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KENYA (ROLE OF THE JUDICIARY IN ENVIRONMENTAL GOVERNANCE)

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Chapter 14
Kenya

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1 INTRODUCTION

1.1 BACKGROUND

Kenya is situated on the East African highlands with a total area of 225,000 square miles. It has wide differences in the amount, reliability and seasonal distribution of rain. There is also great elevation variation which has produced regions with sharply contrasting environments.[1] The terrain consists of low plains rising to the central highlands which are bisected by the Rift Valley, leading on to the fertile western plateau. Forest vegetation is confined to areas that are 5,000 feet above sea level while savannah, comprising tall grass with scattered trees and shrubs or acacia trees, are a characteristic of the plateau area to the south and south west of Kenya. The most common vegetation is the dry bush land and thorn scrub.[2]

Kenya lacks major exploitable mineral resources and arable land is scarce. The main economic activities are based on the primary sector, predominantly

1. See D.C. Edwards, 'The Ecological Regions of Kenya: Their Classification in Relation to Agricultural Development', *Empire J. Experimental Agriculture* 24 (1956): 96.
2. See C.G. Trapnell & I. Langdale-Brown, 'The Natural Vegetation of East Africa', in *The Natural Resources of East Africa*, ed. E.W. Russell (Nairobi: DA Hawkins, 1962), 92. See also J.F. Griffiths, 'The Climate of East Africa', in *id.*, 79, noting that most of it however, has extremely arid climate with too little rain to sustain any form of agriculture.

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agriculture,[3] which is both a source of food as well as a foreign revenue earner. The agricultural sector employs over 70% of the country's population and in the 1990s, agricultural products accounted for as much as 25% of the gross domestic product (GDP) compared to manufacturing which contributed 14%.[4] The country can be divided broadly into three land categories based on agricultural production and the amount of rainfall received. These are the high, medium and low potential areas. Over 75% of the human population lives in the high potential area to the south and west. Much of north and east Kenya is too dry to support any agriculture.[5] Kenya has great faunal and floral diversity including forests, woodlands, swamps, grasslands of many different varieties and plant and animal species. It is endowed with unique and economically valuable wildlife resources.

Kenya's population is currently estimated to be thirty-seven million people.[6] Only 25% of this population live in urban areas, the remainder live in the rural areas and consequently depend directly on land for a living.[7] The rural population depends mainly on biological resources, which has resulted in biodiversity erosion owing to over-cultivation, over-grazing and the clearing of forestlands and crop plantation areas to make way for urban expansion. Further, population growth has outstripped the agricultural capacity of the land in adequately watered areas and resulted in migration to drier low agricultural potential areas designated in official policy as arid and semi-arid areas (ASALs). ASALs comprise 88% of Kenya's total land area and carry over 20% of the country's total human population and more than 50% of its livestock.[8] Traditional pastoral systems of land use still prevail in these areas and temporary out-migration is common due to climate and insecurity. Pastoralists are, however, increasingly settling permanently in these areas due to interventionist activities of the government, donors and non-governmental organizations (NGOs) which develop means of communications and permanent water sources.[9]

1.2 Major Environmental Challenges

Kenya's main environmental challenges include: degradation of habitat; loss of biological diversity;[10] pollution; management of water, wildlife and forest

3. The term 'agriculture' denotes cultivation and livestock keeping. We use the term 'settled agriculture' when we discuss areas where livestock keeping is practiced alongside cultivation.
4. See Republic of Kenya, *Economic Recovery Strategy* (Nairobi: Government Printer, 2003), 12.
5. See, e.g., Griffiths *supra* n. 2.
6. Republic of Kenya, *Economic Survey 2007* (Nairobi: Ministry of Planning and National Development KNBS, 2007).
7. See Republic of Kenya, *supra* n. 4.
8. Republic of Kenya, *Environmental Action Plan for Arid and Semi-Arid Lands in Kenya* (Nairobi: Government Printer, 1992).
9. *Ibid.*
10. See generally P. Kameri-Mbote, *Property Rights and Biodiversity Management in Kenya* (Nairobi: ACTS Press, 2002).

resources; and competition between environmental conservation and land uses inimical to such conservation. By 1994, deforestation had reduced Kenya's forest cover to a meager 1.7% (1,4 million hectares).[11] Continued deforestation[12] has also impacted negatively on indigenous forests which are now only found in the Aberdare range (250,000 hectares), Mount Kenya (220,000 hectares), the Mau complex (400,000 hectares), Mount Elgon (74,000 hectares) and the Cherangani Hills (120,000 hectares).[13] The loss of forest cover (a critical habitat for many species), has also entailed loss of genetic resources. Other related issues comprise: biopiracy; absence of a national legal framework for protecting indigenous knowledge that can be used for sustainable environmental management; lack of an implementation framework for bioprospecting activities and equitable benefit sharing; and the absence of a national legal framework for genetic modification of organisms and related threats, principally to the environment and human health (allergenicity and toxicity).[14]

As a developing country with a growing population, the imperatives of economic development and environmental protection are in constant tension. Indeed, land use is a major challenge to sustainable environmental management impacting both on habitat as well as being a source of pollution. Not surprisingly, there are conflicts between humans and conservation agencies especially around protected wildlife reserves and gazetted forests. Kenya's population largely depends on land for subsistence as well as economic activities. Environmental degradation consequently has implications for the well-being of individuals and the country as a whole. Moreover, wildlife based tourism significantly contributes to Kenya's GDP.

Agriculture, water and sanitation, the physical planning and biodiversity management interface with environmental management, together with the governance frameworks put in place for these activities, have implications for general sustainability. For instance, the *Agriculture Act*[15] provides for soil quality and use while the *Physical Planning Act*[16] provides for rational use of space. Kenya is also concerned about the management of national and international waters. Being endowed with a coastal zone, a share of Lake Victoria, and river basins such as the Nile with other countries, the concerns about water quantity, quality and sustainable use, are major issues in Kenya. Being a country prone to cyclic droughts

11. P. Wass, *Kenya's Indigenous Forests: Status, Management and Conservation* (Paris: IUCN, 1994).
12. V. Matiru, Forest cover and forest reserves in Kenya: Policy and Practice: EPA working paper no. 5 (Nairobi: IUCN, 2002).
13. KFWG, *Changes in Forest Cover in Kenya's Five 'Water Towers' 2000-2003* (Nairobi: KFWG, 2004).
14. This is notwithstanding the fact that genetic modification activities are continuing in the country whilst Kenya has both signed and ratified the Cartagena Protocol on Biosafety (2000) 6 *ILM* 1027. For more discussions on this, see generally, P. Kameri-Mbote, G. Tumushabe & I. Sithole-Niang, *Biotechnology and Law: Africa's Dilemma* (Forthcoming, 2008).
15. Cap. 318 of the Laws of Kenya.
16. Cap. 286 of the Laws of Kenya.

and having a substantial part of its territory as ASALs, Kenya's management of its water resources is an issue of major concern. Related to this is the concern to reduce the country's dependence on hydrocarbons for energy and to facilitate research and development on renewable energy resources.

