

**UNIVERSITY OF NAIROBI**



**SCHOOL OF LAW**

**WISE USE OF WETLANDS UNDER INTERNATIONAL AND NATIONAL LAWS: THE  
CASE OF KENYA**

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**THIS THESIS IS SUBMITTED TO THE SCHOOL OF LAW IN PARTIAL  
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## DECLARATION

I, **Mwadzoyo Mwanasha Rajab**, do hereby sincerely declare that this is my original work; it has neither been submitted nor is it currently being submitted for fulfillment of a degree in any other university.

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## **DEDICATION**

This work is dedicated to my family for the support they gave me throughout the period of study.

## **ACKNOWLEDGEMENTS**

I am grateful to the Almighty God for the infinite blessings during the course of learning.

I am sincerely thankful to my supervisor Prof. Albert Mumma for his time and guidance throughout this study.

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## **ABSTRACT**

Wetlands are vital resources for human beings and the environment generally. They are natural resources that have multiple values. To mention but a few, wetlands provide source of food for a large population living around them and they are a source of national income through activities such as tourism. Wetlands have also ecological benefits to the environment through regulation of the water quality and quantity. They control impact of floods and drought and they provide habitats for numerous wetlands dependent biodiversity.

Despite these essential benefits of wetlands, these resources have been subjected to extreme pressures as a result of human activities. Human beings have been over-exploiting these resources to the extent of causing them to degrade and disappear at an alarming rate. Activities such as overgrazing, agriculture, human settlement and conversion of wetlands for commercial developments have all being ranked as major causes of wetlands loss in Kenya and all-round the globe.

The enacted laws and institutional arrangement formulated to regulate wetlands have proved to be inadequate hence it is incapable of abating the excessive and distractive pressure facing wetlands. The existing Kenyan laws have failed to adequately cater for wise utilization of the resource despite the Country having committed to comply with Ramsar Agreement of 1971. The institutions in charge of managing wetlands lack sufficient legal support to operate effectively. The laws have failed to provide for coordination of the multiple institutions managing wetlands. There is no legal provisions integrating the concept of prudent use of wetlands in the various sectors of the environment. Therefore, this situation calls for reform of the legal and institutional arrangement to enable the country save these essential resources for the benefit of all generation, present and those upcoming in compliance with Ramsar Convention.

**Mwadzoyo Mwanasha Rajab**  
**G62/7287/2017**

## GLOSSARY OF ACRONYMS

CITES	Convention on International Trade in Endangered Species of Wild Fauna and Flora, 1975
COP	Conference of Parties
CS	Cabinet Secretary
DEO	District Environmental Officer
EIA	Environmental Impact Assessment
EA	Environmental Audits
EANECE	East African Network for Environmental Compliance and Enforcement
EMCA	Environment Management Coordination Act 1999
EMCR	Environment Management Coordination Regulations 2009
KFC	Kenya Forest Service
KWS	Kenya Wildlife Service
MEMR	Ministry of Environment and Mineral Resources
NEAP	National Environment Action Plan
NEMA	National Environment Management Authority
NET	National Environment Tribunal
SEA	Strategic Environment Assessment
UNCCD	United Nations Convention to Combat Desertification
WRA	Water Resources Authority

## **LIST OF LEGAL INSTRUMENTS**

### **CONSTITUTION**

The Constitution of Kenya, 2020

### **ACT OF PARLIAMENT**

The Agriculture, Fisheries and Food Authority Act no. 13 of 2013

The Environmental Management and Coordination Act no. 8 of 1999

The Land Act, no. 6 of 2012

The Physical and Land Use Planning Act no. 13 of 2019

The Water Act, 2016

The Wildlife Conservation and Management Act no. 47 of 2013

### **REGULATIONS**

The Environmental Management and Co-Ordination (Wetlands, River Banks, Lake Shores and Sea Shore Management) Regulations, 2009

### **CONVENTIONS**

Convention on Wetlands of International Importance especially as Waterfowl Habitat, 1971, (as amended by the Protocol of 3.12.1982 and of 28.5.1987)

Convention on Biological Diversity (CBD) of 1992;

United Nations Framework Convention on Climate Change of 1992;

Convention on Protection of the World Cultural and Natural Heritage of 1972;

United Nations Convention to Combat Desertification (UNCCD) of 1996;

Convention on the Conservation of Migratory Species of Wild Animals (the “CMS or Bonn Convention”) of 1983

Convention on International Trade in Endangered Species of Wild Fauna and Flora (CITES) of 1975.

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## CHAPTER ONE

### 1.0 INTRODUCTION

#### 1.1 Background

Wetlands are among resources that come about naturally. They are unique areas harbouring special classes of living organisms and provide colossal benefits ecologically, economically and socially. The support provided by wetlands have led to the resources being are categorised as one of the priceless resources of the earth.<sup>1</sup> However, these massive benefits have caused the resources to be over-exploited.<sup>2</sup> Wetlands are defined in different perspectives by various authors and nations. There is no uniform and extensive definition recognized by everyone.<sup>3</sup> The various definitions of wetlands are associated with complication in identifying these natural resources. Wetlands display characters of both aquatic and terrestrial ecosystem. They are composed of soil, water, animals and vegetation.<sup>4</sup> The key feature that distinguish wetlands resources from land resources or water resources is the presence of special vegetation (aquatic plants). Wetlands range from permanent wet areas to areas with temporary waters whose borderline increase and decrease periodically in response to weather changes.<sup>5</sup>

Despite the challenge in defining wetlands, efforts have been made to describe these resources. One of the definitions is that wetlands are areas with water as the main feature that support life of organisms living therein. The water is found adjacent to the land that stretches inward to not more than six meters.<sup>6</sup> Others describes wetlands as an ecology that is determined by continuous and

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<sup>1</sup> Kenya Land Alliance, 'Wise or Unwise Use? :A Survey of Some Wetlands in Kenya', Unpublished report, 2006 at Page 3

<sup>2</sup> C. Odote, B. Ochieng and O. Makoloo O, 'The Implications of Property Rights for Sustainable Management of Wetlands in Kenya,' in IASC Conference, Cheltenham, UK, (2007) at page 1 available at [https://dlc.dlib.indiana.edu/dlc/bitstream/handle/10535/1757/Odote\\_122601.pdf?sequence=1](https://dlc.dlib.indiana.edu/dlc/bitstream/handle/10535/1757/Odote_122601.pdf?sequence=1) accessed on 17/10/2020

<sup>3</sup> C.M Finlayson and N.C Davidson, 'Wetland inventory, assessment and monitoring: Practical techniques and identification of major issues. Introduction and review of past Recommendations' (2001) in MEMR, *Kenya Wetlands Atlas* (Ministry of Environment and Mineral Resources, Kenya, 2012) page 1 <[https://na.unep.net/atlas/datlas/sites/default/files/Kenya\\_Wetlands.pdf](https://na.unep.net/atlas/datlas/sites/default/files/Kenya_Wetlands.pdf)> accessed on 10/01/2019

<sup>4</sup> Ibid

<sup>5</sup> Kenya Wetland Forum (2012) as quoted in MEMR, *Kenya Wetlands Atlas* (Ministry of Environment and Mineral Resources, Kenya, 2012) page 1 <[https://na.unep.net/atlas/datlas/sites/default/files/Kenya\\_Wetlands.pdf](https://na.unep.net/atlas/datlas/sites/default/files/Kenya_Wetlands.pdf)> accessed on 10/01/2019

<sup>6</sup>Ramsar Convention Secretariat, *An Introduction to the Convention on Wetlands* (Ramsar Convention Secretariat Gland, Switzerland, 2016) page 9

frequent low flood or wetness at the earth surface.<sup>7</sup> “Convention on Wetlands of International Importance especially waterfowl habitat” of 1971, branded as “Ramsar Convention”, is a primary worldwide instrument for protection of wetlands. The name Ramsar comes from the town of Iran where the convention was adopted. The main aim of the convention as brought out in the opening statement is to stop global destruction and disappearance of wetlands. The instrument describes wetlands as:

“areas of marsh, fen, peatland or water, whether natural or artificial, permanent or temporary, with water that is static or flowing, fresh, brackish or salt, including areas of marine water the depth of which at low tide does not exceed six metres.”<sup>8</sup>

The above description encompasses wide range of wetlands resources. The description has been accepted and applied by several States that are members to the Convention. Interpretation of wetlands in Kenya is provided in EMCA of 1999. It describes wetlands at section 2, in similar term as the Ramsar Agreement. The description of wetlands stated above precisely demonstrates that wetlands covers a broad area stretching from inland waters to marine waters as well as land areas with water that is temporary or permanent.<sup>9</sup> This study will rest on this comprehensive description of wetlands.

Wetlands are usually grouped broadly into natural wetlands and manmade wetlands. Natural wetlands consist of five main classes as follows:

- i. Marine wetlands (that is coral reefs, seagrass beds, coastal lagoons and rocky shores)
- ii. Estuarine wetlands (such as deltas, tidal, mangrove swamps and mudflats )
- iii. Palustrine wetlands (which include swamps and marshlands)
- iv. Lacustrine (linked to lakes) and
- v. Riverine (occurring along rivers and streams).<sup>10</sup>

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<sup>7</sup> National Research Council, ‘Wetlands: Characteristics and Boundaries.’ Washington, DC: The National Academies Press (1995) available at <https://doi.org/10.17226/4766> accessed on 19/10/2020

<sup>8</sup>The Ramsar Convention 1971 Article 1.1 (came into operation on 21/12/1975).

<sup>9</sup> MEMR, *Kenya Wetlands Atlas* (Ministry of Environment and Mineral Resources, Kenya, 2012) page 4 <[https://na.unep.net/atlas/datlas/sites/default/files/Kenya\\_Wetlands.pdf](https://na.unep.net/atlas/datlas/sites/default/files/Kenya_Wetlands.pdf)> accessed on 10/01/2019

<sup>10</sup> Ramsar Convention Secretariat, *An Introduction to the Convention on Wetlands*, (Ramsar Convention Secretariat, Gland, Switzerland, 2016) page 9.

On the other hand, artificial or man-made wetlands are made up of fish ponds, farm ponds and shrimp ponds, irrigated lands for agriculture namely canals, salt fields, rice fields, gravel pits, pools, and dams.<sup>11</sup>

Kenya has diverse geographical features. These features have made the country rich of all the six types of wetlands. These include coastal marine, lacustrine along Lake Victoria and Rift Valley region, riverine along river Yala, Athi and Nyando. Example of palustrine is Nyando floodplain while estuarine are at Tana River Delta and Kilifi turtle bay and artificial wetlands such as the Kindaruma dams.<sup>12</sup> The wetlands area is estimated at 6% globally. The estimated area in Kenya varies at 3% to 4% and is capable of going up to 6% when it rains.<sup>13</sup>

Wetlands resources have countless social, cultural, ecological and economic benefits. The social benefits include supply of food and drinking water, provision of energy for cooking especially in the rural areas, provision of herbal treatment and provision of opportunity for learning. Wetlands have recreational and aesthetic values to human beings. Apart from the social benefits, wetlands are used to promote cultural activities related to some spiritual, inspirational and religious values as well as cultural heritage. Additionally, wetlands play critical ecological roles to the environment. These roles include refining and storing water, preventing floods and hurricanes, averting drought, calming shorelines as well as curbing erosion. Wetlands recharge and discharge groundwater, they retain pollutants and sediments and balance climate through modifying rainfall and temperatures. Moreover, some wetlands plants assist in reducing salinity of water especially arid or semi-arid areas. They also offer a suitable environment for a variety of wetlands dependent organisms to live.<sup>14</sup>

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<sup>11</sup> Ramsar Convention Secretariat, *An Introduction to the Convention on Wetlands*, (Ramsar Convention Secretariat, Gland, Switzerland, 2016) page 9.

<sup>12</sup> MEMR, *Kenya Wetlands Atlas* (Ministry of Environment and Mineral Resources, Kenya, 2012) page 1 <[https://na.unep.net/atlas/datlas/sites/default/files/Kenya\\_Wetlands.pdf](https://na.unep.net/atlas/datlas/sites/default/files/Kenya_Wetlands.pdf)> accessed on 10/01/2019

<sup>13</sup> Ibid

<sup>14</sup> C. Odote, et all 'The Implications of Property Rights for Sustainable Management of Wetlands in Kenya," in IASC Conference, Cheltenham, UK, (2007) at page 1 available at [https://dlc.dlib.indiana.edu/dlc/bitstream/handle/10535/1757/Odote\\_122601.pdf?sequence=1](https://dlc.dlib.indiana.edu/dlc/bitstream/handle/10535/1757/Odote_122601.pdf?sequence=1) accessed on 17/10/2020, also see Ramsar Convention Secretariat, *An Introduction to the Convention on Wetlands*, (Ramsar Convention Secretariat, Gland, Switzerland, 2016), page.11

Further, wetlands have incredible economic benefits to Nations. These include provision of quality water, opportunity for fish farming and agriculture, provision of building materials such as timber and other materials such as papyrus reeds used in weaving, generation of hydroelectric energy, and promotion of tourism through wildlife resources, bird spotting and provision of transport among others.<sup>15</sup> It is noted that in Kenya, wetlands are among the crucial ecologies that maintains the water resources and production in the agricultural sector. Thus, wetlands are recognized as a crucial resource for achieving a lasting growth plan for the country, “the vision 2030”, through promoting tourism industry, agriculture, supply of fresh water and food hence reducing poverty and hunger.<sup>16</sup>

Although the wetlands provide such significant benefits to human beings and the environment at large, these resources have been subjected to continued destruction to the extent of causing their disappearance due to destructive acts of mankind. In Kenya, the rate of destruction and disappearance of wetlands is alarming. Wetlands are subjected to extreme burden from human beings namely agriculture, overgrazing and sedimentation, excessive utilization of wetland products and amenities, human settlements, commercial development and pollution, invasive alien species, hydropower generation and deforestation of the primary water catchment areas. Other problems facing wetlands in Kenya are limitations facing the institutions managing wetlands as well as weak and inadequate legal and regulatory framework on wetlands.<sup>17</sup>

The destruction and loss of wetlands is not only a Kenyan menace but a rampant global threat. Reports indicates that throughout the world there is high speed of damage and disappearance of wetlands compared to related ecosystems.<sup>18</sup> This is caused by reasons like failure of policy

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<sup>15</sup> C. Odote, et all “The Implications of Property Rights for Sustainable Management of Wetlands in Kenya,” in IASC Conference, Cheltenham, UK, (2007) at page 1 available at [https://dlc.dlib.indiana.edu/dlc/bitstream/handle/10535/1757/Odote\\_122601.pdf?sequence=1](https://dlc.dlib.indiana.edu/dlc/bitstream/handle/10535/1757/Odote_122601.pdf?sequence=1) accessed on 17/10/2020, also see Ramsar Convention Secretariat, *An Introduction to the Convention on Wetlands*, (Ramsar Convention Secretariat, Gland, Switzerland, 2016), page.11

<sup>16</sup> MEMR, *Kenya Wetlands Atlas* (Ministry of Environment and Mineral Resources, Kenya, 2012) page iii and 72-79 <[https://na.unep.net/atlas/dAtlas/sites/default/files/Kenya\\_Wetlands.pdf](https://na.unep.net/atlas/dAtlas/sites/default/files/Kenya_Wetlands.pdf)> accessed on 10/01/2019

<sup>17</sup> Ibid page 87

<sup>18</sup> R.C Gardner, “Rehabilitating Nature: A Comparative Review of Legal mechanisms That encourage Wetland Restoration Efforts” Vol. 52(3) *The Catholic University Law review* 573 (2003)

decision makers to incorporate the roles and values of wetlands in the decision making processes.<sup>19</sup> The concern over destruction and loss of wetland at the international level was raised way back in 1962 and consequently on 2<sup>nd</sup> February 1971, member States approved “the Convention on Wetlands of International Importance especially as Waterfowl Habitat” (Ramsar Convention). However, it was until December 1975 when the Convention was enforced.<sup>20</sup> Kenya became a Member State to this instrument on 5<sup>th</sup> October 1990.<sup>21</sup> The Contracting Parties to this Convention were certain about the scientific, economic, social and cultural values of wetlands and noted that irreparable damage would be caused if the resources are lost. Hence, they devoted to prevent the destruction and loss of this resource in the present and future generation. The Convention stipulates obligations for all its members to support proper management and rational exploitation of wetlands.<sup>22</sup>

One of the wise use obligations that forms the basis of this research is resolution VII.7 of the 7th COP held in the year 1999 in Costa Rica. Parties were urged to analyze their laws and roles of the respective governing bodies to guarantee application of Ramsar agreement towards realization of the objectives set. While making the analysis, Parties were tasked to guarantee that their actions are intended to clear away all the hindrances in discharging obligations under the Convention as well as establish systems that are beneficial in backing effective performance of commitments on wise utilization of wetlands. Further it is stated that review to be undertaken should include legal and institutional framework at all levels within the territories of Member States. Kenya has several legislations that are applied in management of wetlands. There is no specific Act of parliament that deals with regulations of wetlands as in the case of other sectors of the environment.<sup>23</sup> The

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<sup>19</sup> ‘The Millennium Ecosystem Assessment’ (2005) in MEMR, *Kenya Wetlands Atlas* (Ministry of Environment and Mineral Resources, Kenya, 2012) at page 69 and 83 <[https://na.unep.net/atlas/datlas/sites/default/files/Kenya\\_Wetlands.pdf](https://na.unep.net/atlas/datlas/sites/default/files/Kenya_Wetlands.pdf)> accessed on 10/01/2019

<sup>20</sup> Ramsar Convention Secretariat, *An Introduction to the Convention on Wetlands*, (Ramsar Convention Secretariat, Gland, Switzerland, 2016) page.19

<sup>21</sup> Ibid note 17 at page 1

<sup>22</sup> Ramsar Convention 1971 Preamble, also discussed in C. Odote, et al ‘*The Implications of Property Rights for Sustainable Management of Wetlands in Kenya*,’ in IASC Conference, Cheltenham, UK, (2007) at page 2 available at [https://dlc.dlib.indiana.edu/dlc/bitstream/handle/10535/1757/Odote\\_122601.pdf?sequence=1](https://dlc.dlib.indiana.edu/dlc/bitstream/handle/10535/1757/Odote_122601.pdf?sequence=1) accessed on 17/10/2020,

<sup>23</sup> C. Odote, et al ‘*The Implications of Property Rights for Sustainable Management of Wetlands in Kenya*,’ in IASC Conference, Cheltenham, UK, (2007) at page 4 available at [https://dlc.dlib.indiana.edu/dlc/bitstream/handle/10535/1757/Odote\\_122601.pdf?sequence=1](https://dlc.dlib.indiana.edu/dlc/bitstream/handle/10535/1757/Odote_122601.pdf?sequence=1) accessed on 17/10/2020, also see Odote, C., ‘*Wise Use and Sustainable Management of Wetland in Kenya*’ in Okidi, C.O et al.

Constitution of Kenya, 2010 has guaranteed sustainable use of natural resources. Relevant statutes applicable are Environmental Management and Coordination Act, 1999<sup>24</sup>, Water Act, 2016, Forest Conservation and Management Act, 2016, Land Act, 2012 and the Wildlife Conservation and Management Act, 2013.

The object of this investigation is to analyze commitments of Parties to Ramsar Conventions on effective management and rational utilization of wetlands. Case study of this research is Kenya. The study will evaluate the laws and institutions on management of wetlands in compliance with international wise use obligations. In this process, this research will bring out the inadequacies and weaknesses of existing laws and organizations established to manage utilization of wetlands in Kenya. This includes evaluation of sectoral environmental management applied in Kenya against an integrated system. The study makes proposal for legal and institutional reforms that will remedy the damage and disappearance of wetlands in Kenya. Such proposals include establishment of appropriate, coordinated and comprehensive policy, legal and institutional measures on wetlands.

