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TOWARDS GREATER ACCESS TO JUSTICE IN ENVIRONMENTAL DISPUTES IN KENYA: OPPORTUNITIES FOR INTERVENTION

Dr Patricia Kameri-Mbote

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I. Introduction

Concern for the environment has increased over the years since the United Nations Conference on the Human Environment in 1972. Kenya has signed, acceded to or ratified many international instruments providing for access to justice for its citizenry generally and in environmental decision-making specifically. Access to justice in environmental decision-making is secured through the incorporation of environmental procedural rights in emerging international and regional instruments. These provisions are then deposited in national legislations to give them effect at that level. The issue of the status of international instruments that a state has signed and ratified but not domesticated remains but jurists point to the Vienna Convention's Article 26 which provides that "every treaty in force is binding upon the parties to it and must be performed by them in good faith."¹

Law performs different functions in a given context. First, the law has the object of preserving order and doing justice. Second, the principles of modern law are broadly classified as just application, equality, uniformity, authority and certainty. Third, in seeking redress three elements of the law are critical, legal rights, interest and persons. It follows therefore that promulgation of environmental rights is by itself insufficient to guarantee the enjoyment of the rights. The efficacy of law is a function of diverse factors such as knowledge of the law, capacity to 'go to law', availability of fora to adjudicate disputes in the implementation of the law when these arise and access to such for a by aggrieved parties. It is thus critical in promoting greater access to justice in environmental matters to take these issues into consideration as the effect of even the best legal instruments can have differing effects on diverse persons in a given community and context. With substantive entitlements co-sily deposited in laws with no innate capacity to get to the people they are supposed to benefit, procedural rights assume prominence as they are the vehicle through which substantive rights are articulated. Indeed Anderson and Boyle argue that effective environmental rights should be principally procedural in character.²

In the quest for a template for procedural rights in the environmental realm, human rights have proved to be particularly useful for a number of reasons. First, environmental legislation and regulatory regimes often vaguely and inadequately provide for these rights. Human rights, therefore, provide a broad conceptual framework within which environmental concerns may be contextualised. Second, human rights' claims, having been articulated for a much longer time than environmental rights as such, have a stronger and surpass political whim. Third, a human rights approach is often highly emotive and therefore appealing to authorities. Fourth, human rights have a universal character having territorial, international and global links and thus include the right (and the obligation) of international enforcement. Fifth, human rights are pragmatic and dynamic and hence can be applicable to different issues in changing contexts.³

The most succinct statement on procedural rights is the Rio Declaration on Environment and Development which at Principle 10 explicitly states that

*Environmental issues are best handled with the participation of all concerned citizens, at the relevant level. At the national level, each individual shall have appropriate access to information concerning the environment that is held by public authorities, including information on hazardous materials and activities in their communities, and the opportunity to participate in decision-making processes. States shall facilitate and encourage public awareness and participation by making information widely available. Effective access to judicial and administrative proceedings, including redress and remedy, shall be provided.*⁴

The states parties to the declaration also commit themselves to grant the right of access to information held by public authorities to each individual citizen, the opportunity to participate in decision-making processes, and effective access to judicial and administrative proceedings, including redress and remedy. It thus lays out the basic tenets of procedural rights namely, public participation, access to information, and access to justice. Increasingly, these rights have been adopted in emerging international treaties on the environment such as the Convention on Biological Diversity⁵ and its Cartagena Protocol⁶ and also in domestic legislation. Article 23 of the Cartagena Protocol on Biosafety affirms that the "the Parties shall, in accordance with their respective laws and regulations, consult the public in the decision making process regarding living modified organisms and shall make the results of such decisions available to the public, while respecting confidential information in accordance with article 21."

The Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters,⁷ known as the Aarhus Convention, a European regional convention, comprises the most exhaustive international instrument on environmental rights. In addition to the general right to a clean environment, the Aarhus Convention spells out three substantive sets of citizens' rights: to access environmental information, to participate in environmental policymaking, and to environmental justice. Given the wide acceptance of these rights globally and the fact that they are part of the national laws, it is likely that countries such as Kenya may consider acceding to the convention. In this regard, Uganda has been in communication with Aarhus Secretariat on its intention to accede to the Convention.

