

COURTS AS CHAMPIONS OF SUSTAINABLE DEVELOPMENT: LESSONS FROM EAST AFRICA

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INTRODUCTION

Courts function as an arm of government that is critical in the separation of powers doctrine, and they play a crucial role in giving effect to legislative and executive intentions and pronouncements. Judicial power enables sovereign states to decide controversies between itself and its subjects and between the subjects *inter se* (between themselves).¹ Judiciaries the world over balance the interests of society with economic development, environmental sustainability, and the competing interests of persons and entities. Sustainable development is defined as development “that meets the needs of the present without compromising the ability of future generations to meet their own needs.”² Sustainable development requires mediation between the interests of current generations and those of future generations as well as between competing interests of current generations. Not surprisingly, the judiciary has been called upon in the quest for enforcing sustainable development policies owing to its traditional role in dispute resolution and interpretation of laws. As D. Kaniaru, L. Kurukulasuriya, and C. Okidi state:

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. 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.³

The role of the judiciary is particularly important in developing countries, such as those in Africa, where the bulk of the population is poor and relies on natural resources for livelihood and sustenance, and where the countries’ economies have those same resources as the bedrock of the gross domestic product. At the World Summit on Sustainable Development⁴ in Johannesburg in 2002, chief justices and senior judges from around the world presented the Johannesburg Principles on the Role of Law and Sustainable Development.⁵ The Principles had been adopted at the Global Judges Symposium on the Role of Law and Sustainable Development.⁶ The Principles underscored the critical role that judiciaries around the world can and should

play in efforts to promote sustainable development.⁷ The judges underscored the fact that:

an independent Judiciary and judicial process is vital for the implementation, development and enforcement of environmental law, and that members of the Judiciary, as well as those contributing to the judicial process at the national, regional and global levels, are crucial partners for promoting compliance with, and the implementation and enforcement of, international and national environmental law⁸

The assembled judges then made a commitment to “contribut[e] towards the realization of the goals of sustainable development through the judicial mandate to implement, develop and enforce the law, and to uphold the Rule of Law and the democratic process.”⁹

It is against this background that this paper assesses the role that judiciaries in East Africa have played in the quest for sustainable development. It focuses on Kenya, Uganda, and Tanzania, the original members of the East African Community. These three countries also have legal systems drawing on the common law tradition. The paper first summarizes the key environmental issues in the region as a prelude to the discussion on the legal framework for environmental management and the court structure in the three countries in the following section. It then analyzes several trends in judgments and the emerging jurisprudence on environmental law matters from the courts in East Africa.¹⁰ Finally, it proposes ways of improving the role of the judiciaries in fostering sustainable development in East Africa.

MAJOR ENVIRONMENTAL ISSUES AND CHALLENGES FOR SUSTAINABLE DEVELOPMENT IN EAST AFRICA

As a region, East Africa is largely poor: two of the three countries reviewed in this paper are classified as Least Developed¹¹ and only Kenya as Developing. The region is, however, endowed with numerous natural resources including forests, wildlife, fisheries, minerals, land, rivers, and Lake Victoria, the second largest freshwater lake in the world. The major environmental resources in East Africa may be categorized broadly into either transboundary or national ecosystems.¹²

The key challenges to the environment in the region are driven and controlled by three factors: (i) high populations and the attendant pressure from the interaction between the population and their surroundings; (ii) the ineffectiveness of the legal

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framework put in place to regulate these pressures; and (iii) the weak institutional arrangements in place for monitoring compliance leading to widespread non-compliance with the law by all concerned.¹³ The resulting environmental challenges include land degradation, poor land use and land management, over-exploitation of fisheries, water pollution, poor waste disposal management, water scarcity, biodiversity loss, wetlands destruction, deforestation, and climate change.¹⁴

A synoptic review of the regional environment shows that natural resources are not being managed in a sustainable and rational manner.¹⁵ The rate of degradation and exploitation of resources threatens the region's quest for sustainable development and thus brings great challenges for the judiciaries in East Africa. With the region's high levels of poverty, food insecurity, underdevelopment, low levels of awareness, barriers to access to information, and institutional challenges, the judiciaries have an increasingly critical role to play.

THE LEGAL FRAMEWORK FOR ENVIRONMENTAL MANAGEMENT

REGIONAL

Within East Africa, the totality of law is derived from both regional legal instruments and national legislation.¹⁶ In addition, however, recourse must be had to continental environmental laws¹⁷ and international environmental laws, since East African countries are members of the international community. The principal legal instrument at the regional level is the Treaty for the Establishment of the East African Community ("Treaty").¹⁸ The Treaty was signed on November 30, 1999 and entered into force on July 7, 2000, heralding the rebirth of the East Africa Community ("Community") as a regional integration bloc.¹⁹ The broad objective of the Community is stipulated in the Treaty to be "the development of policies and programmes aimed at widening and deepening co-operation among the partner states in political, economic, social and cultural fields, research and technology, defence, security and legal and judicial affairs."²⁰ Broadly speaking, therefore, the Treaty envisages development of programs and policies in a diverse range of areas, including the environmental field. Article 5(3) stipulates that:

For purposes set out in paragraph 1 of this Article and as subsequently provided in particular provisions of this Treaty, the community shall ensure:

(a) The attainment of sustainable growth and development of the Partner States by the promotion of a more balanced and harmonious development of the Partner states.

...

(c) The promotion of sustainable utilization of natural resources of the partner states and the taking of measures that would in turn, raise the standard of living and improve the quality of life of their populations.²¹

Further, Chapters 19 and 20 of the Treaty²² contain substantive provisions addressing environment and natural resource management and tourism and wildlife management. In addition

to these expansive provisions, the East African Community has also developed two protocols relevant to environmental management: the Protocol for the Sustainable Development of Lake Victoria²³ and the Protocol on Environment and Natural Resources.²⁴ Taken together with international instruments to which the East Africa Partner States are parties, these provide the legal framework for environmental management at the regional level.

NATIONAL

Environmental management in the three East African countries derives from the states' constitutions, parliamentary laws, and regulations made pursuant to such laws. Additionally, the customs and traditional practices of local communities continue to provide important rules and provisions for the management of the environment in all three countries. The framework environmental laws recognize the importance of such customary laws, providing that in determining environmental matters and upholding sustainable development, courts should be guided by, amongst other things, the cultural and social principles traditionally applied by communities for the management of the environment. The only caveat to this provision is that such principles and practices should not be repugnant to justice and morality.²⁵

The principal source of all laws in each of the three countries is each country's respective constitution. The constitutions of Uganda,²⁶ Tanzania,²⁷ and Kenya²⁸ treat the issue of environment differently.²⁹ Of the three, Uganda has the most comprehensive provisions on the environment.