## **1.2 Statement of the Problem**

The existing legislations and institutions established for wetland management in Kenya are weak and inadequate to promote wise utilization of wetlands envisaged under the Ramsar agreement. The current law has failed to curb destruction of these crucial resources of the earth. There is no harmony in the various pieces of legislation applicable in regulating wetlands. Consequently, the country has failed to promote prudent use of these resources contrary to the commitments agreed upon under Ramsar agreement.<sup>25</sup> The law has failed to tame unwise utilization of the resources and to encourage positive human actions that nurture sustainability of wetlands. The institutions created to manage wetlands are also weak. They lack legal support and coordination to effectively manage utilization of the resources in a sustainable way.

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(Eds). *Environmental Governance in Kenya, Implementing the Framework Law* East African Educational Publisher, Nairobi (2008), page 342

<sup>24</sup> A detailed discourse of the background and application of this statute see Anne Angwenyi, “*An Overview of the Environmental Management and Coordination Act*,” in C.O. Okidi, P.K. Mbote and J.A. Migai (Eds) *Environmental Governance in Kenya: Implementing the Framework Law* (EAEP, 2008).

<sup>25</sup> Odote, C., ‘*Wise Use and Sustainable Management of Wetland in Kenya*’ in Okidi, C.O et al. (Eds). *Environmental Governance in Kenya, Implementing the Framework Law* East African Educational Publisher, Nairobi (2008), page 353



The laws of the land have failed to appreciate the multiple crucial roles carried out by wetlands for the benefit of human being, the nation and the environment at large. The law is unable to stem the excessive pressure of over exploitation of the resource, commercial development, human settlement, contamination and increased farming on wetlands areas among other destructive human actions.<sup>26</sup> These harmful activities have not been adequately controlled by the law hence they have increased continuous harm to wetlands and led to extinction of wetland dependent living organisms (biodiversity). Wetlands spots registered as areas of international value are also degraded despite being under protection of the State by law. A case in point is Lake Baringo which has been adversely degraded as a result of overgrazing and deforestation leading to soil erosion on the edges of the lake. This resulted into reduction of size of the lake. The quality of water in the lake has also been affected as a result of siltation.<sup>27</sup>

Despite having laws and institutions managing wetlands and ratifying international responsibility to protect wetlands, destruction and disappearance of the resources is still evident. Negative resultant effects are also apparent. Mankind has been living in constant fear of floods whenever rain season begin. He also lives in fear of shortage of water and prolonged drought during dry seasons. These harmful situations are associated with destruction of wetlands. A case in point, in the year 2018, the daily nation newspaper reported floods sinking and sweeping homes at lush Green Park Gardens Estate in Athi River, Machakos County.<sup>28</sup> According to the report, the principal cause of flooding in that area and in various other parts of the country in particular Nairobi, Narok and Kajiado was encroachment of the wetlands by mankind.<sup>29</sup> It is also stated that the condition of Nairobi River is declining with modification of its biological structure and those of neighbouring wetlands due to invasion by human beings for occupation and farming. The leading activities done on these wetlands resulting to deterioration of the resources are discarding of wastes, excessive rearing of livestock and extravagant domestic usages, quarrying, increased

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<sup>26</sup> MEMR, *Kenya Wetlands Atlas* (Ministry of Environment and Mineral Resources, Kenya, 2012) page 87 <[https://na.unep.net/atlas/datlas/sites/default/files/Kenya\\_Wetlands.pdf](https://na.unep.net/atlas/datlas/sites/default/files/Kenya_Wetlands.pdf)> accessed on 10/01/2019

<sup>27</sup> Ibid

<sup>28</sup> J. Kahongeh and M. Mwololo, 'Conserve wetlands to reduce floods', *Daily Nation*, (Nairobi, 4<sup>th</sup> April 2018) <[www.nation.co.ke/lifestyle/dn2/Conserve-wetlands-to-reduce-floods/957860-4371070-pfgmag/index.html](http://www.nation.co.ke/lifestyle/dn2/Conserve-wetlands-to-reduce-floods/957860-4371070-pfgmag/index.html)> accessed on 3/3/2019

<sup>29</sup> Ibid

small scale agricultural production. All these activities are carried out despite their being international promise to prevent destruction of wetlands.<sup>30</sup>

The photo below shows trash dumped along the riparian area of the Nairobi River.<sup>31</sup>



The present law on management of wetlands has proved to be ineffective. Hence, this situation calls for review and reforms of the legal systems and the operations of institutions implementing the laws. The review should aim at supporting proper governance and exploitation of the essential wetlands ecosystems in Kenya.<sup>32</sup>

### 1.3 Research Questions

The following are the research questions under discussion herein:

- i. What are the obligations of Parties to Ramsar Convention on management of wetlands?
- ii. Which laws are applicable in promoting rational use of wetlands in Kenya
- iii. What legal challenges are hindering realization of wise utilization of wetlands in Kenya?
- iv. Which institutions are charged with implementing laws on management of wetlands?
- v. What legal factors are limiting operations of these institutions?

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<sup>30</sup> MEMR, *Kenya Wetlands Atlas* (Ministry of Environment and Mineral Resources, Kenya, 2012) page 91 <[https://na.unep.net/atlas/datlas/sites/default/files/Kenya\\_Wetlands.pdf](https://na.unep.net/atlas/datlas/sites/default/files/Kenya_Wetlands.pdf)> accessed on 10/01/2019

<sup>31</sup> Ibid

<sup>32</sup> Ibid page 87

- vi. What are legal and institutional reforms to be introduced to support wise exploitation of wetlands in Kenya?

#### **1.4 Objectives of the Research**

The central aim of this study is to analyze the laws of Kenya applicable in wetlands management and determine compliance of the Country's commitment on rational use of the resources as agreed under Ramsar agreement. Hence, this study will bring out the existing legal measures applied to manage wetlands in the Country against the recommended measures agreed upon by members to the Ramsar agreement. In so doing, this study will reach a finding on Kenya's compliance to Ramsar agreement on wise utilization of the wetlands.

#### **1.5 Hypothesis**

- i. The existing national laws and institutions governing wetlands are weak, inadequate, fragmented and uncoordinated hence they are unable to support rational exploitation of wetlands.
- ii. A state policy on wetlands and a specific wetlands legislation with clear institutional mandate are paramount measures for attaining productive management of wetlands. The policy outlines priority areas of a country for actions while the specific legislation provides a link between the international, national and local measures implemented.
- iii. Clear legal provisions translates commitments of State Parties for ease of compliance in their countries.
- iv. The existing national laws and institutions governing wetlands have failed to comprehensively address rational use of wetlands.
- v. The integrated management system applied is poor and has failed to incorporate wetlands management across all the sectors of the environment in Kenya.

#### **1.6 Theoretical Framework**

The problem statement of this study is that the existing legislation and institutions put in place are weak and inadequate to promote wise utilization of wetlands. The research is based on assumption that wetlands like other natural resources ought to be utilized in a sustainable manner so that the resources is not wasted. To achieve this sustainability, it require mankind

to act reasonably in his daily activities. It also require review of the statutes enacted on wetlands management. Having this in mind, this research will therefore be centered on all the three major theories of law, that is, Natural Law Theory, Positivists Theory and Sociological Theory of Law as discussed herein.

The subject resources under discussion in this research are wetlands as natural resources. Advocating for wise utilization of natural resources means agreeing to philosophies of natural law theorists. As put by St Thomas Aquinas, Natural Law Theory is about compliance with principles of divine law. The compliance is driven by natural forces directing human beings to do good deeds for the benefits of all mankind. Natural law theory require reasoning in every actions and it is of global application. This research discusses the global appeal to wisely utilize wetlands. The measures agreed to be implemented under the wise utilization concept are based on human reasoning and are of universal application. They are aimed at protecting the resources for benefit of all mankind present and future. It is for these reasons that to a certain extend the foundation of this research is Natural Law Theory.<sup>33</sup> The divine law requires mankind to act rationally in protecting the environment.

The study also rests on Positivist Theory of law advocated by John Austin. According to this theory, law is a directive of the organ vested with supreme authority to legislate.<sup>34</sup> The legal provisions evaluated under this study are statutes enacted by the legislative body in the Country and the proposal made include reviewing these laws to make them more effective. According to Austin, the legal order is supported by penalties.<sup>35</sup> The present legal framework under study consist of several sanctions imposed as a way of protecting the wetlands resources. This paper scrutinizes these statutes with a view to establish their adequacy in promoting wise utilization of wetlands in compliance with the agreed commitments of parties under Ramsar Convention.

Lastly, this study will be premised on Sociological Theory as propounded by Von Jhering and Roscoe Pound. According to Roscoe Pound, the duty of law is to serve a specific purpose in

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<sup>33</sup> R. Wacks, *Understanding Jurisprudence: An Introduction to Legal Theory*, page 17-20

<sup>34</sup> J. P. Omony, *Key Issues in Jurisprudence. An In-depth Discourse on Jurisprudence Problems*, page 49

<sup>35</sup> Ibid at page 55

humanity that will eventually lead to regulation of societies. Law should not be simply a legitimate direction but a procedure of harmonizing differing social welfares. The duty of legislation is to harmonize competing benefits that arise as a result of the increased human desires and needs. Since the law balances the various interests, the society has a role to structure it to adapt to new situations of life.<sup>36</sup> It is for this reason that this study calls for review of the existing legislations to enhance the measures put in place towards realization of rational use of wetlands.

### **1.7 Conceptual Framework**

The call for proper management and conservation of wetlands through prevention of wasteful uses is intended to promote a healthy environment. Thus, efforts have been made to promote sustainability of the resource and ensure human beings live in a safe and healthy surroundings. Ecologically, wetlands promote a healthy environment. It is now settled that, every individual is entitled to a clean surrounding that is healthy for his well-being. Protection of the environment is recognized globally as a condition that add up to the determination to realize sound joy of the fundamental rights. This is because, it is noted that human beings cannot enjoy the fundamental rights in an environment that is degraded.<sup>37</sup> Thus, the foundation of this research is prevention of wasteful exploitation of wetlands in order to promote a healthy surrounding. Right to live in an environment that is safe for all was internationally recognized during meeting of the United Nations on the Human Environment (the Stockholm Declaration) in 1972. These Nations deliberated on the necessity to establish a universal direction and standards to stimulate and lead the human population around the globe in preventing wasteful use and promote sustainability of the environment. The Parties took a position to protection of basic right to equality and provision of suitable surroundings within a setting that promote decent life and health of all living organism. The Parties were firm that human beings have a serious obligation to safeguard and enhance the environment for benefit of all generations. Moreover, as part of the declaration, parties recognized the need to protect the earth's natural resources such as water, flora and fauna, land and air for prosperity of all the generations through engaging in thorough preparations and management

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<sup>36</sup> J. P. Omony, *Key Issues in Jurisprudence. An In-depth Discourse on Jurisprudence Problems* at page 86-88

<sup>37</sup> D. Shelton, 'Human rights and the environment: substantive rights' in Fitzmaurice M., et al. (Eds). *Research Handbook on International Environmental Law*, Cheltenham, UK . Northampton MA, USA, Edward Elgar, (2010) page 265

where applicable.<sup>38</sup> This study is therefore anchored on conservation and efficient management of wetlands in order to enhance the universal requirement to keep our surrounding clean and healthy for all mankind at all times.

Nationally, Article 42 of the Kenyan 2010 Constitution assures every person a fundamental right to an environment that is good and safe for all. This guarantee comprises of caring for the environment for the benefit of all generations through actions such as enactment of laws among others. Consequently, at Article 70 of the Constitution, all persons are given mechanism of enforcing the environmental right through court action. Article 42 demands protection of this fundamental right to a decent environment through legislative and other measures. It is on this basis that this study examine operation of legal systems and institutions established for management of wetlands. In so doing, this study point out at constraints that affect efficient utilization of wetlands leading to degradation and disappearance of wetlands in Kenya.

The principal international instrument on conservation of wetlands resources calls for rational utilization of all wetlands in all the regions of its members.<sup>39</sup> This restriction on exploitation of wetlands by Parties within their regions is not only applicable to specific sites registered for international value but to all wetlands areas in the entire region of members. There is no definition of the phrase “wise use” in the body of the Convention. This term was defined during 3<sup>rd</sup> COP of 1987 at Regina in Canada as utilization of wetlands in a manner that promote their ability to renew and serve all human beings harmoniously without affecting the natural properties of the ecosystem. Natural properties of the ecosystem is defined as essential features which are either biological, physical or chemical in nature as contained in natural resources like soil, water, flora and fauna, nutrients or existing out of interaction among these elements. On the other hand, the 3<sup>rd</sup> COP defined “sustainable use” of wetlands as an approach to utilization of resources whereby human beings exploit wetlands in a way that allows the resource to yield maximum value to the living

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<sup>38</sup>Stockholm Declaration, 1972 principle 1 and 2 <[https://www.soas.ac.uk/cedep-demos/000\\_P514\\_IEL\\_K3736-Demo/treaties/media/1972%20Stockholm%201972%20%20Declaration%20of%20the%20United%20Nations%20Conference%20on%20the%20Human%20Environment%20-%20UNEP.pdf](https://www.soas.ac.uk/cedep-demos/000_P514_IEL_K3736-Demo/treaties/media/1972%20Stockholm%201972%20%20Declaration%20of%20the%20United%20Nations%20Conference%20on%20the%20Human%20Environment%20-%20UNEP.pdf),> accessed on 13/08/2019

<sup>39</sup> The Ramsar Convention 1971 Article 3.1

population at the same time maintaining its ability to meet the desire and wishes of future generation.<sup>40</sup>

Wise utilization concept provides a foundation and philosophy of this research. Preamble of Ramsar agreement talk of stemming wetland loss by promoting prudent use of the resource. This theory is a major principle of the Ramsar Agreement.<sup>41</sup> It express the need for conservation of wetlands for both anthropocentric and eco-centric values. It also provides for maintenance of the ecological and socio-economic values of wetlands in the interest of all mankind present and future. This paper envisages a wetland ecosystem that is exploited wisely hence serving all communities present and future with maximum benefits.

During a COP to Ramsar agreement in the year 1996, the phrase ‘wise use’ was explained in comparison with “sustainable use” as applied in Convention for Biological Diversity (CBD). Thus, the meeting of parties recognized the two phrases as synonymous terms. Article 2 of the CBD describes sustainable use as utilization of various organic resource in a manner that allows the resource to renew continuously without deteriorating hence retaining its capacity to satisfy desire and wishes of human beings at all times. Hence, the principle of sustainability of wetlands resources is one of underlining principles of this study.

In order to achieve sustainability of wetlands in Kenya, appropriate laws and institutions regulating these resources must be put in place to enable them play their vital role to the ecosystem. The principle of sustainability is adopted in several agreements binding nations such as World Charter for Nature of 1982. Under this Charter, the World agreed as a general principle that there should be proper management of all aquatic, atmospheric and terrestrial resources including living organisms and their ecosystems that human beings exploit in order to attain and sustain their production at optimum levels. In so doing, the nations shall ensure measures taken do not risk the stability of other coexisting ecosystems or species.<sup>42</sup> This study looks at how the legal framework

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<sup>40</sup>The Ramsar Convention Secretariat, ‘*The Ramsar Concept of Wise Use*’ <[www.ramsar.org/sites/default/files/documents/library/info2007-07-e.pdf](http://www.ramsar.org/sites/default/files/documents/library/info2007-07-e.pdf)> accessed on 14/01/2019

<sup>41</sup> The Ramsar Convention Secretariat, ‘*The Wise Use of Wetlands.*’ <[www.ramsar.org/about/the-wise-use-of-wetlands](http://www.ramsar.org/about/the-wise-use-of-wetlands)> accessed on 14/01/2019

<sup>42</sup> The World Charter for Nature 1982, Article 4

in Kenya promote rational use of wetlands resources so that these resources serve all generation without being depleted.

Definition of the phrase “wise use” was revised in year 2005 by COP to Ramsar Agreement to mean conserving the natural qualities of the environment by carrying out techniques that promote “sustainable development.”<sup>43</sup> The revision of this term brought in concept of sustainable development in management of wetlands. Thus, this research is anchored on the principle of sustainable development. This principle is construed to mean carrying out activities that promote economic growth in a manner that takes into account all generation, present and future, to allow them satisfy their basic needs. The economic growth should not occur at the expense of the future generations.<sup>44</sup> The concept of developing the economy in a sustainable manner grew and got global recognition from the write-up of the global conference and International Commission on Environment and Development.<sup>45</sup> Sands et al outlined components of sustainable development as follows:

- i. An obligation to protect natural resources for enjoyment of all people including future generation (the principle of intergenerational equity);
- ii. Working towards utilization of natural resources in a way that will improve the ability of the resources to renew and to continue providing their essential services (the principle of sustainable use);
- iii. Reasonable utilization of natural resources by states such that each one of them considers the necessity of another in the course of exploiting the resources (the principle of equitable use, or intra-generational equity);

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<sup>43</sup>Annex A to Resolution IX.1 2005, ‘A Conceptual Framework for the wise use of wetlands and the maintenance of their ecological character’ <[www.ramsar.org/sites/default/files/documents/pdf/res/key\\_res\\_ix\\_01\\_annexa\\_e.pdf](http://www.ramsar.org/sites/default/files/documents/pdf/res/key_res_ix_01_annexa_e.pdf)> accessed on 15/01/2019

<sup>44</sup>Report of the World Commission on Environment and Development: Our Common Future 1987’ page 43 <[www.are.admin.ch/are/en/home/sustainable-development/international-cooperation/2030agenda/un--milestones-in-sustainable-development/1987--brundtland-report.html](http://www.are.admin.ch/are/en/home/sustainable-development/international-cooperation/2030agenda/un--milestones-in-sustainable-development/1987--brundtland-report.html)> accessed on 14/10/2019; also see M.C Segger and A. Khalfan, *Sustainable Development Law: Principles, Practices, and Prospects* Oxford University Press page 18

<sup>45</sup>M.C Segger and A. Khalfan, *Sustainable Development Law: Principles, Practices, and Prospects* Oxford University Press page 15



- iv. Obligation to support integration of environmental matters into economic and other growth projects, strategies and programmes so that the demands for growth and development are reflected on realization of various environmental goals (the principle of integration).<sup>46</sup>

Sustainable development concept is set out at Article 3.1 of the Ramsar Agreement where member States are called upon to work out and execute their growth strategies for the nations in a way that boost conservation of wetlands. Thus, plans and strategies for development of nations should also deliberate over wetlands conservation.

In Kenya, Article 10 of the 2010 Constitution calls on all person enacting, applying or interpreting the laws, making or implementing public policy decision to take into account the idea of “sustainable development”. Constitution of Kenya under Article 69 (1) commits the State to guarantee its citizens that natural resources shall be used, enjoyed managed, protected and maintained in a manner that support these resources to renew naturally. Hence, the Country is committed to promote rational and strategic utilization of all wetlands within her borders in order to realize sustainable development. Therefore, this study will evaluate how the principle of sustainability is applied and implemented on wetlands resources and why despite international and national demand to utilize wetlands in a rational manner, this resource is still in deplorable state.

History of mankind has been associated with the destruction of wetlands by regarding wetlands as wastelands available for conversion to other uses. Human beings are prone overexploit resources to satisfy their needs. Consequently, wetlands have been put to various alternative land uses without considering the danger posed by the said actions. As opined by one writer, E. Maltby,<sup>47</sup> protecting and maintaining wetlands requires conserving services of ecosystems to ensure they yield maximum benefits. The reason behind the call for rational management of wetlands is avert the negative impacts that occur when the resources deteriorates and finally gets wiped out. Wetlands resources are not renewable and they disappear when exposed to extreme pressure hence the need for sustainable exploitation.