Environmental litigation in Kenya, as in most other countries, is basically in the form of civil actions.⁸ Perhaps this is due to the fact that it is largely private parties that resort to judicial intervention in environmental issues in Kenya.⁹ Currently, the context for promotion of access to justice and participation in the resolution of environmental disputes in Kenya is intrinsically intertwined with the human rights implementation context.

II. Legal Provisions on Environmental Rights

Kenya's environmental legislation is scattered in a multiplicity of over 77 resource/sector specific laws.¹⁰ The assumption in the statutes is that disputes that arise will be handled through the formal court process. It is however noteworthy that there has not been much environmental litigation in Kenya. It is anticipated that the trend will change with the Environment Management and Coordination Act, 1999 being operationalised.

A. Constitution

Kenya's constitution does not contain explicit environmental provisions.¹¹ It does, however, place importance on the right to life, and experts argue that the right to life encompasses the right to a clean and healthy environment.¹² It protects individual fundamental rights and freedoms which are relevant in accessing justice in environmental matters. These include freedoms 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 associate with other persons, and includes the right to form or belong to associations. The constitution also includes the right of access to the High Court for redress regarding enforcement of fundamental individual rights and freedoms.

The legal provision for rights does not guarantee enjoyment of those rights if one has no access to justice. It is therefore instructive to note that the constitutions also provide for the right to sue. The issue as to who has this right is one that is widely debated especially in environmental cases. It has been ruled that the Constitutional 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".¹³ 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 in the case of *Shah Vershi Devshi & Co. Ltd. v. The Transport Licensing Board*¹⁴ The High Court of Kenya held in this celebrated case that the constitutional references to "person" covered both natural and legal persons. The applicant company had been refused renewal of licence under the policy of Africanisation. 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.¹⁵

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 persons; or to impose reasonable conditions relating to, for example, registration of trade unions and martial law.

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. The Kenyan 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 had not played an active role in informing the public about pertinent issues relating to public participation and decision making in the environmental and natural resources fields.

A cross-section of groups feels that constitutional weaknesses are the primary reason behind the government's failure to make environmental information available.¹⁶ This perception is partially based on the lack of a constitutional mandate for the government to collect and disseminate relevant information. Furthermore, while some constitutional provisions lay the basis for access to information, they also contain exceptions that negate the right to access to information. 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 prosecution of claims.

The draft Constitution of Kenya, 2004

The constitutional review currently underway in Kenya is expected to define a more explicit basis for public participation in environmental decision-making. The draft constitution includes explicit provisions for public participation in environmental decision making and access to information. For instance, the chapter on national values, principles and goals includes principles on promotion of public participation in public affairs, sharing and devolution of power and access of the people to independent, impartial, competent, timely and affordable institutions of justice.¹⁷ The Bill of Rights further reinforces these rights and provides that "every citizen has the right of access to information held by the state"¹⁸ and requires Parliament to enact legislation providing for access to information.¹⁹ It also explicitly provides for the right to a healthy environment and free information about the environment²⁰ and access to courts.²¹ The provision on 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.²²

B. The Environmental Management and Coordination Act, 1999

1. Normative Provisions

The Environment Management and Coordination Act, 1999 (EMCA) creates an overall and all-embracing agency for the management of the environment as opposed to hitherto existing legislation that set up sectoral agencies often leading to regulatory competition. 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 this administrative structures, there is concern to ensure that justice is accessible.

Right to a healthy environment

Significantly, EMCA provides for the right of every person to a clean and healthy environment. It also makes it the obligation of every person to protect and manage the environment. 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 such as public participation in the development policies, plans and processes for the management of the environment.

Locus standi

One great innovation of the 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. Effectively, this provision grants to every person the right to protect the environment.

The provision in EMCA for the publication of annual state of the environment reports²³ which are expected to inform the budget has implications for access to justice. It is critical that the right and requirement to protect the environment be enhanced through provision of information and requisite financial resources. These resources empower the citizenry to carry out the duty placed on them at article 3 of the Act. The timely publication and wide publicization and availability of the state of the environment report would go a long way in enhancing access to justice. It is a matter of concern that there were limited copies during the one time that the report was published and it was in English making it inaccessible to the majority of Kenyans.

