

# LAND, THE ENVIRONMENT AND THE COURTS IN KENYA



**BACKGROUND PAPER**

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## TABLE OF CONTENTS

<b>I. INTRODUCTION.....</b>	<b>3</b>
<b>II. LAND TENURE, ENVIRONMENTAL CONSERVATION AND LAND USE REGULATION .....</b>	<b>3</b>
A. Land Tenure and Resource Management.....	4
i. Public Land Tenure.....	5
ii. Individual Tenure.....	7
iii. Community/Customary Tenure .....	8
B. Regulation of Land Use .....	10
i. Eminent Domain .....	10
ii. The Police Power .....	11
<b>III. ENVIRONMENTAL LAW AND LAND USE REGULATION IN KENYA....</b>	<b>12</b>
A. Fundamental Principles of Environmental Law .....	12
B. Law and the Environment.....	15
<b>IV. THE COURTS AND THE ENVIRONMENT .....</b>	<b>23</b>
<b>V. CONCLUSION .....</b>	<b>26</b>

## I. INTRODUCTION

Land is an important aspect of the life of any society. It is essential for food production and security, supports important biological resources and processes, sustains the livelihoods of the majority of Kenyans, and constitutes an important cultural heritage for many communities. Land should therefore be managed in a way that recognizes its many attributes.

In particular, the law should establish a suitable framework for the sustainable management of land and land-based resources if they are to continue performing these vital functions. Further, the courts should ensure that land use, whether by government or individuals or groups thereof, adheres to the tenets of sound resource management.

This is an examination of the interface between land and environmental conservation in Kenya. Part II examines the different regimes of land tenure and their implications for environmental conservation. It also reviews the powers of the state to regulate land use. Part III reviews the legislative framework for environmental conservation in Kenya. Part IV reviews the case law on land and the environment. Part V concludes.

## II. LAND TENURE, ENVIRONMENTAL CONSERVATION AND LAND USE REGULATION

Land tenure refers to the terms and conditions under which rights to land and land-based resources are acquired, held, transferred, or transmitted. That is, land tenure denotes the quantum of property rights that a given society has decided to allow individuals or groups thereof to hold, and the conditions under which those rights are to be enjoyed. Because it determines access to land and land-based resources, land tenure becomes “a critical variable in the management and conservation of the environment.”<sup>1</sup> Further, the importance of tenure in resource use and conservation explains why the state retains

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<sup>1</sup> Bondi D. Ogolla & John Mugabe, *Land Tenure Systems and Natural Resource Management*, in IN LAND WE TRUST: ENVIRONMENT, PRIVATE PROPERTY AND CONSTITUTIONAL CHANGE 85 (Calestous Juma & J.B. Ojwang, eds., Nairobi: Initiatives Publishers, 1996).

powers to regulate private land use or entirely abrogate property rights in land in the interests of environmental conservation.

#### *A. Land Tenure and Resource Management*

The management of a thing refers to its control and regulation. As far as natural resources are concerned, management is central to the broad objective of conservation since the utilization of the resources depends on the way in which they are controlled.<sup>2</sup> The task of a land/resource tenure system is thus to establish a control system for the utilization of the resource in question. Resource tenure systems arise because natural resources are scarce and must be distributed equitably among all claimants. As regimes of control, resource tenure systems are thus social institutions whereby the methods of acquiring and utilizing natural resources are regulated. They evolve over time to mediate conflicting interests among users.

Essentially, natural resource management is concerned with ownership, that is, the right to use the resource and the right to determine the nature and extent of use by others. Ultimately, these are decisions that have to be made by the owner or manager of the resource since it is the entity that possesses and exclusively controls the resource. It is in this context that the various regimes of land/resource tenure become important. Typically, these are individual tenure, public tenure and community or customary tenure. These regimes define the bundle of rights to occupy, use or benefit from land and land-based resources under a particular system of law and authority.<sup>3</sup> In each case, rights are linked to corresponding duties, which may include environmental conservation.<sup>4</sup> Further, each of these regimes has different implications for the resource being managed. And what makes any one regime suitable for any given resource depends on many factors, such as the social, economic and cultural circumstances affecting or conditioning that

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<sup>2</sup> A.S. MATHER, *GLOBAL FOREST RESOURCES* 88 (London: Belhaven Press, 1990).

<sup>3</sup> C.V. Barber, et al, *BREAKING THE LOGJAM: OBSTACLES TO FOREST POLICY REFORM IN INDONESIA AND THE UNITED STATES* 13 (New York: World Resources Institute 1994).

<sup>4</sup> *Id.*

resource. Thus a particular resource may be most effectively managed by a group of users since they depend on it for their basic needs.<sup>5</sup>

i. Public Land Tenure

This refers to a tenure regime in which the government is a private landowner. In Kenya, this regime originated from the Crown Lands Ordinance of 1902, which declared that all “waste and unoccupied land” in the protectorate was “crown land.”<sup>6</sup> A 1915 amendment to this ordinance redefined crown lands to include land in actual occupation by “native” Kenyans. Subsequently, native lands were excised from crown land and vested in a Native Lands Trust Board established by the Native Lands Trust Ordinance of 1938. At independence, these native lands became trust lands, and were vested in county councils to hold them in trust for the benefit of all persons residing thereon. Further, crown land became government land, and was vested in the President, whom the constitution empowered to make grants or dispositions of any estates, interests or rights in or over unalienated government land. Some of these powers have, however, been delegated to the Commissioner of Lands.