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<sup>46</sup> P. Sands et al, *Principles of International Environmental Law*, (Cambridge University Press, 2012) at page 206

<sup>47</sup> E. Maltby, ‘Landscaping and Urban Planning. Wetlands management goals: wise use and conservation’ (Elsevier, 1991) < [www.sciencedirect.com/science/article/pii/016920469190085Z](http://www.sciencedirect.com/science/article/pii/016920469190085Z)> accessed on 31/03/2018

## 1.8 Literature Review

Composition of this research involved a review of several literatures on wetlands and environment generally. The review brought out findings of previous writers and the gaps left that shaped this study. A book titled “*Environmental Governance in Kenya: Implementing the Framework Law*”<sup>48</sup>, gave an elaborate discussion on various articles related to the Kenyan law on wetlands management. One of the articles is by Collins Odote, titled “*Wise Use and Sustainable Management of Wetlands in Kenya.*” This article presents an analysis of wetlands in Kenya and examines laws and policies established for promoting prudent utilization of wetlands in the Country and how they marry with EMCA. A review of this literature gave this study an overview of the management of wetlands in Kenya. It has a detailed study of Environmental Management and Coordination Act (EMCA) and draft national policy on wetlands. It provides an insight of how the law caters for wetland management. The Articles also highlights provisions of Physical Planning Act, Chapter 286 and their relations to wetlands. The institutional conflicts that exists between NEMA established under EMCA and the Water Authority under the Water Act. It also analyses the Wildlife Act, Chapter 376 in relations to the function of Kenya Wildlife Service which is the Nation’s central point for implementation of the Ramsar Agreement. The gap that is left in this literature which has been addressed by the study herein is that the literature is majorly an analysis of all other nationals’ laws and how they coordinate with EMCA on wetlands management. The present study deals with analysis of the national laws against the principal international instrument on wetlands, the Ramsar agreement. This paper therefore expound on the issues of wise utilization of wetlands agreed by parties to the Ramsar Agreement as per the text of the agreement supplemented by recommendations of the Annual General Meetings for realizing protection and prudent use of wetlands.

Dr. Kariuki Muigua,<sup>49</sup> in his book, “*Natural Resources and Environmental Justice in Kenya*” also discussed the concept of wetlands management in Kenya. The literature outlines under Article titled “*Approaches to Natural Resources Management in Kenya,*”<sup>50</sup> various tactics used in

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<sup>48</sup>C.O Okidi, P. Kameri-Mbote, M. Akech, *Environmental Governance in Kenya: Implementing the Framework Law* (Nairobi, East African Publishers, 2008) page 335 to 353

<sup>49</sup>K. Muigua, D. Wamukoya, F. Kariuki, *Natural Resources and Environmental Justice in Kenya* (Glenwood Publishers Limited, 2015).

<sup>50</sup> Ibid page 36 -55

management of natural resources including wetlands. These approaches some of which will guide recommendations of this study include “command and control approach” where States use criminal sanctions in managing natural resources; “market based approach” which involve use of incentive like imposing tariffs and offering financial aid and implementation of community methods of managing natural resource and “ecosystem based approach” where integrated systems are applied”. This literature was useful in this research in terms of analysis of legal position in management of wetlands. This literature also provided useful information under article titled “*Environmental Justice*.”<sup>51</sup> This term is described as one of rights to mankind to utilize natural resources without any unnecessary restrictions caused by environmental policies, legislation and rules and it include right to have and make use information about environments as well as to take part in decision making concerning the resources.<sup>52</sup>

An article by Prof. P. Kameri-Mbote titled ‘*Land Tenure, Land Use and Sustainability in Kenya: Toward Innovative Use of Property Rights in Wildlife Management*’<sup>53</sup> was very useful to this research as it provided a study for wildlife management which can be applied in management of wetlands because wildlife and wetlands in Kenya are currently managed through protected areas under the same body, the Kenya Wildlife Service. The research herein points out failure of the law to adequately cater for wise utilization of wetlands. Among the issues raised as a failure of the law is the manner in which the communal groups have been omitted in caring for these resources. This failure is brought out in by the author in the discussion of wildlife regulation that turning public goods into state-owned property aimed at conservation in absence of measures to guarantee equal right to use for all could intensify the condition of populations and persons depending on these resources and culminate in more harm than the targeted goal of conservation.<sup>54</sup> Further wetlands provide habitats for several wildlife. Thus the failure of the law in managing wildlife sustainably as outlined under the Author’s literature equally affects wetlands which are used as homes for

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<sup>51</sup> K. Muigua, D. Wamukoya, F. Kariuki, *Natural Resources and Environmental Justice in Kenya* (Glenwood Publishers Limited, 2015) at page 56

<sup>52</sup> R. Ako, ‘*Resources Exploitation and Environmental Justice: the Nigerian Experience*’ in K. Muigua et al., *Natural Resources and Environmental Justice in Kenya*, Glenwood Publishers Limited, 2015.

<sup>53</sup> See N. J. Chalifour, et al. (Eds), *Land Use Law for Sustainable Development*. (Cambridge: Cambridge University Press, 2006) at page 132-160; also see P. Kameri-Mbote, *Aligning Sectoral Wildlife law to the Framework Environmental Law* in C.O Okidi, et al, (Eds) *Environmental Governance in Kenya: Implementing the Framework Law* (Nairobi, East African Publishers, 2008)

<sup>54</sup> *Ibid* at page 135

some of these animals. The author points out institutional problems of the KWS. KWS as aforesaid is the national body for managing protected wetlands in addition to wildlife. The literature brings out the weakness of this institution that it has failed to establish a robust multidisciplinary players for researching. It is majorly constituted of armed services, a structure born from independence. This structure makes the organization incapable of gathering, consolidating and distribution of information on conservation hence weaken the efforts of maintaining sustainability of the resources under it.<sup>55</sup> The Author has also provided useful literature for this research in her Article titled *Land Tenure and Sustainable Environmental Management in Kenya*, whereby issues of land tenure systems and their challenges are discussed. Of particular importance is the discussion that the trends in ownership of land has been conversion of public land and land held in trust by local authorities to private ownership. Hence, the restrictions placed on use of these lands cease after privatization. Issue of sustainability in use of land cease die away upon privatization.<sup>56</sup>

E. Kasimbazi has written about '*The Development of Environmental Law and Its Impact on Sustainable Use of Wetlands in Uganda*.'<sup>57</sup> This literature has brought out the position of Environmental law in managing wetlands in Uganda. This positions relates to the circumstances prevailing in Kenya, being East African Countries, sharing a lot in common. In giving the context of managing wetlands in Uganda, the Author brings out the problem of the law which is also facing Kenya that is the resources do not have specific laws of their own. They are regulated under a collection of ministries of several sectors of the environment resulting to promoting a constricted sectoral strategy to utilization of wetlands. Consequently, wetlands have been managed and utilized frequently for a sole purpose as determined by primacies of the regulatory ministry like water, agriculture, wildlife, forestry and land resources.<sup>58</sup>

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<sup>55</sup> See N. J. Chalifour, et al. (Eds), *Land Use Law for Sustainable Development*. (Cambridge: Cambridge University Press, 2006) at page 151

<sup>56</sup> P. Kameri-Mbote, *Land Tenure and Sustainable Environmental Management in Kenya*, in C.O Okidi, et al, (Eds) *Environmental Governance in Kenya: Implementing the Framework Law* (Nairobi, East African Publishers, 2008) at page 271

<sup>57</sup> Ibid at page 160 -180

<sup>58</sup> Ibid at page 166

A literature by C. Shine and C. De Klemm, “*Wetlands, Water and the Law: Using Law to Advance Wetland Conservation and Wise use*,”<sup>59</sup> was also reviewed. This writing provided this research with a structured guide on the concept of conservation and rational use of wetlands through discussion of various legislation both at international and national levels. The writers outlined main legal concerns in operation of the Ramsar Agreement. This literature provided great information to this study on use of law in handling wetlands. It provided, among other materials, omission of legislations and legal traditions in curbing degradation and extinction of wetlands.<sup>60</sup> It gave this research an overview of how the purpose of law has traditionally been regarded to deal with issue amongst human beings, not concerning nature and people. It also brought out a concern that planning of law was not aimed at addressing ecological considerations. However, the authors noted that recently actions have been taken to link and address the relation of science and law. Further, the book discussed why environmental degradation is becoming an irreparable loss. According to these authors, extreme wetlands degradation is caused by failure of law to govern components of natural environment unless they form part of property rights or user rights. The author also discussed the need for increased communal responsibility for natural resources. The present case is that communal responsibilities is restricted to traditional societies only.<sup>61</sup>

Additionally, various Ramsar handbooks were analyzed. These include “*An Introduction to Ramsar Convention on wetlands.*” This handbook provided a comprehensive summary of the Ramsar Agreement including purpose that led to preparation of the convention and obligations of parties to it. The obligations are classified into three broad pillar that is designation of listed sites, rational utilization of wetlands and international cooperation. This discussion shaped this paper into investigation on responsibilities of Parties to Ramsar Convention in managing and protecting wetlands.<sup>62</sup> Other materials include 4<sup>th</sup> edition manuals on “*Wise Use of Wetlands; National Wetland Policy; Law and Institutions; Participatory Skill; Wetland inventory; Impact Assessment; Designating Ramsar sites*” and a guide titled “*Addressing Change in Wetland Ecological*

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<sup>59</sup> C. Shine & C. De Klemm, *Wetlands, Water and the Law. Using law to advance wetland conservation and wise use*, (IUCN, IUCN Environmental Policy and law paper no. 38, 1999)

<sup>60</sup> Ibid at page 23

<sup>61</sup> Ibid at page 23

<sup>62</sup>Ramsar Convention Secretariat, *an Introduction to the Convention on Wetlands*. (Ramsar Convention Secretariat, Gland, Switzerland, 2016) page.11

*Character*". All these materials were useful in providing resolutions of members to the Ramsar Agreements in their various meetings.

An atlas on Kenyan Wetlands,<sup>63</sup> was also reviewed and provided this study with useful information about the state of wetlands in Kenya. It gave the study an overview of both internal and transboundary wetlands in Kenya as well as the legal and regulatory framework regulating the wetland resource. It also provided the pressure exposed to wetlands in Kenya, their impacts, constraints and opportunities. The Atlas outlines a promising statement that's boost proper management and protection of wetlands by the then Minister for Environment and Mineral Resource Hon, AMB, Chirau Ali Mwakwere, EGH, FCIT, MP that his administration is cognizant of various opportunities that are wasted as a result of deterioration of wetlands. Hence the ministry had commenced permanent plan of action to promote protection of the wetlands.<sup>64</sup>

Literature titled '*Climate Change Adaptation and Mitigation: Exploring the Role of Land Reforms in Africa*' by *Okoth-Ogendo*<sup>65</sup> gave this research a boost in respect to a detailed discussion proposing land reforms in Africa to engender sustainability in "land and land-based resources".<sup>66</sup> From the various description of wetlands stated above, wetlands are resources composed of land submerged in water permanently or on short term. As such, the discussion on land reforms provided crucial knowledge for this research outlining measures for managing wetlands as a land based resource in a sustainable manner.

Apart from land, the other characteristic feature of wetlands is presence of water. One of the well-known wetlands are swamps. These resources are categorised as wetlands as well as water resources, hence they are regulated under the Water Act as well, going by the definition of water resources at section 2 of the Water Act, 2016. Thus, a discussion on water resources has given this research a good understanding of management of wetlands and challenges facing these resources. As such, this research benefitted greatly from an Article by Migai Akech on *Governing Water and*

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<sup>63</sup> MEMR, *Kenya Wetlands Atlas* (Ministry of Environment and Mineral Resources, Kenya, 2012) <[https://na.unep.net/atlas/datlas/sites/default/files/Kenya\\_Wetlands.pdf](https://na.unep.net/atlas/datlas/sites/default/files/Kenya_Wetlands.pdf)> accessed on 10/01/2019

<sup>64</sup> Ibid

<sup>65</sup> An Article in Chalifour N. J., et al. (Eds). *Land Use Law for Sustainable Development*. (Cambridge: Cambridge University Press, 2006), page 60-70

<sup>66</sup> Ibid at page 70

*Sanitation in Kenya*.<sup>67</sup> Of more relevancy is the Author's discussion on the present Water Act, 2016 and cohesive approach in regulating water resources where she pointed out the failure of the Act to assign and harmonize the roles of the entities formed therein together with other present bodies. It makes provisions for Water Resource Authority to regulate water resources without recognizing the existence of NEMA under EMCA which is formed as the primary body for environmental regulation. Other concern raised is that the Act confers too much authority to the CS for water yet the resources requires technical professionals to manage it.<sup>68</sup>

A PhD thesis by C. Odote, on "*regulating property rights to ensure sustainable management of wetlands in Kenya*"<sup>69</sup> guided this study on national and global structures for regulating wetlands with case studies from Uganda and USA. It provided a case for inclusion of property rights in the processes of managing and promoting rational utilization of wetlands. The author's argument is that property rights and interests are overlooked in various projects aimed at managing and conserving the environment. The author's paper is different from the current study in that it majorly focuses on regulation of property rights and interests to promote conservation and rational utilization of wetlands in Kenya. The investigation herein involves application of rational use concept in regulating wetlands in Kenya against the commitment of parties under the Ramsar Agreement. Other material by this author that was of great assistance on the subject matter of discussion is an Article titled 'the Implications of Property Rights for Sustainable Management of Wetlands in Kenya'.<sup>70</sup> This article discusses the various legal measures applicable in Kenya towards achieving sustainability in managing wetlands.

Wise utilization of wetlands requires appropriate arrangement of institution and assignment of roles. The Parties to the Ramsar agreement committed to review their institutions managing wetlands and align them towards realization of prudent use of the resources. This study involved perusal of writing about the Country's institutional and legal framework on land use and

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<sup>67</sup> Akech Migai, *Governing Water and Sanitation in Kenya*, in C.O Okidi, et al, (Eds) *Environmental Governance in Kenya: Implementing the Framework Law* (Nairobi, East African Publishers, 2008) at page 305 -334

<sup>68</sup> Akech Migai, *Governing Water and Sanitation in Kenya*, in C.O Okidi, et al, (Eds) *Environmental Governance in Kenya: Implementing the Framework Law* (Nairobi, East African Publishers, 2008) at page 323 -327

<sup>69</sup> C. Odote 'Regulating property rights to ensure sustainable management of wetlands in Kenya', (PhD thesis, University of Nairobi, 2010).

<sup>70</sup> C. Odote, B. Ochieng and M. Makoloo, 'The Implications of Property Rights for Sustainable Management of Wetlands in Kenya,' in IASC Conference. Cheltenham, UK, (2007).

environmental management by A. Mumma discussed in ‘*The Role of Administrative Dispute Resolution Institutions and Processes in Sustainable Land Use Management: The Case of the National Environment Tribunal and the Public Complaints Committee of Kenya*’.<sup>71</sup> It is the author’s position that the bodies established to manage the environment have no sufficient statutory powers and capacity to implement national policies on regulation of the environment and natural resources. Consequently, the country’s policies on healthy and rational use of natural resources have not been implemented and unsound environmental practices are persisting.<sup>72</sup>

A paper by B. Barczewski,<sup>73</sup> on implementation of regulation during the construction of Thika Highway provided a practical information guiding application of impact assessment as a necessary process for regulating environment. The papers also brought out challenges facing national institutions in carrying out their statutory mandates. This information was useful in terms of discussing the institutional establishments and assignment of mandates for regulating wetlands.

## **1.9 Research Methodology**

The research involved investigation carried out through doctrinal research method. It involved extensive use of library materials such as books, journals, articles, other research papers, thesis, and reports relating to wetlands management. It also involved review and examining critically various statutes, regulations and policies. Additionally, the research included use of internet sources. Various legal instruments were analyzed to establish the national position on wetlands management. This also involved appraisal of the mandates of the institutions responsible for wetlands. Data on international instruments were mostly obtained from the internet. The data obtained from these multiple sources were analyzed and evaluated on how Kenya complies with her obligations under Ramsar Convention in promoting rational utilization of wetlands. The data obtained guided on proposals for reforming legal structures.

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<sup>71</sup> In N.J Chalifour et al. (Eds). *Land Use Law for Sustainable Development*. (Cambridge: Cambridge University Press, 2006) at page 254

<sup>72</sup> Ibid

<sup>73</sup> B. Barczewski, ‘How well do Environmental Regulations work in Kenya: A case Study of the Thika Highway Improvement Project’ (2013) policy research paper, < <http://csud.ei.columbia.edu/files/2013/06/How-Well-Do-Environmental-Regulations-Work-in-Kenya.pdf>> accessed on 10/25/2019



## **1.10 Chapter Breakdown**

This study is structured into five parts laid out as follows:

Part one is an overview and a general background on conservation and rational utilization of wetlands. It outlines commitments of parties to the Ramsar Agreement. It contains detailed statement of the problem on wetlands in Kenya leading to this research. It gives a hypothesis of weak regulations of wetlands assumed in this study. It also gives a summary of principles underlying the study and research methodology applied in collection of data for examination and analysis. The chapter also gives an outline of literatures from various authors on the subject matter forming a foundational philosophy for this research.

Part two analyses the commitments of Contracting Parties under Ramsar Convention of 1971 on wetlands. The chapter brings out the concept of rational use of wetlands as provided for under this instrument and the strategies formulated to guide parties in ensuring compliance with the international obligations under this Convention. Various components of the rational use concept are discussed in a bid to lay out the actionable areas for the Parties to Ramsar Agreement.

Part three deliberates on Kenyan legislations for promoting regulation of wetlands in a sustainable way. It involves a thorough examination of the legislations and regulations of the various environmental sectors in Kenya such as water, wildlife, and forest to establish how laws of the country have incorporated the concept rational use of wetlands. In the course of examination, this Chapter brings out legal hindrance in protecting wetland, such as the failure to integrate wetland in the environmental management, lack of a specific national legislation on wetlands and the delay in enacting the national wetland policy.

Part Four of the study evaluate the institutional framework in terms of their establishments and mandate's assigned in line with wise use of wetlands. It also examines the challenges facing these institutions including the weak legal support and lack of coordination.

Part five sums up the research by way of conclusion and makes appropriate recommendations for promoting conservation and rational utilization of wetlands in Kenya. This chapter makes proposal

for realization of the objectives of wetland conservation such as the use of modern technology in monitoring the vital resources and protects them from degradation and eventually their loss.

### **1.11 Conclusion**

Notwithstanding that wetlands perform a central role in in life of human beings and environment at large, their ecosystem has faced continuous deterioration caused by human actions. Hence, special attention need to be taken to protect this unique and valuable resource.

There is need to address the legal and institutional challenges facing management of wetlands, so that both the present and the future generation benefits form the resource. A number of reforms need to be carried as will be discussed in the preceding chapters. Key to this is the need for recognition of benefits of wetlands, determination of economic values of the resource and dissemination of conservation measures at grass root level as a collective approach to managing the wetlands. Because of the nature of wetlands, their management does not lie within the scope of one agency. Thus, this situation calls for coordination and involvement of all stakeholders in realizing conservation and wise use of the wetlands. The next chapter analyses commitments of contracting parties to the international instruments on wetlands with a view to evaluate their implementation at national level.