In Uganda, the National Objectives and Directive Principles of State Policy of the Constitution contains a directive on protection of natural resources, which provides that "The State shall protect important natural resources, including land, water, wetlands, minerals, oil, fauna and flora on behalf of the people of Uganda."³⁰ There is also a directive on environmental management, requiring the State to promote sustainable development and public awareness of the need to manage land, air, and water resources in a balanced and sustainable manner for present and future generations;³¹ promote and implement energy policies that will ensure that people's basic needs and those of the environment are met;³² create and develop parks, reserves, and recreation areas; ensure conservation of natural resources; and promote rational use of natural resources so as to safeguard and protect biodiversity of Uganda.³³ Although these provisions are only hortatory, they demonstrate the premium that the Constitution places on environment and natural resource management. Additionally, the substantive part of the Constitution on fundamental rights and freedoms guarantees every Ugandan the right to a clean and healthy environment,³⁴ and gives every Ugandan the right to apply to a court for redress if that right is violated.³⁵

The Tanzanian and Kenyan constitutions, on the other hand, do not contain an enumerated right to a clean and healthy environment. Instead, both guarantee the right to life, which, following the expansive jurisprudence and interpretation of other courts such as those in Asia,³⁶ has been held by courts in both countries to include the right to a clean and healthy

environment.³⁷ Additionally, the Tanzanian Constitution, in the part on Fundamental Objectives and Directive Principles of State Policy,³⁸ urges the Tanzanian Government and all its agencies to direct their policies and programs towards ensuring “that public affairs are conducted in such a way as to ensure that the national resources and heritage are harnessed, preserved and applied toward the common good and the prevention of the exploitation of one man by another.”³⁹

The Kenyan Constitution⁴⁰ has no part dealing with directive policies. Since 2001, with the establishment of the Constitution of Kenya Review Commission, the country has been going through a structured process to review and rewrite its constitution.⁴¹ As part of that process and following the National Constitutional Conference in 2004, it produced a draft constitution, which included provisions guaranteeing the right to a clean and healthy environment as a constitutional right.⁴² The review process has not ended and has been dogged with controversy, the result of which is that the environmental provisions remain aspirations awaiting the adoption of a new constitutional order in Kenya.⁴³

In addition to constitutional provisions, the East African countries also have statutes dealing with the environment. The principal laws are those referred to as framework environmental statutes, a concept that emerged in the 1990s to describe a statute dedicated to environmental management and “encompassing regimes of planning, management, fiscal incentives and penal sanctions.”⁴⁴ Uganda was the first country to adopt its National Environmental Act⁴⁵ in 1995, followed by Kenya, with its Environmental Management and Coordination Act in 1999.⁴⁶ Tanzania closed the circuit when it adopted the Environmental Management Act in 2004.⁴⁷ The Acts provide the framework for sustainable environmental management and create the institutional mechanisms for environmental management.⁴⁸ They contain legal provisions reiterating the right to a clean and healthy environment,⁴⁹ establish a central environmental authority,⁵⁰ and have detailed provisions requiring environmental impact assessments.⁵¹ To complement the framework laws, each of the countries has additional legislation governing specific sectors of the environment including fisheries, forestry, wildlife, and water.⁵²

DISPUTE RESOLUTION MECHANISMS FOR ENVIRONMENTAL MATTERS

Within the traditional structure of government, the arm of government responsible for dispute resolution is the judiciary. In all the three countries under study, the judiciary serves this dispute resolution function. The constitutions of Uganda,⁵³ Kenya,⁵⁴ and Tanzania⁵⁵ describe the structure of the judiciary. In Uganda, in addition to the Constitution, the Judicature Act⁵⁶ and the Magistrates’ Courts Act⁵⁷ provide for the structure and functions of the Ugandan judiciary. At the apex of the court structure in Uganda is the Supreme Court,⁵⁸ which is the court of last resort with appellate powers for decisions emanating from the Court of Appeal.⁵⁹ Below the Supreme Court are the Court of Appeal,⁶⁰ which also serves as the first instance constitutional court in Uganda,⁶¹ then the High Court,⁶² which has unlimited

original jurisdiction in all matters and such appellate jurisdiction as conferred on it by the Constitution.⁶³ The Constitution stipulates that the country, through parliament, shall establish such subordinate courts as it shall desire.⁶⁴ Pursuant to this constitutional stipulation, Parliament has provided for magistrates’ courts to hear limited criminal and civil cases as “reasonably practicable.”⁶⁵ It has also established local county courts to hear simple civil cases falling within their jurisdiction,⁶⁶ as well as a military court system.⁶⁷

Tanzania’s court system comprises of a Court of Appeal as the final court with appellate jurisdiction over decisions from the High Court.⁶⁸ The High Court has jurisdiction as specified by the Constitution or any other law.⁶⁹ Below these courts are the Resident’s Magistrate’s Courts, District Courts, and Primary Courts.⁷⁰

The Kenyan Constitution provides for the court structure at Chapter IV.⁷¹ This is augmented by the provisions of the Judicature Act,⁷² the Magistrates’ Courts Act,⁷³ and the Appellate Jurisdiction Act.⁷⁴ The Constitution stipulates that the highest court shall be the Court of Appeal,⁷⁵ with powers to hear appeals from the High Court. The High Court has original unlimited jurisdiction to hear and determine all civil and criminal cases.⁷⁶ It also has powers to hear appeals from subordinate courts.⁷⁷ In 2007, the Chief Justice of the Republic of Kenya administratively created a Division of the High Court charged with handling land and environmental cases.⁷⁸ The Constitution also empowers Parliament to establish subordinate courts.⁷⁹ Under this provision, Parliament has created the resident magistrate’s courts, which have jurisdiction over civil and criminal matters.⁸⁰ Unlike the High Court, which has unlimited jurisdiction, the resident magistrates’ courts’ jurisdiction is limited both geographically and monetarily.⁸¹

At the regional level, the Treaty for the East African Community creates the East African Court of Justice,⁸² consisting of the First Instance Division and the Appellate Division.⁸³ The Court’s jurisdiction is limited to interpretation and application of the Treaty,⁸⁴ until such time as the Partner States, on recommendation of the Council of Ministers shall, by protocol, extend the jurisdiction to other areas and issues.⁸⁵ So far, no environmental matters have been brought before this court.

In addition to the national- and regional-level courts, there are two other mechanisms for resolving environmental disputes. The first utilizes informal traditional community-level mechanisms, principally the institution of the elders. Although such traditional institutions may vary from place to place, most communities in Kenya, Uganda, and Tanzania have some mechanism to resolve disputes at a local level.⁸⁶ Secondly, there exist quasi-judicial mechanisms and institutions for resolving environmental disputes in Kenya and Tanzania. In Kenya, the Environmental Management and Coordination Act creates two bodies with limited powers. The first is the Public Complaints Committee⁸⁷ with powers to investigate, either on its motion or on the basis of a report by any person,⁸⁸ any action of the National Environmental Management Authority or any case of environmental degradation in Kenya and subsequently prepare

a report. The Committee is essentially Kenya's environmental ombudsman.⁸⁹ The second is the National Environment Tribunal,⁹⁰ established to "offer specialized, expeditious and cheaper justice than ordinary courts of law."⁹¹ Its mandate is to hear appeals arising from administrative decisions of the National Environmental Management Authority.⁹²

Similarly, the Tanzanian Environmental Management Act establishes an Environmental Appeals Tribunal⁹³ to hear appeals arising from the decision or omission of the minister responsible for environment matters, "restriction or failure to impose any condition, limitation or restriction issued under the Act and approval or disapproval of an environmental impact statement by the Minister."⁹⁴ The Tribunal, however, has yet to be actually established.⁹⁵ Uganda has not made any provisions for such an institution.

ANALYSIS OF SIGNIFICANT ENVIRONMENTAL JUDGMENTS

This section reviews the performance of the East African courts as a dispute resolution mechanism for environmental matters. The enactment of the constitutional provisions on environment in Uganda in 1995 followed by the adoption of framework environmental statutes in the three countries heralded a new era in environmental management. With more expansive provisions, recognition of the rights and obligations of citizens to ensure a clean and healthy environment, and more relaxed rules on access to environmental justice in conformity with the requirements of Principle 10 of the Rio Declaration,⁹⁶ one would expect more robust action from the judiciary in East Africa than has been seen.