Other environmental challenges include sustainable management of fisheries to ensure that fishing activities are within the maximum sustainable yield in both inland waters and the territorial sea (*ca.* 9,700 km^2); legal facilitation of carbon trading and sequestration; control of indoor and outdoor pollution; and marine pollution.

2 PRINCIPAL ENVIRONMENTAL LAWS

2.1 Introduction

Kenya's environmental legislation is contained in the Constitution,[17] the *Environment Management and Coordination Act* 1999 (EMCA),[18] and resource or sector specific laws.[19] It is expected that all sectoral laws will be reviewed or amended to ensure their consistency with EMCA. Section 148 of EMCA states that:

> Any written law, in force immediately before the coming into force of this Act, relating to the management of the environment shall have effect subject to modification as may be necessary to give effect to this Act, and where the provisions of any such law conflict with any provisions of this Act the provisions of this Act shall prevail.

A number of sectoral environmental laws have been revised after the promulgation of EMCA. These include the *Water Act*,[20] *Forests Act*,[21] and *Energy Act*.[22] The *Wildlife Management and Conservation Act*,[23] is in the process of being reviewed and one of the reasons for the review is to align it to EMCA. There is also a draft Mining Bill 2007.

Additionally, common law and criminal law are integral components of Kenya's environmental law. Even though statute law is now dominant in the environmental field, common law still has residual functions in sustainable development. Common law arises from the English tradition laying supremacy on case law or decided cases, especially from superior courts, which provide precedence over succeeding cases by virtue of the doctrine of *stare decisis*. A common law action may be brought in the form of judicial review – an action in public law challenging

17. Act 5 of 1969 (amended in 2008).
18. Act 8 of 1999.
19. J.B. Ojwang, *Environmental Law and the Constitutional Order* (Nairobi: ACTS Press, 1993), 35.
20. Act 8 of 2002.
21. Act 7 of 2005.
22. Act 12 of 2006.
23. Cap. 376 of the Laws of Kenya (amended in 1989).

the legal validity of the decisions or actions of public bodies when they result in injuries. Judicial review may be used to: (a) quash a decision (*certiorari*); (b) stop an unlawful action (prohibition); (c) require performance of a statutory duty (*mandamus*); (d) declare the legal position of a litigant (declarations); (e) monetary compensation; or (f) declare the *status quo*. Common law also provides for causes of action in private law, which include trespass, nuisance, negligence and the rule in *Rylands v. Fletcher*, or strict liability.[24]

Criminal enforcement of environmental law is necessary to protect the integrity of the regulatory system, to prevent harm to the environment, to protect public health and welfare and to punish culpable violations. Other reasons for using criminal law to enforce environmental law are: the inadequacy or failure of civil/administrative law to adequately deter violations; the use of criminal sanctions as a back-up where civil remedies are not suitable or cannot remedy the situation; societal preference to criminalize actions as an expression of moral outrage; and to prohibit the activity. In the case of moral outrage, the commonality of interest in an issue forms the basis for prosecuting the wrong. Criminal sanctions punish the responsible party and make it clear that non-compliance is a crime. Kenya's Penal Code[25] has been used to deal with environmentally harmful activities that also constitute criminal activities. Moreover, EMCA makes provision for both substantive as well as administrative offences.[26]

The following sections investigate the Constitution's provisions pertinent to environmental governance, as well as EMCA and a selection of sectoral environmental statutes. Apart from these laws, customary law is recognized as one of the legal orders governing people's life in Kenya. To the extent that such customary law impacts on the environment, it is critical for effective environmental governance. The adjudication of customary law matters is carried out largely by traditional governance institutions and also by Magistrates' Courts. The customary law provisions are reflected on where appropriate.

2.2 Constitution

2.2.1 The Constitution of Kenya, 1969

Kenya's Constitution of 1969 does not contain explicit environmental provisions.[27] It does, however, place importance on the right to life, which experts

24. C.O. Okidi, 'Concept, Structure and Function of Environmental Law', in *Environmental Governance in Kenya: Implementing the Framework Law*, ed. C.O. Okidi, P. Kameri-Mbote & M. Akech (Nairobi: EAEP 2008), 3.
25. Cap. 63 of the Laws of Kenya.
26. P. Kameri-Mbote, 'The Use of Criminal Law in Enforcing Environmental Law', in *Environmental Governance in Kenya: Implementing the Framework Law*, ed. C.O. Okidi, P. Kameri-Mbote & M. Akech (Nairobi: EAEP, 2008), 110.
27. Act 5 of 1969 (amended in 1992, rev. in 1998 and 2008).

argue encompasses the right to a clean and healthy environment.[28] 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 the protection of the law, which appear in Chapter V of the Constitution. Of particular significance is section 80, which guarantees every person the right to assemble freely and to associate with other persons, and further includes the right to form or belong to associations. The Constitution also includes the right to access to the High Court for redress regarding enforcement of fundamental individual rights and freedoms.

The legal provision of rights does not guarantee enjoyment of those rights if one has no access to justice. It is therefore instructive to note that the Constitution also provides for the right to sue.[29] The issue as to whom this right belongs to is one that is widely debated especially in environmental cases. It has been ruled that the Constitution's provisions for the protection of fundamental rights and freedoms of the individual cover both natural and legal persons. The word 'person' is defined in the Constitution to include 'any body of persons corporate or unincorporate'.[30] There has been detailed judicial pronouncement on what may be regarded as a 'person' within the meaning of the fundamental rights provisions or the Constitution. This was the case in *Shah Vershi Devshi & Co. Ltd v. The Transport Licensing Board*,[31] where the High Court of Kenya held the constitutional references to 'person' covered both natural and legal persons. The applicant company had been refused renewal of a license under the Policy of Africanization. It appealed to the High Court claiming breach of its fundamental rights. The court observed:

> a company is a 'person' within the meaning of Chapter V. [of the Constitution of Kenya] and would be entitled to all the rights and freedoms given to a 'person' which it is capable of enjoying. . . . If a right or freedom is given to a 'person' and is, from its nature, capable of being enjoyed by a 'corporation' then a 'corporation' can claim it, although it is included in the list of 'rights and freedoms of the individual'. The word 'individual' like the word 'person', does, where the context so requires, include a corporation.[32]

These rights and freedoms are subject to respect for the rights and freedoms of others and for the public interest. In democratic societies, justifiable and reasonable limitations to freedoms must be provided under the law. The Constitution specifies that freedom of assembly and association may be curtailed to protect public defence, safety, health, order, morality, and the rights and freedoms of other

28. G.M. Wamukoya & F.D.P. Situma (eds), *Environmental Management in Kenya: A Guide to the Environmental Management and Coordination Act* (Nairobi: Centre for Research and Education Environmental Law, 2000), 2.
29. S. 84(1) of the Constitution.
30. S. 123.
31. (1971) EALR 289.
32. *Ibid.*, 298.

persons; or to impose reasonable conditions relating to, for example, registration of trade unions and martial law.[33] The rights to freedom of expression, assembly, and association, are inextricably linked to the right to information. However, numerous obstacles impede access to environmental information in Kenya, as the Constitution contains no express provision covering the right to information. This right is only implied in provisions that address the protection of the fundamental rights and freedoms of the individual. Indeed, until recently, the government did not play an active role in informing the public about pertinent issues relating to public participation and decision making in the environmental context.

