on environmental issues. More specifically building capacity for public interest clinics at the faculties of law in Kenyan universities linking these with well-established law firms can catalyse public interest litigation and provide legal assistance. This would foster access to justice.

In the medium term, interventions such as commissioning studies on traditional governance institutions impacting on access to justice as a background on ways of incorporating these institutions into the dispute settlement fora is an essential gap towards access to justice. Within most communities, there are institutions that the communities use to manage their environmental resources and for adjudication of disputes. Studies should be carried out in select representative areas to map out the nature and operations of these institutions established.

Following such studies, there should be investment in institutional supply and capacity building of local communities to enable them interact with and engage national and regional structures such as water boards, NEMA, KWS and Forest Department. To ensure that the local community institutions foster access to justice, training and capacity building are critical.

The Kenyan courts need to establish a clear jurisprudence on matters of *locus standi* in order to enhance access to environmental justice in Kenya. They should also isolate specific environmental law principles upon the interpretation of the Kenyan statutes and the Constitution, combined with a liberal view towards ensuring social justice and the protection of human rights. The courts should also prioritize the environment over development, when the situation demanded an immediate and specific policy structure.

There is also need to equitably and strategically locate the mechanisms for access to environmental justice in Kenya only in urban centers, but also in rural areas, in order to reach out to every person in Kenya. There is also need to put in place a system to monitor the progress of a case in order to ensure that the courts of law are not plagued with delays and backlog of cases.

In order to guarantee the independence of the NET and the PCC, it is important that its administrative staff be persons who are employed by the Ministry of Environment and Natural Resources and not NEMA. The NET and the PCC should also operate at arm's length from the sponsoring Ministry as well as from NEMA.

The PCC should strive to make its recommendations known to the public contemporaneously with the submission to NEC. Its files and other documents should be open to the press and members of the public. The PCC should publicize the cases it finds in favour of a complainant or where it has acted on its own motion, if it is convinced that serious environmental damage has been occasioned or is about to be occasioned. This is very important especially in current situation where the PCC has no way of acting on its recommendations.

There is need for joint operations and investigations between the PCC and NEMA in order to save time and money by avoiding duplications and repeat jobs. The PCC needs to ensure that it is not perceived as renegade and in competition with NEMA for profile and resources. This also applies to all other relevant institutions within or without NEMA that are important in the working of the Committee. There should be a good working relationship between the Committee and other lead agencies such as the KWS and the office of the Attorney General.

In the long- term, it is necessary to review EMCA and take stock of its operations and efficacy in seven to ten years. For instance there is need to amend EMCA in order to embody all conceivable principles necessary for access to environmental justice such as the principle of transparency and uninhibited access to justice.

There is also need to amend EMCA in order to give NET original jurisdiction in environmental matters. This would position it as the best forum for hearing environmental disputes before these are taken to the High Court.

The professional qualifications of the environmental experts in the NET and the PCC should be clearly stated in EMCA. It should also be clearly stated how one can determine who has contributed what in environmental matters.

To be credible, the appointment procedures of members of the NET and the PCC must be fair and independent of the administrative authorities of government which have direct interest in the Tribunal's decision. Additionally, appointees must enjoy security of tenure, subject of course, to clearly laid rules for removal of office in case of poor performance, misbehaviour or incapacity.

Since multiple Tribunals with concurrent powers could lead to many conflicting rulings which limits access to justice, it is important to have just one Tribunal which may sit in various provinces or other places alternately. However, should the Minister proceed to establish other Tribunals, Tribunals, the Rules should provide for the transfer of appeals to other Tribunals which have the same jurisdiction.

The NET should be empowered to review, revoke or vary any decision on a number of grounds. If for example, a wrong decision was arrived at because of an error on the staff of the Tribunal, it may review its decision.

In order to guarantee the independence of the PCC, there is need to amend EMCA in order to correct the contradictory legal provisions which give the impression that the PCC is an appendage of NEMA and thus it is answerable to it.

There is also need to amend EMCA in order to compel NEC to act on the recommendations of the PCC. The PCC needs to have a mechanism of finding out whether its recommendations have been acted upon by NEMA. This is the only way of ensuring that access to justice is enhanced.

The terms of service of the members of the PCC and NET should be clearly stipulated in EMCA in order to ensure that members devote all their time to the activities of these mechanisms for access to environmental justice.

EMCA should also provide for the staggering of the appointments of the members of the PCC so that the expiry dates of the terms of office fall at different times. This will ensure that there is the continuity of the PCC and hence enhance access to environmental justice.

Members of the PCC should hold the public hearings in alternation perhaps three per sitting. This would enable the PCC to handle two complaints at one go. This would mean that they would hear more complaints in any given period and thus enhance access to environmental justice.

The PCC and NET should be adequately funded by the State in order to carry out its mandate effectively. If budget lines allow, the PCC and NET should be flexible in sourcing expertise. It would be nice to have a data bank of retired Kenyans who can do the odd work and who would be willing to volunteer for a small fee to assist in the workings of the PCC and NET.

The PCC needs to have a title that well matches its mandate. Part of the reason why there is the misunderstanding between the PCC and NEMA could be precisely because it is regarded as a "Committee".. A Commission would sound bigger and be presumed to be independent.

Given the fact that the Committee is handling a number of complaints, there is need to develop its rules of procedure in order to avoid inconsistencies in its operations and therefore lack of comprehension on the part of the ordinary citizen.

Last but not least, there is need to facilitate the passing of and implementation of the draft constitution. The provisions of the draft constitution have far reaching implications for access to justice in terms of both substantive provisions as well as the mode of governance. The constitutional provisions on environmental rights and access to justice can promote access to justice.

5.2 CONCLUSION

The mechanisms for access to environmental justice have been ineffective in fostering access to justice due to factors highlighted in the preceding chapters. However, if the interventions illustrated above are comprehensively addressed, access to environmental justice in Kenya could be enhanced and the substantive rights provided for in EMCA could be realized.

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