Except for the East African Court of Justice, which has not had occasion to determine a case of an environmental nature since its establishment,⁹⁷ the national courts of East Africa have demonstrated their contribution and approach to sustainable development generally and sound environmental management in particular. This section reviews the landmark decisions that have come out of the courts in East Africa so as to determine the emerging trend from such cases. It does not, however, analyze decisions of the subordinate courts in any of the three countries owing principally to the absence of law reporting at these levels.⁹⁸

RIGHT TO LIFE AND A HEALTHY ENVIRONMENT

As discussed earlier, of the three countries, only Uganda has constitutional provisions on the right to a clean and healthy environment. The other two enumerate those rights in environmental statutes. However, courts in the countries have been supportive of protecting the right to a clean and healthy environment.

The High Court of Uganda had occasion to address environmental harm as a breach of the right to privacy and the home in *Dr. Bwogi Richard Kanyerezi v. The Management Committee Rubaga Girls School*.⁹⁹ The plaintiff complained that the defendants' toilets emitted odiferous gases that reached the plaintiff's home thus unreasonably interfering with and diminishing the plaintiff's ordinary use and enjoyment of his home.¹⁰⁰ In spite of the fact that the defendant's school benefited society, the

court held that the defendants should cease using the toilets.¹⁰¹ Although this case was argued from the traditional common law principle of nuisance, it illustrates the use of privacy and home rights to protect the environment.¹⁰²

Kenya and Tanzanian courts have had to grapple with what the right to life really means in the context of the environment. The question has been whether the scope should be extended to include a right to the means necessary for supporting life. For example, because air and water are necessary to sustain life, does the right to life necessarily imply a right to clean air and water?¹⁰³ The courts of Kenya and Tanzania, which only have a "right to life" standard with which to anchor environmental protection via their constitutions, have both returned a "yes" verdict to the above question.¹⁰⁴

Tanzania appears to be the first African nation whose courts have addressed the scope of the constitutional right to life in provisions in the context of environmental protection.¹⁰⁵ In the case of *Joseph D. Kessy v. Dar es Salaam City Council*,¹⁰⁶ the residents of Tabata, a suburb of Dar es Salaam, sought an injunction to stop the Dar es Salaam City Council from continuing to dump and burn waste in the area. The City Council in turn sought an extension to continue with the said activities. The Court of Appeals of Tanzania,¹⁰⁷ in denying the City Council its requested extension, held that their actions endangered the health and lives of the applicants and thus violated the constitutional right to life. In the words of Justice Lugakingira:

I have never heard it anywhere before for a public authority, or even an individual to go to court and confidently seek for permission to pollute the environment and endanger people's lives, regardless of their number. Such wonders appear to be peculiarly Tanzanian, but I regret to say that it is not given to any court to grant such a prayer. Article 14 of our constitution provides that every person has a right to live and to protection of his life by the society. It is therefore, a contradiction in terms and a denial of this basic right deliberately to expose anybody's life to danger or, what is eminently monstrous, to enlist the assistance of the court in this infringement.¹⁰⁸

Nearly ten years later the High Court of Kenya reached a similar verdict regarding the constitutional right to life. In the case of *Waweru v. Republic*,¹⁰⁹ the applicants, property owners in the small Kenyan town of Kiserian, had been charged with the offence of discharging raw sewage into a public water source contrary to provisions of the Public Health Act.¹¹⁰ The applicants filed a constitutional reference against the charge,¹¹¹ arguing that they had been discriminated against since not all land owners had been charged, although the actions complained against were carried out by all land owners in Kiserian.¹¹² Although the Court agreed with the applicants it went on *sua sponte* (without any of the parties raising the issue) to discuss the implications of the applicants' action for sustainable development and environmental management.¹¹³ The Court held that the constitutional right to life as enshrined in section 71 of the

Kenyan Constitution includes the right to a clean and healthy environment. In the Court's words:

Under section 71 of the Constitution all persons are entitled to the right to life – In our view the right to life is not just a matter of keeping body and soul together because in this modern age that right could be threatened by many things including the environment.¹¹⁴

Then it went on to hold that:

It is quite evident from perusing the most important international instruments on the environment that the word life and the environment are inseparable and the word life means much more than keeping body and soul together.¹¹⁵

LOCUS STANDI AND PUBLIC INTEREST LITIGATION

The effectiveness of substantive legal provisions to protect the environment hinges upon accompanying procedural provisions to facilitate enforcement. One key aspect relates to provisions guaranteeing access to justice. Traditionally, under common law, in environmental matters, access was granted to individuals who had *locus standi* (standing to sue).¹¹⁶ The normal rule for *locus standi* is that one should have a direct personal and proprietary relationship with the subject matter of litigation.¹¹⁷ This followed from the fact that litigation was about private rights and interests, and the “common law legal systems . . . always . . . ready to come to the aid of individuals suffering damage, whether of a personal or proprietary nature, where the activities of others may have caused damage or loss.”¹¹⁸

This private nature of rights, remedies, and litigation tends to restrict against protecting environmental rights, which are essentially public rights.¹¹⁹ To remedy this situation, there has arisen public interest environmental litigation, where public spirited individuals and groups seek remedies in court on behalf of the larger public to enforce protection of the environment. The success of Public Interest Litigation requires courts to have a relaxed view on the rule of *locus standi*.¹²⁰

Traditionally, courts in East Africa took a restrictive view on *locus standi*, following the traditional view at common law, espoused in the famous English case of *Gouriet vs. Union of Post Office Workers*,¹²¹ where it was held that unless a litigant could demonstrate personal injury and loss, the matter was one within the realm of public law, where only the Attorney General had *locus standi* to institute the action. The only exceptions to this rule were representative suits or a relator action.¹²² However, especially with the enactment of broad provisions in the framework environmental laws, courts have started interpreting the rules of *locus standi* liberally, generally holding that in environmental cases, individuals have standing notwithstanding the lack of a personal and proprietary interest in the matter. The most celebrated case on this point is a case from the Tanzanian High Court, *Rev. Christopher Mtikila v. The Attorney General*,¹²³ in which Justice Lugakingira departed from the traditional view on *locus standi*, arguing that in the circumstances of Tanzania, if a public spirited individual seeks the Courts' intervention against

legislation or actions that pervert the Constitution, the Court, as a guardian and trustee of the Constitution, must grant him standing.¹²⁴

In *Festo Balegele and 749 others v. Dar es Salaam City Council*,¹²⁵ a Tanzanian case, the plaintiffs were residents of Kunduchi Mtongani. The defendant City Council used this site to dump the city's waste in execution of their statutory duty of waste disposal.¹²⁶ The dumped refuse endangered the residents' lives.¹²⁷ They went to the Court of Appeal of Tanzania seeking restraining orders.¹²⁸ On the issue of *locus standi*, the plaintiffs were held to have standing to apply for the orders based on several factors.¹²⁹ First, they were residents of the site at issue. Second, the site fell within the area of jurisdiction of the defendant City Council. Third, this site was zoned as a residential area, as opposed to a dumping site. Fourth, the dumped refuse and waste turned the area into a health hazard and a nuisance to the plaintiffs. Therefore, the plaintiffs were aggrieved by the action of the defendant.¹³⁰ The Court echoed the sentiments of its earlier decision in *Abdi Athumani and 9 others v. The District Commissioner of Tunduru District and others*.¹³¹ In that case, Judge Rubana, writing for the Court, said that every citizen has a right to seek redress in courts of law when the citizen feels that the Government has not functioned within the orbit or limits dictated by justice that the Government had set for itself.¹³²

The courts in Uganda have been the most liberal in granting standing to plaintiffs in environmental cases.¹³³ Great reliance has been placed on the provisions of Article 50 of the Ugandan Constitution, which provides that “[a]ny person or organization may bring an action against the violation of another person's or group's human rights.”¹³⁴ Courts have interpreted this to give every person *locus standi*.¹³⁵