Environment Impact Assessment (EIA)

Another mechanism that fosters access to justice is environment impact assessment (EIA). The Act 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.²⁴

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 the Authority that the proposal will result in or is likely to have significant impacts on the environment, then an EIA must be undertaken.²⁵ No other licensing authority can lawfully issue any licence in respect of a project for which an EIA is required under the Environment Management and Coordination Act. Only a licence issued by the Director General of NEMA would be valid.²⁶ The EIA is undertaken by the project proponent at her/his own expense.

EMCA identifies the areas in which EIA must be carried out.²⁷ The categories of projects under the Second Schedule that must undergo EIA are broad enough to accommodate any projects which may result in significant impacts. The Minister responsible for matters relating to the environment has powers to amend the Schedule after consultations with the key actors in the environmental field.

The Act also requires that the public participate in the process.²⁸ The participation of the public is also required in the review of the EIA.²⁹

2. Institutions under EMCA

The National Environment Council

The National Environment Council (NEC) is a top policy making body under the Act charged with the responsibility of formulating policy on matters relating to environment management in Kenya. Those who sit on the Council include two representatives of public universities in Kenya, two representatives of specialised research

institutions in Kenya, three representatives of the business community and two representatives of NGOs active in the environmental field. The Council regulates its own procedure and may invite any person to attend and participate in its deliberations but the invited person is not entitled to vote.

The National Environment Management Authority

The National Environment Management Authority (NEMA) is the principal Government institution responsible for the implementation of all policies relating to the environment. The Authority is the one responsible for dealing with EIA. The Board of the Authority includes at least seven members who are not public servants. It is noteworthy that NEMA has over the last year developed its human resource capacity to enable it to discharge its duties in the environmental realm.

Provincial and District Environment Committees

The following civil society and business sector representatives sit on the Provincial Environment Committees: a representative of each local authority within the Province; two representatives of farmers or pastoralists, two representatives of NGOs involved in environmental management programmes in the Province, 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, four representatives of farmers, women, youth and pastoralists; two representatives of NGOs involved in environmental management programmes in the district; two representatives of community-based organisations involved in environmental management programmes in the district; and two representatives of the business community in the district. The function of the Provincial and District Environment Committees is the proper management of the environment within the provincial and district.

The Public Complaints Committee

The Public Complaints Committee is set up under section 31 of the Act. It is concerned with investigation of complaints relating to environmental damage and degradation generally and it has powers to investigate NEMA. It can initiate investigations on its own without waiting for a complaint to be made. The PCC's findings are reported to the NEC. It is noteworthy that the NEC is not specifically requested to do anything with regard to the PCC's report and often will note and adopt its report with no follow up action. Its members include representatives of the Law Society of Kenya (LSK), the NGO sector and the business community. Some of the problems encountered by the PCC are non-appearance in response to summons, hostility between parties during hearings, hostility towards PCC investigators, lack of understanding of EMCA and abdication of duty by lead agencies. Given that the duty of the PCC is only to file its report with the NEC, it lacks mandate to see the recommendations it makes carried through.

The National Environment Tribunal

The National Environment Management Tribunal (NET) is established under section 125 of EMCA. This is in addition to the recognition of the role of formal courts in environmental dispute settlement. The tribunal is set up to hear appeals from administrative decisions taken by organs responsible for enforcement of environmental standards. The appeals may be launched by the proponent of a project against the rejection of an environment impact assessment and against a denial of a licence. An appeal may also be launched by a local community against the grant of a licence by an administrative body such as NEMA to a project developer. The limited mandate of the NET has hampered its effectiveness because its work is predicated on work that NEMA is doing. If NEMA and other administrative organs are inactive as has been the case until recently, NET has no work to do. Access to justice can be enhanced by giving the tribunal 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 is supposed to be independent but it continues to depend on the Ministry of Environment to supply it with the requisite personnel. It sits in Nairobi though 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 of orders of the NET. It is necessary that NET gets power to enforce its orders rather than being required to file these with formal courts.

National Environment Action Plan Committee

The EMCA also establishes the National Environment Action Plan (NEAP) Committee. This cross-sectoral committee prepares the national environment action plan. It consists of, among others, representatives of the public universities and research institutions of Kenya, the NGO sector and the business community.