Various groups feel that the constitutional weaknesses are the primary reason behind the government's failure to make environmental information readily available to the public.[34] This perception is partially based on the lack of a constitutional mandate for the government to collect and disseminate relevant information. Furthermore, while some of the Constitution's provisions lay the basis for access to information, they also contain exceptions that negate this right. As a result, there is a seemingly adversarial relationship between citizens who seek information and government officials who use legal arguments to restrict the flow of information. This impedes access to justice where information is critical to prosecuting offences and bringing civil claims.

2.2.2 The Draft Constitution of Kenya, 2004

The stalled constitutional review process was expected to define a more explicit basis for environmental rights. The draft Constitution includes explicit provisions on the environment, including the right to a healthy environment, public participation in environmental decision making, and access to information. For instance, the chapter on national values, principles and goals includes principles on the promotion of public participation in public affairs, sharing and the devolution of power; and access of the people to independent, impartial, competent, timely and affordable institutions of justice.[35] The Bill of Rights further reinforces these rights and provides that 'every citizen has the right of access to information held by the state',[36] and requires parliament to enact legislation providing for access to information.[37] It also explicitly provides for the right to a healthy environment and free information about the environment,[38] and access to courts.[39] The provision on

33. S. 80(2) of the Constitution.
34. See N. Rukuba-Ngaiza et al., *Public Involvement in Environmental Decision-making in Asia and East Africa: Law and Practice* (Washington DC: Legal Vice Presidency IBRD/WB, 2003), 60.
35. The Draft Constitution of Kenya adopted by the National Constitutional Conference on 15 March 2004.
36. *Ibid.*, Art. 51(1).
37. *Ibid.*, Art. 51(4).
38. *Ibid.*, Art. 67(a) & (c).
39. *Ibid.*, Art. 72.

access to courts makes room for access to justice through other non-State justice systems such as councils of elders and other local community institutions.[40]

2.3 The Environment Management and Coordination Act, 1999

2.3.1 Normative Provisions

EMCA[41] creates an overall and all-embracing agency for environmental management as opposed to previous legislation that set up sectoral agencies often leading to regulatory competition.[42] It also provides for public participation and access to justice. The Act establishes the National Environment Council (NEC); the National Environment Management Authority (NEMA); the Provincial and District Environment Committees; the National Environment Tribunal; and the Public Complaints Committee. In all these administrative structures, access to justice remains a concern.

2.3.1.1 Right to a Healthy Environment

Significantly, EMCA provides for the right of every person to a clean and healthy environment.[43] It also imposes an obligation on every person to protect and manage the environment.[44] Any person may bring an action in the High Court to enforce the right to a clean and healthy environment. Redress may be sought if the right has been violated, is being violated, or is likely to be violated. In determining the dispute, the court will be guided by the principles of sustainable development including public participation in the development of policies, plans and processes for environmental management.

2.3.1.2 Locus Standi

One great innovation of EMCA is that it overcomes most of the limitations on standing to sue. It explicitly provides that an aggrieved person need not show special damage or peculiar injury beyond that which is suffered by other affected people.[45] Effectively, this provision grants every person the right to protect the environment. Further, the provision in EMCA for the publication of annual state of

40. It provides that 'every person has the right to have any dispute that can be resolved by the application of law decided in a fair public hearing before a court or, where appropriate, another independent tribunal or forum', *Ibid.*
41. EMCA 1999.
42. See C.O. Okidi & P. Kameri-Mbote, *The Making of a Framework Environmental Law* (Nairobi: ACTS Press, 2001).
43. S. 3(1) of EMCA.
44. S. 3 of EMCA.
45. S. 3(3) of EMCA.

the environment reports,[46] which are expected to inform the budget, facilitates proper environmental governance by providing access to information. This will empower the citizenry to carry out the duty placed on them by section 3 of EMCA. The timeous publication and wide availability of the state of the environment report should go a long way towards enhancing sustainable environmental management.

2.3.1.3 Environment Impact Assessment

Another mechanism that fosters sustainable environmental management is environment impact assessment (EIA). EMCA states:

> Notwithstanding any approval, permit or licence granted under this Act or any other law in force in Kenya, any person, being a proponent of a project, shall, before financing, commencing, proceeding with, carrying out, executing or conducting or causing to be financed, commenced, proceeded with, carried out, executed or conducted by another person any undertaking specified in the Second Schedule to this Act, submit a project report to the Authority, in the prescribed form, giving the prescribed information and which shall be accompanied by the prescribed fee.[47]

The essence of EIA is to gather information and the use of that information in the decision-making process. If, after studying the report, it becomes clear to NEMA that the proposal will result in, or is likely to have, significant impacts on the environment, then an EIA must be undertaken.[48] No other licensing authority can lawfully issue any license in respect of a project for which an EIA is required under EMCA. Only a license issued by the Director General of NEMA is valid.[49] The EIA is undertaken by the project proponent at her/his own expense.

EMCA identifies the categories of projects that must undergo an EIA and these are broad enough to accommodate any projects which may result in significant impacts.[50] The minister responsible for matters relating to the environment has powers to amend the list of projects after consultations with the key actors in the environmental field. The Act also makes extensive provision for public participation,[51] which ensures inclusive and accountable environmental governance.

2.3.2 Institutions under EMCA

A number of institutions are established under EMCA to facilitate sustainable environmental governance. The first of these is the NEC which is responsible

46. S. 58(1) of EMCA.
47. S. 9 of EMCA.
48. S. 58(2) of EMCA.
49. S. 158 of EMCA.
50. These are specified in the Second Schedule to EMCA.
51. Ss 52 and 59 of EMCA.

for formulating policy on matters relating to environment management in Kenya. Its membership comprises of two representatives of public universities in Kenya, two representatives of specialized research institutions in Kenya, three representatives of the business community, and two representatives of NGOs active in the environmental field.

The second institution is NEMA, the principal government institution responsible for the implementation of all policies relating to the environment. NEMA is responsible for dealing with EIA (see also the discussion above). The third group of institutions is the Provincial and District Environment Committees. The Provincial Environment Committees draw their membership from: each local authority within the province; representatives of farmers or pastoralists; representatives of NGOs involved in environmental management programmes in the province; and a representative of every regional development authority in the province. The District Environment Committees also include: a representative of each local authority within the district; representatives of farmers, women, youth and pastoralists; representatives of NGOs involved in environmental management programmes in the district; representatives of community-based organizations involved in environmental management programmes in the district; and representatives of the business community in the district. The function of the Provincial and District Environment Committees is the proper management of the environment at the provincial and district levels.

The Kenyan judiciary has at times not given due recognition to decisions of District Environmental Committees, thereby reducing their efficacy. In the case of *Gathoni v. Republic*,[52] for instance, it was held that a failure to obey an order of the District Environmental Committee was not an offence under the Penal Code's section 131, which deals with failure to obey a lawful order. In the court's opinion, this section of the Penal Code applied in situations where public peace and harmony were at risk. The court did not regard the transportation of timber by a motor vehicle on a public road as falling within this ambit. A more positive reading of the decision may be to infer that in the court's opinion, EMCA had provisions dealing with infractions under it, and that bringing the action under the Penal Code was erroneous. It is, however, necessary to have synergy between different laws that impact on environmental management if proper governance is to be achieved.