In *Environmental Action Network Ltd. v. The Attorney General and National Environmental Management Authority*,¹³⁶ a public interest litigation group brought an application, complaining about the dangers of second-hand smoke on its behalf and on behalf of the non-smoking members of the public under Article 50(2) of the Constitution, to protect their right to a clean and healthy environment and their right to life, and for the general good of public health in Uganda.¹³⁷ The applicants stated that non-smoking Ugandans have a constitutional right to life under Article 22 and a constitutional right to a clean and healthy environment under Article 39 of the Ugandan Constitution,¹³⁸ and that these rights were being threatened by the unrestricted practice of persons smoking in public places. The respondents raised several preliminary objections to the application, one of them being that the applicants could not claim to represent the public, in essence challenging their *locus standi*.¹³⁹ The High Court of Uganda, in dismissing the preliminary objection and holding that the applicants had standing, relied on “cases which decided that an organization can bring a public interest action on behalf of groups or individual members of the public even though the applying organization has no direct individual interest in the infringing acts it seeks to have redressed.”¹⁴⁰

Kenyan courts, though initially taking a restrictive view on *locus standi*,¹⁴¹ have in the last few years caught up with their

counterparts in Uganda and Tanzania, liberally granting *locus standi* and promoting public interest litigation. The new view is captured by the words of the High Court in the case of *Albert Ruturi & Another v. Minister for Finance and Others*,¹⁴² subsequently quoted with approval in the case of *El Busaidy v. Commissioner of Lands & 2 Others*:¹⁴³

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 legal injury is caused, must be departed from. In these types of cases, any person or social groups, acting in good faith, can approach the Court seeking judicial redress for a legal injury caused or threatened to be caused to a defined class of persons represented¹⁴⁴

REGULATION OF PROPERTY RIGHTS

A critical issue in environmental management that is normally subject to litigation regards the regulation of property rights. Developments in law have led to the evolution of the concept of public rights in private property¹⁴⁵ so as to ensure that use of property does not affect the rights and interests of the larger public. Two particularly critical tools available for the state in regulating property rights are eminent domain and the police power.¹⁴⁶ How both powers are used in practice and courts' attitudes towards these powers demonstrate an emerging approach to sustainable development and environmental protection. In East Africa, courts have started to recognize the state's regulatory powers and the existence of public rights in private property.

In the Kenyan case of *Park View Shopping Arcade Limited v. Charles M. Kangethe and 2 Others*,¹⁴⁷ the Court had to resolve an issue regarding the use of a wetland. The plaintiff corporation, the registered owner a piece of land in Nairobi, applied for an injunction seeking to evict the respondents, who were occupying his land.¹⁴⁸ He argued that their occupation was infringing on his constitutional rights to private property.¹⁴⁹ The respondents on the other hand argued that the land at issue was a sensitive wetlands area along one of the tributaries of the Nairobi River and that, contrary to the applicant's assertion, they were not trespassers, but rather persons enhancing the environmental quality of the land with a permit from the relevant authorities.¹⁵⁰ While the applicant wanted to undertake construction on the land, the respondents were operating a flower business.¹⁵¹ The respondents argued that the proposed construction was contrary to the general right to a clean and healthy environment guaranteed in law.¹⁵² The Court held that, although the law allows for regulation of property rights in the interest of the public, such regulation must be undertaken in a lawful manner. Justice Ojwang wrote:

If, therefore the defendants/respondents had genuinely wished to pursue the cause of environmental protection . . . the logical and correct cause of action for them would have been to approach the Ministry of environment and plead for compulsory acquisition of the suit land [I]t is not acceptable that they should forcibly occupy the suit land and then plead public interest in environmental conservation, to keep out the registered owner.¹⁵³

The Court further ordered the Minister for Environment to assess the status of the land and take appropriate action thereafter, in essence recognizing the fact that property rights can be regulated for environmental protection.¹⁵⁴

The High Court of Uganda has also confirmed the government's right to regulate property rights for environmental protection in the case of *Sheer Property Limited v. National Environmental Management Authority*.¹⁵⁵ The case involved an application by Sheer Property Limited seeking to quash the refusal of the National Environmental Management Authority ("NEMA") to grant an Environmental Impact Assessment license for the respondent's proposed development on its land, a wetlands area near the shores of Lake Victoria.¹⁵⁶ In the May 29, 2009 judgment, Justice Mugamba reached the conclusion that NEMA had the right to regulate land use, the private property owner's rights notwithstanding.¹⁵⁷

ENVIRONMENTAL IMPACT ASSESSMENTS

Environmental Impact Assessments ("EIAs") enable the examination, analysis, and assessment of proposed projects, policies, or programs for their environmental impact, thus integrating environmental issues into development planning and increasing the potential for environmentally sound and sustainable development. The EIA process, as argued by Hunter and others, "should ensure that before granting approval (1) the appropriate government authorities have fully identified and considered the environmental effects of proposed activities under their jurisdiction and control and (2) affected citizens have an opportunity to understand the proposed project or policy and to express their views to decision-makers."¹⁵⁸ The EIA is also a means for the democratization of decision-making on environmental issues and the allocation of natural resources—however, this hinges upon the nature and the extent of public participation in the process.

East African countries provide for EIAs in their framework environmental statutes. In Kenya, a change in philosophy came about before the framework law was enacted due to the clamor by civil society to enact the Physical Planning Act, 1996.¹⁵⁹ This Act sought, *inter alia*, to use planning as a specific method of preventing environmental degradation, and provides for the use of environmental impact assessments.¹⁶⁰ For EIA purposes, the Physical Planning Act obligates developers to seek and obtain plan information from the relevant local authorities.¹⁶¹ Local authorities are further empowered to demolish buildings built without their permission. In the Kenyan case of *Momanyi v. Bosire*,¹⁶² these planning requirements received judicial

recognition. In this case, Momanyi was a resident of Imara Daima Estate in Nairobi. Bosire obtained plan information to put up a kiosk at the entrance of the Estate. Rather than a kiosk, however, he constructed a resort for selling liquor and other related products. The plaintiff and others instituted a suit against Bosire and the Nairobi City Council. The court held that Bosire was in breach of the Physical Planning Act requirements relating to plan information. Similarly, the City Council was in breach of its statutory obligation for failing to demolish the building as it was built without plan information.¹⁶³ Accordingly, the resort was pulled down.¹⁶⁴

Similarly, the High Court of Uganda in *National Association of Professional Environmentalists (NAPE) v. Nile Power Limited*¹⁶⁵ held that activities of economic benefit to the community must be lawfully authorized. In this case, the applicants sought an injunction to restrain the respondent company from concluding a power project agreement with the government of Uganda until the EIA on the project had been approved. Although the Court declined to grant the injunction sought, it declared that the Lead Agency and the National Environment Authority must approve the EIA study on the project.¹⁶⁶ It observed that the signing of the protested agreements was subject to the law and any contravention of the law would be challenged.¹⁶⁷

HARNESSING THE ROLE OF COURTS AS CHAMPIONS FOR SUSTAINABLE DEVELOPMENT

The environmental challenges facing East Africa and the rest of Africa are many and growing. Increasing poverty, land degradation, and the huge threats posed by climate change, against a background of corruption and other governance challenges,¹⁶⁸ require the concerted efforts of all actors. The judiciary, more than any other institution, is uniquely placed to help society implement appropriate strategies for confronting these challenges and to thus deliver on sustainable development because the judiciaries, by their nature, are expected to mediate between different interests in society and they are removed from the daily political pressures and interests that confront the executive and legislature in most African countries. In any case, the laws on environmental management require an arbiter who will ensure that they are adhered to and transgression dealt with. Courts in East Africa are slowly waking up to the reality that they have this critical role. They are starting to be assertive, innovative, and inspirational in their judgments. However, they are still faced with numerous obstacles requiring attention if they are to be fully effective as champions of sustainable development. Moving into the future requires increased capacity building, the development of robust jurisprudence, and a judiciary that realizes that its task is not just to react and adjudicate, but also to inform and provide leadership. Above all, judiciaries must help society to adhere to the rule of law and inculcate environmental ethos and values.