Today, public land tenure is embodied in the Government Lands Act, and has constituted the principal framework for the conservation of biodiversity established by the Forests Act and the Wildlife (Conservation and Management) Act.<sup>7</sup> These statutes declare large areas of land as forest reserves, national parks or national reserves with the objective of protecting forests and wildlife.<sup>8</sup> The effect of such declarations is to exclude all other forms of land use, and to vest monopoly rights of management and conservation in the government.<sup>9</sup>

As far as environmental conservation is concerned, public tenure may be justified on a number of grounds. First, it is argued that “biological resources such as forests and wild animals serve important functions and possess values that transcend the scope of

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<sup>5</sup> See, e.g., F. Berkes and D. Feeny, *Paradigms Lost: Changing Views on the Use of Common Property Resources*, 17 ALTERNATIVES 48 (1990).

<sup>6</sup> Ogolla & Mugabe, *supra* note \_\_ at 104.

<sup>7</sup> *Id.* at 105.

<sup>8</sup> *Id.*

<sup>9</sup> *Id.*

immediate individual preoccupations,” such as the protection of water catchments, the propagation of species, and the maintenance of genetic diversity.<sup>10</sup> While public tenure may ensure the realization of these functions and values, individual or community tenure may not. Secondly, proponents of public tenure contend that the management of such resources entails the outlay of human, financial and technical resources far beyond the capabilities of individuals or communities.<sup>11</sup> Finally, it is argued that state control is crucial “since it will ensure an effective and sustainable framework for long-term planning and implementation.”<sup>12</sup>

Nevertheless, public tenure of land and land-based resources has a number of serious limitations. First, the practice of wrapping nature in protected areas while excluding other forms of land use may not be sustainable in the face of population pressure on the land outside the protected areas.<sup>13</sup> When that happens, “there will be mounting political pressure to convert portions of [the] protected areas into human settlements and agriculture.”<sup>14</sup> Thus in Kenya, large chunks of forest areas have been excised and converted, either legally or illegally, to agriculture and settlement to satisfy the demands of adjacent populations. Secondly, many governments have assumed far more resource management responsibility than they are able to carry out effectively.<sup>15</sup> Especially where government management is under-funded, large scale and managerially distanced from the resource in question – as is often the case – government control breaks down because of absentee landlordism. Since the locus of power is far away, the government becomes an inefficient custodian.<sup>16</sup> De facto use and management therefore devolve to the people living with the resources in question.<sup>17</sup>

Thirdly, public tenure often marginalizes local management, thereby antagonizing the people living with the resource. They are therefore likely to make destructive inroads into forests or kill wild animals recklessly, as these resources no longer belong to them.

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<sup>10</sup> Id.

<sup>11</sup> Id.

<sup>12</sup> Id.

<sup>13</sup> Id.

<sup>14</sup> Id.

<sup>15</sup> M.W. Murphree, *Communities as Resource Management Institutions*, International Institute for Environment and Development, Gatekeeper Series No. 36, at 4 (1993).

<sup>16</sup> G. Shepherd, *Forest Policies, Forest Politics*, Overseas Development Institute (ODI) Agricultural Occasional Paper No.13 at 13 (1992).

<sup>17</sup> Murphree, *supra* note \_\_ at 4.

Public tenure may therefore take away local incentives to manage natural resources. Finally, it is argued that public tenure often leads to an open access regime, thereby resulting in resource degradation.<sup>18</sup> All too often, critics point out, the state lacks the administrative capacities required for effective resource management.

The practice of wrapping nature in protected areas also “ignores the interaction of different land uses in ecosystems and habitats.”<sup>19</sup> In the case of game reserves, for instance, the areas that are suitable for wildlife tend to be the same areas that pastoralists require for their livestock and other needs.<sup>20</sup> By excluding multiple land uses, therefore, this practice impacts adversely on the lives of pastoralists.<sup>21</sup>

## ii. Individual Tenure

Individual tenure is a regime in which land and land-based resources are owned by individuals. In Kenya, the quantum of the bundle of rights conferred by individual tenure depends on the statutory framework under which they are registered. Thus the statutory framework provides for freehold, absolute proprietorship and leasehold. In theory, the freehold connotes the largest quantum of rights which the sovereign can grant to an individual. It confers unlimited rights of use, abuse and disposition, although it is subject to the regulatory powers of the state. The freehold is established by the Registration of Titles Act, the Land Titles Act and the Government Lands Act. The absolute proprietorship is established by the Registered Land Act as a separate land tenure category, but it essentially confers the same rights as the freehold. For its part, the leasehold involves the derivation of rights from a superior title (that is, freehold or absolute proprietorship) for a period of time certain or capable of being ascertained and the enjoyment of such rights in exchange for specific conditions including, but not limited to, the payment of rent.

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<sup>18</sup> See, e.g., E. BIRGEGARD, NATURAL RESOURCE TENURE: A REVIEW OF ISSUES AND EXPERIENCES WITH EMPHASIS ON SUB-SAHARAN AFRICA (Uppsala: FAO, 1993).

<sup>19</sup> PATRICIA KAMERI-MBOTE, PROPERTY RIGHTS AND BIODIVERSITY MANAGEMENT IN KENYA 31 (Nairobi: ACTS Press, 2002).

<sup>20</sup> Id.

<sup>21</sup> Id.

Individual ownership of land and land-based resources is justified on the basis of the incentives said to be engendered by such ownership. It is argued that the possibility of personal gain fosters sound management of resources. That is, individual ownership is said to be the most rational, efficient and productive way of managing resources.

The major shortcoming of this regime, however, is that it tends to ignore the wider social implications of resource utilization. Individual ownership emphasizes short-term economic interests at the expense of wider and long-term social interests. In Kenya, individual tenure has also wrecked havoc on indigenous conservation systems, which are organized around indigenous tenure.<sup>22</sup> The Group (Land Representatives) Act provides a good illustration of this phenomenon. This statute applies the philosophy of individualization of tenure to pastoral communities. It was enacted to replace the communal tenure system with a system that was more responsive to market forces, namely individual tenure. In practice, this statute has contributed immensely to the neglect of customary land management systems. For instance, adjudication officials made little effort to ensure that the boundaries of group ranches coincided with those of the main traditional units of cattle management among pastoral communities. The result has been an adverse impact on land use, insofar as existing boundaries ignored the fact that the traditional boundaries were established to regulate access to land.