EMCA also establishes the Public Complaints Committee (PCC) under section 31. Its members include representatives of the Law Society of Kenya (LSK), the NGO sector and the business community. The function of the PCC is to investigate complaints relating to environmental damage and degradation generally, but it can also investigate issues under NEMA. These investigations can be initiated *mero motu* or following receipt of a complaint, and its findings are reported to the NEC. Some of the problems currently encountered by the PCC are the non-appearance by witnesses in response to summons, hostility between parties during hearings, hostility towards PCC investigators, lack of understanding of EMCA, and the abdication of duty by sectoral lead agencies. Given that the

52. Criminal Appeal No. 297 of 2004 reported in (2006) KLR (Environment and Land) 697.

duty of the PCC is only to file its report with the NEC, it also lacks the necessary authority to see that the recommendations are formally implemented.

The final institution established under EMCA, is the National Environment Tribunal (NET), which is a specialized dispute settlement institution.[53] NET is set up to hear appeals from administrative decisions taken by organs responsible for enforcing environmental standards. The appeals may be launched by the proponent of a project against the rejection of an EIA and against a denial of a license. An appeal may also be launched by a local community against the grant of a license by an administrative body such as NEMA. The limited mandate of NET has hampered its effectiveness as its work is predicated on work undertaken by NEMA.[54] Access to justice in Kenya could be enhanced by giving 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 tribunal sits in Nairobi, but it has powers to sit anywhere else in the country as long as it gives notice to the public to that effect. EMCA is silent on the enforcement status of NET's orders. It would appear advisable for NET to be afforded power to enforce its orders rather than being required to file these through the formal courts.

2.4 Sectoral Statutes

Alongside the Constitution and EMCA, Kenya has an elaborate mosaic of sectoral environmental laws. These include laws on wildlife, biodiversity, forests, mining, fisheries, water, energy, marine resources and public health. Laws on agriculture, the working environment, land tenure and land use planning also have implications for environmental governance in Kenya. Many of these laws were part of the colonial legacy and predate EMCA. Indeed, the colonization of Kenya by Britain in 1895 was followed by the importation of institutions for the management of resources. The laws on wildlife and forests were, at inception, mainly concerned with the extraction of resources and conservation was only carried out in selected landscapes. These laws have now incorporated concerns for sustainable management of resources in light of increased resource degradation.

The sectoral ministries, departments and agencies continue to operate under the sectoral laws and policies inherited from the colonial era. They have, however, recognized the need to cooperate with other agencies as well as to involve stakeholders.[55] Revised sectoral forest and water laws have redefined the role of lead

53. S. 125 of EMCA.

54. If NEMA and other administrative organs are inactive, as has been the case until recently, NET has no work to do.

55. The Fisheries Department and the Kenya Wildlife Service (KWS) have, using limited provisions in the sectoral laws and their discretion, introduced elaborate schemes for involving local communities in natural resource management. Examples of these can be seen in the cooperative arrangements between KWS and local communities in developing wildlife sanctuaries and preserving wildlife corridors. Similar arrangements are being institutionalized in the fisheries sector through introducing beach management units.

agencies. The *Forest Act*[56] establishes a comprehensive institutional framework for managing forests in Kenya. It creates the Kenya Forest Service (KFS) responsible for overseeing the sustainable development of the nation's forests; makes elaborate provision for involving local communities in forest management through forest community associations; and creates a system of incentives for co-opting compliance. Similarly, the *Water Act* (2002) establishes the National Water Board, a central body responsible for: allocating water rights; coordinating the River Basin Boards and the District Water Boards; managing data banks; monitoring water resources; and undertaking all other key functions ascribed to it by the responsible ministry. In addition, the policy framework envisages delegation of many of the functions of the National Water Board to the River Basin Boards. River Basin Boards are accordingly responsible for approving applications for water permitting, formulating recommendations on water use and conservation, and monitoring and enforcing water use in their respective catchment areas.

3 JUDICIAL AND NON-JUDICIAL FORMS OF ENVIRONMENTAL DISPUTE RESOLUTION

3.1 An Overview of the Court System

Kenya attained independence in 1963 and adopted the Constitution of Kenya in 1964 which provides for the separation of the powers between the executive, legislative and judicial arms of government. Having been a British colony, Kenya's laws have been inherited from Britain with some modifications to reflect local conditions. The Kenyan legal system is thus based on English common law but has elements of customary law and religious law (mainly Islamic law). Chapter IV of the Constitution sets out the court structure which is further elaborated on by both the *Judicature Act*,[57] and the *Magistrates' Courts Act*.[58]

The Constitution establishes the High Court as a superior court of record with: unlimited original jurisdiction in civil and criminal matters and to hear appeals from subordinate courts; powers of constitutional interpretation; and such other jurisdiction and powers as may be conferred on it by the Constitution or any other law.[59] It also establishes the Court of Appeal as the highest appeal court immediately above the High Court.[60] Under section 65, the Constitution bestows on parliament the power to establish other courts subordinate to the High Court and court-martial with such jurisdiction and powers as conferred on them under the Constitution or any other law.[61] Magistrates' Courts have been created as the

56. Act 7 of 2006.
57. Cap. 8 of the Laws of Kenya.
58. Cap. 10 of the Laws of Kenya.
59. S. 60 of the Constitution.
60. S. 64 of the Constitution.
61. S. 65(1) of the Constitution.

primary subordinate courts and decide on the majority of legal disputes in the country.[62] Section 65(2) of the Constitution vests the High Court with jurisdiction to supervise any civil or criminal proceedings before a subordinate court or court-martial. In such cases, the High Court may make such orders, issue such writs and give such directions as it may consider appropriate for the purpose of ensuring that justice is duly administered by those courts. The Constitution formally recognizes Kadhi's Courts at section 66. The jurisdiction of these courts is elaborated in section 66(5) as: '... the determination of questions of Muslim law relating to personal status, marriage, divorce or inheritance in proceedings in which all the parties profess the Muslim religion'.