III. Judicial and Non-judicial Forms of Dispute Resolution

A. Formal

1. Judicial

Courts of Law

The judiciary is a critical component of government, forming one of the arms of government and being integral to the doctrine of separation of powers between the ruling arm (executive) and the law-making arm (legislature). The court structure in Kenya comprises of the Court of Appeal at the apex being the highest court of appellate jurisdiction in Kenya. Appeals lie to the Court of Appeal from the high Court.

Judicial pronouncements on environmental decision making have not helped remedy the absence of explicit provisions in the constitution. For instance, Kenyan courts have not established a clear jurisprudence on matters of locus standi (right to sue). In the public interest case *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.³⁰ In contrast, previously, in *Wangari Maathai v. Kenya Times Media Trust*, an environmental case brought before the court as a public interest matter, locus standi was denied.³¹ The plaintiff was a resident of Nairobi and the coordinator of the Greenbelt Movement, a nongovernmental organization (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.*³²

Furthermore, in the *Law Society of Kenya v. Commissioner of Lands and others*,³³ on December 19, 2001, Justice N. R. O. Ombija's ruling adopted a highly restrictive construction. In a matter involving public land that the Law Society had argued to have been improperly allocated, the judge opined that matters of public interest are the domain of the attorney general. The judge explained:

*If the interest issue is a public one, then the litigant must show that the matter complained of has injured him over and above injury, loss or prejudice suffered by the rest of the public in order to have a right to appear in court and to be heard on the matter. Otherwise, public interest [issues] are litigated upon by the Attorney-General or such other body as the law sets out.*³⁴

More recently, opportunities have presented themselves for the judiciary to make pronouncements on environmental impact assessments as instruments for ensuring access to justice in cases involving titanium mining in Kwale, forestry excisions and the Sondu Miriu power project. In the titanium case, a Canadian company Tiomin sought to mine titanium in Kwale district. Environmental lobby groups disputed the legitimacy of the EA on the basis that no environmental impact assessment report had been provided as required by section 3 of

the EMCA.³⁵ They were supported by the Kwale District Mining Forum. As a result, the lobby group commissioned an independent EIA on the project, and local consultants from Kenyatta University³⁶ prepared another EIA.³⁷ The High Court granted an injunction to the Nguluku Squatters Welfare Group restraining the Company from carrying out acts of mining in any part of the land in Kwale District and secondly a declaratory order that the mining being carried in Kwale was illegal and thirdly general damages. (representing the local community) Among the principles that the court should look at in exercising jurisdiction under this section is the principle of public participation in the development of policies, plans, and other processes for the management of the environment.³⁸ In granting the injunction, the judge noted that although the defendants had obtained the required licenses under the chapter 306 of the Mining Act, they still had to comply with the provisions of section 58 of the EMCA. Section 58 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 the National Environment Management Authority. The case was later resolved extra-judicially with allegations that some of the parties had been bought off. While NEMA had a basis for pursuing the issue, it is important to note that the Minister for Environment proceeded to deal with the issue directly. This denied the regulatory body and the courts an opportunity to determine a very critical issue relating to EIA as a tool for facilitating the citizenry access to justice in development projects.

In the case of the forest excisions, a judicial review application was lodged with the High Court seeking various orders among them writs of certiorari to quash gazette notices seeking to degazette forests, prohibition to stop the government from dealing with the forest areas in a manner detrimental to Kenya's environmental health.³⁹ The court granted the orders stopping the government from proceeding with the exercise until the matter was fully heard and determined. The procedure for getting this matter to be heard was very cumbersome because it was against the government. Given that many environmental resources are in the care of the state and its organs, the issue of procedure can be a bar to accessing justice in environmental matters.