## CHAPTER TWO

### 2.0 ANALYSIS OF THE PRINCIPAL INTERNATIONAL LAW ON RATIONAL USE OF WETLANDS

#### 2.1 INTRODUCTION

Nations globally have been called upon to conserve natural resources including wetlands. Conservation in this respect means taking care and utilization of natural resources in a prudent manner for purposes of achieving continuous benefits.<sup>74</sup> The need for conservation and rational utilization of wetlands is therefore a worldwide responsibility of Nations. Research has shown that, universally, wetlands are deteriorating at a high speed (thrice) than forests.<sup>75</sup> This destruction of wetlands and their disappearance has resulted in extensive harm such as floods, change of weather patterns, and extended scarcity of water around the world. Latest study on continuing tendencies on wetland areas all over the world based on analysis of 189 reports established that the permanent disappearance of natural wetlands reported was within 54% and 57%. The reports showed a rapid loss of wetland (3.7 more) in 20<sup>th</sup> and early 21<sup>st</sup> centuries.<sup>76</sup>

The call for proper management and utilization of wetlands is linked to the benefits of the ecosystems which is valued higher than other types of ecosystem as per report on the commercial aspect of wetlands ecosystems, water and various living organisms therein. Deterioration and disappearance of wetlands affects lives of mankind, other wetlands dependent biodiversity and the economy of Nations as a whole.<sup>77</sup>

In addressing negative impacts of wetlands worldwide, the global community developed and executed several agreements to stimulate conservation and rational utilization of various natural resources together with their ecosystems. State Parties to these instruments have series of

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<sup>74</sup>The Law Dictionary, (2nd Ed.) <<https://thelawdictionary.org/conservation/>> accessed on 15/10/2019

<sup>75</sup> Ramsar Convention Secretariat, *Global Wetland Outlook: State of the World's Wetlands and their Services to People*. (Gland, Switzerland: Ramsar Convention Secretariat, 2018) page 5

<sup>76</sup> N. Davidson, 'How much wetland has the world lost? Long-term and recent trends in global wetland area' (CSIRO Publishing, Marine and Freshwater Research, 2014) page 65, 934 – 942 <<http://agris.fao.org/agris-search/search.do?recordID=US201500077447>> accessed on 11/01/2019

<sup>77</sup> The Economics of Ecosystems and Biodiversity for Water and Wetlands at page 4 <[https://www.ramsar.org/sites/default/files/documents/library/teeb\\_waterwetlands\\_execsum\\_2013\\_e.pdf](https://www.ramsar.org/sites/default/files/documents/library/teeb_waterwetlands_execsum_2013_e.pdf)> found in <<https://www.informea.org/ar/node/482115>> accessed on 11/01/2019

commitments aimed at conserving the resources as well as the environment at large.<sup>78</sup> The key international agreement executed by Nations to encourage conservation and rational use of wetlands ecosystem is the Ramsar agreement. This agreement obligates its parties to safeguard wetlands and utilize the resources in a manner that promote their ability to renew naturally for enjoyment by all generations.<sup>79</sup>

Although the Ramsar agreement is the main international agreement on wetlands conservation, there are subordinate instruments that have fundamental roles in wetlands protection. Some of these agreements are “ Convention on Biological Diversity (CBD)” of 1992; “United Nations Framework Convention on Climate Change” of 1992; “Convention on Protection of the World Cultural and Natural Heritage” of 1972; “United Nations Convention to Combat Desertification (UNCCD)” of 1996; “the Convention on the Conservation of Migratory Species of Wild Animals” (the “CMS or Bonn Convention”) of 1983 and “Convention on International Trade in Endangered Species of Wild Fauna and Flora” (CITES) of 1975.<sup>80</sup> These agreements were formulated for various environmental sectors, however, their implementation supports protection of wetlands in a number of ways.<sup>81</sup>

## **2.2 THE RAMSAR CONVENTION**

This instrument was approved upon by State parties on 2<sup>nd</sup> February 1971 and was enforced in December 1975.<sup>82</sup> The history behind enactment of this Convention is that wetlands had long been the subjected to reclamation for other uses like commercial development and agriculture. Their valuable benefits to the environment such as provision of habitat for other organisms and balancing

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<sup>78</sup> D. Russi, P. Ten Brink, A. Farmer, et al., ‘the Economics of Ecosystems and Biodiversity for Water and Wetlands’ (IEEP, London and Brussels, 2013), <[www.cbd.int/financial/values/g-ecowaterwetlands-teeb.pdf](http://www.cbd.int/financial/values/g-ecowaterwetlands-teeb.pdf) > accessed on 11/01/2019

<sup>79</sup> See discussion in Collins Odote, titled “*Wise Use and Sustainable Management of Wetlands in Kenya* in C.O Okidi, et al, (Eds) *Environmental Governance in Kenya: Implementing the Framework Law* (Nairobi, East African Publishers, 2008) at page 340

<sup>80</sup> MEMR, *Kenya Wetlands Atlas* (Ministry of Environment and Mineral Resources, Kenya, 2012) page 12-13 <[https://na.unep.net/atlas/datlas/sites/default/files/Kenya\\_Wetlands.pdf](https://na.unep.net/atlas/datlas/sites/default/files/Kenya_Wetlands.pdf)> accessed on 10/01/2019

<sup>81</sup> Collins Odote, titled “*Wise Use and Sustainable Management of Wetlands in Kenya* in C.O Okidi, et al, (Eds) *Environmental Governance in Kenya: Implementing the Framework Law* (Nairobi, East African Publishers, 2008) at page 341

<sup>82</sup> Ramsar Convention Secretariat, *An Introduction to the Convention on Wetlands*, (Ramsar Convention Secretariat, Gland, Switzerland, 2016) page 19

level of water had been disregarded.<sup>83</sup> The Convention has been adjusted in two instances from the date of application. The 1<sup>st</sup> variation was made in December 1982 by Paris Protocol and the changes were implemented in 1986. The changes incorporated a process of amending the agreement at article 10. It also endorsed official interpretation of the agreement in French, Spanish, Arabic, Russian and German. The 2<sup>nd</sup> variation of the agreement was made in 1987 by Regina amendments. These changes were implemented on 1<sup>st</sup> May 1994. The amendments varied articles 6 and 7 of the Convention. These changes were related to the operation of the Agreement by describing the authority of meetings of Parties; formation of inter-sessional permanent committee, a long term secretariat and a fund for the Convention.<sup>84</sup>

At the introduction of the Convention, members appreciated that wetlands have economic, biological, cultural and recreational benefits hence they undertook to immediately stop the continuing destruction and disappearance of wetlands as well as any address any forthcoming threats. The agreement establishes broad requirements for rational utilization and conservation of wetlands. Execution of commitments by members is flexible, taking into account the unique circumstances of each member. Thus, each party is free to legislate and discharge the obligations taking into account the prevailing circumstances in her territory. The extent of legal measures encouraged by members to the Convention depend on magnitude, ecology and socio-economic component of each wetland.<sup>85</sup> The need for protecting this resource was developed as a response to alarming degree of damage to wetlands globally. Thus, parties to this Convention made commitments to address the threats of wetlands.<sup>86</sup>

### **2.3 OBLIGATIONS OF PARTIES TO THE RAMSAR AGREEMENT**

The Ramsar agreement presents four key commitments of its members as discussed below.<sup>87</sup>

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<sup>83</sup> E. J. Goodwin E. J., *International Environmental Law and the Conservation of Coral Reefs*, 1<sup>st</sup> Ed, Taylor & Francis (2011) page 138

<sup>84</sup> Ramsar Convention Secretariat, *An Introduction to the Convention on Wetlands*, (Ramsar Convention Secretariat, Gland, Switzerland, 2016) page 19, also see discussion in C. Odote Collins Odote, titled “*Wise Use and Sustainable Management of Wetlands in Kenya*” in C.O Okidi, et al, (Eds) *Environmental Governance in Kenya: Implementing the Framework Law* (Nairobi, East African Publishers, 2008) at page 340

<sup>85</sup> C. Shine & C. De Klemm, *Wetlands, Water and the Law. Using law to advance wetland conservation and wise use*, (IUCN, IUCN Environmental Policy and law paper no. 38, 1999), page 113

<sup>86</sup> Ramsar Convention Secretariat, *An Introduction to the Convention on Wetlands* (Ramsar Convention Secretariat, Gland, Switzerland, 2016) page 12

<sup>87</sup> *Ibid* page.14

### 2.3.1 Designating Wetlands of International Status

The Ramsar agreement at article 2(1) call upon its members to select and set aside wetlands to be added in a class of wetlands of international standing.<sup>88</sup> This obligation was arrived at by State parties because they were certain that the commitment will assist towards realization of goal of the agreement by having a wide-reaching network of wetlands sites comprised of many types of wetlands.<sup>89</sup> During their 7<sup>th</sup> COP,<sup>90</sup> the parties were called upon to classify all wetlands that may be suitable for selection as Ramsar locations and to set up goals for subsequent selection taking into account the expected number of sites and to give the information on these objective during meetings of parties and to Ramsar bureau. This activity forms part of operational plan of the parties under the agreement.

This obligation does not stop at mere designation, but rather the parties are required to conserve the sites and to include more sites to the register as well as spread the boundary of the selected wetlands. The criteria for selecting the wetlands for purposes of registering them is provided under article 2.2 of the agreement, that is, importance of wetlands to international community in relations to ecology, zoology, hydrology, ecology, limnology or botany. There are other 9 principles for consideration established by the State parties of which at least one of them must be met in the process of designation. These are, whether a wetland —

- i. consists of a classic, uncommon or exceptional sample variety of wetland established in the right biogeographic area;
- ii. sustains weak, threatened or critically threatened species or endangered environmental communities;
- iii. encourage population of animal and plant of all variety that are essential for conserving biological diversity of a specific area;
- iv. hold variety of animal and plants during their vital phase in their life span or harbor them at the time of unfriendly conditions;

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<sup>88</sup> Detailed discussion is found in E. J. Goodwin E. J., *International Environmental Law and the Conservation of Coral Reefs*, 1<sup>st</sup> Ed, Taylor & Francis (2011) page 139

<sup>89</sup> Annexes A and B (9<sup>th</sup> COP, 2005) X.1 and X.20 (10<sup>th</sup> COP, 2008) to Resolution VII.11 (7<sup>th</sup> COP, 1999) and amended by Resolutions VII.13 (1999), VIII.11 and VIII.33 (8<sup>th</sup> COP, 2002), IX.1 in Ramsar Convention Secretariat, *Designating Ramsar Sites: Strategic Framework and guidelines for the future development of the List of Wetlands of International Importance*. (Ramsar handbooks for the wise use of wetlands, Ramsar Convention Secretariat, Switzerland, vol. 17, 2010) page 7

<sup>90</sup> Ibid, 'Annexes A and B (9<sup>th</sup> COP, 2005) X.1 and X.20 (10<sup>th</sup> COP, 2008)'

- v. commonly maintains 20,000 or higher waterbirds;
- vi. routinely maintains 1% of the individuals in a population of one class or subclass of waterbirds;
- vii. maintains a major percentage of native fish subspecies, class or families, life-history phases, species relations and/or populations that are samples of wetland uses and/or values and thereby add to universal biological diversity;
- viii. is an essential point of food supply for fishes, breeding ground, nursery and/or migration route relied upon by fish breeds inside or outside the wetland; and
- ix. commonly maintains 1% of the individuals in a population of one class or subclasses non-avian animal species that rely on wetlands.<sup>91</sup>

Apart from instituting more registered sites, State parties are obligated to notify Ramsar secretariat without delay all kinds of variations or likelihood of alteration of natural conditions of registered sites caused by pollution, advance in use of technology or human intervention.<sup>92</sup>

### **2.3.2 Wise Utilization of Wetlands**

The Members of Ramsar agreement committed to guarantee rational utilization of all wetlands within their countries as provided at article 3 of the agreement. The Ramsar team established strategies for implementation of “wise use” concept. This obligation forms backbone of this research and will be discussed in detail later in the chapter.

### **2.3.3 Establishment of Nature Reserves and Capacity Building**

Ramsar Agreement at Article 4(1) requires every party to encourage conservation of wetlands and waterfowl through establishing wetlands nature reserves that may or may not be registered. Further, the parties have an obligation to publish data about wetlands and train staff/employees in charge of managing wetlands.<sup>93</sup>

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<sup>91</sup> Ramsar Convention Secretariat, *Designating Ramsar Sites: Strategic Framework and guidelines for the future development of the List of Wetlands of International Importance*. (Ramsar handbooks for the wise use of wetlands, Ramsar Convention Secretariat, Switzerland, vol. 17, 2010) page 28-39

<sup>92</sup> Ramsar Convention 1971 Article 3 (2)

<sup>93</sup> E. J. Goodwin E. J., *International Environmental Law and the Conservation of Coral Reefs*, 1<sup>st</sup> Ed, Taylor & Francis (2011) page 140

### **2.3.4 International Cooperation**

This is the fourth broad responsibility of parties to the Ramsar agreement as stipulated at article 5. Thus, members agreed to put their heads together and deliberate on implementation of this obligations under the Convention. The consultation is mainly in shared wetlands, common water systems and species. The call for cooperation include harmonization of strategies, rules and procedures on protection of wetlands and lives (plants and animals) therein.<sup>94</sup> The parties agreed during 7<sup>th</sup> COP<sup>95</sup> to give attention to the following areas when executing this commitment:

- i. Sorting out different varieties of trans-boundary wetlands and river basins and team up with each other at all levels in pushing for management of these resources.
- ii. Promoting integration with other relevant international instrument in management of wetlands where appropriate.
- iii. Enhancing actions targeted at sharing skills and knowledge in management of wetlands such as “site twinning arrangements” and increase the capacity of the staff or employees dealing with protection of wetlands.
- iv. Engage in activities that will stimulate the effectiveness of “international development assistance f” in protecting wetlands.
- v. Analyzing international trade in products from wetland and take any action needed to ensure that the harvesting of such products is done in a sustainable manner.
- vi. Ensuring that all venture and development plans about wetlands within territory of parties are evaluated on their impact to environment. Recommend rules of management for business sectors on this aspect and consider putting in place procedures that will authorize resources extracted from wetland-related development project to support call for rational use of the resource.<sup>96</sup>

## **2.4 WISE USE OF WETLANDS: MAIN OBJECTIVE OF RAMSAR AGREEMENT**

Wetlands provide countless benefits to the ecology, the economies of nations and lives of human beings. To ensure full enjoyment of these benefits, conservation and prudent utilization of wetlands

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<sup>94</sup> Ramsar Convention 1971 Article 5

<sup>95</sup> Annex to Resolution VII.19, San Jose, Costa Rica, 1999,

[www.ramsar.org/sites/default/files/documents/library/key\\_res\\_vii.19e.pdf](http://www.ramsar.org/sites/default/files/documents/library/key_res_vii.19e.pdf) accessed on 20/01/2019

<sup>96</sup> Ramsar Convention Secretariat, *International cooperation: Guidelines and other support for international cooperation under the Ramsar Convention on Wetlands*. (Ramsar handbooks for the wise use of wetlands, 4th edition, vol. 20. Ramsar Convention Secretariat, Gland, Switzerland. 2010) page 7



have been considered as comprehensive goals of Ramsar Agreement.<sup>97</sup> Prudent use of wetlands covers a general meaning and involves carrying out of several other activities as discussed herein. It is the foundation of the Ramsar Agreement. Wise use concept entails measures that are over and above the main commitments in the text of the Convention such as the selection and registering of sites, planning, instituting wetlands reserves and supporting international conservation.<sup>98</sup> It is for this reason this research focuses on investigating legislations and institutions established to promote conservation and prudent utilization of wetlands in Kenya in compliance with the Ramsar agreement.

The call for rational utilization of wetlands is provided under article 3.1 of the Ramsar agreement. The agreement stipulates that parties shall work out and execute their strategies in a manner that supports conservation of wetlands that are registered. Additionally, the parties are tasked to ensure prudent utilization (wise use) of all the wetlands within their boundaries irrespective of registration. The requirement for prudent utilization of wetlands apply to all wetlands in the borders of a party. Thus, wetlands registered as spots of international significance and those of national interest as well as all other wetlands must be utilized in a rational manner. The commitment of Parties under Article 3(1) is interpreted as general presumption for every wetland whether registered or not.<sup>99</sup>

Although the Ramsar agreement talks of “wise use” of wetlands, this term is not interpreted in the text of the Convention. The term was defined during the 3<sup>rd</sup> COP in Regina, Canada, in 1987 as “sustainable utilization” of resources in a manner that will serve humankind harmoniously while conserving “natural properties” of the environment.<sup>100</sup> On the other hand, “sustainable utilization” was interpreted as enjoyment of wetlands by human beings so that the resources can produce the highest benefit to the current generation at the same time retain its capacity to serve the needs and

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<sup>97</sup> Ramsar Convention Secretariat, *An Introduction to the Convention on Wetlands*, (Ramsar Convention Secretariat, Gland, Switzerland, 2016) Page.14

<sup>98</sup> C. Shine and C. De Klemm, *Wetlands, Water and the Law. Using law to advance wetland conservation and wise use*, (IUCN, IUCN Environmental Policy and law paper no. 38, 1999), page 47

<sup>99</sup> E. J. Goodwin E. J., *International Environmental Law and the Conservation of Coral Reefs*, 1st Ed, Taylor & Francis (2011) page 141

<sup>100</sup> Ramsar Convention Secretariat, *An Introduction to the Convention on Wetlands* (Ramsar Convention Secretariat, Gland, Switzerland, 2016) Page 38

desires of other coming generations.<sup>101</sup> The COP to Ramsar agreement made further clarifications on the concept of wise use of wetlands in the year 1996. This came after considering the object of the concept against that of sustainable use which is applied in “Convention on Biological Diversity” (CBD) of 1992. Hence, the COP to the Ramsar agreement found that the two concepts were substantially similar in application by member States.<sup>102</sup> The CBD describe “sustainable use” at article 2 as utilization of various elements of “biological diversity” in a manner and frequency that does not cause permanent destruction of the organisms and maintaining the capacity of the resources to satisfy the needs and desire of all generations

The definition of the phrase, wise utilization, was later revised by COP of the Ramsar agreement under resolution IX.1 Annex A of year 2005 to mean conservation of natural environmental character by means of applying ecosystem techniques within sustainable development perspective.<sup>103</sup> This description introduced the term “sustainable development” with a view of aligning benefits of utilizing the resources wisely to all generations. The Parties to Ramsar agreement sanctioned guidelines for realizing prudent utilization of wetlands during their 3<sup>rd</sup> and 4<sup>th</sup> COP. Supplementary guidelines for achieving prudent use of wetlands were also agreed upon during 5<sup>th</sup> Ramsar agreement COP.<sup>104</sup> Thus, in summary, the guidelines approved by the COP’s for prudent use of wetlands are:

1. 1<sup>st</sup> Recommendation (Annex to Recommendation 3.3, Regina 1987). These recommendations brought out the following local actions to be carried out:
  - i. Develop proper institutions and organizations
  - ii. Agree on laws and policy requirements;
  - iii. Intensify knowledge and appreciation of wetland uses;
  - iv. Register and monitor the quality of wetlands; and
  - v. Pinpoint urgent strategies and devise action plans for particular sites as part of a Wetland Policy for Nations.

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<sup>101</sup>Ramsar Convention Secretariat, *An Introduction to the Convention on Wetlands* (Ramsar Convention Secretariat, Gland, Switzerland, 2016) Page 38

<sup>102</sup>C. Shine and C. De Klemm, *Wetlands, Water and the Law. Using law to advance wetland conservation and wise use*, (IUCN, IUCN Environmental Policy and law paper no. 38, 1999) page 47

<sup>103</sup>Ibid note 101 at page 38

<sup>104</sup> Ibid note 101 at page 37-38

2. 2<sup>nd</sup> Recommendation (Annex to Recommendation 4.10, Montreux 1990).

These recommendations encouraged reaching a lasting solution through formulating an all-inclusive National Wetland Policies. They also endorsed parties to take conservation measures suited to address activities which although carried out outside the wetlands areas, affect the wetlands (also called non-site-specific measures). These conservation measures include formulating legislations, establishment of proper institutions established and taking scientific measures in addition to operation of a national register of wetlands.<sup>105</sup>

3. Additional guide for implementation of the concept (Annex to Resolution 5.6, Kushiro 1993).<sup>106</sup>

These guidelines focused on 6 issues, that is, “wise use” programmes should comprise of social factors, economic influences, local communities, other stakeholders (private and public), respective institutions, coastal zones or catchments areas and implementation of precautionary principle whenever it is suitable.