Specialized judicial divisions have been created to deal with constitutional matters, commercial matters, criminal matters, family matters and more recently, land and environmental matters. The land and environment division was established at the High Court and Magistrates' Court levels in February 2007 to deal with land and environment matters.[63] The presiding officers of the different courts are designated as justices, judges, magistrates and Kadhis.[64]

The *Judicature Act* prescribes the laws to be applied by the courts in Kenya. It states that:

> The jurisdiction of the High Court, the Court of Appeal and of all subordinate courts shall be exercised in conformity with –
>
> (a) the Constitution;
> (b) subject thereto, all other written laws, including the Acts of Parliament of the United Kingdom cited in Part I of the Schedule to this Act, modified in accordance with Part II of that Schedule;
> (c) subject thereto and so far as those written laws do not extend or apply, the substance of the common law, the doctrines of equity and the statutes of general application in force in England on the 12th August, 1897, and the procedure and practice observed in courts of justice in England at that date; but the common law, doctrines of equity and statutes of general application shall apply so far only as the circumstances of Kenya and its inhabitants permit and subject to such qualifications as those circumstances may render necessary.[65]

62. ICJ, *Kenya: Judicial Independence, Corruption and Reform* (Nairobi: ICJ Kenya Chapter, 2005), 6.
63. In his announcement on the establishment of these courts, the Chief Justice also pointed out that 'the court would waive filing fees for the environmental suits due to public interest' and that 'a litigant would also be allowed to sue as a pauper without paying the cost of the suit under the provisions of the Civil Procedure Rules'. See Judiciary of Kenya, 'New Courts Set Up to Handle Land Cases', <www.judiciary.go.ke/ news_info/view_article.php?id=408673>, 23 September 2008.
64. ICJ, *supra* n. 62.
65. S. 3(1) of the Judicature Act.

The Act further provides that:

> ... the High Court, the Court of Appeal and all subordinate courts shall be guided by African customary law in civil cases in which one or more of the parties is subject to it or affected by it, so far as it is applicable and is not repugnant to justice and morality or inconsistent with any written law, and shall decide all such cases according to substantial justice without undue regard to technicalities of procedure and without undue delay.[66]

Magistrates' Courts are established under the *Magistrates' Courts Act*. Section 3 of the Act establishes Resident Magistrates' Courts with jurisdiction throughout Kenya; subordinate to the High Court; and duly constituted when held by chief, senior principal, principal, senior resident and resident magistrates. These courts have jurisdiction over criminal[67] and civil matters. With respect to civil matters, the jurisdiction of Resident Magistrates' Courts is limited to matters where the value of the subject matter in question does not exceed Kshs 500,000.[68]

District Magistrates' Courts, established under section 8 of the *Magistrates' Court Act*, also have jurisdiction in criminal and civil proceedings. In civil proceedings, section 9 provides that a District Magistrates' Court shall have and exercise jurisdiction and powers in proceedings of a civil nature where either the proceedings concern a claim under customary law; or the value of the subject matter in dispute does not exceed Kshs 5,000, or Kshs 10,000 where the court is constituted by a district magistrate having power to hold a Magistrates' Court of the first class.

With respect to customary law, the *Magistrates' Court Act* provides that a Magistrates' Court 'may call for and hear evidence of the African customary law applicable to any case before it'.[69] Many environmental matters are heard at the Magistrates' Courts level as criminal or civil matters. This underscores the crucial role of these courts in environmental governance. Unfortunately, the low levels of understanding of environmental matters and the heavy workload at this level can negatively impact on environmental governance. Indeed the judicial officers at this level have limited understanding of environmental issues which raises the need for training.

3.2 Quasi-Judicial Tribunals

As pointed out above, EMCA has established NET to offer specialized, expeditious and cheaper justice than the ordinary courts of law. By their nature, tribunals are

66. S. 3(2) of the Judicature Act.
67. S. 4 of the Magistrates' Courts Act.
68. *Ibid.*, s. 5.
69. *Ibid.*, s. 17.

designed to be more accessible, informal and free from legal technicalities. There is increased use of the Tribunal to challenge decisions of NEMA.

Several sectoral statutes, such as the *Water Act* 2002, the *Energy Act* 2006 and the *Forests Act* 2005, similarly provide for the establishment of tribunals to resolve matters relating to water, energy and forestry matters. Appeals from the decisions of these tribunals lie to the High Court of Kenya. To date, not one matter has been considered by any of these tribunals. The tendency is likely to be for lawyers to file environmental matters in the High Court unless there is a concerted effort to mandate parties to go through the tribunals prior to approaching the High Court.

3.3 Non-Judicial Environmental Dispute Resolution

Over and above judicial and quasi-judicial dispute resolution forums, there exist community level organizations that are used to resolve disputes at local levels. These differ from place to place and context to context. The nature of community groups in a pastoral setting is different from those in an agricultural setting, and these differences are linked to the nature of land tenure systems and the cohesion of community members. There is not yet a detailed study of traditional governance institutions that are used in environmental management activities in Kenya but they do exit; they are dynamic and acquire new roles as the need arises, making a generalization both undesirable as well as too simplistic.

It is, however, possible to identify institutions that one finds among most communities in Kenya, whose mandate increasingly includes environmental matters. Being accessible and accepted at the lowest level of society where most environmental resources are found, these institutions compete with national, provincial and district mechanisms and can impact on the efficacy of the latter where their objectives are not the same. This raises the need to incorporate them in national environmental policy planning and implementation to ensure proper governance of the environment in those areas where access to formal courts is limited by physical distance, linguistic and cost barriers.

3.3.1 Elders

In almost all communities in Kenya, the institution of *Wazee* (elders) exists. This is ordinarily the first point of call when any dispute arises in a community. Since most Kenyans' lives are closely linked to environmental resources, it is not surprising that most of the issues that elders deal with touch on the environment. In north eastern Kenya, the elders' role in managing water resources as custodians is noteworthy. They manage water extraction from boreholes and determine community members' entitlements to water. District umbrella water users' associations include these elders in their membership as they know the status of the water resources and are revered among their communities. Among most of the communities in north eastern Kenya, referral of a matter to the formal dispute resolution mechanisms such as courts, is analogous to taking your dispute to the 'enemy',

Only persons that refuse to accept the elders' verdict will be turned over to the chief and to the courts.[70]

The procedures adopted by the elders' courts are *ad hoc* and typically involve only older men. Although the exclusion of women and youth from the court process may undermine their human rights, these members of the community appear to accept the process. Among the Rendille tribe for instance, the two most important organs of the community are *geeyi makhabaale* and *nabo*, both of which are an exclusive male preserve and whose mandate includes formulating community strategy and dispute resolution.[71]

3.3.2 The Chief

The institution of the chief plays an integral role in regulating people's affairs at community level. Having started as a formalization of the traditional chief, the chief remains the most powerful person in a local setting in modern day Kenya. His duties are multi-faceted including the resolution of environmental disputes.[72]

3.3.3 Peace Committees

Peace committees are typically found in pastoral communities that have historically had sour relations with their neighbours. While most of the members will be the elders, there is representation from other members of the community. Most disputes revolve around livestock and pasturelands and consequently, the mandate of these committees includes handling environmental matters.