### iii. Community/Customary Tenure

Under this regime, a set of clearly defined rights and obligations over land and land-based resources is held by a clearly defined group of users, which may be a clan or ethnic community. The group regulates resource use by employing rules and guidelines which, in the traditional form of this regime, are handed down from generation to generation. Rights to use the resources are distributed equitably among members of the group. However, non-members are excluded, and as a general rule, members of the group are prohibited from unilaterally transferring rights of use to non-members. It may thus be

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<sup>22</sup> See, e.g., J.M. Migai Akech, *Rescuing Indigenous Tenure from the Ghetto of Neglect: Inalienability and the Protection of Customary Land Rights in Kenya*, ACTS Ecopolicy Series No. 11 (2001).



said that this regime represents private property for group members, given that non-members can neither use the resource nor make decisions over it.<sup>23</sup>

Apart from the exclusion of non-members, the other regulatory mechanisms under this regime which serve to ensure sustainable management are seasonal variations and social pressure. The latter mechanism operates within the framework of a closely-knit community which is deeply tied to the land, whose effect is to foster a commitment to conservation. Such a commitment is also encouraged by social mores and the deification of the land, which is in many cases regarded as ancestral. And because the land is regarded as a heritage, the customary tenure regime also strives to accommodate concerns of intra- and inter-generational equity.

The advantage of this regime over the other two should by now be apparent. Individual tenure may lead to resource overuse and degradation as it ignores wider social concerns, while the state is often a poor manager of the resources it has expropriated. Customary tenure offers a viable alternative since it has a capacity for self-regulation that is not present under either individual or public tenure. Nevertheless, customary tenure is vulnerable to external interference, especially from the state. In Kenya, for instance, the policy has been to replace customary tenure with individual tenure, even where this is not suitable for sound resource management. Among other things, the policy of individualization tenure has been based on the erroneous argument that customary tenure systems have contributed to environmental degradation.

The effectiveness of customary tenure largely depends on the existence of socially recognized institutional arrangements that regulate the behavior of individuals with respect to resource use. When these institutions break down, so does the property regime. Unfortunately, the imposition of the institutions of the state through policies such as individualization has had exactly this effect, especially because it has been abrupt. Due to such imposition, traditional resource management institutions have been undermined to the extent that there is no longer a legitimate authority that can enforce the traditional resource-use regulatory mechanisms. And in the absence of traditional institutional arrangements, many common property systems have been transformed into

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<sup>23</sup> D.W. Bromley & J.A. Cochrane, *Understanding the Global Commons*, University of Wisconsin-Madison, EPAT/MUCIA Working Paper, at 12 (1994).

undesirable situations of open access, in which neither the rights nor user groups are clearly defined. Indeed, this largely explains the misconception that customary tenure systems and open access situations are similar.

### *B. Regulation of Land Use*

In many circumstances, a particular private property use generates far-reaching effects for other the owners of other property and the public at large. Unfortunately, nuisance law and private arrangements such as restrictive covenants may not, and are often unable to, deal with such effects. Thus for instance questions of standing limit the effectiveness of public nuisance law to deal with the adverse effects of the use of private property. Among other things, this necessitates some form of state regulation of the use of private property rights. The assumption, then, is that there are public rights in private property, which justify state intervention in private land-use decision making.<sup>24</sup>

In addition, certain governmental functions, which are developmental in nature (such as the building of roads), require land. Further, due to contemporary interests in environmental quality, the functions of the state have been extended to cover the conservation of natural resources that are within its borders.

For these reasons, the state may thus take property from its private owners and reallocate it to governmentally preferred uses, or leave the property in the hands of its owners but regulate its use. The first approach – taking property – is the method of eminent domain, which is also known as compulsory acquisition. The second approach – regulating property use – is the method of police power.

#### i. Eminent Domain

This is the power of the state or its assigns to acquire private property for public purposes, subject to the prompt payment of compensation. Whenever the state exercises

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<sup>24</sup> See Ogolla & Mugabe, *supra* note \_\_ at 107 (Observing that “the realization that a particular mode of land-use may affect not only other property users but also the public interest led to the recognition of the concept of public rights in private property.”)

this power, it forces involuntary transfers of property from private owners to itself or its assigns. The power of eminent domain is derived from the feudal notion that as the sovereign, the state holds the radical title to all land within its territory. In Kenya, this power is embodied in the constitution, which requires that private property can only be acquired compulsorily for public use.<sup>25</sup> Further, the constitution requires that such public use must be weighed against the hardship that may be caused to the owner. Finally the constitution requires that the acquisition must be accompanied by prompt payment of adequate compensation. The constitution also provides for a modified form of acquisition in the case of trust land, which is referred to as “setting apart” and may be activated by the President or local authorities. The rules governing the setting apart of trust land and the payment of compensation to affected residents are contained in the Trust Land Act. All other cases of compulsory acquisition are regulated by the Land Acquisition Act.

The power of compulsory acquisition thus provides the state with a useful instrument for the conservation of environmental resources, this being in the public interest.

## ii. The Police Power

This is the power of the state to regulate land use in the public interest, such as to secure proper resource utilization and management. It is also an attribute of the sovereignty of the state. Unlike compulsory acquisition, it does not extinguish property rights but merely regulates their use in order to vindicate public rights deemed to be overriding. Again, the state is not obligated to pay compensation whenever it exercises this power, the rationale being that it is simply requiring the land owner to stop causing harm to the public. So that while compensation is required when the public helps itself to good at private expense whenever the power of compulsory acquisition is invoked, no compensation is due when the public – by exercising the police power – simply requires one of its members to stop making a nuisance of himself or herself.

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<sup>25</sup> The Constitution of the Republic of Kenya, §§ 75, 117 and 118.