Klaus Toepfer, former United Nations Environment Programme (“UNEP”) Executive Director wrote in the preface to the book *Making Law Work, (Volumes I and II) - Environmental Compliance & Sustainable Development*¹⁶⁹ the following:

The future of the Earth may well turn on how quickly we can improve the legal framework for sustainable development Sustainable development cannot be achieved unless laws governing society, the economy, and our relationship with the Earth connect with our deepest values and are put into practice internationally and domestically. Law must be enforced and complied with by all of society, and all of society must share this obligation.¹⁷⁰

The judiciary should be at the forefront in ensuring that East Africa realizes the goal of sustainable development. For, as Justice Ojwang’ has written:

In the case of the *environment* . . . the state of the law may well be relatively obscure; yet a decision must be pronounced. From my understanding of the law, and from my own experience of judicial decision-making, where the question before the Court relates to the environment, and the legislature’s guidance is by no means comprehensive, the Court, once it ascertains the *facts*, must appreciate the relevant *principles* which ought to be reflected in the law So, whenever the Court has an opportunity to declare the law on an environmental question, the shape of that law should be *conservatory of the environment and the natural resources*; and the Court should apply this principle to determine, where possible, such rights or duties as may appear to be more immediately linked to economic, social, cultural, or political situations.¹⁷¹

The cases reviewed above demonstrate the great strides that courts in East Africa are making in promoting sustainable development in East Africa. The initial seeds have been sown, but more work still lies ahead to ensure that courts become true bastions of justice and champions for sustainable development.

Among the steps that need to be taken are enhanced training and capacity building for the judiciary. Environmental law is a fairly recent branch of law. It was only introduced in law schools after a good number of the judges currently working in East Africa had already graduated. Even after the subject was introduced, it was an elective rather than a required subject. Consequently, not many judges have academic knowledge and experience in environmental law. It is therefore critical that, as called for by the Global Judges’ Symposium on the Rule of Law and Sustainable Development,¹⁷² capacity building programs on environmental law be mounted for members of the judiciary. In Uganda and Kenya, commendable efforts have been made both by UNEP under the Partnership for Development of Environmental Law in Africa program and by local civil society organizations¹⁷³ to organize colloquia for judges on environmental law. The efforts in Tanzania on this front are still minimal.¹⁷⁴ With the establishment of judicial training institutes in East Africa,¹⁷⁵ training on environmental law should be entering the mainstream and made continuous so as to ensure that judicial officers keep abreast of the latest developments in the field of environmental law and thus are better able to make sound decisions.

The three East African countries follow the doctrine of *stare decisis* and judicial precedent, where decisions of previous superior courts are binding on inferior tribunals. To be effective, this process requires a functioning legal reporting system. The status of law reporting in East Africa is, however, very weak. Kenya leads with commendable efforts by the National Council for Law Reporting.¹⁷⁶ It has produced a volume of land and environmental reports, containing landmark environmental judgments in Kenya from 1909 to 2006.¹⁷⁷ This program should be emulated in all three countries to provide easy reference and a dedicated law reporting process on environmental cases, and to help develop a sound body of environmental jurisprudence in East Africa.

There is also need to modernize courts generally to increase their effectiveness. The information superhighway has yet to reach the courts in East Africa. They are still traditional and largely archaic institutions. To reap the benefits of information technology, modernization of judiciaries by introduction of computers, stenographers to record court proceedings, and internet connection would greatly enhance the performance of these courts. The effectiveness of the judiciary will also depend to a large degree on its independence and freedom from political interference, especially by the executive branch, and its fidelity to the rule of the law.



Endnotes: COURTS AS CHAMPIONS OF SUSTAINABLE DEVELOPMENT: LESSONS FROM EAST AFRICA

¹ J. B. OJWANG, CONSTITUTIONAL DEVELOPMENT IN KENYA: INSTITUTIONAL ADAPTATION AND SOCIAL CHANGE 158 (ACTS Press 1990).

² WORLD COMMISSION ON ENVIRONMENT AND DEVELOPMENT, OUR COMMON FUTURE 44 (Oxford University Press 1987).

³ D. Kaniaru, L. Kurukulasuriya, & C. Okidi, *UNEP Judicial Symposium on the Role of the Judiciary in Promoting Sustainable Development*, in CONFERENCE PROCEEDINGS 22 (presented to the Fifth International Conference on Environmental Compliance and Enforcement in Monterey, California in Nov. 1998), available at <http://www.inece.org/5thvol1/lal.pdf>.

⁴ The summit was held in Johannesburg, South Africa between August 26 and September 4, 2002, ten years after the ground-breaking conference on environment and development in Rio de Janeiro. For information on the summit, see World Summit on Sustainable Development . . . LIVE!, Home Page, <http://www.un.org/events/wssd/> (last visited Nov. 3, 2009).

⁵ Johannesburg Principles on the Role of Law and Sustainable Development, reprinted in JOURNAL OF ENVIRONMENTAL LAW 15(1) at 107-110 (2003) [hereinafter Johannesburg Principles], available at <http://www.dfa.gov.za/docs/2002/wssd0828a.htm>.

⁶ The symposium was held in Johannesburg, South Africa between August 18 and 20, 2002, just before the World Summit on Sustainable Development. For information on the symposium, see UN Environment Program, Global Judges Symposium on Sustainable Development and the Role of Law, http://www.unep.org/law/Symposium/Judges_symposium.htm (last visited Nov. 3, 2009).

⁷ Johannesburg Principles, *supra* note 5.

⁸ *Id.* at preamble.

⁹ *Id.* at principle 1.

¹⁰ East Africa as a regional integration entity comprises five countries: Kenya, Uganda, Tanzania, Rwanda, and Burundi. However, this paper restricts itself to Kenya, Uganda, and Tanzania. Secondly, although Zanzibar is part of the United Republic of Tanzania, it has some of its own legal institutions, including a high court. This paper does not discuss Zanzibar where its procedures and laws differ from that of mainland Tanzania.

¹¹ Every three years, the UN Economic and Social Council reviews and classifies a list of Least Developed Countries (“LDCs”) based on three criteria: a low-income criterion; a human resource weakness criterion; and an economic vulnerability criterion. See UN Office for the High Representative for the Least Developed Countries, Landlocked Developing Countries and Small Island Developing Countries, The Criteria for the Identification of the LDCs, <http://www.un.org/special-rep/ohrls/lde/lde%20criteria.htm> (last visited Oct. 23, 2009).

¹² Wabunoha, A., *Environmental Law of East Africa*, in ENVIRONMENTAL GOVERNANCE IN KENYA: IMPLEMENTING THE FRAMEWORK LAW 485, 486–87 (East African Educational Publishers 2008); see also Dr. Tom Okurut, *Leading Environmental Problems of East Africa*, Paper Presented to the Judicial Colloquium on Environmental Law and Access to Justice in East Africa, Mombasa (Apr. 10–15, 2007).

¹³ Okurut, *supra* note 12, at 17.

¹⁴ See generally Wabunoha, *supra* note 12; Okurut, *supra* note 12.