Quasi-Judicial Tribunals

NATIONAL ENVIRONMENT TRIBUNAL

The National Environment Tribunal established under section 125 of EMCA seeks to offer expeditious and cheaper justice than the ordinary courts of law. By their nature, tribunals are designed to be more accessible, informal and free from legal technicalities. As noted above, the NET lacks original jurisdiction and must await appeals from decisions of administrative organs under EMCA. This denies people a chance to go directly to the tribunal when they have environmental issues to be resolved. The result is that the Tribunal has not had much work whereas there may be many people that might have gone to it to lodge issues owing to its cheaper, simpler and more user friendly procedure. The design of the Tribunal seeks to make it easy to have issues heard. This opportunity is lost by predicating its work on that of other organs. In a personal interview with a member of the NET, the author learnt that no matter has come before the tribunal yet and that since 2000, NET has developed its rules of procedure and been going around the districts carrying out public awareness workshops. The lack of autonomy of the NET from the Ministry and inadequate financial resources also hamper the effectiveness of NET as it can only carry out so many awareness-raising workshops on the budget it has.

NET is based in Nairobi but can sit anywhere in Kenya as pointed out above. It is important to consider devolution of the Tribunal's roles to district and provincial levels. This can, however only make a difference if NET is given wider latitude to deal with environmental matters.

PUBLIC COMPLAINTS COMMITTEE

The PCC, established under Article 31 of EMCA was formally constituted in August 2001 but only started serious operations in January 2003. the membership of the PCC comprises of a chairman appointed by the Minister who must be a person duly qualified to be appointed as a judge of the High Court of Kenya, a representative of the Attorney-General, a representative of the Law Society of Kenya, a representative of non-governmental organisations appointed by the NGO Council who acts as the secretary to the committee, a representative of the business community appointed by the Minister and two members appointed by the Minister for their active role in environmental management. Their functions are to investigate any allegations or complaints against any person regarding the environment in Kenya; any allegations or complaints against NEMA regarding the

environment in Kenya; and to investigate on its own motion any suspected case of environmental degradation in Kenya.

It is expected to make a report of its findings to the NEC as well as to prepare periodic reports of its activities. Such reports form part of the annual report on the state of the environment. It is important to note that the role of the PCC in enabling the citizenry to access justice is immense given its standing vis á vis NEMA. However, its effectiveness is doubtful since NEC is not required to act on PCC's reports. Consequently, there may be no follow up after the reports are presented. The PCC has so far investigated cases of air pollution caused by uncontrolled burning of garbage, emission of noxious gases by factories and industries, emission of dust through constructions and quarrying activities, fumes from un-roadworthy vehicles; water emission caused by discharge of untreated sewage into water masses, discharge of industrial waste into water resources; noise pollution caused by earth moving equipment during construction and quarrying, loud music played in discos, bars and places of worship; and drying up of lakes due to diversion of rivers.

From the examples given above, PCC has the opportunity to enhance people's access to justice in environmental matters. The limitation on the use of their reports denies the country an opportunity to deal with environmental issues that are very rampant and that impact significantly on people's enjoyment of the right to a health environment.

2. *Non-Judicial*

Over and above judicial and quasi-judicial forums enhancing access to justice, there exist community level organizations that are used at local levels to resolve disputes. Given the nature of this study, it was not possible to delve in-depth into these structures for a number of reasons. First, these differ from place to place and context to context. The nature of community groups in a pastoral setting are different from those in an agricultural setting and these are also linked to the land tenure system and cohesion among community members. Second, a detailed study of traditional governance institutions that are used in environmental management activities is required to map the kinds of institutions existing in Kenya. Third, these institutions are dynamic and acquire new roles as the need arises making a generalisation both undesirable as well as too simplistic. Finally, a week's job of a consultant is inadequate to map out the institutions in any depth. There are however, some institutions that one finds in most parts of and 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 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 that access to justice is realised.

Elders

In almost all communities, 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 entitlements of community members to water. District umbrella water users' associations include these elders as they know the status of the water resources and are revered among their community members. Among most of the communities in that part of Kenya, referral of a matter to the formal dispute resolution mechanisms such as courts is analogous to taking you to the 'enemy'. Only persons that refuse to accept the elders' verdict will be turned over to the chief and to the courts.

The operations of elders' courts are *ad hoc* and typically involve only older men excluding women and youth. The procedure used may lead to trampling on people's human rights yet people accept these and can explain and rationalise it. Among the Rendille 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 is among others strategising for the community and resolving disputes.

Chief

The institution of the chief plays an integral part in the running of people's affairs at community level. Having started as a formalisation of the traditional chief, the most powerful person in a local setting is the chief. His duties are multi-faceted including settlement of disputes. These disputes include environmental ones.