3.3.4 Provincial, District and Local Environment Committees

These environmental committees are critical to access to justice as they act as the link between the formal and informal structures. The membership of these committees is drawn from governmental agencies, district and local governance institutions, civil society organizations and community-based organizations engaged in environmental programmes, representatives of women, youth, farmers, pastoralists and the business community, and representatives of regional development authorities.[73]

The Provincial and District Environment Committees are responsible for the proper management of the environment within the province or district in respect of which they are appointed. They are also expected to perform such additional functions as may be prescribed by EMCA or assigned by the minister by notice

70. P. Kameri-Mbote, 'Towards Greater Access to Justice in Environmental Disputes in Kenya: Opportunities for Intervention', *Law Society Digest* July 2005, <www.ielrc.org/content/w0501.pdf>, 23 September 2008.
71. *Ibid.*, 42.
72. *Ibid.*
73. S. 29 of EMCA.

in the Gazette.[74] Since these committees operate at lower levels, they are closer to the communities and can easily interface with both the formal and informal structures as the membership is drawn from both. They have the potential to promote access to justice by taking the best from both sides.[75]

4 ANALYSIS OF SIGNIFICANT ENVIRONMENTAL JUDGMENTS

4.1 *Locus Standi*

Judicial pronouncements on environmental decision making have not helped remedy the absence of explicit environmental provisions in the Constitution. For instance, Kenyan courts were unable to establish a clear jurisprudence on matters of *locus standi* (right to sue) before the promulgation of EMCA in 1999. In the public interest case of *Maina Kamanda v. Nairobi City Council*, the High Court adopted a fairly liberal position on *locus standi* and granted the plaintiff the right to be heard.[76] This was in stark contrast to *Wangari Maathai v. Kenya Times Media Trust*,[77] an environmental case brought before the court as a public interest matter, in which *locus standi* was denied. The plaintiff was a resident of Nairobi and the coordinator of the Greenbelt Movement, a NGO working in environmental conservation. She filed suit on her own behalf seeking a temporary injunction to restrain the defendant from constructing a proposed complex in a recreational park in Nairobi. The court upheld the defendant's objection that the plaintiff lacked standing to bring the suit, because the plaintiff would not be affected more than any other resident of Nairobi. The court pointed out:

> it is not alleged that the Defendant Company is in breach of any rights, public or private in relation to the plaintiff nor has the company caused damage to her nor does she anticipate any damage or injury.[78]

Furthermore, in *Law Society of Kenya v. Commissioner of Lands and Others*,[79] the court adopted a highly restrictive approach to *locus standi*. The matter involved public land that had allegedly been improperly allocated to the Law Society. The judge opined that matters of public interest are the domain of the Attorney General and held 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 prejudice suffered by the rest of the public in order to have a right to appear in court and to

74. *Ibid.*
75. Kameri-Mbote, *supra* n. 70, 43.
76. HCK Civ. Case No. 6153 (1992).
77. HCK Civ. Case No. 5403 (1989).
78. *Ibid.*, 24.
79. HCK Civ. Case No. 464 (2000).

> be heard on the matter. Otherwise, public interest [issues] are litigated upon by the Attorney-General or such other body as the law sets out.[80]

In *Albert Ruturi & Another v. The Minister for Finance and Others*,[81] the Kenya Bankers Association challenged the constitutionality of the *Central Bank of Kenya (Amendment) Act* 2000. The Attorney General challenged the *locus standi* of the association to bring the application since it had no right to litigate on behalf of its member banks. The court held that representative suits brought by an organization on behalf of its members were permissible provided that: (i) the organization's members have standing to sue in their own right; (ii) the interest which the organization seeks to protect is germane to the organization's purpose; and (iii) neither the claim nor the relief sought requires the individual participation of the members. The court added that where an organization was formed for the very purpose of promoting a particular interest, it would be ridiculous to hold that it does not have the right to litigate to protect such interest of its own. Although not dealing with an environmental issue, this case provided an important precedent for environmental associations and organizations seeking to bring applications on behalf of their members.

4.2 Suits against Government Agencies

In *Lereya and 800 Others v. Attorney General and 2 Others*,[82] the plaintiffs, describing themselves as the affected residents of Marigat Division, sought an order against the Attorney General, the Minister of Environment and Natural Resources and NEMA, compelling them to eradicate the weed *Prosopis Juliflora* from their land. The weed had been introduced by the United Nations Food and Agriculture Organization (FAO) ostensibly to curb desertification. It had, however, invaded large tracts of land causing harm to local vegetation, livestock, people and the environment. The defendants objected to the suit on three main grounds. First, that the plaintiffs had not served the statutory notice of intention to sue on the Attorney General as required under the requisite legislation. Secondly, that the application was barred by statutory limitation having been filed in 2006 when the weed was introduced in 1983. Thirdly, the defendants argued that the plaintiffs lacked *locus standi*. The High Court ruled that the suit be struck off the court role owing to the failure of the plaintiffs to serve the mandatory notice on the defendant. However, the court noted that *Prosopis Juliflora* is an invasive weed with a long-term and continuing impact on the environment. It according held that the application was not barred by statutory limitation. Finally, with regard to *locus standi*, the court noted that EMCA filled a gap existing in Kenyan law by being the first statute with provisions specifically tailored to address *locus standi* in

80. *Ibid.*, 12.
81. Nairobi High Court Misc. Civ. Appl. No. 908/2001 1 KLR 54 (2002).
82. High Court at Nairobi, July 11, 2006, KLR (Environment & Land) 1 (2006) 761.

environmental matters. The court accordingly held that the plaintiffs had *locus standi* to bring the application as spelt out in sections 3(3) and 3(4) of EMCA.

A second case relating to the same weed was brought before the High Court in *Charles Lekuyen Nabori and Others v. The Attorney General and Others*.[83] The applicants sought a declaration from the court that the right to life embodied in the Constitution entitled the applicants to a clean and healthy environment, free from the damage occasioned by the weed *Prosopis Juliflora*. The applicants also sought to have the weed declared a noxious weed; and an order that the respondents be held liable for breach of the right to property on account of their failure to eradicate the weed. The court held that the right to life includes a clean and healthy environment which guarantees the full enjoyment of natural resources.[84] The judges also noted that 'the failure by the Ministry of Environment and Natural Resources to take affirmative steps towards eradication of the weed/plant *Prosopis Juliflora* amounts to a breach of property'.[85] Most interestingly, the court affirmed recommendations of the PCC calling for the creation of a commission of technical and local experts by the government to assess and quantify the loss caused to the environment by the weed and the injury suffered by the petitioners; and recommended commensurate monetary compensation.[86]

In the case of *John Peter Mureithi and Others v. The Attorney General and 4 Others*,[87] the applicants, acting on behalf of the Mbari-ya-Murathimi clan, sought to challenge the acquisition of the clan's ancestral land by the Catholic Consolata Mission when the community was moved from the land to emergency villages by colonial authorities in 1955. The applicants argued that the land belonged to the clan under Kikuyu customary law. The respondents argued that: the applicants had no *locus standi*; the applicants' remedy lay in private law rather than public law; and the applicants had unduly delayed the assertion of their claim for up to forty years and were accordingly barred from bringing the suit. The court held that:

> . . . the clan members and their successors are sufficiently aggrieved since they claim an interest in the parcels of land which they allege was clan and trust land and which is now part of a vibrant Municipality. I find it in order that the applicants represent themselves as individuals and the wider clan and I unequivocally hold that they have the required standing to bring the matter to this court. Moreover in this case I find – the claim that the land belonged to the clan and finally there cannot be a better challenger than members of the affected clan.[88]

83. HCK Nairobi (Nairobi Law Courts) Petition No. 466 of 2006 (Eklr) 2007.
84. *Ibid.* See Rawal's J judgment, 54.
85. *Ibid.*
86. *Ibid.*, 66.
87. High Court at Nairobi, Misc. Civil Appl. No. 158 of 2005, 2 June 2006 KLR (Environment & Land) 1 (2006) 707.
88. *Ibid.*, 708.