During 4<sup>th</sup> Meeting of COP at Montreux, in 1990<sup>107</sup> member States accepted that the theory of rational utilization of wetlands encompasses protection and management of wetlands in all conditions. They noted that it comprises of improvement of policies and plans, taking legal and educational activities, among other clear-cut actions. Although development of national wetland policy is taken as the necessary measures to promote prudent use of wetlands, State parties agreed that this was a deep-rooted goal. Hence, the Parties opted for recommendations that involved speedy actions. The following constitutes activities that were agreed to assist parties in achieving the goal of prudent utilization of wetlands. It was further agreed that these activities may be part of a comprehensive wetland policy for Nations or may be executed under urgency (priority actions) by States:<sup>108</sup>

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<sup>105</sup> C. Shine and C. De Klemm, *Wetlands, Water and the Law. Using law to advance wetland conservation and wise use*, (IUCN, IUCN Environmental Policy and law paper no. 38, 1999) page 49

<sup>106</sup> Ibid

<sup>107</sup> Recommendation 4.10: Montreux 1990, ‘Guidelines for the Implementation of the Wise Use Concept.’

<sup>108</sup> Annex to Recommendation 4.10 (Revised.), ‘Guidelines for Implementation of the Wise Use Concept of the Convention’ (4<sup>th</sup> COP, Montreux, Switzerland, 1990)

- 2.4.1 Formation and Development of institutions
- 2.4.2 Evaluation of laws and government policies affecting wetlands
- 2.4.3 Spreading knowledge and appreciation of wetlands importance
- 2.4.4 Actions for effective management of wetlands (Assessment of the degree of, and ascertainment of priorities for all wetlands within territory of nations)
- 2.4.5 Onsite measures at wetlands areas

#### **2.4.1 Formation and Development of Institutions**

The activities under this category are as follows:

**a) Establishment of institution and assignment of appropriate mandates.**

In order to promote protection of wetlands, State parties committed to create and develop organizations and systems that will bind respective officers to discover suitable actions for wetland conservation.<sup>109</sup>

**b) Incorporate integrated multidisciplinary wetland management approach**

State parties are obligated to come up with ways that would integrate multidisciplinary management approach during formulation and implementation of strategies and developments activities having effect on wetlands and their support systems for purposes of ensuring wise use of wetlands and enjoying maximum benefits of this resource for all generations.<sup>110</sup> Moreover, the 1993 additional recommendations of wise utilization of wetlands requires formation of agencies whose representation cut across all sectors at national level. The arrangement of these agencies should be composed of cross—ministerial delegates or commissions, department, committees or inter—agencies to supervise and collaborate in management of the wetlands resources.

#### **2.4.2 Evaluation of Laws and Government Policies Affecting Wetlands**

Guiding principles for rational utilization of wetlands outlines the following activities for State parties in ensuring protection of wetlands:

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<sup>109</sup> Annex to Recommendation 4.10 (Revised.), 'Guidelines for Implementation of the Wise Use Concept of the Convention' ( 4<sup>th</sup> COP, Montreux, Switzerland, 1990)

<sup>110</sup> C. Shine and C. De Klemm, *Wetlands, Water and the Law. Using law to advance wetland conservation and wise use*, (IUCN, IUCN Environmental Policy and law paper no. 38, 1999) page 71

- a) Analysis of current laws and policies (including subsidies and incentives) touching on protection of wetland;
- b) Operationalize existing laws and policies that promote wetlands protection;
- c) Enactment of different laws and policies where need be;
- d) Utilizing development funds for activities that support protection of and sustainable utilization of the resources.<sup>111</sup>

### **2.4.3 Spreading Knowledge and Appreciation of Wetlands Importance**

Under this category, State Parties to Ramsar agreement agreed to:

**a) Increase the awareness of the full benefits in wise utilization of wetlands**

This action is aimed at increasing understanding of protection of wetlands and the benefits connected to them by those in charge of making decision as well as members of public. Article 4(3) of the Ramsar agreement call upon parties to motivate research and exchange of knowledge and publications concerning wetlands as well as the living organisms therein.

**b) Assess customary techniques promoting rational use of wetlands**

Under this item, parties are tasked to revise the traditional techniques of rational utilization of wetlands in order to associate them with modern ideas and elaborate experimental projects that illustrate rational use of a sample wetland types.

**c) Interchange experience and information on conservation and rational use of wetlands**

Parties to Ramsar agreement are under obligation of exchanging experience and information with a view to update on techniques of protecting wetlands.

**d) Training of appropriate staff**

This involves increasing capacity for management of wetlands aimed at enhancing execution of wetland conservation actions and policies.

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<sup>111</sup>Annex to Recommendation 4.10 (Revised.), 'Guidelines for Implementation of the Wise Use Concept of the Convention' ( 4<sup>th</sup> COP, Montreux, Switzerland, 1990)

#### **2.4.4 Actions for Effective Management of Wetlands**

This encompasses analyzing the conditions of wetlands and ascertain the areas that need urgent actions for both the registered international sites and all other wetlands within the territory of State parties. It involves the following actions:

**a) Implementation of a register of wetlands at national level**

State parties are required to prepare national inventory of wetlands and classify them for ease of management. An inventory of wetlands assists in complying with the obligation of designating protected sites as it provides comprehensive and consistent material about wetlands within territory of parties. Parties to Ramsar agreement under Resolution VII.20 (1999) of the 7<sup>th</sup> COP agreed to organize a full register of wetland on priority to assist in execution of other duties such selection and registration of sites which require appropriate information.<sup>112</sup>

**b) Classification and assessment of benefits and values of wetlands on site**

Benefits and values of wetlands include: controlling soil weathering, controlling overflow of water, maintaining water condition and reducing impurities, supporting ground and underground water sources, supporting fishing, pasturing and cultivating, leisure activities and learning, providing home for wildlife, mainly waterfowl, and contributing to steady weather patterns.<sup>113</sup>

**c) Monitoring and noting change of ecological conditions of wetlands**

Parties to Ramsar agreement are under duty to keep track of the wetlands and define the preferred conservancy and other operational tasks at every wetland area in harmony with demands and situation of every Nation.<sup>114</sup> This commitment comprises of giving notice on change of the ecological situation of the selected wetlands as per Article 3(2) of Ramsar agreement. Parties to this agreement undertook to communicate to “Ramsar Secretariat” in advance if biological conditions of each and every wetland in her region that is

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<sup>112</sup> Ramsar Convention Secretariat, *Wetland inventory: A Ramsar framework for wetland inventory and ecological character description*. (Ramsar handbooks for the wise use of wetlands, 4th edition, vol. 15. Ramsar Convention Secretariat, Gland, Switzerland, 2010) page 7

<sup>113</sup>Annex to Recommendation 4.10 (Revised.), ‘Guidelines for Implementation of the Wise Use Concept of the Convention’ ( 4<sup>th</sup> COP, Montreux, Switzerland, 1990)

<sup>114</sup>Ibid

registered as of international significance is different, varied or has probability of changing as the result of growth in technology, contamination or other human intervention.

#### **2.4.5 Onsite Measures at Wetlands Areas**

These include the following activities:

##### **a) Full assessment of environmental impact of projects**

The State Parties are obligated to integrate environmental issues in their planning and carry out full assessment of environmental impacts of projects before approval, continue with project appraisal at time of execution as well as imposing all essential actions recommended to moderate any environmental impact of developments activities. It is provided that appraisal process (preparation, estimations and decision making) must deal with developments activities from the upstream all the way to wetlands as well as acts that may affect the wetland. In the course of appraisal care must be taken to preserve the uses of the wetlands. Thus, development must be carried out in a way that is friendly with prudent utilization of wetlands”.

##### **b) Structured utilization of natural components of wetland operation**

State Parties committed to control and manage utilization of wetlands within their territories to ensure the resources are not utilized in excess to give room for the wetlands system to function properly.

##### **c) Involving local people in management of wetlands**

This activity requires contribution of all concerned parties and mostly users of wetlands and indigenous community within the wetlands areas and take into consideration their views in management of the resources. As part of rational use of wetlands, State parties to Ramsar agreement in their 7<sup>th</sup> COP<sup>115</sup> noted that involving all concerned parties can fast-track realization of the prudent utilization and conservation of wetlands in accordance with article 3.1 of the Convention. Consequently, the State parties were called upon to prefer and take into consideration youth, women and their groups where possible. Parties

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<sup>115</sup> Resolution VII.8, San José, Costa Rica, May 1999

were also pressed to include extensive dialogue with indigenous communities in formation of national policies and laws on wetlands. They were also urged to confirm that these techniques when established, will include mechanisms for actively engaging public on their application. Moreover, parties were urged to create laws and policies whose context where applicable will assist native community with uninterrupted participation in decision-making at both national and local levels of governance for attaining continuous use of wetlands.<sup>116</sup>

**d) Designating wetlands of international status**

This activity is expressly provided under Article 2 of Ramsar agreement. The provision mandates each party to select appropriate wetlands in its region to be registered wetlands of international significance. The selection process involves outlining and marking out boundaries of every wetland on a map. The Convention lay out conditions to be used for selecting spots to be designated as wetlands of international status under Article 2(2). These conditions relates to relevance of wetlands in terms of zoology, botany, hydrology, limnology, ecology, as well as their importance to waterfowl.<sup>117</sup> In considering these standards, the parties are urged avoid overlooking minor sites since prospective sites of International benefit are not necessarily the major wetlands in the territory. The central point for consideration in selecting wetlands spots is the function of the wetlands in the area. It is noted that minor wetlands may be playing a vital task of conserving habitat or providing ecology for biological diversity at the area. Once a site is selected, a party is committed to protect it in order to achieve desired objective.

**e) Establishing nature reserves at wetlands sites**

This commitment entails establishment of nature reserves at wetlands sites. They may or may not be part of wetlands sites registered as of international status.

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<sup>116</sup> Resolution VII.8, San José, Costa Rica, May 1999

<sup>117</sup>Ramsar Convention Secretariat, *Designating Ramsar Sites: Strategic Framework and guidelines for the future development of the List of Wetlands of International Importance* (Ramsar handbooks for the wise use of wetlands, 4th edition, vol. 17. Ramsar Convention Secretariat, Gland, Switzerland, 2010) page 8.



**f) Restoring degraded wetlands**

Under this category of activity, it is required that degraded wetlands must be rehabilitated, to enable them serve people and the environment with the various essential benefits.

**2.5 RAMSAR CONVENTION STRATEGIC PLAN FOR THE PERIOD 2016-2024**

In order to ensure implementation of the activities towards wise utilization of wetlands, the State parties to Ramsar agreement have been formulating strategic plans for various periods. At the time of investigation of this paper, the 4<sup>th</sup> strategic project for the year 2016 to 2024 term had been approved through decision number XII.2 of 12<sup>th</sup> COP held in Punta del Este, Uruguay, in the year 2015. Vision of parties in this plan was to see that wetlands resources are conserved, utilized prudently, rehabilitated and their usefulness is appreciated and treasured by all parties.<sup>118</sup>

There are four strategic goals under this plans aimed at achieving conservation and prudent use of wetlands globally. These are as follows:<sup>119</sup>

**a) Putting Effort on Cause of Destruction and Disappearance of Wetlands**

This is a goal that targets restoration of damaged wetlands. It is an assurance for the State parties to promote stakeholders participation with a view to reduce destruction of wetlands from various human activities. The measures agreed to fulfil this goal include exchanging good implementation practices.<sup>120</sup>

**b) Conserving and Dealing with Ramsar Site Excellently**

This goal aims at protecting wetlands sites of international significance through keeping track of these sites and proper management. It calls for broader involvement of public by creating local organizations for protection of these wetlands areas. It also call for more efforts to increase number of wetlands listed in the Ramsar register.<sup>121</sup>

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<sup>118</sup> Ramsar Convention Secretariat, *An Introduction to the Convention on Wetlands (Ramsar Convention Secretariat, Gland, Switzerland, 2016)* Page 16

<sup>119</sup> Ibid

<sup>120</sup> Ibid

<sup>121</sup> Ibid

**c) Prudent Utilization of All Wetlands**

This is a goal that aims at all the wetlands within territories of State parties unlike the previous goal which targets selected sites. It requires State parties to focus on issues such as keeping national catalogue of all wetlands, carry out cohesive coastal zone and river-basin management, rehabilitating damaged wetlands. It also calls for assurance that crucial sectors of economies which are supported by wetlands are managed sustainably and their impacts checked.

**d) Strengthening Application of the Convention**

This goal is aimed to be realized through advancing and spreading technical and scientific assistance, growing regional commitment, “Communication, Education, Participation, and Awareness” (CEPA) and increasing competency, improved worldwide assistance, and contributing to basic fiscal among others.<sup>122</sup>

## **2.6 CONCLUSION**

From the above analysis of the principal international law on management of wetlands, it is demonstrated that management of wetlands is well catered for in legal instruments at global level. Undeniably, there is a moderately wide-ranging background pertaining to proper management and viable utilization of wetlands and all living organism therein. This position gives a good footing for the protection of the resources around the globe. The Ramsar agreement laid down various commitments of parties for implementation aimed at achieving long term goal of prudent use of wetlands within national territories. In order to aid in implementation of the Convention, various initiatives including detailed wise utilization guidelines are provided to assist State parties to comply with their commitments. Some of these initiatives are provision of scientific and technical guidance, mainstreaming wetlands conservation and wise utilization of the resources through spreading information, enhancing skills and knowledge, active community participation and awareness programmes.

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<sup>122</sup> Ramsar Convention Secretariat, *An Introduction to the Convention on Wetlands (Ramsar Convention Secretariat, Gland, Switzerland, 2016)* Page 16

The Conference of parties have laid out guidelines to assist parties in implementing their commitments of wise utilization of wetlands. All these efforts are necessary for establishing a supportive environment through local actions. Thus with all this international backing, it is now upon the member States to act within their borders to implement their pledges and responsibilities.<sup>123</sup>

By becoming a party to an agreement, a Nation obliges herself to perform all essential measures fitting within her laws and established structure to execute commitments agreed.<sup>124</sup> Therefore, it is upon the member States of Ramsar agreement to ensure the objectives set are realized for the benefit of all generations. The requirements of Ramsar agreement and recommendations to be executed are framed in a comprehensive terms to fit all parties. They cannot be regarded as self-executing. The commitment to promote wise use will not be realized unless each State party breaks down this extensive theory into full and harmonized legal instruments suited within national conducts and settings for execution. Thus, parties are required to put in place appropriate legal, policy and institutional mechanisms to achieve the desired goals under the Conventions. This should be carried out together with clear duties at all levels in the territory of member States. There is also need for sufficient powers permitting the established agencies to set out suitable tracking and operations of relevant laws.

The next two chapters will discuss the legal and institutional measures established in Kenya to promote wetlands management and the limitations that hinder realization of the objective of Ramsar agreement in protecting wetlands.

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<sup>123</sup> C. Shine and C. De Klemm, *Wetlands, Water and the Law. Using law to advance wetland conservation and wise use*, (IUCN, IUCN Environmental Policy and law paper no. 38, 1999) page 41

<sup>124</sup> *Ibid* at page 42

## CHAPTER THREE

### 3.0 EVALUATION OF LAWS ON WISE UTILIZATION OF WETLANDS IN KENYA

#### 3.1 INTRODUCTION

The analysis of commitments under the Ramsar agreement as detailed in Chapter two of this research brings out various obligations that bind State parties. The obligations are aimed at achieving sustainable management of wetlands, their ecosystems and biodiversity. As a State party to this Conventions, Kenya has an obligation to discharge the requirements declared in the text of the Convention and to engage in various activities that stimulate prudent use and proper management of wetland as authorized under the Convention and resolutions of meetings of parties.<sup>125</sup>

Kenya has been complying with the international obligations through various measures of wetlands conservation. These measures range from legislations, policy development, and institutional organization, among others as discussed herein. This notwithstanding, it should be noted, wetlands in Kenya are still facing extreme pressure from human activities as documented in various reports such as the “Kenya Wetland Atlas” (2012) and newspaper reports.<sup>126</sup>

Therefore, in this chapter, the study will evaluates the current legal framework on prudent utilization of wetlands in Kenya in conformity with the commitment of parties under the Ramsar Agreement and resolutions made in their Conference of Parties. With that, the study will examine the weaknesses of this framework that hinder realization of the objective of prudent utilization of wetlands. This chapter will also give various proposal for reforms. The reforms are in line with the recommendations for implementing the concept of rational use approved in the year 1990 at

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<sup>125</sup> Collins Odote, titled “*Wise Use and Sustainable Management of Wetlands in Kenya* in C.O Okidi, et al, (Eds) *Environmental Governance in Kenya: Implementing the Framework Law* (Nairobi, East African Publishers, 2008) at page 340

<sup>126</sup> MEMR. *Kenya Wetlands Atlas*, Ministry of Environment and Mineral Resource (2012) page 87; J. Kahongeh & M. Mwololo, ‘Conserve wetlands to reduce floods’, *Daily Nation*, (Nairobi, 4<sup>th</sup> April 2018) <[www.nation.co.ke/lifestyle/dn2/Conserve-wetlands-to-reduce-floods/957860-4371070-pfgmag/index.html](http://www.nation.co.ke/lifestyle/dn2/Conserve-wetlands-to-reduce-floods/957860-4371070-pfgmag/index.html)> accessed on 3/3/2019

Montreux, Switzerland during 4<sup>th</sup> COP. These guidelines provide for scrutiny of the existing legislations and institutions to ensure appropriate management of wetlands.<sup>127</sup>

In Kenya, environmental issues are addressed within sectoral legal framework. These sectors include wildlife, water, forestry, fisheries, mining, agriculture, land and marine sector. Despite the sectoral management, there is no specific legal framework for wetlands sector.<sup>128</sup> Hence this is one of the setbacks in promoting rational utilization of wetlands. Management of wetlands is catered for sparingly in various other sectoral legislations whose activities have effects on wetlands. Example of these environmental sectors associated to wetlands are agriculture, water, forestry and tourism sectors.<sup>129</sup> Thus, in the Kenyan context, the main sector legislations that govern wetlands include the Water Act, 2016, the Wildlife Conservation and Management Act, 2013, the Forest Conservation and Management Act, 2016 and the Environment Management and Coordination Act, 1999 as will be discussed herein.