In Kenya, the police power is exercised mainly through land use legislation, which determines the uses to which land may be put, seeks to reconcile competing demands on land and land-based resources, and seeks to ensure that established resource use and conservation standards and objectives are adhered to by holders of land rights. The regulation of the use of agricultural land and the regulation of the development of land illustrate the use of the police power in Kenya. The use of agricultural land is regulated by the Agriculture Act, which seeks to secure the proper utilization and management of agricultural land so as to maximize output. Among other things, the Agriculture Act empowers the Director of Agriculture to issue land preservation orders to owners or occupiers of agricultural land requiring the performance of certain acts to preserve the land and prohibiting acts which cause soil erosion. On the other hand, land use planning is regulated by the Town Planning Act and the Land Planning Act. Here, regulation seeks to maintain decent environmental standards and to regulate use and development within the context of intensifying land use. For instance, land owners or occupiers intending to put up structures on their property are required to obtain the permission of “planning authorities,” which are obligated to make physical plans. The idea is that any proposed structure must adhere to the requirements of such plans.

### III. ENVIRONMENTAL LAW AND LAND USE REGULATION IN KENYA

#### *A. Fundamental Principles of Environmental Law*

Environmental law is principally concerned with ensuring the sustainable utilization of natural resources according to a number of fundamental principles developed over the years through both municipal and international processes. In an ideal setting, the utilization of land and land based resources should adhere to these principles, which are sustainability, intergenerational equity, principle of prevention, the precautionary principle, the polluter pays principle, and public participation.<sup>26</sup>

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<sup>26</sup> David Hunter, James Salzman and Durwood Zaelke, INTERNATIONAL ENVIRONMENTAL LAW AND POLICY 379-438 (New York: Foundation Press, 2<sup>nd</sup> ed., 2002).

The principle of sustainability requires that natural resources should be utilized “in a way and at a rate that does not lead to the long-term decline of biological diversity, thereby maintaining its potential to meet the needs and aspirations of present and future generations.”<sup>27</sup> It strives for equity in the allocation of the benefits of development and decries short-term resource exploitation which does not consider the long-term costs of such exploitation.<sup>28</sup> In short, it advocates for prudent utilization of natural resources.

The principle of sustainability should be examined together with that of intergenerational equity, which focuses on future generations as a rightful beneficiary of environmental protection.<sup>29</sup> Essentially, the principle of intergenerational equity advocates fairness, so that present generations do not leave future generations worse off by the choices they make today regarding development.<sup>30</sup> Its implementation requires the utilization of natural resources in a sustainable manner while avoiding irreversible environmental damage.<sup>31</sup>

The principle of prevention states that “protection of the environment is best achieved by *preventing* environmental harm in the first place rather than relying on remedies or compensation for such harm after it has occurred.”<sup>32</sup> The reasoning behind this principle is that prevention is less costly than allowing environmental damage to occur and then taking mitigation measures.<sup>33</sup> At the international level, this principle has been particularly prominent in the context of pollution.<sup>34</sup>

The precautionary principle recognizes the limitations of science, as it is not always able to accurately predict the likely environmental impacts of resource utilization.<sup>35</sup> Thus environmental problems occurring today such as ozone depletion and climate change were not foreseen in good time by scientists. It thus calls for precaution

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<sup>27</sup> The Convention on Biological Diversity, Article 2.

<sup>28</sup> Goran Hyden & John Mugabe, *Governance and Sustainable Development in Africa*, in GOVERNING THE ENVIRONMENT 35 (H.W.O. Okoth-Ogendo & Godber W. Tumushabe, eds., Nairobi: ACTS Press, 1999).

<sup>29</sup> Hunter, Salzman & Zaelke, *supra* note \_\_\_ at 398.

<sup>30</sup> *Id.*

<sup>31</sup> *Id.* at 398-399.

<sup>32</sup> *Id.* at 404 (Emphasis in original).

<sup>33</sup> *Id.*

<sup>34</sup> *Id.*

<sup>35</sup> *Id.* at 405.

in the making of environmental decisions where there is scientific uncertainty.<sup>36</sup> Accordingly, it is closely related to the principle of prevention and “can be viewed as the application of the principle of prevention where the scientific understanding of a specific environmental threat is not complete.”<sup>37</sup> The precautionary principle thus requires that all reasonable measures must be taken to prevent the possible deleterious environmental consequences of development activities. Further, it demands that scientific uncertainty should not be used as a reason for not taking cost-effective measures to prevent environmental harm.

In addition, the need for environmental impact assessment (EIA) should be seen in the context of the precautionary principle. The purpose of such an assessment is to assess the impact of proposed development activities and ensure that any likely adverse impacts on the environment can be dealt with.

The polluter pays principle requires that polluters of natural resources should bear the full environmental and social costs of their activities.<sup>38</sup> It thus seeks to internalize environmental externalities by ensuring that the full environmental and social costs of resource utilization are reflected in the ultimate market price for the products of such utilization.<sup>39</sup> Since environmentally harmful products will tend to cost more, this principle promotes efficient and sustainable resource allocation as consumers are likely to prefer to the cheaper less polluting substitutes of such products.<sup>40</sup>

Finally, the principle of public participation seeks to ensure environmental democracy and requires that the public, especially local communities, should participate in the environment and development decisions that affect their lives.<sup>41</sup> It requires that the public should have appropriate access to information concerning the environment that is held by public authorities, and should be given an opportunity to participate in decision-making processes. In addition, it requires that the public should be given effective access to judicial and administrative proceedings. Accordingly, the public should have access to the judicial review of environmental decision making.

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<sup>36</sup> Id.

<sup>37</sup> Id at 406.

<sup>38</sup> Id at 412.

<sup>39</sup> Id.

<sup>40</sup> Id.

<sup>41</sup> Id at 435.

The following section examines Kenyan law and the extent to which it has embraced these principles of environmental management.