¹⁵ Wabunoha, *supra* note 12, at 487.

¹⁶ *Id.* at 494 (defining the environmental law of East Africa to include laws that facilitate environmental protection or management within the community with either a regional scope, or laws that can be commonly applied or practiced in all the partner states).

¹⁷ There are several pieces of legislation governing environmental management within the African region. The preeminent one, however still remains the African Convention on the Conservation of Nature and Natural Resources, available at <http://www.africa-union.org/root/AU/Documents/Treaties/Text/nature%20and%20natural%20recesource.pdf> (revised and adopted at Maputo in 2003).

¹⁸ Treaty for the Establishment of the East African Community, Burundi-Kenya-Rwanda-Tanz.-Uganda, Nov. 30, 1999 [hereinafter EAC Treaty], available at <http://www.eac.int/about-eac.html> (select the “About EAC” tab; then select “Treaty Establishing the EAC” from the drop-down menu).

¹⁹ The original East African Community was formed in 1967, but collapsed in 1977 following disagreements amongst the leadership of the three Partner States, Kenya, Uganda, and Tanzania. For an in-depth discussion, see Korwa G. Adar & Mutahi Ngunyi, *The Politics of Integration in East Africa Since Independence*, in POLITICS AND ADMINISTRATION IN EAST AFRICA (Walter O. Oyugi ed., 1992); see also KIBUA, T. & TOSTENSEN, A., FAST-TRACKING EAST AFRICAN INTEGRATION: ASSESSING THE FEASIBILITY OF A POLITICAL FEDERATION BY 2010 (CMI 2005).

²⁰ EAC Treaty, *supra* note 18, art. 5(1).

²¹ *Id.* art. 5(3).

²² *Id.* art. 111–16.

²³ Protocol for the Sustainable Development of Lake Victoria, Kenya-Tanz.-Uganda, Nov. 29, 2003, available at http://www.fao.org/fishery/shared/faolex-trans.jsp?xp_ISIS_MFN=035651&xp_faolexLang=E&xp_lang=en.

²⁴ Protocol on Environment and Natural Resources, Kenya-Tanz.-Uganda, Apr. 3, 2006, available at http://www.eac.int/advisory-opinions/doc_download/5-east-african-community-protocol-on-environmental-and-natural-resources-management.html.

²⁵ See Environmental Management and Coordination Act, No. 8 (1999) pt. II § 5(b) (Kenya) [hereinafter EMCA], available at http://www.reconcile-ea.org/wkelc/env_mgt_act.pdf (last visited Nov. 3, 2009).

²⁶ CONSTITUTION (1995) (Uganda), available at http://www.ugandaonline.lawlibrary.com/files/constitution/constitution_1995.pdf.

²⁷ CONSTITUTION (1997) (Tanz.), available at <http://www.issafrika.org/cdct/mainpages/pdf/Corruption/Legislation/Tanzania/Tanzania%20Constitution%20in%20English.pdf>.

Endnotes: Courts as Champions of Sustainable Development: Lessons from East Africa *continued on page 83*