4.3 Right to a Healthy Environment

In *Waweru v. Republic*,[89] the applicants, property owners in the Kiserian Township, had been charged with discharging raw sewerage into a public water source and the environment contrary to the *Public Health Act*;[90] and failing to comply with a statutory notice issued by the public health authority. The applicants challenged the charge and contended that: the selection of accused persons was discriminatory; they could not comply with the health requirements concerning wastewater as the cost would be prohibitive; and that it was the responsibility of the local authority to construct and maintain the drainage system and sewerage plant. In dismissing the criminal charges against the applicants, the High Court confirmed that it was the duty of the local authority to build and maintain a sewerage and drainage system. The court, however, rejected the applicants' argument that the cost of complying with health requirements was prohibitive: 'Firstly because sustainable development has a cost element which must be met by developers and secondly, because they had not stated other alternatives which could have been more environmentally friendly to deal with the problem'.[91] Interestingly, the court noted at the end of its judgment:

> Our inspiration to take up the challenge should spring from the fact that our generation has perhaps witnessed the greatest degradation of the environment more than any other past generation . . . we have witnessed the steepest drift from Grace (call it the Garden of Eden if you may) to the bottled water type of environment! We were created for greater things and no effort should be spared in restoring the lost grace.[92]

Furthermore, the court having stated that 'development that threatens life is not sustainable development and it ought to be halted,' went beyond the applicants' prayers and ordered the Ministry of Water, Nairobi Water Services Board and Olkejuado County Council to construct sewerage treatment works.[93] It also directed that its judgment be served on the Ministry of Water, Ministry of Local Government, Olkejuado County Council, NEMA, Attorney General's Office and the ministry responsible for physical planning; and further that NEMA be urged to consider making appropriate restoration orders.[94]

This case has been held as a landmark decision in environmental jurisprudence in Kenya. It confronted issues that affect the environment drawing from examples in Pakistan and also the documents emanating from the UN National Conference on Environment and Development held in 1992. Quoting Klaus Topfer, the former

89. HCK Nairobi, Misc. Civil Appl. No. 118 of 2004, 2 March 2006, KLR (Environment & Land) 1 (2006) 677.
90. Cap. 242 of the Laws of Kenya.
91. *Supra* n. 90, 678.
92. *Ibid.*, 696.
93. *Ibid.*, 693 and 688.
94. *Ibid.*, 687.

UN Environment Programme's Executive Director's address to the Global Judges Programme in 2005, the Court noted that:

> The judiciary is also a crucial partner in promoting environmental governance, upholding the rule of law and in ensuring a fair balance between environmental, social and developmental consideration through its judgments and declarations.[95]

4.4 Environment Impact Assessment

The judiciary has also had to make pronouncements on EIAs as instruments for ensuring access to justice in cases involving mining; forestry excisions; and environmental resources held in trust by the government.

In the mining context, the case of *Rodgers Muema Nzioka and Others v. Tiomin Kenya Ltd*,[96] is noteworthy. A Canadian mining company, Tiomin, sought to mine titanium in the Kwale district. Environmental lobby groups disputed the legitimacy of the authorization process on the basis that no EIA report had been provided as required by section 3 of EMCA. The High Court granted: first, an injunction in favor of the applicants restraining the company from undertaking mining activities in the Kwale District; second, a declaratory order that the company's existing mining activities in the Kwale District were illegal; and third, general damages. In granting the injunction, the court noted that although the defendant had obtained the required licenses under the mining legislation, it had not complied with the provisions of EMCA, specifically section 58 which provides that a person intending to carry out any activity under the second schedule to the Act (including mining and quarrying), must submit a project report to NEMA. Following the above court wrangling, the Minister of Environment stepped in to personally resolve the issue extra-judicially, with allegations of bribery and corruption following. While NEMA had a basis for pursuing the issue, it is important to note that the Minister's intervention effectively undermined the role of the regulatory authorities and the judiciary as well as citizens' access to justice.

4.5 Public Trust

In the context of forestry, the Kenyan judiciary has also been called upon to consider the validity of the government's decision to de-gazette state forests, thereby effectively removing them from protection. In the case of *Republic v. Minister for Environment and Natural Resources and Others ex parte Kenya Alliance of Residents Associations and Others*,[97] the applicants sought to review such a decision and sought *writs of certiorari* to quash the relevant government notice and prohibit the

95. *Ibid.*, 688-689.
96. HCK Mombasa, Civ. Case No. 97, 2001.
97. HCK Misc. Civ. Appl. No. 421 of 2002.

government from dealing with the forest areas in a manner detrimental to Kenya's environmental health. The court granted the orders, thereby stopping the government from proceeding with the exercise until such time as the issue was fully heard and determined. The procedure for bringing this matter to court was very cumbersome owing to the fact that the respondent was the Kenyan government. To be able to bring a civil action against the government, one has to give notice.[98] This is a matter of grave concern given that many of Kenya's environmental resources are held in (public) trust by the State and its organs; and the cumbersome procedures could therefore effectively act as a bar to accessing justice in environmental matters. Interestingly, in the *Waweru* case, the court held that 'in the case of land resources, forests, wetlands and waterways . . . the Government and its agencies are under a public trust to manage them in a way that maintains a proper balance between the economic benefits of development with the needs of a clean environment'.[99]

4.6 Regulation of Property Rights

The judiciary has also been called upon to consider the boundaries between private property rights and broader public environmental imperatives. In *Park View Shopping Arcade Limited v. Charles M. Kang'ethe and 2 Others*,[100] the High Court had to determine how to balance constitutionally guaranteed private property rights in the face of public environmental concerns. The case concerned a wetland, which the applicant argued it was the *bona fide* registered owner of. The applicant further argued that as owner, it had the right to enjoy, occupy and use the land. The problem was that the land was occupied by the respondents. The applicant wished to develop the land and sought an order evicting the respondents. The respondents opposed the application and argued that: the land constituted a sensitive marshland and wetland along one of the tributaries of the Nairobi River; they were not trespassers, and had a permit to conduct their business on the land which enhanced the environmental quality of the area; and the applicant's proposed construction was a threat to a clean and healthy environment. The court resolved the matter by compelling the Minister of the Environment to 'ensure the conduct of a professional and policy assessment' of the land in question in accordance with section 42 of EMCA. The resolution of the other matters in the case was predicated on the carrying out of an EIA.