### **3.1.1 Law Regulating Environmental Sectors Encompassing Wetlands**

#### **i. Land Sector**

Land is a prevalent component in description of wetlands. Hence, law on land utilization and land tenure connects on wetlands and determines the manner in which people recognize their roles to wetlands.<sup>130</sup> Land tenure refers to the way by which people or a group of persons take possession of or convey proprietary rights in land.<sup>131</sup> The legal provisions on land ownership systems in Kenya are found in the Constitution, 2010, the Land Act, 2012 and the Community Land Act, 2016. The Constitution of Kenya under Article 60 stipulates principles applicable in holding, utilizing and managing land among them being sustainability of the resources. The methods of land ownership in recognized under the Constitution of Kenya are public ownership, private ownership and

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<sup>127</sup> 'The Ramsar Concept of Wise Use' <[www.ramsar.org/sites/default/files/documents/library/info2007-07-e.pdf](http://www.ramsar.org/sites/default/files/documents/library/info2007-07-e.pdf)> accessed on 07/10/2019

<sup>128</sup> Similar wetlands challenges are also found in Uganda as discussed in E. Kasimbazi has written about 'The Development of Environmental Law and Its Impact on Sustainable Use of Wetlands in Uganda,' in N. J. Chalifour, et al. (Eds), *Land Use Law for Sustainable Development*. (Cambridge: Cambridge University Press, 2006) page 166

<sup>129</sup> C. Shine & C. De Klemm, *Wetlands, Water and the Law. Using law to advance wetland conservation and wise use*, (IUCN, IUCN Environmental Policy and law paper no. 38, 1999) page 42

<sup>130</sup> Ibid note 128 at page 164

<sup>131</sup> P. Kameri-Mbote, *Land Tenure and Sustainable Environmental Management in Kenya*, in Okidi, C.O., et al. (Eds), *Environmental Governance in Kenya: Implementing the Framework Law* East African Educational Publisher, Nairobi (2008) at page 261

community land. Public land is land held by the central or the devolved government in trust for the citizens and it is managed by National Land Commission on behalf of the people. Community land is land held by community groups founded on cultural values, ethnicity or any other related interests. Private land on the other hand is land possessed by any individual on freehold or leasehold tenure.<sup>132</sup> The land Act provides the forms of land tenure as freehold, leasehold and community land rights.<sup>133</sup> Wetlands are found in all forms of land tenure. Other relevant laws are the Agriculture Act, the Physical Planning Act, 2019, Community Land Act, no. 27 of 2016 among others. In order to promote sustainability in managing Environmental resources, which include wetlands, Prof. P. Mbote in one of her literature proposes ownership of land to be accompanied with deterring covenants that will control the manner in which land proprietors use their lands. These controls will act as means of ensuring proprietors are controlled in the use of their lands. Thus whether privately or group owned, the owners will have to adhere to the restrictions placed.<sup>134</sup>

## **ii. Water Sector**

Wetlands are known as water-logged areas. The presence of water is crucial in describing wetlands. Hence a discussion on legal regulatory structure of water sector is crucial in a study of wetlands. Water sector is regulated by the Water Act, 2016. This Act defines water resources to include swamps which are one of the categories of wetlands. Hence, both EMCA and Water Act have provisions that regulate wetlands. The two laws are implemented by two separate Ministries, each minister is empowered to make regulations over the resource. There is no harmony in the various bodies established under these legislations. This has brought in overlap of mandate and resulted into confusion. Consequently, unwise utilization of wetlands have continued unrestricted notwithstanding existence of these laws.<sup>135</sup>

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<sup>132</sup> Article 61- 64 of the Constitution of Kenya, 2010

<sup>133</sup> Land Act, 2012 Section 5

<sup>134</sup> See discussion on property rights and wetlands management in Kenya in C. Odote, 'Wise Use and Sustainable Management of Wetland in Kenya' in Okidi, C.O et al. (Eds). *Environmental Governance in Kenya, Implementing the Framework Law* East African Educational Publisher, Nairobi (2008), page 348

<sup>135</sup> C. Odote, 'Wise Use and Sustainable Management of Wetland in Kenya' in Okidi, C.O et al. (Eds). *Environmental Governance in Kenya, Implementing the Framework Law* East African Educational Publisher, Nairobi (2008), page 345-346

### 3.2 PRUDENT USE OF WETLANDS UNDER KENYAN LEGAL STRUCTURE

Article 3 of Ramsar agreement obligates the State parties to develop and execute their projects with a view to encourage the protection of wetlands ranked as of international significance. The provision also calls for prudent utilization of all wetlands where applicable within territory of parties. Wise utilization of wetlands is a standard that guides realization of the purpose of the Ramsar agreement. It assist parties to determine proper actions as well as selections of right course in policy formulation for managing wetlands.<sup>136</sup> As stated in Chapter 2, State parties to Ramsar agreement reconfirmed the position of the Convention during their 4<sup>th</sup> COP that the idea of prudent use applies to all stages of wetland management.<sup>137</sup> The concept of prudent use entails activities such as formation of policy, planning, organizing legal and institutional measures, promoting educational activities and other actions carried out on sites.<sup>138</sup> Kenya has not yet established a policy on wetlands. However, there is a draft policy that is pending finalization and approval.<sup>139</sup> The commitment to guarantee prudent use of wetlands is aimed at securing continuous supply of essential products and services from wetlands and taking care of various living organism including human beings that dependent on wetlands for survival.<sup>140</sup> This responsibility encompasses four main obligations as laid out in the recommendation for wise utilization of wetlands. These are as follows:<sup>141</sup>

- 3.2.1 Effective management of wetlands within the borders
- 3.2.2 Establishing specific measures for onsite wetlands conservation
- 3.2.3 Increasing knowledge and awareness on wetlands benefits
- 3.2.4 Proper institutions and organizations

The following is a discussion on each of these commitment and the activities therein as agreed by parties to the Ramsar agreement in achieving conservation and prudent utilization of wetlands around the globe.

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<sup>136</sup> Ramsar Convention Secretariat, *National Wetland Policies: Developing and implementing National Wetland Policies* (Ramsar handbooks for the wise use of wetlands, 4th edition, vol. 2. Ramsar Convention Secretariat, Gland, Switzerland, 2010) Page 23

<sup>137</sup> Ibid note 134 at page 351

<sup>138</sup> Recommendation 4.10: Montreux 1990, 'Guidelines for the Implementation of the Wise Use Concept.' Available at <https://www.ramsar.org/sites/default/files/documents/library/info2007-07-e.pdf> accessed on 28/10/2019

<sup>139</sup> MEMR. *Kenya Wetlands Atlas*. Ministry of Environment and Mineral Resources (2012), page 13

<sup>140</sup> 'The Ramsar concept of wise use' <[www.ramsar.org/sites/default/files/documents/library/info2007-07-e.pdf](http://www.ramsar.org/sites/default/files/documents/library/info2007-07-e.pdf)> accessed on 07/10/2019

<sup>141</sup> Annex to Recommendation 4.10 (Revised.), 'Guidelines for Implementation of the Wise Use Concept of the Convention' (4<sup>th</sup> COP, Montreux, Switzerland, (1990)

### 3.2.1 Effective Management of Wetlands

This is the first obligation under the concept of wise utilization of wetlands. In this category of obligation, the State party to Ramsar agreement are tasked to engage in careful planning, management and prohibition of certain activities.<sup>142</sup> Promoting prudent use of wetlands through proper management is very crucial to ensure the resource remain a key player in providing its vital roles of boosting human development, various other living organisms and the key processes of the earth such as water and carob chain.<sup>143</sup> The agreed management activities under this category are as follows:

- a) Creating and maintaining a national register of wetlands
- b) Establishing wetland management plans and policies
- c) Appraising usefulness of wetlands in every location
- d) Observing and informing the secretariat any variance of ecological state of wetlands

#### **(a) Creating and maintaining a national register of wetlands**

Preparing an account of national wetlands is a mandate of State parties to Ramsar Agreement. The significance of a register of wetlands is that it gives reliable material concerning the wetland resources within the borders of a State party. The inventory helps in compliance with the Ramsar Agreement in that it provides essential material that assist in selection and registration of different classes of wetlands sites of international, national and local significance. The obligation of maintaining a national wetland register is found in resolution VII.20 of the 7<sup>th</sup> COP of 1999. Under this resolution, parties acknowledged the usefulness of an extensive national wetland register as a root for many activities necessary for achieving prudent utilization of wetlands. Other activities for wetlands that depend on the register are establishment of policy, selection and registration of Ramsar Sites, keeping records of loss of wetland as well as determining wetlands that are likely to be rehabilitated.

It is worth noting that a register of wetlands is handy in boosting implementation of the commitment in article 2.1 of the agreement. It helps in registration of sites that are ranked in

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<sup>142</sup> C. Shine & C. De Klemm, *Wetlands, Water and the Law. Using law to advance wetland conservation and wise use*, IUCN, IUCN Environmental Policy and law paper no. 38, (1999), page 48

<sup>143</sup> Ramsar Convention Secretariat, Gland, *An Introduction to the Convention on Wetlands* Ramsar Convention Secretariat, Gland, Switzerland, (2016) page 37



providing international benefit. However, in the Kenyan setting, EMCA which is the primary law on environment does not stipulates mandates of preparing a wetland register. The water Act, 2016 which regulates some aspects of wetlands is also silent on this commitment. Preparation of a wetlands register is provided for under regulation 10 of EMCR 2009. The regulation vests the function of preparation and maintenance of the register to NEMA that is established under EMCA. The failure to provide for this crucial function in the principal law establishing NEMA makes the function a subordinate mandate of the entity. Consequently, the inventory has not been prepared since 2009 when the regulations were made. Thus, there is need for a substantive statutory provision to give strength to the preparation of the inventory and a legal backing that will compel the responsible state agency to act. This will in the long run assist in registration of more sites of international status in compliance with article 2.1 and 2.5 of the Ramsar agreement.

#### **(b) Appraising usefulness of wetlands in every location**

As outlined in Chapter one of this research, wetlands have enormous benefits to both human beings and the environment at large. They have regulatory, provisioning and supporting benefits. These include retention and storage of water for industrial use, agriculture as well as domestic use. Other benefits include formation of soil and cycling of nutrients. They also recharge and discharge ground water, and remove pollutants.<sup>144</sup> Despite these essential services, neither EMCA nor its regulations have provided for identification and evaluation of the benefits of wetlands in Kenya. There is no instrument compelling compliance with this obligation in spite of the values of wetlands to the human population, the environment and economy of the nation. Consequently, wetlands have received low recognition by decision makers leading to their destructive exploitation.

#### **(c) Observing and reporting any variance of ecological state of the wetlands**

Prudent utilization of wetlands covers a commitment by State parties to keep track of the state of wetlands and report to Ramsar secretariat any alteration of the ecological state of the protected sites. The Ramsar agreement under article 3.2 mandates State parties to notify the secretariat in advance whether natural state of a wetland registered in the record of wetlands having international

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<sup>144</sup> MEMR, *Kenya Wetlands Atlas* (Ministry of Environment and Mineral Resources, Kenya, 2012) page 69 <[https://na.unep.net/atlas/datlas/sites/default/files/Kenya\\_Wetlands.pdf](https://na.unep.net/atlas/datlas/sites/default/files/Kenya_Wetlands.pdf)> accessed on 10/01/2019

value within her region is altered or there is possibility of alteration due to advance in technology, contamination or other interventions by human activities. It is required that data on such variations has to be communicated with speed. This obligation involves keeping an eye on the natural state of the wetlands areas. Compliance with this obligation entails safeguarding or rehabilitating the ecological state of the wetlands areas through reasoned preparation and integrated management. It also involves ensuring there is a remarkable rise in quantities, acreage and linkage of various natural spots. Lastly, it encompasses guarantee by the State parties to focus on reducing pressures facing wetland sites. It also involves dealing with other factors that expose wetlands and result into change of their ecological state.<sup>145</sup>

In Kenya, monitoring of the Ramsar listed sites is carried out by KWS. KWS is established under the Wildlife Conservation and Management Act, 2013.<sup>146</sup> The exercise of this role by KWS is not expressly anchored in EMCA or the Wildlife Act. The appointment of KWS to oversee and keep an eye on the Ramsar sites was done administratively, and the mandate is comprised as part of the role of the agency in managing nature reserves. Similarly, provisions of EMCA do not expressly mandate NEMA to manage wetlands. The function of NEMA is provided in general terms as the administration and harmonization of all matters concerning the environment.<sup>147</sup> Thus, KWS lacks express legal support to monitor the protected wetlands sites having international values or any other wetland site nationally. The lack of express legal mandates to empower an agency to manage wetlands affects effective management of the resource. This position causes confusion in monitoring the ecological state of wetlands (both the international spots and the other wetland sites in the territory).

In view of above, there is need for express legislative provisions to mandate KWS to manage the international wetland sites. This will assist in compliance with the Ramsar agreement in effective tracking of ecological state of registered wetlands and their ability to hold the agency accountable for that function. Reports indicates that some of the selected wetlands sites are under threat of

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<sup>145</sup> Resolution XII.2 Punta del Este, Uruguay, 2015 ‘Ramsar Strategic Plan 2016-2014’ page 14 <[www.ramsar.org/sites/default/files/documents/library/cop12\\_res02\\_strategic\\_plan\\_e\\_0.pdf](http://www.ramsar.org/sites/default/files/documents/library/cop12_res02_strategic_plan_e_0.pdf)> accessed on 20/2/2019

<sup>146</sup> C. Odote, ‘Wise Use and Sustainable Management of Wetland in Kenya’ in Okidi, C.O et al. (Eds). *Environmental Governance in Kenya, Implementing the Framework Law* East African Educational Publisher, Nairobi (2008), page 347

<sup>147</sup> Environment and Management Coordination Act 1999 Section 9

destruction causing change of their ecology. By way of example, Lake Naivasha faces threat due to pesticide and fertilizer utilization as a result of intensive greenhouse floriculture and horticulture farming in the area and also extreme extraction of water.<sup>148</sup> Lake Baringo is exposed to continuous and excessive feeding of livestock and cutting down of trees, alteration of water course for farming from one of the inflowing rivers, foreign hostile species like Pistia (Nile cabbage), in addition to motor boats practices by water sports.<sup>149</sup> Tana delta is under threat due to construction of High Grand Falls Dam. This is a government project carried out under dam and irrigation projects. This plan is reported to have effect of diverting water in the upstream resulting to lesser amount of water reaching downstream.<sup>150</sup> These threats of destruction of the designated sites are contributed by the lack of express legal support in the monitoring roles and reporting efforts of KWS as well as lack of specialist to deal with the resource. As pointed out by Prof. P. Kamari- Mbote there no robust multidisciplinary players for researching established by the relevant laws. The KWS is predominantly made up of uniform personnel with weapons, an arrangement taken over from colonial time. This arrangement makes the body incapable of gathering, consolidating and distribution of information on conservation hence weaken the efforts of maintaining sustainability of the resources under it.<sup>151</sup>

Further, the existing permitted human activities on the wetlands sites have resulted in changes in ecological state of these registered wetlands due to increased populations of the communities around the wetlands. All this is occasioned by lack of a comprehensive legislative and institutional approach to monitoring the wetlands. EMCA does not expressly provide for promotion of use of technology in the monitoring and assessment of wetlands. With advance of technology, the law should be revised to mandate the wetlands managing institutions to apply appropriate technology which are trending in monitoring of wetlands. These provisions would allow the use of modern technology such as remote sensing and satellite imagery.<sup>152</sup>

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<sup>148</sup> Annotated Ramsar site: Kenya', <[https://rsis.ramsar.org/sites/default/files/rsiswp\\_search/exports/Ramsar-Sites-annotated-summary-Kenya.pdf?1572267424](https://rsis.ramsar.org/sites/default/files/rsiswp_search/exports/Ramsar-Sites-annotated-summary-Kenya.pdf?1572267424)> accessed on 12/023/2019

<sup>149</sup> Ibid

<sup>150</sup> 'Tana river delta under treat from development' <[www.downtoearth.org.in/news/environment/kenya-s-tana-river-delta-under-threat-from-development-projects-58267](http://www.downtoearth.org.in/news/environment/kenya-s-tana-river-delta-under-threat-from-development-projects-58267)> accessed on 04/03/2019

<sup>151</sup> See N. J. Chalifour, et al. (Eds), *Land Use Law for Sustainable Development*. (Cambridge: Cambridge University Press, 2006) at page 151

<sup>152</sup> GIS an Remote Sensing in Wetland mapping and monitoring' <[www.researchgate.net/publication/316575395\\_GIS\\_and\\_Remote\\_Sensing\\_Applications\\_in\\_Wetland\\_Mapping\\_and\\_Monitoring](http://www.researchgate.net/publication/316575395_GIS_and_Remote_Sensing_Applications_in_Wetland_Mapping_and_Monitoring)> accessed on 07/10/2019

#### **(d) Establishment of Wetland Policy and Management Plans.**

##### **National Wetland policy**

A large number of activities agreed upon within the structure of Ramsar agreement aimed at conservation and wise utilization of wetlands focus on instituting clear legislations and policy arrangement. Hence, a key demonstration of achieving the goals of the Convention deals with degree at which the various agreed elements of wise utilization of wetlands have been domesticated by parties. As reported by C. Shine & C. De Klemm, a special structure of the law on wetland present a robust opportunity to appreciate the essential values of wetlands as ecologies calling for different tactics to their maintenance and conservation. Thus, wetlands should not be camouflaged in objectives of other environmental sectors. A policy framework will raise the public profile of wetlands and could be the finest method of encompassing wetlands onto development strategies of a party. It can also be a useful tool for accountability in respect of achieving goals of conserving wetlands and expanding responsibilities of officers in charge of wetlands.<sup>153</sup>

In Kenya, the process of developing a policy for conserving and managing wetlands has taken over ten years (1997- 2008 revised draft). It is necessary that the policy is concluded and executed so that the benefits of wetlands are fully accepted.<sup>154</sup> Once the policy is concluded, it will highly assist in addressing the high rate of destruction and disappearance of wetland. Further, the policy will harmonize the conservation and prudent utilization measures advocated under Ramsar agreement.<sup>155</sup>

Various challenging and primary projects of nations like expansion of farms to boost production of food stuff (food security), the need to put up housing for settlement and other investment activities threaten wetland areas due to lack of a clear legal framework wetlands. Further, little attention is given to wetlands in their own right in the current government policies and legislation unlike major ecological areas and their natural resources like water, forests, and wildlife. Existing

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<sup>153</sup> MEMR, *Kenya Wetlands Atlas* (Ministry of Environment and Mineral Resources, Kenya, 2012) page 13 <[https://na.unep.net/atlas/dAtlas/sites/default/files/Kenya\\_Wetlands.pdf](https://na.unep.net/atlas/dAtlas/sites/default/files/Kenya_Wetlands.pdf) > accessed on 10/01/2019

<sup>154</sup> C. Odote, 'Wise Use and Sustainable Management of Wetland in Kenya' in Okidi, C.O et al. (Eds). *Environmental Governance in Kenya, Implementing the Framework Law* East African Educational Publisher, Nairobi (2008), page 342

<sup>155</sup> Ibid

legislations for wetlands conservation is scanty under the various sectors legislation. Therefore, there is need for substantive legal provisions that call for preparation and application of national policy on wetlands in Kenya.

The current draft wetland policy outlines the various wetlands values and the policy statement aimed at promoting the conservation for purposes of achieving the full benefits of wetlands. It also brings out the challenges and threats facing wetlands and how the policy aims at addressing them. The draft policy makes promising conservation measures at would be put to end the destruction of the resource which include integrating wetland conservation in all sectoral reforms.<sup>156</sup>

### **Wetland Management Plans**

The call for prudent use of wetlands encompasses having various measures of conserving wetlands in national plans and strategies. These national strategies and plans may be land-use projects, development blueprint and environmental plan or water-resource management schemes. Formulation and implementation of plans assist in keeping track of all activities to achieve the intended goal. Failure to include wetlands in the national projects and strategies leads to decline of the environmental quality.<sup>157</sup>

The EMCA under Part IV provides for Environmental Planning. Section 37 of this legislation vests role of formulating National Environmental Action Plan (NEAP) on NEMA and the Cabinet Secretary (CS) for Environment is responsible for approving the plan. Section 40 of the Act provide for preparation of County Environment Action Plans that will feed into the NEAP. The national plan will then trickle down to the various environmental sectors for implementation through preparation of management plans by specific sectoral agencies. Apart from this provision on general environmental plan, the EMCA does not have any mandatory requirements for development of wetlands management plans. The task is provided as a discretionary power to the CS under section 42(3) of EMCA. It is stated that the CS has a discretion to issue orders either general or specific as well as regulations and standards through a gazette notice. The orders relates

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<sup>156</sup> Republic of Kenya, Final draft (revised) Sessional Paper on National Wetlands Conservation and management April, 2008

<sup>157</sup> M. Bowman, 'the Ramsar Convention on Wetlands: Has it Made a Difference?' <[http://ramsar.rgis.ch/pdf/key\\_law\\_bowman2.pdf](http://ramsar.rgis.ch/pdf/key_law_bowman2.pdf) > accessed on 02/03/2019

to maintenance of wetlands and includes issues of protecting, marinating and conserving the resource in all areas that are facing threats of environmental damage and in the process the CS is mandated to come up with strategies for guarding wetlands from destructions.

Pursuant to this provision of the law, the EMCA regulations, 2009 were issued. Under regulation 10(1), the CS for environment then appointed NEMA to be the national entity responsible for putting in place wetland management strategy. The section of the law requires that in three years' time from the onset of the regulations, NEMA should have consulted other related lead agency and institute various actions in addition to setting up management strategies in order to avoid and manage dreadful condition of wetlands. It should be noted that this mandates is vested on NEMA through regulations (subsidiary legislation). This task will be subordinate to the mandates of NEMA provided under the substantive Act (EMCA).