### *B. Law and the Environment*

For a long time, Kenya did not have a comprehensive legislative framework for environmental regulation. Thus the law governing environmental matters was confined to the common law and a number of statutes regulating sectors such as water, health, forestry, agriculture and industry. Nevertheless, increasing environmental activism and governmental appreciation of the significance of a sound legislative framework for environmental regulation culminated in the enactment of the Environmental Management and Coordination Act (EMCA) of 1999. On the whole, EMCA does not repeal the aforesaid sectoral legislation and instead seeks to coordinate the activities of the various agencies tasked to regulate the various sectors. In addition, the common law remains a useful instrument for environmental regulation.

The common law deals with the environment in a “reactive” as opposed to a “managerial” manner, since it is predominantly concerned with remedying any interference with a landowner’s rights over his or her land.<sup>42</sup> These rights were mainly protected under the common law of torts, which provides for four causes of action on environmental problems. These are nuisance, trespass, negligence and strict liability.

Nuisance involves the unreasonable interference with another’s use and enjoyment of land. It is the most frequently invoked common law cause of action in cases of environmental degradation. Nuisance may either be private or public. Private nuisance seeks to protect a landowner from interference with his or her use and enjoyment of land, and in so doing seeks to balance the competing claims of landowners by ensuring that one landowner’s use of his or her land does not unduly subordinate the rights of adjoining landowners. But because this cause of action is available only to landowners, its usefulness for environmental protection is quite circumscribed as it can

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<sup>42</sup> ACTS-UNEP, THE MAKING OF A FRAMEWORK ENVIRONMENTAL LAW IN KENYA 26 (Nairobi: ACTS Press, 2001).

only be claimed by those that own land. So that where a landowner does not pursue it, environmental degradation will in all likelihood continue unabated.

Conversely, public nuisance seeks to remedy nuisances which affect an interest that is common to the general public. As a general rule, this cause of action can only be claimed by an appropriate public official, unless an individual can demonstrate that he or she has suffered some particular direct and substantial loss over and above that suffered by the public at large. Thus the requirement of *locus standi* is a serious impediment to the efficacy of public nuisance as an instrument for environmental regulation.

Trespass involves the direct and physical interference with another's ownership or occupation of land, which need not be environmental in nature. This cause of action is thus inadequate as a tool for environmental management, given that the interference must be physical and direct. For instance, it is ineffective for air pollution control.

The cause of action of negligence may also be instrumental in managing environmental problems such as factory emissions, provided it can be established that the injury alleged to have been caused by the defendant was foreseeable, the defendant owed the plaintiff a duty of care, and the injury sustained by the plaintiff was caused by the defendant's act of negligence.

The cause of action of strict liability, also known as the rule in *Rylands v. Fletcher*, requires that "The person who for his own purposes brings on his land and collects and keeps there anything likely to do mischief if it escapes, must keep it in at his own peril, and, if he does not do so, is 'prima facie' answerable for all the damage which is the natural consequence of its escape."<sup>43</sup> In effect, this cause of action holds a land owner strictly responsible for ensuring that nothing escapes from his or her land where he or she is using such land in a manner that is not "natural."

The common law also protects riparian rights, that is, the rights of those who own land abutting a waterfront to use the water without prejudicing the equal rights of other riparian owners. The riparian land owner has three basic rights, that is, a right to the natural quantity of water, a right to the natural quality of the water, and a right of access

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<sup>43</sup> (1866) L.R. 1 Ex. 265 at 279-280.



and navigation.<sup>44</sup> Riparian rights are thus important for water conservation, although they are of limited use since they are only available to riparian owners.

As far as the legislative framework is concerned, the constitution provides an important starting point. While the constitution does not directly make provision for environmental regulation, it nevertheless provides for the compulsory acquisition of property for, among other things, public health, town and country planning or the development or utilization of property so as to promote the public benefit.<sup>45</sup> Further, the constitution permits the government to compulsorily acquire private property if it is in a dangerous state or is injurious to the health of human beings, animals or plants.<sup>46</sup> Again, the government may compulsorily acquire land for purposes of conserving soil or other natural resources. Thus the power of compulsory acquisition provides an important instrument for environmental management.<sup>47</sup>

In addition, numerous Acts of Parliament deal with the matter of environmental management. These “statutes are sectoral either by the natural resources such as fisheries, water, forestry and wildlife, or by the functional sectors such as public health, agriculture, factories, mining, [or] shipping.”<sup>48</sup>

The main statute governing water resources is the Water Act,<sup>49</sup> which vests the rights over all surface and ground water in the state, except for water that is wholly situated in a landowner’s domain. It regulates matters such as the apportionment and utilization of water supplies, and the issuance of utilization permits. Fisheries are regulated by the Fisheries Act<sup>50</sup> and the Maritime Zones Act.<sup>51</sup> The Fisheries Act regulates matters such as fishing equipment, the sizes of fish which may be caught, landing and landing site requirements, and the transfer of fish from and to specific waters. It also requires all persons engaged in fishing to obtain licenses, except where they are fishing for purposes of consumption. Such licenses will stipulate the species to be fished

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<sup>44</sup> See Cleophas O. Torori, Albert O. Mumma & Alison Field-Juma, *Land Tenure and Water Resources in IN LAND WE TRUST*, supra note \_\_ 143 at 155.

<sup>45</sup> The Constitution of the Republic of Kenya, §75.

<sup>46</sup> Id.

<sup>47</sup> Id.

<sup>48</sup> UNEP-ACTS, supra note \_\_ at 32.

<sup>49</sup> Water Act, Chapter 372, Laws of Kenya.

<sup>50</sup> Fisheries Act, No. 5 of 1989.