5 CRITICAL SURVEY

As has been highlighted above, the judiciary is increasingly contributing to environmental governance in Kenya. This trend seems to have followed the

98. S. 13A of the Government Proceedings Act, Cap. 40 of the Laws of Kenya.
99. *Supra* n. 89, 692.
100. Civil Suit No. 438 of 2004.

promulgation of EMCA which provides an explicit foundation for environmental governance. The *Maathai* case highlighted the *lacuna* in Kenyan laws for public spirited attempts to protect environmental resources that were held in trust by the government for the entire country. The *Waweru* case illustrates how far the judiciary has come in understanding its key role in environmental governance. One of the reasons for this recent judicial activism is the environmental legal training provided to all High Court judges by the United Nations Environmental Programme; the Centre for Advanced Studies in Environmental Law and Policy of the University of Nairobi; and the Institute for Law and Environmental Governance. The training was conducted between 2005 and 2007 and it is noteworthy that many of the landmark environmental decisions discussed above coincide with this period and were handed down by judges who had attended the training programme. By 2007, all High Court and Court of Appeal members had received training on environmental law. In the interests of consistency and continuity, it would appear advisable to ensure that all judicial officers appointed since 2007 receive similar training.

It is also interesting to note that shortly after EMCA's promulgation; many environmental cases were dismissed on technical grounds. This no longer appears to be the case. For example, in the *Lereya* case, where the court – while pointing out the need to properly serve the Attorney General – was also clear on the issue of *locus standi* and the gravity of the matter before it. Similarly, if one reads the full judgment of the *Waweru* case, one senses the court's frustration that both parties' lawyers failed to furnish the court with all relevant information or join key parties to the proceedings.[101] There appears to be a lack of symmetry in the knowledge of environmental law between the judges and the members of the bar, which needs to be addressed. The reason for the above is no doubt the fact that until recently, environmental law was not part of the formal legal curriculum at universities and even now, it remains a final year elective, not a compulsory course. It is also not among the mandatory courses that the Council for Legal Education sets for admission to the Kenyan Bar. It is therefore not surprising that many lawyers have no environmental law knowledge. Another factor limiting the Kenyan Bar's engagement in environmental law matters is that the matters are predominantly public in nature and the country does not have a culture of public interest litigation. If there is no client able to pay for instituting the legal proceedings, an environmental issue may remain unaddressed in perpetuity. Similarly, Kenya does not have the epistolary institution of cases in court, as is the case in other jurisdictions such as India.

It is disturbing that *locus standi* continues to be used by parties to thwart environmental actions, even though EMCA, which resolves the issue of legal standing in the environmental context, was promulgated almost ten years ago. This is significant considering that, in sharp contrast to the High Court and Appeal Court judges, only a small number of magistrates have received environmental law

101. *Ibid.*, 12.

training. The magistrates may, therefore, be ignorantly dismissing environmental cases on the grounds of standing. Given that the majority of cases begin their life in the Magistrates' Courts, implementing environmental law training for magistrates requires urgent attention. Besides, environmental issues may come to the court not as environmental case, but as general civil and criminal case. This is epitomized by, for example, the *Waweru* case; a criminal case that turned out to have great implications for environmental jurisprudence in Kenya.

In light of the above, it is essential that all members of the judiciary are trained in environmental law to ensure that there is an overall context for promoting environmental governance. These training interventions should not, however, be limited to formal judicial institutions, but should extend to quasi-judicial and informal dispute resolution *fora*, as these latter two *fora* are where many environmental-related disputes are resolved. The training needs to be continuous to appraise the personnel on new issues and to cater for those joining after the completion of the initial training. The training should also illustrate the linkages between the different dispute resolution *fora*. For instance, it is important for judicial officers to understand the mandate of NET with the objective to promote synergy; not unnecessary duplication and conflict.

As has been mentioned above, legal practitioners also require training in environmental law. In this regard, it is heartening to note that the LSK has introduced continuing legal education to build the capacity of Kenya's lawyers and as a requirement for obtaining an annual practicing certificate. Environmental law is one of the courses offered. However, the current structure of these courses and their non-compulsory status may undermine their role in transferring the requisite environmental law skills to legal practitioners.

6 CONCLUSION AND WAY FORWARD

As should be evident from the preceding analysis, the role of Kenya's judiciary in environmental governance is growing. With the proliferation of international environmental treaties and the domestication of these into Kenya's national law, the role of the judiciary will no doubt continue to grow. Indeed, the role of the judiciary is well captured in the following statement:

> The judiciary plays a critical role in the enhancement and interpretation of environmental law and the vindication of the public interest in a healthy and secure environment. Judiciaries have and will most certainly continue to play a pivotal role both in the development and implementation of legislative and institutional regimes for sustainable development.[102]

102. D. Kaniaru, L. Kurukulasuriya & C.O. Okidi, 'UNEP Judicial Symposium on the Role of the Judiciary in Promoting Sustainable Development', paper presented at the 5th International Conference on Environmental Compliance and Enforcement, (California: ICECE, 1998), 22.

The development of Kenya's environmental jurisprudence has clearly begun. The increased participation of all its judicial officers in *fora* where they can exchange views between themselves, with judicial officers from other jurisdictions, and environmental law academics and specialists, will play an invaluable role in building their capacity to develop this jurisprudence. As Kaniaru, Kurukulasuriya and Okidi note:

> A judiciary, well informed on the contemporary developments in the field of international and national imperatives of environmentally friendly development will be a major force in strengthening national efforts to realise the goals of environmentally friendly development and, in particular, in vindicating the rights of individuals substantively and in accessing the judicial process.[103]

Building this environmental capacity and jurisprudence may not always be easy. Key challenges include: the imbalance between demand for judicial services compared to the available judicial officers; the limited public awareness of the quasi judicial and informal dispute resolution mechanisms; the minimal awareness of the citizenry and legal practitioners of environmental law; the absence of a culture of public interest litigation; and developing synergies between the myriad of different bodies charged with environment governance and the judiciary. Key opportunities do currently exist for overcoming these obstacles and these include: the willingness of the judiciary to learn; the increasing implementation of EMCA and NEMA's activities; renewed interest in traditional justice delivery institutions; the governance, justice, law and order sector reforms aimed at enhancing environmental governance through improved access to justice; and increased interest by civil society in environmental matters. If properly overseen, these opportunities and challenges will take environmental governance to a higher level in Kenya. The seeds have been sown and improvements can be made if the existing efforts are sustained.

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103. *Ibid.*

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Albert Ruturi & Another v. The Minister for Finance & Others Misc. Appl. No. 908/2001
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TABLE OF LEGISLATIVE INSTRUMENTS

Cartagena Protocol on Biosafety (2000) 6 *ILM* 1027

ABBREVIATIONS

ASAL(s)	Arid and Semi-arid Area(s)
BMU	Beach Management Unit
CREEL	Centre for Research and Education Environmental Law
EAEP	East African Education Publishers
EAP	Eastern Africa Program
EIA	Environmental Impact Assessment
EMCA	Environment Management and Coordination Act
FAO	Food and Agricultural Organization
FD	Forest Department
GDP	Gross Domestic Product
HCK	High Court of Kenya
IBRD/WB	International Bank for Reconstruction and Development/ World Bank
ICJ	International Commission of Jurists
KFS	Kenya Forest Service
KFWG	Kenya Forest Working Group
KLR	Kenya Law Reports
KNBS	Kenya National Bureau of Statistics
KWS	Kenya Wildlife Service
LSK	Law Society of Kenya
NEC	National Environment Council
NEMA	National Environment Management Authority
NET	National Environment Tribunal
NGO(s)	Non-governmental Organization(s)
PCC	Public Complaints Committee
UN	United Nations