On the other hand, the Water Act, 2016 mandates the CS for water under section 10 to work out a strategy for water resources that would include government tactics to manage, protect regulate and conserve water resources. Thus, wetlands that are viewed as water resources are catered for under this provision of the water Act.

Under the Wildlife Conservation and Management Act, 2013, section 7 (h) and (i) mandates KWS to harmonize the groundwork and application of ecosystem strategies as well as to formulate and implement management strategies for national park. Thus, wetlands which have been categorised as national reserves under the Wildlife Act will also be cared for in management plan prepared by KWS.

Hence, from the above analysis of the law, the CS for water, the KWS and NEMA are mandated to develop and implement wetland management plan as per the various sectoral legislations. This means wetlands that will be categorised as water resources will be managed by the CS under the Water Act, while those falling under national reserves will be managed by KWS under the Wildlife Act; the rest of wetlands will be managed by NEMA according to the EMC regulations (2009). This creates overlapping mandates and confusion on management of the wetlands resources unless the sectoral laws are harmonised.

Further, it is well known that the government agencies e.g. KWS, WRMA, KFS, NEMA are structured according to particular environmental sector. Priority functions for these national entities are set according to the laws establishing them as expressly stated in the Acts and in their management plans. These sectoral laws have not mainstreamed management of wetlands. Thus, wetlands management would not feature or be prioritized in the sectoral management plans of these agencies. The lack of clear legislative provisions to support rational use of wetlands by relevant institutions causes little or no consideration given to wetlands in the national developments plans and strategies.<sup>158</sup>

### **3.2.2 Specific Conservation Measures on Wetlands Sites**

This is the second limb of the wise use obligation and it encompasses the following activities:

- a) Carry out full impact assessment of projects
- b) Supervising use of the natural elements of wetland systems
- c) Engaging local communities in management of wetlands
- d) Selection of wetlands sites of international value
- e) Creation of conservation zones at specific wetlands areas
- f) Restoration of damaged wetlands

The following is a discussion around these activities.

#### **(a) Full Evaluation of Impact to Environment**

Evaluation of Environmental Impact is a vital analysis of reactions of a project to the environment.<sup>159</sup> The evaluation is designed to unveil the impacts of a recommended scheme to the environment including people around the area and their properties. It is carried out to reduce the harmful effects on the environment and allied threats.<sup>160</sup>

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<sup>158</sup> C. Odote, 'Wise Use and Sustainable Management of Wetland in Kenya' in Okidi, C.O et al. (Eds). *Environmental Governance in Kenya, Implementing the Framework Law* East African Educational Publisher, Nairobi (2008), page 347

<sup>159</sup> Environmental Impact Assessment, <[www.nema.go.ke/index.php?option=com\\_content&view=article&id=119&Itemid=144](http://www.nema.go.ke/index.php?option=com_content&view=article&id=119&Itemid=144)> accessed on 10/06/2019

<sup>160</sup> Ibid

The Ramsar Agreement recognizes the need for applying various expertise in evaluating environmental impact of projects. These expertise are implemented in circumstances where the biological condition of wetlands is at risk within parties' territories due to development plans or other superior policies and strategies. The State parties to the Convention have made several endorsements and decisions (such as endorsement no. 6.2 of 1996 and Resolution no. VII.16 of 1999) that urged parties to review their legal system by integrating therein components of environmental impact assessment and ensure assessments techniques are implemented where applicable.<sup>161</sup> COP to Ramsar agreement in their 7<sup>th</sup> meeting endorsed the function of impact assessment and economic assessment as a strategic action for achieving objectives of the Convention.<sup>162</sup>

Consequently, under resolution VII.16<sup>163</sup> of the 7<sup>th</sup> COP to Ramsar Agreement, the parties were urged to strengthen their efforts through implementing accurate and careful assessments of the effects of any programmes, plans, projects and policies that are likely to modify the natural character of wetlands registered with the Ramsar secretariat or impact adversely on all other wetlands within their territories. Further, the parties were tasked to ensure that all processes and systems for regulating the assessment exercise are designed at demonstrating the actual usefulness of wetland ecosystems. This should take account of the numerous functions, goods and service of wetlands and ensure they are deliberated throughout policymaking and management processes. The 7<sup>th</sup> Ramsar COP also urged its member states to confirm that the impact assessment measures go along with laws, policy and requirements of respective organizations and institutions managing wetlands.<sup>164</sup>

In Kenyan perspective, EMCA provides for integrated EIA under Part VI.<sup>165</sup> Section 42 lays out detailed activities banned on wetlands unless authorization is given after EIA has been carried out.

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<sup>161</sup> Ramsar Convention Secretariat, *Impact assessment: Guidelines on biodiversity-inclusive environmental impact assessment and strategic environmental assessment* (Ramsar handbooks for the wise use of wetlands, 4th edition, vol. 16. Ramsar Convention Secretariat, Gland, Switzerland, 2010) Page 6

<sup>162</sup> 7th meeting of the COP to the Convention on Wetlands, San José, Costa Rica, 1999

<sup>163</sup> 'The Ramsar Convention and impact assessment: strategic, environmental and social' <[http://archive.ramsar.org/pdf/res/key\\_res\\_vii.16e.pdf](http://archive.ramsar.org/pdf/res/key_res_vii.16e.pdf)>, accessed on 29/05/2019

<sup>164</sup> 7<sup>th</sup> meeting of the Conference of the Contracting Parties to the Convention on Wetlands, San José, Costa Rica, 1999

<sup>165</sup> Environment and Management Coordination Act 1999 Section 57A- 67.



These activities include building, renovating, erecting, varying, lengthening, pulling down a building or part of it, mining, drilling, and introducing any alien species, depositing any substance if it would or has possibility to produce harmful environmental effects on the wetland.<sup>166</sup> NEMA is the body authorized under EMCA to approve activities on wetlands upon being satisfied with EIA carried out by project owners.

Although EMCA gives the legal basis for carrying out EIA, its provisions are weak and require review to appreciate the concept of prudent use of wetlands as required under the Ramsar agreement. Example, section 58 (2) of EMCA under its proviso gives NEMA discretion to direct that owner of a development activities do without complying with the requirements of assessing the impacts of their projects to the environment. These certain cases are not stated. This proviso reduces the strictness of conducting EIA and conflicts with the wise use concept and opens up rooms for a project that are harmful to the wetlands and the environment generally to take off without carrying out EIA.<sup>167</sup>

Further, under section 66 of EMCA, the responsible government officers (the reliable experts) are shielded from any liability for the issuance of EIA License. Hence, liability does not arise to government officer on how they carry out the exercise of issuing the EIA License. Furthermore, EMCA stipulates that the obtaining an EIA License for any development plan shall not be a defence to any civil suit or to a criminal trial against a developer in respect of putting up, management or operation of the project. The License which ought to be a determinate factor on whether a project should be carried out or not, however, it is provided that having it is not a defence in law. These provisions are setback to the efforts of conserving and managing resources to maintain their viability particularly the wetlands.

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<sup>166</sup> Ibid, section 58, see also C. Odote, 'Wise Use and Sustainable Management of Wetland in Kenya' in Okidi, C.O et al. (Eds). *Environmental Governance in Kenya, Implementing the Framework Law* East African Educational Publisher, Nairobi (2008), page 343

<sup>167</sup> See similar discussion in C. Odote, 'Wise Use and Sustainable Management of Wetland in Kenya' in Okidi, C.O et al. (Eds). *Environmental Governance in Kenya, Implementing the Framework Law* East African Educational Publisher, Nairobi (2008) page 346.

### **(b) Engaging Local Communities in Wetlands Management**

The State parties to the Ramsar Agreement noted during the 7<sup>th</sup> COP<sup>168</sup> that historically indigenous people and communities have been managing and exploiting wetlands sustainably. Further, they have been using wetlands in accordance with their continuing rights, ancestral values, and customary knowledge. They also have organizations concerned with managing the use of wetlands. Moreover, the parties noted that native stakeholders' contribution in management of wetlands is valuable in terms of realizing the objective of prudent use of wetlands under the Ramsar agreement. Hence, the State parties resolved to carry out the following:-

- i. Ensure that native groups and local individuals take part in discussions on preparation of policies for wetlands as well as engaging them in law making processes. These strategies should also give appropriate mechanisms that would facilitate active engagement and contribution of the general community in administrative and implementation processes at all level to promote prudent utilization of wetlands
- ii. Provide a clear management procedure on wetlands and their conservation and institute systems for full sharing with the interested parties of practical knowledge and other materials for selection of wetlands registered sites and general organization of every wetland. The procedure should also assure stakeholders of taking their input in the processes;
- iii. Guarantee that administration of wetlands is handled in collaboration with technical specialists and indigenous people to safeguard reflection of best available science and local knowledge in the whole processes.
- iv. Absorb the native people and home-grown groups, wetlands learning spots and NGO's that have necessary expertise to aid in formation of all inclusive style of management;
- v. Member States should reflect that often monetary aid and incentives inspires the participatory processes hence it is the ideal to stimulate the contribution of home-grown groups and local individuals.

Kenyan legal system appreciated the above resolution of COP to the Ramsar agreement and incorporated in her systems provisions on public participation in conservation of wetlands and the environment. This principle has been documented in our Supreme law of the land and the national

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<sup>168</sup> Annex to Resolution VII.8 by the 7th Conference of the Contracting Parties, San José, Costa Rica, May 1999

laws. Specific application of this principle on wetlands is provided under regulation 5(1) of the EMCR<sup>169</sup> stating that public contribution is one of the standards of administration for all wetlands in Kenya. Despite these express legal provisions, there are no laid down procedure on how this principle should be applied to achieve the intended objective. Hence, there has been challenges in implementing the said standard in Kenya.

The challenge of implementing the rule of community participation is demonstrated in case of *We Care About Nairobi Do It & Another*<sup>170</sup> where NET was faced with claims that a developer had failed to conduct public participation before commencing a project that was alleged to have great damaging effect to the adjacent community and the environment. The proponent's defence was that there was discussion with neighbours and publication was done in print media. The claimants admitted that the publication was made but in small print and thus it was not adequate publication. In determining the case, NET observed that indeed publication was done in small print in a print media that was not popular. However, it found in favour of the developer that there was evidence of public notice and involvement by some few neighbours.<sup>171</sup> This finding is a clear case on lack of legal procedure on how public participation should be carried out to guide the public, the courts and tribunal in this area. Consequently, project owners have been influencing political persons in the communities to give consent to project and later on regard that as public participation. This practice thus defeats the objective of public participation.

#### **(d) Designating Wetlands of International Significance**

Kenya is obligated under the Ramsar agreement to select a wetland site for registration in rank of wetlands having international value. The factors for consideration in selecting the sites are laid out in the Convention. These are international benefits of wetlands sites in hydrology, ecology, limnology, zoology and botany.<sup>172</sup>

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<sup>169</sup> Kenya Gazette Supplement no. 9, the Environment Management and Coordination (Wetlands, River Banks, Lake Shores and Sea shores) Regulations, 2009

<sup>170</sup> [2007] (NET) Para 44 < <http://kenyalaw.org/caselaw/cases/view/41766/> > accessed on 20/2/2019

<sup>171</sup> Ibid

<sup>172</sup> Ramsar Convention Secretariat, *Designating Ramsar Sites: Strategic Framework and guidelines for the future development of the List of Wetlands of International Importance*. (Ramsar handbooks for the wise use of wetlands, 4th edition, vol. 17. Ramsar Convention Secretariat, Gland, Switzerland, 2010) page 8.

An accurate number of wetlands in Kenya is anonymous due to absence of a wetlands register. However, wetlands in Kenya are predicted to fill around 3 to 4 per cent of the land mass and sometimes this area may escalate momentarily to 6 per cent during the wet times.<sup>173</sup> In compliance with the requirement for selection of wetlands sites, Kenya has designated six (6) sites as Wetlands of International Importance (Ramsar Sites). Five of the sites were designated along the Great Rift Valley region while the 6<sup>th</sup> sites was designated along the Coast region. These sites are as follows:

**i. Lake Nakuru designated on 05-06-1990**

The lake entices a tremendous number of flamingos because of mass growth of seaweeds. Apart from flamingos, there are other classes of birds such as pied kingfisher, African fish eagle, Verreaux's eagle, among others living around the area of the Lake. The region nearby the lake shelters other organism like warthogs, leopards, baboons, southern white rhino, cheetahs, eastern black rhinos among others.<sup>174</sup>

**ii. Lake Naivasha**

The Lake was registered as a Ramsar site on 10-04-1995. It accommodates a countless multiplicity of wildlife, a sizeable group of hippos and various classes of birds exceeding 400 in numbers.<sup>175</sup>

**iii. Lake Bogoria**

It was registered a Ramsar site on 27-08-2001. It is among the many lakes in Rift Valley. It is a notorious lake for harbouring the biggest population of flamingo around the globe. The lake is also internationally appreciated as a special dwelling place for other wildlife and birds.<sup>176</sup>

**iv. Lake Baringo**

It was designated on 10-01-2002 as Ramsar site. It accommodates various classes of birds in excess of 470 in number comprising species of wandering waterbird. In addition, the lake provide a

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<sup>173</sup> 'Kenya Wetlands Forum', (2012) in MEMR, *Kenya Wetlands Atlas* (Ministry of Environment and Mineral Resources, Kenya, 2012) page 1 <[https://na.unep.net/atlas/datlas/sites/default/files/Kenya\\_Wetlands.pdf](https://na.unep.net/atlas/datlas/sites/default/files/Kenya_Wetlands.pdf)> accessed on 10/01/2019

<sup>174</sup> Annotated list of Wetlands of International Importance, Kenya' <[https://rsis Ramsar.org/sites/default/files/rsiswp\\_search/exports/Ramsar-Sites-annotated-summary-Kenya.pdf?1570516327](https://rsis Ramsar.org/sites/default/files/rsiswp_search/exports/Ramsar-Sites-annotated-summary-Kenya.pdf?1570516327)> accessed on 08/10/2019

<sup>175</sup> Ibid

<sup>176</sup> Ibid

dwelling place for hippopotamus, Nile crocodile, and numerous other classes of amphibians, reptiles, and invertebrates.<sup>177</sup>

**v. Lake Elementaita**

The lake was selected as a Ramsar spot on 05-09-2005. There are numerous classes of birds inhabiting at the lake region while other are wanderers staying at the lake in winter time. Further, the reed beds adjacent to the lake act as fishing grounds for herons and pelicans birds.<sup>178</sup>

**vi. Tana River Delta**

It was designated a Ramsar site on 09-07-2012.<sup>179</sup> It provides habitation like floodplains, pristine beaches, mangrove plantations found in coastal areas, inter—tidal areas linking marine salty water and freshwater ecosystems etc. The different types of habitations found in the area support multiple aquatic organisms for instance shrimps, marine prawns, threatened species of turtle’s fish and bivalves. A number of common species of animals such as red colobus and mangabey live around the river too.<sup>180</sup>

The national laws of Kenya do not specifically provide for classification of wetlands sites to be registered as of international value. The designation of these spots as of international benefits is carried out through declaration of protected areas under section 42 (2) of EMCA. Declaration of protected sites is a role of CS for environment and natural resources and it is exercised through issuance of Gazette notice. This section provide that the CS when proclaiming an area as a protected zone is at liberty to put such limitations which in his opinion are crucial in protecting wetlands against harmful activities. The issues for consideration in declaring a wetland as a protected sites under the EMCA are physical size of wetland and the benefits of the local resident living near the subject wetland.

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<sup>177</sup> Annotated list of Wetlands of International Importance, Kenya’  
<[https://rsis.ramsar.org/sites/default/files/rsiswp\\_search/exports/Ramsar-Sites-annotated-summary-Kenya.pdf?1570516327](https://rsis.ramsar.org/sites/default/files/rsiswp_search/exports/Ramsar-Sites-annotated-summary-Kenya.pdf?1570516327)> accessed on 08/10/2019

<sup>178</sup> Ibid

<sup>179</sup> Ibid

<sup>180</sup> Annotated list of Wetlands of International Importance, Kenya’  
<[https://rsis.ramsar.org/sites/default/files/rsiswp\\_search/exports/Ramsar-Sites-annotated-summary-Kenya.pdf?1570516327](https://rsis.ramsar.org/sites/default/files/rsiswp_search/exports/Ramsar-Sites-annotated-summary-Kenya.pdf?1570516327)> accessed on 08/10/2019

According to the factor for consideration on selecting sites for designation of wetlands of international status, the geographical size and interest of the community around the wetland are not provided for under the Ramsar Agreement. The standards used is international value of wetlands sites in hydrology, ecology, limnology, zoology and botany. However, the factors are not provided for in the EMCA to guide in the selection and declaration process in Kenya. The size of wetland as a factor of consideration in the selection process is ruled out at the international community on the basis that the size of a wetland does not matter. A minor wetlands may have the same impact as a major site. The provision of EMCA to consider the size of wetland in selecting protected sites is therefore in contravention of the Ramsar Agreement. This provision opens up for wetland with significant ecological or hydrological benefits to be left out of protection due to its size and thus leading to its destruction and loss.

On the other hand, the CS through his Regulations, EMCA Regulations, 2009 at regulation 8(1) provides a different criteria for declaring a protected wetlands site. It stipulates that a declaration may be done in respect of an area where the said area has international and national values due to its ecological benefits, biological diversification, aesthetic value, natural heritage or landscape. These criteria under the regulation contradicts the factors set in the principal legislation, the EMCA.

Further, in providing for declaration of protected sites, the EMCA is silent on the need for consultation between the CS for Environment and the CS for other relevant Ministries such as the Ministry of water, agriculture, mining, lands or wildlife or consulting the institutions managing the wetlands. There is no substantive legislation requiring submission of recommendations by relevant institutions to the CS for consideration before exercising this power. Thus the law does not provide for expert opinion to guide the CS in the process despite wetlands having special scientific characteristics. The failure to expressly provide for consultation in the declaration process under the principal legislation gives room for important wetlands to be left out of protection and be subjected to their destruction.

Moreover, the procedure for selection and declaration of the wetlands protected sites is not provided for in the principal legislation, the EMCA. The procedure is laid out in the EMCA

Regulations, 2009 at regulation 9(1). It stipulates that the Minister (CS) may give the notification of a protected wetland under regulation 8 after consulting the appropriate lead agency or may do so based on NEMA's recommendation after discussion with lead agency, a registered community groups, an individual person or acting on its own. Thus it is the regulations issued by the CS that provide for the procedure for declaration and the need for consultation in the process. All these are silent in the substantive legislation despite being the superior law. Having these crucial roles spelt out by the CS in the regulation makes the process of designation weak as it may be scrapped off anytime at the will of the CS.

Further, designation of site as required under the Ramsar agreement also involves expansion of the size of the wetlands. The Kenyan principal legislation on wetlands management is silent on which institution is mandated to vary the boundaries of the wetlands sites. It does not also provide for the conditions for consideration in varying boundary of a wetland. These activities are pronounced by the CS in the EMCA Regulations, 2009, under Regulation 10(5). It states that NEMA may alter borderlines of wetlands on maps after engaging the appropriate lead agency and insert any necessary alterations in the records capturing the definite areas affected. This tasks is carried out when there is in place register of wetlands to effect the changes of boundaries.

#### **(e) Establishing Nature Reserves at Wetlands Site**

The principal legislation on environment in Kenya, EMCA, under section 42(2) does not differentiate between declaration of wetland protected sites for international importance and those of national importance. The EMCA regulations, 2009, under regulation 8 provides generally for all protected wetlands. It gives liberty to the CS for environment to declare protected spots for wetlands in area having international and national values because of its landscaping, ecological benefits, harbouring multiple organisms, beautifulness or for being a common heritage. There is no specific provision giving criteria used to declare international wetlands sites separate from national protected wetlands areas and this creates a confusion on the permitted uses and the conditions applicable on these sites.