Peace Committees

These 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.

Provincial, District and Local Environment Committees

These committees are critical to access to justice as they act as the link between the formal and informal structures. Operating at lower levels, they are closer to the communities and can easily walk into both the formal and informal structures. They have the potential to promote access to justice by taking the best from both sides.

IV. Barriers to Access to Justice

The processes of accessing environmental justice are yet to be articulated even though the procedural rights have been promulgated. Among the barriers to access to justice is the absence of an Access to Information Act. There is also lack of awareness of environmental rights provided for under EMCA and other laws both on the part of the citizens and legal practitioners. Indeed some lawyers do not know of the existence of the structures under EMCA and have at times appealed against NEMA in the high court instead of going to the NET while Judges have at times entertained appeals from decisions of NEMA before these have been taken to the NET. This raises the question as to whether judges and lawyers are adequately equipped to handle environmental matters. Most lawyers, magistrates and judges went to Law School before environmental law was taught as a discipline. Moreover, precedents on environmental law from the courts have been very reductionist in their interpretations of concepts such as locus standi. Lack of awareness of EMCA may lead to courts' reliance on such old and bad law and thus stifle developments in the law. In more concrete terms, access to court is limited owing to the complexity of court processes and the inaccessibility thereto without legal representation which is expensive. The geographical location of courts and transport and related costs are indeed structural barriers to access to justice.

Further compounding the situation are the multiple sectoral laws that are yet to be synchronised with EMCA. The sectoral laws provide for access to formal courts as the dispute resolution mechanism. The ongoing constitutional review process which proposes devolved structures of government will need to be considered as one situates justice fora for environmental disputes.

The establishment of both the PCC and NET under EMCA was geared to making justice more accessible in environmental matters. However both institutions' effectiveness has been hampered by a variety of factors. Firstly, NET is still anchored to a Ministry and lacks the requisite independence even to hire its own staff. It has to rely on staff from the Ministry of Environment who may not be skilled to discharge NET functions. Second and related to this is the limitation of NET's jurisdiction to appeals against NEMA decisions. If NEMA does not make any decisions or if no person appeals against such decisions, NET has no work.

Another major barrier to access to justice is the lack of awareness of and/or recognition of traditional governance systems that can foster sustainable environmental management. These institutions are very close to the people and need to be linked to formal institutions For instance, among the pastoral communities of North-Eastern Kenyan, environmental security closely linked with traditional governance structures owing to the fragility of the ecosystem, water scarcity and historical conflicts over resources among the communities. Any

interventions to enhance sustainable environmental management and access to justice must of essence include these structures if they are to be effective. Non-inclusion of these structures creates parallel structures with token and contemptuous observance of national systems while allegiance typically is to traditional norms and institutions

The implications of not considering traditional governance institutions is that the deficiencies in these systems remain and can become further barriers to access. These barriers include ad hoc procedures, lack of awareness of and reverence for national and regional environmental management laws, no support information on status of resources such as water and discrimination on the basis of gender and age. The recognition of these institutions would entail investment in institutional supply to deal with the barriers while establishing means of articulation between them and other access to justice fora.

V. Opportunities for Promoting Access to Environmental Justice in Kenya

The promotion of access to justice needs to take a multi-faceted approach so as to deal with supply and demand issues. The barriers identified above include both structural and mechanistic barriers. The latter can be dealt with in the short term while the former require a longer time-frame. The first action that needs to be taken is raising awareness on EMCA and the institutions established under it. EMCA was promulgated in 2000. While a lot of work has been done to put in place the institutional frameworks for operationalising it, there is still not much awareness of its provisions. This might explain the dearth of environmental cases being dealt with in the courts. The situation is aggravated by the fact that environmental law has only been taught as part of the law curriculum in Kenyan Universities from the late 1990s and even then as an optional course.

To fully realise the objectives of EMCA, it is critical that its users be well versed with its provisions and put it to use. Access to justice provisions in EMCA will remain inoperative if there is no critical mass of judicial functionaries utilising the provisions. Use of the provisions can be hampered by lack of understanding of the provisions.