- ²⁸ CONSTITUTION (2008) (Kenya), available at <http://aceproject.org/ero-en/regions/africa/KE/the-constitution-of-the-republic-of-kenya-as/view>.
- ²⁹ For a discussion of constitutional treatment of environmental issues in African constitutions, see generally ENVIRONMENTAL LAW INSTITUTE & UN ENVIRONMENTAL PROGRAMME, CONSTITUTIONAL ENVIRONMENTAL LAW: GIVING FORCE TO FUNDAMENTAL PRINCIPLES IN AFRICA (2007) [hereinafter ELI & UNEP].
- ³⁰ CONSTITUTION (Uganda), *supra* note 26, directive XIII.
- ³¹ *Id.* princ. XXVII(i).
- ³² *Id.* princ. XXVII(iii).
- ³³ *Id.* princ. XXVII(ii).
- ³⁴ *Id.* art. 39.
- ³⁵ *Id.* art. 50.
- ³⁶ See Brian J. Preston, *The Role of the Judiciary in Promoting Sustainable Development: The Experience of Asia and the Pacific*, 9 ASIA PACIFIC JOURNAL OF ENVIRONMENTAL LAW 109 (2005).
- ³⁷ See *Joseph D. Kessy and others v. The City Council of Dar es Salaam*, High Court of Tanzania, Civil Case No. 29 of 1998 (unreported); *Waweru v. Republic*, (2006) 1 K.L.R. 677-700 (H.C.K) (Kenya) (interpreting the right to life provisions in the constitution to include a right to a clean and healthy environment).
- ³⁸ CONSTITUTION (Tanz.), *supra* note 27, part II.
- ³⁹ *Id.* art. 9(1)(c).
- ⁴⁰ CONSTITUTION (Kenya), *supra* note 28.
- ⁴¹ The history of the review process in Kenya, however, predates this year. It was originally linked with the agitation for, and the 1991 introduction of, multi-party politics. For an exhaustive treatment of this history, see MAKAU MUTUA, KENYA'S QUEST FOR DEMOCRACY: TAMING THE LEVIATHAN (Fountain Publishers 2009); see also WILLY MUTUNGA, CONSTITUTION-MAKING FROM THE MIDDLE: CIVIL SOCIETY AND TRANSITION POLITICS IN KENYA, 1992-1997 (1999).
- ⁴² Draft Constitution, art. 67 (Kenya) (adopted by the National Constitutional Conference Mar. 15, 2004), available at <http://ancl-radc.org.za/sites/ancl-radc.org.za/files/Constitution%20of%20Kenya%20Review%20Commssion%20%27Bomas%27%20Draft%20Constitution%20Adopted%20by%20the%20National%20Constitutional%20Conference%20%2015%20March%202004.pdf>
- ⁴³ See Anthony Kagiri, *Central MPs Tie Boundaries to Constitution*, CAPITAL NEWS (Oct. 23, 2009), available at <http://www.capitalfm.co.ke/news/Kenyanews/Central-MPs-tie-boundaries-to-Constitution-6240.html> (reporting on delay in ratification of the 2004 amended constitution as part of political struggle over redistricting in Kenya).
- ⁴⁴ Charles O. Okidi, *Concept, Function and Structure of Environmental Law*, in ENVIRONMENTAL GOVERNANCE IN KENYA, *supra* note 12, 3-60 at 3 (discussing the rationale for framework environmental law, pointing out that the three countries adopted fairly similar paths in enacting their framework laws).
- ⁴⁵ National Environmental Act, (1995) Cap. 153 (Uganda) [hereinafter NEA].
- ⁴⁶ EMCA, *supra* note 25.
- ⁴⁷ Environmental Management Act, (2004) Cap. 191 (Tanz.) [hereinafter EMA].
- ⁴⁸ NEA (Uganda), *supra* note 45; EMCA (Kenya), *supra* note 25; and EMA (Tanz.), *supra* note 47.
- ⁴⁹ NEA (Uganda), *supra* note 45, at § 4(1); EMCA (Kenya), *supra* note 25, at § 3(1); EMA (Tanz.), *supra* note 47, at § 4(1).
- ⁵⁰ NEA (Uganda), *supra* note 45, at § 4; EMCA (Kenya), *supra* note 25, at § 7; EMA (Tanz.), *supra* note 47, at § 16.
- ⁵¹ NEA (Uganda), *supra* note 45, at § 19; EMCA (Kenya), *supra* note 25, at § 58; EMA (Tanz.), *supra* note 47, at § 81.
- ⁵² For a discussion of the sectoral legislations in Kenya, Uganda, and Tanzania, see Patricia Kameri-Mbote, *Kenya*, in THE ROLE OF THE JUDICIARY IN ENVIRONMENTAL GOVERNANCE: COMPARATIVE PERSPECTIVES 351, 461-2 (Kluwer Law International 2009); Emmanuel Kasimbazi, *Uganda*, in THE ROLE OF THE JUDICIARY IN ENVIRONMENTAL GOVERNANCE: COMPARATIVE PERSPECTIVES 479, 483-4 (Kluwer Law International 2009); and J.P. Kabudi, *Tanzania*, in THE ROLE OF THE JUDICIARY IN ENVIRONMENTAL GOVERNANCE: COMPARATIVE PERSPECTIVES 505, 514 (Kluwer Law International 2009).
- ⁵³ See CONSTITUTION (Uganda), *supra* note 26, §§ 126, 129.
- ⁵⁴ CONSTITUTION (Kenya) *supra* note 28.
- ⁵⁵ CONSTITUTION (Tanz.) *supra* note 27.
- ⁵⁶ Judicature Act, (1996) Cap. 13 (Uganda).
- ⁵⁷ Magistrates Courts Act, (1971) Cap. 16 (Uganda).
- ⁵⁸ CONSTITUTION (Uganda), *supra* note 26, art. 130.
- ⁵⁹ *Id.* art. 132.
- ⁶⁰ *Id.* art. 134.
- ⁶¹ *Id.* arts. 130-32, 137.
- ⁶² *Id.* art. 138.
- ⁶³ *Id.* art. 139(1).
- ⁶⁴ *Id.* art. 129(1)(d).
- ⁶⁵ Judicature Act, *supra* note 56, pt. IV §18.
- ⁶⁶ See Kasimbazi, *supra* note 52, at 487.
- ⁶⁷ See Uganda Peoples' Defence Forces Act, (1992) Cap 307 (Uganda).
- ⁶⁸ CONSTITUTION (Tanz.), *supra* note 27, art. 117.
- ⁶⁹ *Id.* art. 108.
- ⁷⁰ See Magistrates' Courts Act, (1984) Cap. 11 (Tanz.); see also Kabudi, *supra* note 51, at 516 (discussing these courts).
- ⁷¹ CONSTITUTION (Kenya), *supra* note 28, §§ 60-64.
- ⁷² Judicature Act, (2007) Cap. 8 (Kenya).
- ⁷³ Magistrates' Courts Act, (2002) Cap. 10 (Kenya).
- ⁷⁴ Appellate Jurisdiction Act, (2009) Cap. 9 (Kenya).
- ⁷⁵ CONSTITUTION (Kenya), *supra* note 28.
- ⁷⁶ *Id.* § 60.
- ⁷⁷ *Id.* § 60.
- ⁷⁸ See Judiciary of the Republic of Kenya, New Courts Set Up to Handle Land Cases, http://www.judiciary.go.ke/news_info/view_article.php?id=408673 (last visited Nov. 3, 2009).
- ⁷⁹ CONSTITUTION (Kenya), *supra* note 28, § 64.
- ⁸⁰ Magistrates' Courts Act (Kenya), *supra* note 73.
- ⁸¹ *Id.* § 5(1) (establishing caps on monetary damages in civil suits).
- ⁸² EAC Treaty, *supra* note 18, art. 23.
- ⁸³ *Id.* art. 23(2).
- ⁸⁴ *Id.* art. 27(1.)
- ⁸⁵ *Id.* art. 27 (2).
- ⁸⁶ See Kameri-Mbote, *supra* note 52, at 465.
- ⁸⁷ See EMCA, *supra* note 25, § 31.
- ⁸⁸ *Id.* § 32.
- ⁸⁹ See Albert Mumma, *The Role of Administrative Dispute Resolution Institutions and processes in Sustainable Land Use Management: The Case of the National Environment Tribunal and Public Complaints Committee of Kenya*, in LAND USE LAW FOR SUSTAINABLE DEVELOPMENT (Cambridge University Press 2007) (discussing the Public Complaints Committee).
- ⁹⁰ EMCA, *supra* note 25, §125.
- ⁹¹ See Kameri-Mbote, *supra* note 52, at 464.
- ⁹² See EMCA, *supra* note 25, §129. See generally Mumma, *supra* note 89.
- ⁹³ EMA (Tanz.), *supra* note 47, art. 204.
- ⁹⁴ *Id.* art. 206(2)(b)-(c).
- ⁹⁵ See Tanzania Government Website, <http://www.tanzania.go.tz/administration.html> (making no mention of the environmental court).
- ⁹⁶ UN Conference on Environment and Development, Rio Declaration on Environment and Development, June 14, 1992, available at <http://www.un-documents.net/rio-dec.htm>.
- ⁹⁷ In fact as at the time of writing the Court has heard and determined only 10 cases. See South African Legal Information Institute, East African Court of Justice, <http://www.saflii.org/ea/cases/EACJ/> (last visited Nov. 3, 2009).
- ⁹⁸ Cf. KenyaLaw.Org, <http://www.kenyalaw.org/CaseSearch/> (indicating that KenyaLaw.org contains only High Court, Court of Appeals, and Supreme Court cases); Uganda Legal Information Institute, <http://www.ulii.org/> (indicating that cases from Uganda courts below the High Court are unavailable, except for a special Commercial Court); Southern African Legal Information Institute, <http://www.saflii.org/content/tanzania-index> (indicating that only Tanzanian cases at or above the High Court level are reported).
- ⁹⁹ *Dr. Bwogi Richard Kanyerezi v. The Management Committee Rubaga Girls School*, High Court Civil Appeal No. 3 of 1996 (Uganda) (unreported).
- ¹⁰⁰ *Id.*
- ¹⁰¹ *Id.*
- ¹⁰² *Id.*
- ¹⁰³ ELI & UNEP, *supra* note 29, at 39.