<sup>51</sup> Maritime Zones Act, No. 6 of 1989.

and the location of fishing. Conversely, the Maritime Zones Act sets out the limits of Kenya's territorial waters as extending outwards to 12 nautical miles from the baseline, and the Exclusive Economic Zone (EEZ) as extending to 200 nautical miles from the baseline. This act provides that within the EEZ, Kenya has sovereignty and exclusive jurisdiction for purposes of exploitation of marine resources and regulation of the marine environment.

There is also legislation governing specially protected areas, such as forests and national game parks. The main statutes here are the Forest Act<sup>52</sup> and the Wildlife (Conservation and Management) Act.<sup>53</sup> The Forest Act empowers the relevant minister to declare unalienated government lands to be forest areas, and to vary the boundaries of such forest areas. Further, the minister may declare a forest area or some part of it to be a "nature reserve," for purposes of preserving the flora and fauna found therein. The act establishes the office of the Director of Forestry, and gives it responsibilities such as issuing exploitation licenses. Conversely, the Wildlife (Conservation and Management) Act provides for the protection, conservation and management of wildlife. It gives the responsible minister powers similar to those granted by the Forest Act. Thus the minister may declare a given area to be a national park, game reserve, or sanctuary. Further, then minister may similarly vary the boundaries of such special areas. The act is implemented by the Kenya Wildlife Service (KWS), which is a state corporation.

The legislative framework also includes legislation on environmental problems which affect the human body. There is thus legislation on matters such as public health, the working environment<sup>54</sup> and the management of hazardous wastes.<sup>55</sup> For example, the Public Health Act<sup>56</sup> makes it an offence for any landowner or occupier to allow nuisance or other conditions liable to be injurious or dangerous to human health to prevail on his or her land. It defines "nuisance" to embrace "any obstruction, smell, accumulation of wastes or refuse, smoke chimneys, dirty dwellings or premises used without proper sanitation, factories emitting smoke or smell, and improperly crowded or unkempt

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<sup>52</sup> Forest Act, Chapter 385, Laws of Kenya.

<sup>53</sup> Wildlife (Conservation and Management) Act, Chapter 376, Laws of Kenya.

<sup>54</sup> See Factories Act, Chapter 514, Laws of Kenya; Mining Act, Chapter 306, Laws of Kenya.

<sup>55</sup> See Radiation Protection Act, Chapter 243, Laws of Kenya.

<sup>56</sup> Public Health Act, Chapter 242, Laws of Kenya.

cemetery or burial place, so long as it can be demonstrated that the situation endangers or is liable to endanger health.”<sup>57</sup>

While there seems to have been a large body of law applicable to environmental management prior to the enactment of EMCA, various weaknesses in the legislative framework were noted. First, the fact that environmental regulations were scattered across the various sectors was thought to impede a coordinated approach to environmental management.<sup>58</sup> But while there was a need for such a coordinated approach, there was a concern that vesting environmental management in a single institution would result in a “massive bureaucracy [which] would be alienated from the management experts in the line departments and ministries.”<sup>59</sup> Secondly, the legislative framework vested enforcement discretion in government officials who did not always act to enforce the law, with the result that environmental degradation persisted. Apart from the reluctance of government officials to enforce the law, the courts also adopted a restrictive approach to the question of standing, with the result that the public could not do anything about environmental degradation. Public participation in the enforcement of environmental law was thus circumscribed. Third, the law predominantly provided for criminal penalties, and did not require persons degrading the environment to pay for the abatement of the injuries caused by their acts.<sup>60</sup> In addition, these penalties were invariably paltry and did not act as a sufficient deterrent against environmental degradation.<sup>61</sup> Fourth, the law did not provide for the assessment of projects to prevent or mitigate their adverse environmental consequences.<sup>62</sup>

EMCA was enacted to remedy these deficiencies. It establishes the following key principles. First, it provides that “[e]very person in Kenya is entitled to a clean and healthy environment and has the duty to safeguard and enhance the environment.”<sup>63</sup> This right to a clean and healthy environment includes access to “public elements or segments of the environment for recreational, educational, health, spiritual and cultural purposes.”<sup>64</sup>

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<sup>57</sup> UNEP-ACTS, *supra* note \_\_ at 46.

<sup>58</sup> *Id.* at 86.

<sup>59</sup> *Id.*

<sup>60</sup> *Id.* at 88.

<sup>61</sup> *Id.*

<sup>62</sup> *Id.*

<sup>63</sup> Environmental Management and Co-ordination Act (EMCA), Act No.8 of 1999, §3(1).

<sup>64</sup> *Id.*, §3(2).

Secondly, EMCA adopts a permissive approach to the question of standing. It provides that any person who alleges that his or her entitlement to a clean and health environment is being or is likely to be contravened may apply to the High Court for redress.<sup>65</sup> Further, it provides that such a person need not establish that the defendant's act or omission has caused or is likely to cause him or her any personal loss or injury.<sup>66</sup> An important qualification of this right is the requirement that the action should not be frivolous or vexatious or amount to an abuse of the court process.<sup>67</sup>

Where such an action is brought, EMCA mandates the High Court to adhere to the principles of public participation, cultural and social principles for environmental management, international co-operation in the management of shared resources, inter- and intra-generational equity, the polluter pays principle, and the precautionary principle.<sup>68</sup>

The principal management organs established by EMCA are the National Environmental Council (NEC) and the National Environment Management Authority (NEMA). The NEC is responsible for policy formulation, setting national goals and objectives, setting priorities for environmental protection, and promoting cooperation among public and private organizations engaged in environmental protection programs.<sup>69</sup>

The NEMA is the main administrative organ and is established "to exercise general supervision and co-ordination over all matters relating to the environment."<sup>70</sup> It thus co-ordinates the environmental management activities of "lead agencies," that is, government ministries, departments, state corporations or local authorities entrusted with the management of "any element of the environment or natural resource."<sup>71</sup> NEMA is also mandated to promote the integration of environmental considerations into development policies, plans, programs and projects.<sup>72</sup> In order to enable it carry out its

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<sup>65</sup> Id, §3(3).