Raising the awareness of judges, magistrates and lawyers on the provisions of EMCA and the institutional framework for its operationalisation is therefore critical. Some work has been done by UNEP and it would be good to add value to that work rather than replicate what has been done. DFID could concentrate on training magistrates and lawyers since UNEP is training judges. In the longer term, awareness-raising for the public is critical to access to justice since law does not go to people.

A related action is the training of staff at NEMA and related institutions to deal with issues that are raised under EMCA. The requirements in EMCA presuppose a cadre of trained staff to implement and enforce the provisions. Training of staff at NEMA to equip them with skills to handle various issues will promote access to justice. NEMA has been bringing on board new staff members. Short-term training courses based on a needs assessment will facilitate access to justice. This can, for instance focus on EIA. The same kind of training would be beneficial to the members of the National Environment Tribunal and the Public Complaints Committee.

Thirdly, environmental law reporting should be established within the National Council for Law Reporting. Indeed it would be useful to get at one place environmental decisions reached by the courts and also before the National Environment Tribunal and the matters investigated by the Public Complaints Committee. This can be done through specialised reports of the cases within the realm of the National Council for Law Reporting.

Fourthly, specialised environmental courts manned with qualified personnel could be established to deal with environmental disputes. To ensure access to justice, it is necessary that the courts have personnel that can competently handle environmental matters. Specialised environmental courts can go a long way to help achieve

this objective. Given the human resource problems currently plaguing the judiciary, a stop-gap measure would be to ensure that there are magistrates who have gone through the training recommended at number 1 above at each district level. The approach taken with land tribunals can be adopted.

Fifthly, public interest litigation should be encouraged and promoted to deal with demand side of access to justice. Public interest litigation is an effective medium for promoting access to justice since most environmental matters take on a public character. It is also indispensable in a situation where the majority of the citizenry are illiterate and in most cases unaware of their rights. Moreover, most people live in abject poverty and do not have the resources to engage the services of lawyers. The High Court of Tanzania in the case of *Christopher Mtikila v Attorney General*⁴⁰ holding that public interest litigation is allowed by the Tanzanian Constitution stated

Other factors should be listed but perhaps the most painful of all is that over the years since independence Tanzanians have developed a culture of apathy and silence. This is large measure a product of institutionalised mono-party politics, which in impressive dimension, like detention without trial, suppressed initiative and guts. The people found contentment in being receivers without being seekers.

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

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

In the medium term, interventions such as commissioning studies on traditional governance institutions impacting on access to justice as a background on ways of incorporating these institutions into the dispute settlement fora is an essential step towards access to justice. Within most communities, there are institutions that the communities use to manage their environmental resources and for adjudication of disputes. Some of these traditional governance institutions impact significantly on access to environmental justice. Studies should be carried out in select representative areas to map out the nature and operations of these institutions with a view to identifying how they can be synergised with institutions established under EMCA. Following on such studies, there should be investment in institutional supply and capacity building of local communities to enable them to interact with and engage national and regional structures such as water boards, NEMA, KWS and Forest Department. To ensure that the local community institutions foster access to justice, training and capacity building are critical. Some of the areas where interventions are needed are:

- Development of clear operational procedures
- Mechanisms for inclusion of all members of community in decision-making to ensure inclusiveness
- Record keeping for justice delivery systems to ensure development of guiding rules for making decisions on specific matters and to link with appeals to formal courts
- Training on diverse issues relating to EMCA and its relationship with local structures

In the long-term, it is necessary to review EMCA and take stock of its operations and efficacy in seven to ten years. Some of the issues that could be considered are:

- Jurisdiction for NET
- PCC reports
- Devolve PCC and Tribunal gradually to align to devolved structures of government

Related to this is the need to facilitate the passing of and implementation of draft constitution. The provisions of the draft constitution have far reaching implications for access to justice in terms of both substantive provisions as well as the mode of governance. The constitutional provisions on environmental rights and access to justice can promote access to justice. Furthermore, the proposed devolution structures will necessitate locating the loci of institutions promoting access to justice in environmental matters at the appropriate levels. These need to be captured in both the framework law as well as in the sectoral laws.