- ¹⁰⁴ See *Waweru*, *supra* note 37 (construing the right to life in Kenya's Constitution to include some environmental protections); see also *Kessy*, *supra* note 37 (construing the right to life in Tanzania's Constitution to include some environmental protections).
- ¹⁰⁵ ELI & UNEP, *supra* note 29, at 41.
- ¹⁰⁶ *Kessy*, *supra* note 37 (construing the right to life in Tanzania's Constitution to include some environmental protections).
- ¹⁰⁷ *Id.*
- ¹⁰⁸ *Id.* at 15.
- ¹⁰⁹ *Waweru*, *supra* note 37.
- ¹¹⁰ Public Health Act, Cap. 242 (Kenya).
- ¹¹¹ *Waweru*, *supra* note 37, at 2.
- ¹¹² *Id.*
- ¹¹³ *Id.* at 12.
- ¹¹⁴ *Id.* at 687.
- ¹¹⁵ *Id.* at 691.
- ¹¹⁶ See, e.g., *Wangari Maathai v. Kenya Times Media Trust Ltd*, (1989) H.C.K. 5403 (Kenya).
- ¹¹⁷ Cf. *Gouriet v. Union of Postal Office Workers*, (1977) A.C. 729 (Q.B.).
- ¹¹⁸ M.O. MAKOLOO ET AL., PUBLIC INTEREST ENVIRONMENTAL LITIGATION IN KENYA: PROSPECTS AND CHALLENGES 13 (ILEG 2007).
- ¹¹⁹ Cf. *Waweru*, *supra* note 37, at 691.
- ¹²⁰ MAKOLOO, *supra* note 118.
- ¹²¹ *Gouriet*, *supra* note 117.
- ¹²² *Gouriet*, *supra* note 117 at 754 (using relator action in opposition to ex-officio action, and defining it as an action taken by the Attorney General on the information given by *Gouriet*, so that the Attorney-General would be party to the suit and *Gouriet* considered the life of the suit).
- ¹²³ *Rev. Christopher Mtikila v. The Attorney General*, Civil Case No. 5 of 1993, High Court of Tanzania, T.L.R. 31.
- ¹²⁴ *Id.* at 43.
- ¹²⁵ *Festo Balegele and 749 others v. Dar es Salaam City Council*, Civil Case No. 90 of 1991, High Court of Tanzania (Rubana, J).
- ¹²⁶ *Id.* at 129.
- ¹²⁷ *Id.*
- ¹²⁸ *Id.* at 128.
- ¹²⁹ *Id.*
- ¹³⁰ *Id.*
- ¹³¹ *Id.*
- ¹³² *Id.*
- ¹³³ For an exhaustive discussion of the Ugandan Experience, see MAKOLOO, *supra* note 118, at 56-59; see also *Kasimbazi*, *supra* note 52.
- ¹³⁴ National Environmental Act, (1995) Cap. 153 § 71 (Uganda) ("it shall not be necessary for the plaintiff to show that he or she has a right of or interest in, the property, in the environment, or land alleged to have been harmed or in the environment or land contiguous to such land or environment").
- ¹³⁵ Kenneth Kakuru, *Re-thinking Legislative and Judicial Approaches to Environmental Procedural Rights in Uganda*, Address at Green Watch Symposium on Environmental law, available at http://greenwatch.or.ug/index2.php?option=com_docman&task=doc_view&gid=3&Itemid=64.
- ¹³⁶ *The Environmental Action Network v. NEMA*, H.C. Misc. Appl. 39 of 2001 (Uganda) (unreported) [hereinafter TEAN], available at <http://www.greenwatch.or.ug/pdf/judgements/TEAN%20Versus%20A.G%20%20NEMA.pdf>.
- ¹³⁷ *Id.* at 3.
- ¹³⁸ *Id.* at 4.
- ¹³⁹ *Id.*
- ¹⁴⁰ TEAN, *supra* 136, at 7.
- ¹⁴¹ See, e.g., *Wangari Maathai*, *supra* note 116.
- ¹⁴² *Albert Ruturi & Another v. Minister for Finance and Others*, (2002) 1 K.L.R. 61 (Kenya).
- ¹⁴³ *El Busaidy v. Commissioner of Lands & 2 Others* (2006) 1 K.L.R. 479-501 (Kenya).
- ¹⁴⁴ *Id.* at 498-9 (citing *Ruturi*, *supra* note 142).
- ¹⁴⁵ B.D. Ogolla & J. Mugabe, *Land Tenure and Natural Resource Management*, in IN LAND WE TRUST: ENVIRONMENT, PRIVATE PROPERTY AND CONSTITUTIONAL CHANGE 107 (Calestous Juma & J.B. Ojwang, eds., 1996).
- ¹⁴⁶ See generally *Id.*
- ¹⁴⁷ *Park View Shopping Arcade Limited v. Charles M. Kangethe and 2 Others*, (2006) 1 K.L.R. 591 (Kenya).
- ¹⁴⁸ *Id.* at 593.
- ¹⁴⁹ *Id.*
- ¹⁵⁰ *Id.* at 594-595.
- ¹⁵¹ *Id.* at 597-598.
- ¹⁵² *Id.*
- ¹⁵³ *Id.* at 607.
- ¹⁵⁴ *Id.* at 610.
- ¹⁵⁵ *Sheer Property Limited v. National Environmental Management Authority*, High Court, Misc. Civil cause No. 232 of 1998 (Uganda).
- ¹⁵⁶ *Id.*
- ¹⁵⁷ *Id.*
- ¹⁵⁸ DAVID HUNTER ET AL., INTERNATIONAL ENVIRONMENTAL LAW AND POLICY 366-67 (Foundation Press 1998).
- ¹⁵⁹ Physical Planning Act, (1996) Cap. 286 (Kenya) (accompanying regulation enacted as the Physical Planning Regulations in Nov. 1998).
- ¹⁶⁰ *Id.* § 36.
- ¹⁶¹ Sara Kisare, *Strategic Planning Experiences in Kenya*, Paper for Regional Workshop on Local Government Strategic Planning/Management in Eastern and Southern Africa, 7, 17, available at <http://www.mdpafrica.org.zw/Publications/Strategic%20Planning%20Experiences%20in%20Kenya.pdf>; see also Patricia Kameri-Mbote, *Strategic Planning and Implementation in Environmental Decision-Making as they Relate to Environmental Impact Assessment in Kenya*, IELRC Working Paper 1, 18-22 (2000), available at <http://www.ielrc.org/content/w0003.pdf>.
- ¹⁶² *Momanyi v. Bosire*, (1996) H.C.K. (unreported) (Kenya) (Decision of Hayanga, J.).
- ¹⁶³ *Id.*
- ¹⁶⁴ *Id.*
- ¹⁶⁵ *National Association of Professional Environmentalists (NAPE) v. Nile Power Limited*, High Court, Misc. Cause No. 268 of 1999 (unreported) (Uganda), available at <http://www.greenwatch.or.ug/pdf/judgements/NAPE%20Versus%20AES%20Nile%20Power.pdf> (last visited Oct. 30, 2009).
- ¹⁶⁶ *Id.*
- ¹⁶⁷ *Id.* at 9.
- ¹⁶⁸ See 2009 Transparency International East African Bribery Index, available at http://www.transparency.org/news_room/latest_news/press_releases_nc/2009/2009_07_02_kenya_index.
- ¹⁶⁹ DURWOOD ZAELKE ET AL., MAKING THE LAW WORK, (VOLUMES I AND II) - ENVIRONMENTAL COMPLIANCE & SUSTAINABLE DEVELOPMENT (Cameron May Ltd. 2005).
- ¹⁷⁰ *Id.*, Preface at 13, available at <http://www.inece.org/mlw/Preface.pdf> (last visited Oct. 30, 2009).
- ¹⁷¹ J.B. Ojwang, *The Role of the Judiciary in Promoting Environmental Compliance and Sustainable Development*, 1 KENYAN LAW REVIEW 19, available at http://www.kenyalaw.org/Downloads_Other/ojwang_jud_env.pdf.
- ¹⁷² Symposium, *supra* note 6.
- ¹⁷³ These include organizations such as Greenwatch Uganda and the Institute for Law and Environmental Governance in Kenya, which in partnership with the University of Nairobi and NEMA has organized judicial colloquia for all the judges of the High Court and Court of Appeal; see generally UNEP, available at <http://www.unep.org/Padelia/structure/structure.htm> (last visited on Oct. 30, 2009) (showing that PADELIA conducts projects in Uganda, Kenya, and Tanzania); see also UNEP Regional Office for Africa, <http://www.unep.org/roa/> (last visited Nov. 3, 2009) (showing that UNEP holds office in Kenya).
- ¹⁷⁴ See *Kabudi*, *supra* note 52, at 522-3.
- ¹⁷⁵ See e.g. Judicial Studies Institute of Uganda, <http://www.judicature.go.ug/Uganda/index.html> (last visited Nov. 4, 2009).
- ¹⁷⁶ The Council was created under a statute, National Council for Law Reporting Act, Act No. 11 of 1994 (Kenya). It has undertaken a very ambitious law reporting project including an online process. See National Council for Law Reporting, Kenyan Law Reports, http://www.kenyalaw.org/kenyalaw/klr_home/ (last visited Nov. 4, 2009).
- ¹⁷⁷ NATIONAL COUNCIL FOR LAW REPORTING, KENYA LAW REPORTS (ENVIRONMENT & LAND) (2006), available at www.kenyalaw.org.