<sup>66</sup> Id, §3(4).

<sup>67</sup> Id.

<sup>68</sup> Id, §3(5).

<sup>69</sup> Id, §5.

<sup>70</sup> Id, §9(1).

<sup>71</sup> Id, §§2, 9(2)(a).

<sup>72</sup> Id, §9(2)(a).

functions effectively, EMCA requires NEMA to establish District Environment and Provincial Committees.<sup>73</sup>

EMCA also establishes a Public Complaints Committee (PCC) and gives it broad powers to investigate “any allegations or complaints against any person or against the Authority [that is, NEMA] in relation to the condition of the environment in Kenya.”<sup>74</sup> Further, the PCC has the power to investigate suspected cases of environmental degradation.<sup>75</sup> It reports its findings to the NEC.

In addition, EMCA provides for the establishment of NEMA, known as the National Environment Action Plan Committee (NEAPC). Its task is to prepare a national environment action plan every five years for consideration and adoption by Parliament.<sup>76</sup> District and Provincial Environment Committees are similarly required to prepare environment action plans for their areas of jurisdiction.<sup>77</sup>

EMCA also establishes an administrative tribunal, known as the National Environment Tribunal (NET), whose main responsibility is to review the administrative decisions of NEMA.<sup>78</sup> For instance, NET has powers to review NEMA’s refusal to grant licenses and decisions imposing environmental restoration orders.<sup>79</sup>

As far as protection and conservation of the environment is concerned, EMCA makes provision for various instruments. First, it prohibits the carrying out of a number of listed activities without the approval of the Director-General of NEMA.<sup>80</sup> Secondly, it empowers the responsible minister to declare lake shores, wetlands, coastal zones or river banks to be protected areas and to establish regulations for purposes of protecting them from degradation.<sup>81</sup> Thirdly, EMCA mandates NEMA, acting in consultation with relevant lead agencies, to prescribe measures necessary for the conservation of biological diversity, the sustainable management and utilization of genetic resources, and the protection of the ozone layer.<sup>82</sup>

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<sup>73</sup> Id, §29(1).

<sup>74</sup> Id, §§31(1), 32.

<sup>75</sup> Id, §32(a)(ii).

<sup>76</sup> Id, §37.

<sup>77</sup> Id, §§39, 40.

<sup>78</sup> Id, §§125, 129.

<sup>79</sup> Id, §129.

<sup>80</sup> Id, §42(1).

<sup>81</sup> Id, §42(2) and (3).

<sup>82</sup> Id, §§50-56.

In the case of development activities which require the approval of the Director-General, such approval will not be granted in the absence of an environmental impact assessment (EIA).<sup>83</sup> Upon receiving an EIA study, NEMA is mandated to publish a notice describing the project, stating where the EIA study, evaluation or review report may be inspected and a time limit for the submission of public comments on the study, evaluation or report.<sup>84</sup> Interested persons must be afforded a reasonable opportunity to submit comments on the EIA.<sup>85</sup>

In addition, EMCA empowers NEMA to carry out environmental audits of all activities that are likely to have significant effects on the environment.<sup>86</sup> To facilitate such audits, EMCA empowers “environmental inspectors” to enter any land or premises with a view to establishing how far the activities carried out thereon conform to the EIA studies issued in respect of such land or premises.<sup>87</sup>

EMCA also makes provision for the establishment and regulation of environmental quality standards. It establishes a Standards and Enforcement Review Committee (SERC) as a committee of NEMA. Its basic function is to advise NEMA with respect to the establishment and regulation of environmental quality standards.<sup>88</sup> In this area, EMCA also establishes criminal sanctions for those who contravene its provisions. Thus a person who discharges toxic waste into the aquatic environment in contravention of water pollution control standards is guilty of a criminal offence and is liable to imprisonment for a term not exceeding two years or to a fine not exceeding one million shillings or to both such imprisonment and fine.<sup>89</sup> Further, EMCA stipulates that certain activities that are likely to affect the environment such as the emission of substances that are likely to cause air pollution can only be undertaken where NEMA issues a license to that effect.<sup>90</sup>

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<sup>83</sup> Id, §58.

<sup>84</sup> Id, §59(1).

<sup>85</sup> Id, §59(2).

<sup>86</sup> Id, §68(1).

<sup>87</sup> Id, §68(2), 117.

<sup>88</sup> Id, §71.

<sup>89</sup> Id, §72(1).

<sup>90</sup> Id., §80.

Finally, EMCA empowers NEMA to issue environmental restoration orders.<sup>91</sup> For example, such an order will require the person to whom it is issued to restore the land degraded by his or her development activity, including replanting trees.<sup>92</sup> Environmental restoration orders may also be issued by a court of competent jurisdiction “against a person who has harmed, is harming or is reasonably likely to harm the environment.”<sup>93</sup> EMCA also empowers courts to grant environmental easements or environmental conservation orders.<sup>94</sup>

#### IV. THE COURTS AND THE ENVIRONMENT

By far the most litigated matter in environmental law in Kenya has been the question of standing. For a long time, the courts adopted an unduly restrictive approach to standing. As we have seen, however, EMCA has since settled the issue. Nevertheless, it is interesting to review how the courts have approached this question.

On the whole, Kenyan courts have adopted a rigid approach to standing. They have insisted on the plaintiff having a personal stake in the matter before the court. Accordingly, they have required the plaintiff to demonstrate that he or she has suffered some concrete injury in order to be granted standing. This is the approach that the court adopted in the case of *Wangari Maathai v. The Kenya Times Media Trust*,<sup>95</sup> for instance. DUGDALE, J., ruled that the applicant had no standing since she had not alleged that “the defendant company [was] in breach of any rights, public or private in relation to the plaintiff nor [had] the company caused damage to her.”<sup>96</sup>

But in cases decided after *Wangari Maathai*, the courts have adopted a more liberal approach to standing. Thus in *Republic v. Minister for Information & Broadcasting and Ahmed Jibril, ex parte East African Television Network Limited*, for instance, KHAMONI, J., stated that an applicant only needs to demonstrate that he or she has a “sufficient interest” in the matter before the court and comply with the procedural

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<sup>91</sup> Id, §108.