VI. Conclusion

Access to justice in environmental matters is critical to the realisation of environmental rights. Promoting such access requires a multi-pronged approach and the involvement of a diverse group of stakeholders. It also requires taking on board organisational forms and institutional norms and values outside the formal justice sector. There are interventions that can be taken in the short, medium and long term as illustrated above. These would foster access to justice in environmental disputes and ensure that the substantive rights provided for are actually realised.

Endnotes

- ¹ Vienna Convention on the Law of Treaties, Vienna 1969
- ² See, e.g. Boyle, A. & Anderson, M., (eds.) (1996) *Human Rights Approaches to Environmental Protection*, OUP, New York.
- ³ See, e.g. Boyle, A. & Anderson, M., (eds.) (1996) *Human Rights Approaches to Environmental Protection*, OUP, New York.
- ⁴ United Nations Conference on Environment and Development, *Rio Declaration on Environment and Development*, Rio de Janeiro, Brazil, 1992.
- ⁵ United Nations Conference on Environment and Development: Convention on Biological Diversity - Done at Rio de Janeiro, June 5, 1992, *reprinted in* 31 I.L.M. 818 (1992) [hereinafter the Biodiversity Convention].
- ⁶ Cartagena Protocol on Biosafety to the Convention on Biological Diversity, 2000. Montreal.
- ⁷ The Convention was adopted at the Fourth Ministerial Conference of the Committee on Environmental Policy of the Economic Commission for Europe at Aarhus, Denmark between 23-25 June 1998.
- ⁸ The Environmental Management and Coordination Act, 1999 defines environmental offences in line with emerging trends in modern environmental law. See Part XIII of the Act.
- ⁹ It is noteworthy that criminal action is not a preserve of public authorities although in practice the issue of *locus standi* often impedes private prosecutions.
- ¹⁰ Ojwang, J. B. (1993) *Environmental Law and the Constitutional Order* ACTS Press, Nairobi.
- ¹¹ Act No. 5 of 1969 (last amended in 1992 and rev. in 1998).
- ¹² *Environmental Management in Kenya: A Guide to the Environmental Management and Coordination Act*, 2 (G. M. Wamukoya and F. D. P. Situma eds, Centre for Research and Education Environmental Law 2000).
- ¹³ Section 123.
- ¹⁴ 1971 EALR 289.
- ¹⁵ 1971 EALR 289, p. 298.
- ¹⁶ D. Ringia et al., *Legal Hurdles to Accessing Environmental Information* 6(2) *Innovation* (Oct. 16-18, 1999).
- ¹⁷ The Draft Constitution of Kenya adopted by the National Constitutional Conference on 15th March 2004.
- ¹⁸ *Ibid.* Art. 51(1)
- ¹⁹ *Ibid* Art. 51 (4)
- ²⁰ *Ibid* Art. 67(a) & (c)
- ²¹ *Ibid* Article 72
- ²² 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”.
- ²³ Section 9 of EMCA
- ²⁴ Section 58(1).
- ²⁵ Section 58(2).
- ²⁶ See section 148.
- ²⁷ These are specified in the Second Schedule to the Act.

- ²⁸ Section 52 provides a basis for public participation.
- ²⁹ Section 59 of EMCA.
- ³⁰ High Court of Kenya, Civ. Case No. 6153 (1992).
- ³¹ High Court of Kenya, Civ. Case No. 5403 (1989).
- ³² *Id.* at 24.
- ³³ High Court of Kenya, Civ. Case No. 464 (2000).
- ³⁴ *Id.* at 12.
- ³⁵ *Rodgers Muema Nzioka et al. v. Tiomin Kenya Ltd.* (High Court of Kenya at Mombasa, Civ. Case No. 97, 2001).
- ³⁶ The experts were from the Faculty of Environmental Studies and led by Dr. Wellington Wamicha.
- ³⁷ A. Ng'ang'a, *Titanium Mining Could Hit Snag*, People Daily 11 (June 26, 2000).
- ³⁸ EMCA § 3 (5).
- ³⁹ *Republic V. Minister for Environment and Natural Resources and other ex parte Kenya Alliance of residents Associations and Others* High Court of Kenya Miscellaneous Civil Application Number 421 of 2002 .
- ⁴⁰ (1993) Civil Case No.5 of 1995 High court of Tanzania at Dodoma also reported in (1995}TLR