<sup>92</sup> Id, §108 (4)(b).

<sup>93</sup> Id, §111(1).

<sup>94</sup> Id, §112.

<sup>95</sup> [1989] KLR 267.

<sup>96</sup> Id.

requirements of Order 53 of the Civil Procedure Rules in order to be granted standing.<sup>97</sup> And more recently, in the case of *Albert Ruturi and others v. Minister for Finance and Anor.*, the court stated that “as a part of reasonable, fair and just procedure to uphold the constitutional guarantees, the right of access to justice entails a liberal approach to the question of locus standing.”<sup>98</sup> This liberal approach provides an important instrument for environmental protection, as it enables courts to act to save the environment in cases where government agencies may be reluctant to do so. Indeed, it is in keeping with the emerging approach in the Commonwealth, which is to encourage public-spirited individuals and groups to challenge unlawful governmental action or inaction, even though they are not directly affected.<sup>99</sup>

For the avoidance of doubt, however, EMCA has adopted a liberal approach to standing in environmental matters thereby giving public-spirited individuals a firm foundation from which they can seek to ensure the conservation of the environment.<sup>100</sup> Indeed, the courts have affirmed EMCA’s liberal approach to standing. Thus in the case of *Rodgers Muema Nzioka & others v. Tiomin Kenya Limited*, HAYANGA J., stated that in cases where a person seeks to vindicate his or her right to a clean and healthy environment, he or she does not need to demonstrate a right or interest in the land alleged to be invaded.<sup>101</sup> Further, the judge reasoned that the traditional tests for the grant of an injunction established in the seminal case of *Giella v. Cassman Brown*<sup>102</sup> may need to be revised in cases concerning environmental degradation. In particular, he was of the opinion that since environmental degradation affects the public at large, the balance of convenience test should be applied with a view to considering the convenience of the public as opposed to that of the parties to the suit. Further, he stated that EMCA prevails over the sectoral legislation where there is conflict, on the reasoning that “where the provisions of one statute are so inconsistent with the provisions of a similar but later one, which does not expressly repeal the earlier Act, the courts admit an implied repeal.” Accordingly, he held that EMCA prevailed over the Mining Act.

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<sup>97</sup> Nairobi High Court Miscellaneous Civil Application No. 403 of 1998.

<sup>98</sup> [2002] 1 KLR 54

<sup>99</sup> J.M. Migai Akech, *Judicial Review of Spending Powers: Should Kenyan Courts Entertain Taxpayers’ Actions?*, 44 JOURNAL OF AFRICAN LAW 195 at 214 (2000).

<sup>100</sup> See EMCA, §3.

<sup>101</sup> Mombasa High Court Civil Suit No. 97 of 2001.

<sup>102</sup> [1973] EA 358



The courts have also begun to interpret the provisions of EMCA. The path-breaking case here is *Park View Shopping Arcade Limited v. Charles M. Kangethe and Others*,<sup>103</sup> which concerned the relationship between the constitutional guarantee of private property and the conservation of environmental resources, which in this case was a wetland. After reviewing the powers granted by EMCA to the responsible minister, OJWANG, J., issued an order to the minister to “ensure the conduct of a professional and policy assessment” of the land in question “in accordance with section 42” of EMCA. This case is novel since the court sought to compel the minister responsible to take measures to protect an environmental resource.

The courts have also had occasion to deliberate on the question of compulsory acquisition. The typical case concerns irregular acquisitions, where land is acquired ostensibly for a public purpose while the real intention is to transfer the ownership of such land to private individuals. As far as environmental conservation is concerned, it is important to prevent such irregular transfers since they frustrate important public goals. The courts have thus revoked such irregular transfers in a number of cases. For example, in the case of *Coastal Aquaculture Ltd v. The Commissioner of Lands*, the court ruled that a notice of a proposed compulsory acquisition did not “comply with the law in that the name and identity of the public body and the purposes for which such public body requires the land are not disclosed.”<sup>104</sup>

Other environmental matters considered by the courts have concerned the sectoral legislations that are concerned with the environment in one way or another. Such cases have concerned matters such as the exploitation of environmental resources such as forests, fisheries and mining, and development planning. There have also been claims for compensation in cases where individuals are injured by wild animals. Most of these cases were, however, decided before the enact

ment of EMCA and may no longer be good law. They should therefore be read against the background of the provisions of EMCA.

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<sup>103</sup> Nairobi High Court Civil Suit No. 438 of 2004.

<sup>104</sup> Mombasa High Court Miscellaneous Civil Suit No. 169 of 2000; *See also* Sea Star Malindi Ltd v. The Kenya Wildlife Services, [2002] KLR 1.

## V. CONCLUSION

It should by now be quite clear that land is inextricably linked to the environment broadly defined since natural resources are primarily derived from land. And where that is not the case, land constitutes the base for the degradation of the environment. This is the case, for example, with air pollution which arises because of some activity being undertaken on land. For these reasons, land use needs to adhere to the tenets of sound resource management that are now enshrined in EMCA. More particularly, the courts should take a lead in ensuring that land use does adhere to those tenets. While environmental matters have not hitherto been litigated widely in Kenya, it is to be expected that the courts will perform a significant role in environmental regulation given the powers that EMCA grants to the courts to issue environmental restoration orders and compel NEMA to act to protect the environment. But the courts cannot perform this important role unless citizens take advantage of EMCA's permissive approach to standing. Indeed, it is quite perplexing that despite the many instances of environmental degradation reported in the mass media environmental cases have not increased since EMCA resolved the perennial problem of locus standi.