### (f) Restoring Degraded Wetlands

State parties to Ramsar Agreement have a duty to ensure restoration of degraded wetlands within their national jurisdiction. Wetland degradation is defined as destruction of wetland functions by human activities.<sup>181</sup> It is reported that there is a rapid destruction of wetlands. Thus, the wetlands ecosystem is classified as the worst affected and the most imperiled ecosystems on earth. Kenya is not an exception on the increased degradation of wetlands. Restoration activities means activities that work on damaged features of wetlands such as their chemical components, biological elements or physical appearances to renew their natural roles. On the other hand protection activities are those that eradicate a risk or prevent the deterioration of wetland conditions.<sup>182</sup>

The major cause of deterioration of wetlands is the fast growth of people bringing about scarcity of food. Hence, a burden is put on wetlands to yield food to feed the increased population.<sup>183</sup> It is noted that in Kenya, the dreadful conditions of wetlands is a result of multiple socio-economic factors, absence of knowledge on the benefits of wetlands and weak structures and systems for conserving and managing wetlands. A good example is the state of Nyando wetland. It's facing extreme pressure from the neighbouring community who are excessively utilizing it for cultivation, grazing and papyrus harvesting. The wetland is also affected by fire, droughts and soil erosion in the highlands resulting to siltation as well as conflicts on utilization of resources therein. Human activities carried out in the upstream alters movement of water into the wetland. Others are actions performed in the basins of rivers that feeds the wetlands such as construction of dams (e.g. Magwagwa Dam on Sondu-Miriu River) for irrigation and control of floods.<sup>184</sup>

The legal framework in Kenya does not provide for mechanisms or incentives for restoring degraded wetlands. There is also no institution mandated to promote restoration of these damaged

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<sup>181</sup> M, Moser, C. Prentice, and S. Frazier, 'A Global Overview of Wetland Loss and Degradation, Proceedings of Ramsar COP6' (Brisbane, Vol. 10/12, Technical Session B, 1996) page 21 in Masese F.O., Raburu P.O and Kwena F, 'Threats to the Nyando Wetland' <[www.oceandocs.org/bitstream/handle/1834/7415/ktf0428.pdf?sequence=1&isAllowed=y](http://www.oceandocs.org/bitstream/handle/1834/7415/ktf0428.pdf?sequence=1&isAllowed=y),> accessed on 08/10/2019

<sup>182</sup> 'Fostering a culture of restoring degraded wetlands', <[www.climatecolab.org/contests/2019/reshapingdevelopmentpathwaysinLDCs/c/proposal/1334645](http://www.climatecolab.org/contests/2019/reshapingdevelopmentpathwaysinLDCs/c/proposal/1334645),> accessed on 08/10/2019

<sup>183</sup> Masese F.O., Raburu P.O and Kwena F, 'Threats to the Nyando Wetland' <[www.oceandocs.org/bitstream/handle/1834/7415/ktf0428.pdf?sequence=1&isAllowed=y](http://www.oceandocs.org/bitstream/handle/1834/7415/ktf0428.pdf?sequence=1&isAllowed=y),> accessed on 08/10/2019

<sup>184</sup> Ibid



wetlands. Hence, there is need for reviewed of the law to provide for restoration measures to promote the larger benefits of wetlands to the society.

### **3.2.3 Awareness of Wetlands and their Values**

This is the third wise use obligation. This commitment of State parties to the Ramsar agreement involves increasing awareness of full benefits in wise utilization of wetlands; reviewing traditional techniques of prudent use; sharing knowledge and practical skills on managing and prudent utilization of wetlands among others.

Lack of awareness of the vital benefits of wetland to the environment is among key issues causing destruction and disappearance of wetlands ecosystem. The obligation to create awareness and publish information on wetland is catered for under EMCA. It is provided under section 9 as a function of NEMA to implement scheme and plans with a view to boost public knowledge, environmental learning community contribution. However, this function is not specifically for awareness and publication of wetlands information but for the general environmental education. Consequently, there is scanty information on wetlands in Kenya. The wetland register that would assist in publishing information on wetlands has not been developed. Thus, the general public is not well informed on management of these resources in Kenya hence conflicting with the recommendation on prudent use. This situation is existing despite the Constitutional right of citizen under Article 35 on getting data that is in possession of the State where that knowledge is crucial for safeguarding of any other basic right. These Constitutional rights include the right to a safe and clean environment and to guard the environment under Article 42 of the Constitution.

### **3.2.4 Proper Institutional and Organizational Arrangement**

The fourth obligation on prudent use of wetlands entail the following activities for State parties to the Ramsar agreement:

- a) Establishment of institution and assignment of appropriate mandates
- b) Incorporate integrated multidisciplinary wetland management approach

The status of national implementation of these obligations under the Kenyan legal framework will be discussed in detail in the next Chapter.

### **3.3 CONCLUSION**

Kenya is a State party to Ramsar agreement. Hence she is under obligation establish and enforce laws and policy systems that support prudent use of wetland. Parties to Ramsar agreement resolved to promote prudent use of wetland through productive management of wetlands within their borders, establishment of site specific measures for conservation of wetlands, increasing awareness on wetlands and their values and formation of proper institutions and organizations.

Evaluations of present situation of wetlands in designated sites and the overall territory as shown in the Kenya Wetland Atlas, 2012 shows that many wetlands are degraded. Kenyan has failed to comply with her obligation on wise use of wetlands. A state party is under obligation effectively manage wetlands by having in place a national register of wetland. This has not been done in Kenya. Reports analysed in the discussion above demonstrates fully that measures taken to conserve, manage and monitor wetlands are weak and inadequate to check and stop the harmful alterations in ecological wetlands system brought by human beings. The required activities for wise use of wetland have not been fully implemented in the country. This is associated with lack of legal support for prudent use and exploitation of wetlands.

Therefore, the Kenya needs for clear legal provisions for wetland protection. The task ahead is to develop legislation that will integrate prudent utilization of wetlands as required under the Ramsar agreement. Issue of proper institutional planning will be reflected in the subsequent Chapter of this study.

## CHAPTER FOUR

### 4.0 EVALUATION OF INSTITUTIONS AND THEIR MANDATES ON WISE UTILIZATION OF WETLANDS IN KENYA

#### 4.1 INTRODUCTION

Creation of national institution(s) is one of the commitments of Member State under the Ramsar agreement and a recommendation passed in past resolutions of parties. This commitment also involves allocating the institutions proper mandates and empowering them to conserve and encourage prudent utilization of wetlands. The commitment is in compliance with responsibility of Parties agreed upon at Article 3.1 of the agreement. It is aimed at promoting wise exploitation of all wetlands within the regions parties.

Further, Article 6.3 of the Ramsar Agreement call for Member State to stimulate harmonization of internal bodies. It is provides that Member States shall confirm the employees in charge of management of wetlands at all levels have the suitable material on wetlands and shall carry out the recommendation of the Conference of Parties to exploit wisely and conserve wetlands together with their dependent living organisms therein.<sup>185</sup> The procedures and strategies for implementing the concept of prudent exploitation of wetlands agreed upon by Member States gives details on how parties would accomplish setting up of strong institutions with cross-sectoral coordination in compliance with the Convention.<sup>186</sup>

Under this commitment, the Member State to Ramsar agreement are also tasked to determine and implement actions that would raise teamwork and interaction amongst existing organizations; stimulate productive operation of such entities and provide for suitable qualified and resourced staff enough to carry out the tasks<sup>187</sup>

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<sup>185</sup> Ramsar Convention 1971 Article 6.3

<sup>186</sup> Recommendation 4.10: 4<sup>th</sup> Meeting of the Conference of the Contracting Parties Montreux, Switzerland 1990, 'Guidelines for the implementation of the wise use Concept'

<sup>187</sup>C. Shine C. and C. De Klemm, *Wetlands, Water and the Law. Using law to advance wetland conservation and wise use*, (IUCN, IUCN Environmental Policy and law paper no. 38, 1999), page 71

This chapter analyses the establishments of various organizations in charge of conserving and supporting wise exploitation of wetlands in Kenya and roles assigned to them. It also brings out the legal inadequacies of these institutions in carrying out their wetland functions.

## **4.2 INSTITUTIONS AND THEIR MANDATES ON PRUDENT USE OF WETLANDS**

As analyzed at Chapter two and three of this research, one of the priority actions for the Member State to Ramsar Agreement is development of the institutions and organizations managing wetlands in their regions. These commitment entails two main activities:

- 4.2.1 Setting up of institutions and allocating them appropriate authority
- 4.2.2 Incorporating integrated multidisciplinary wetland management approach in the management system.<sup>188</sup>

### **4.2.1 Establishment of Institution and Assignment of Appropriate Mandates**

The Member State to Ramsar Agreement are obligated to create structures and systems that will bind the officers in charge of wetlands to take appropriate actions for wetland conservation.<sup>189</sup> The current institutions that play a role in managing wetlands in Kenya are mainly NEMA, KWS, WRMA, KFS, Government Ministries, County Governments and local communities. Some mandates of these institutions as per recommendations on prudent use of wetlands discussed in detail at Chapter 2 of the study entails preparation of a national inventory of wetlands, assessment of goods and services as well as general usefulness of wetlands in every location, monitoring and taking note of changing ecological conditions of wetlands, and establishing wetland management plans and policies. Additionally, the institutions should also conduct full impact assessment of projects; regulate utilization of the wetland systems; ensure contribution of native people in management of wetlands sites and registration of international and national wetlands spots among other tasks. The analysis below is based on these mandates of the institutions.

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<sup>188</sup> Annex to Recommendation.4.10 (Revised.) 4<sup>th</sup> COP, Montreux, Switzerland, 1990 ‘Guidelines for Implementation of the Wise Use Concept of the Convention.’

<sup>189</sup> Ibid

### **(a) Entities Responsible for Planning and Policy Making**

Ministry of environment and natural resources of Kenya, under leadership of respective CS, is the office responsible for preparation and implementation of policies, setting national goals and handling main concerns for safeguard of the environment under EMCA.<sup>190</sup> This function is generally for the entire environment and not wetlands only.

The CS is also mandated to give instructions, publish directive or rules for managing wetlands and this encompasses measures for protecting, conserving and supervising wetlands in all areas that are threatened by dreadful condition of the environment. He is in charge of developing an overall environmental management strategy taking into account related sectoral interest.<sup>191</sup> Therefore, under the EMCA, it is the CS who is mandated to formulate and ensure implementation of policies and plans for the environment that include wetlands. However, because of the sectoral management of the environment, this absolute mandates on the CS to formulate plans and policies for the environment generally does not benefit the wetlands resources. There is no specific requirement under EMCA for the CS to make policies for wetlands.

The Water Act, 2016 defines water resources at section 2 to mean a swamp, estuary, pond, marsh, lake, watercourse, artesian basin, aquifer, stream, or other areas of any lake, pond, swamp, marsh, stream, watercourse, estuary, aquifer, artesian basin or other static or running body of waters below or above the earth surface. It encompasses marine water and cross-border waters within local control of Kenya. Looking at this definition some categories of wetlands fall under it. Thus, wetlands falling under water resources are regulated by the institutions established under the Water Act, 2016. In this Act, it is the Minister for Water who is authorized to make policies and directive for supervising and organizing water resources. The Act does not clearly states the way in which the ministry of water coordinate with the ministry of environment as regards to wetlands that fall within the category of water resources. Looking at both the EMCA and the Water Act,

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<sup>190</sup> Environment Management and Coordination Act, 1999, Section 5

<sup>191</sup> Ibid section 42(3)

the function of formulating policy for wetlands management is vested in the two ministries without clear separation, hence creating confusion and contradiction.<sup>192</sup>

NEMA is an institution set up at section 7 of EMCA. Its tasks are stipulated at section 9 of the said piece of legislation. Its roles include administration and harmonization of every matter related to the environment. NEMA is also the main national body in employment of every rules and strategies concerning environment. In line with this mandate, NEMA has a Directorate department with a sub-department of “Coastal, Marine & Fresh water” that is mandated to prepare and execute a National Wetlands Strategy.<sup>193</sup> Although the sub-department is in charge of wetlands function, the name (Coastal, Marine and Fresh water sub-department) does not speak of wetlands. Further, the arrangement of vesting policy development function to NEMA contradicts Section 5 of EMCA which mandates the CS to carry out this task. It also contradicts section 9 of the Act which gives NEMA the role of implementation of policy and not policy formulation.

Further there is no clear line of distinction between the functions of NEMA department of Coastal, Marine and Fresh water and Water Resource Authority created at section 11 of Water Act on management of wetlands.

As for preparation and implementation of wetlands plans, section 10 (1) of the Water Act lay down responsibility of Cabinet Secretary (for water), to work out a National Water Resource Strategy. This task was to be done within a year from the date of operation of the Water Act and each five years later. The Act requires that there should be public contribution in carrying out the exercise. The purpose of having a Water Strategy nationally is to outline the project and strategies of the county of conserving, protecting, management and regulating water resources. Thus, this function is vested on the CS for water.

The Water Act under section 11 establishes Water Resource Authority (WRA). The functions of WRA include regulating management and exploitation water resources as well as harmonizing

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<sup>192</sup> C. Odote, ‘Wise Use and Sustainable Management of Wetland in Kenya’ in Okidi, C.O et al. (Eds). *Environmental Governance in Kenya, Implementing the Framework Law* East African Educational Publisher, Nairobi (2008) page 352

<sup>193</sup> < [www.nema.go.ke/](http://www.nema.go.ke/) > accessed on 20/3/2019

with other bodies either at local, national and global level with the aim of enhancing supervision of management and utilization of water resources and others.<sup>194</sup> As stated above, the definition of water resource includes some categories of wetlands such as pond, swamp, marsh and stream.

On the other hand, EMCA is silent on preparation of wetlands management Plan. However in the EMCR 2009 issued by the CS for Environment vests this mandates on NEMA. Regulation 10 (1) authorize the CS to enforce all necessary acts comprising of preparing management strategy for wetlands in order to avert and regulate the rate at which the wetlands area decline. This task has to be taken after deliberation with the relevant lead agency. This means NEMA is the institution charged with preparation and executions of wetlands management plans. The regulation requires that NEMA consult with the relevant lead agency. It is not clear under the law which institution is the lead agency on matters of wetlands management. Lead agency is defined at section 2 of EMCA as any parastatal, ministry, state corporation, department or local authority “whereby a particular piece of legislation has any law conferred it with roles of managing, supervising or dealing with natural resources or any aspect of the environment.

Thus the Water Act is applicable in management of wetlands and the management plan prepared by WRA will be applied to wetlands that fall within the definition of water resources. On the other hand, NEMA is vested with the same powers to prepare wetland management plan while KWS manages the Ramsar registered wetland sites. All these is happening without clarity on coordination of these institution.<sup>195</sup>

Further, supreme law of Kenya sets up devolved governments.<sup>196</sup> The devolved governments are vested with management functions on the environment. It is stated under schedule four of the supreme law that Central Government is in charge of management of natural resources and the entire environment and natural resources<sup>197</sup> while the devolved units are charged with execution of particular government strategies of the country on conserving natural resources and

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<sup>194</sup> Water Act, 2016 Section 12

<sup>195</sup> C. Odote, ‘Wise Use and Sustainable Management of Wetland in Kenya’ in Okidi, C.O et al. (Eds). *Environmental Governance in Kenya, Implementing the Framework Law* East African Educational Publisher, Nairobi (2008) page 352

<sup>196</sup> The Constitution of Kenya 2010, Article 175

<sup>197</sup> The Constitution of Kenya 2010, Fourth Schedule Part 1 paragraph 22

environment comprising of forestry, water and soil conservation.<sup>198</sup> Thus, according to this provision of the Constitution, the Counties are in-charge of implementing the national policies on conservation and management of the environment. The national policies on environment presupposes existence of national polices for all the sectors of the environment. However, there being no National Wetland Strategy in place, the Counties have no guide to assist them in conserving and ensuring wise use of wetlands.

### **(b) Institutions in charge of Preparing Inventory for Wetlands**

The EMCA, despite being the framework legislation on environment, does not provide for preparation of wetland inventory. However, the EMC Regulations, 2009 at regulation 10 (1) mandates NEMA to deliberate with relevant lead agency in formulation and maintenance of a register for every wetland in the Country. Hence according to this regulation, this task was to be carried out in three years after operation of the Regulations (i.e. from the year 2009). The regulations gives NEMA a subsidiary role in addition to the principal roles provided under the EMCA. This means the importance of this task is weakened and ranked low in terms of priority because in most cases, the subsidiary roles are not complied with due to limited resources. Consequently, the register of wetlands has not been developed to date. The absence of inventory of wetlands means lack of appropriate material on the status of wetlands in Kenya and this limits reaching out to all important wetlands leading to their degradation.

### **(c) Institutions for Monitoring and Reporting Wetlands Ecological Conditions**

The KWS is an institution set up under Wildlife (Conservation Management) Act, CAP 376. The responsibilities of the entity are stipulated at section 3A of the piece of legislation and comprises preparation of strategies concerning protection, administration and exploitation of all kinds of plants and animals that are not domestic. It also controls and harmonizes international agreements concerning natural world of all features after deliberating with the Minister.

KWS is also a primary body vested with direct responsibility of managing and monitoring the protected wetlands sited of international status; it is the central point of the country in charge of communication under the Ramsar Agreement. KWS is obligated to monitor wetlands spots that

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<sup>198</sup> The Constitution of Kenya 2010, Fourth schedule Part 2 paragraph 10



are of international benefits and report to the Ramsar Secretariat any change of the ecological condition of these sites.<sup>199</sup> However, this management function of KWS over the protected wetlands sites is not anchored on law. Hence, KWS is exercising a short-term mandates of monitoring the listed sites. This means the KWS is legally weak and ineffective to carry out the management and monitoring roles of the listed wetlands. KWS lacks legitimate power to drive for the objectives of wise utilization of wetlands and it is also limited from seeking adequate funding to stimulate conservation and prudent use of wetlands.

Moreover, absence of legislation to mandates KWS in management of the listed sites means that KWS has no express statutory duty to account for prudent use and conservation of wetlands. Consequently, the institution is cannot to enhance awareness programs both technically and institutionally on the roles and benefits of wetlands that would assist in embedding these considerations into institutional culture. Further, under this arrangement, neither the Ministry of Wildlife supervising KWS nor the KWS can be held accountable under the law through proceedings for judicial review for failing to give proper attention to wetlands when making their sector recommendations.<sup>200</sup>

Although in practice the monitoring of the protected wetlands sites is carried out by KWS, the EMCA mandates NEMA as the institution in charge of managing the environment which include wetlands. The mandates on protected wetlands sites is exercised pursuant to administrative orders of the government. Consequently, there exists two entities entrusted with similar responsibility whereby one functions *de jure* and another *de facto*. These two institutions are supervised by different administrative powers (Ministries), thus, there is high probability of conflicting directives and orders impacting on wetlands. Further, it should be noted that wetlands which are categorised as water resources are also monitored and managed by WRA established under the water Act and reporting to Ministry of water. This arrangement of institutions and mandates creates

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<sup>199</sup> C. Odote, 'Wise Use and Sustainable Management of Wetland in Kenya' in Okidi, C.O et al. (Eds). *Environmental Governance in Kenya, Implementing the Framework Law* East African Educational Publisher, Nairobi (2008) page 352

<sup>200</sup> C, Shine and C. De Klemm, *Wetlands, Water and the Law. Using law to advance wetland conservation and wise use*, (IUCN, IUCN Environmental Policy and law paper no. 38, 1999), pg.72-73

administrative confusion and overlapping mandates in respect of management of the wetlands sites.

The EMCA also establishes County Environment Committees under section 30. The responsibilities of these committees are as follows:

- a. Appropriately manage the environment in the county appointment;
- b. Shape strategic action plan for the environment within the county in each five years; and
- c. Execute any other tasks as set by the respective law or as may be allocated by the Governor through a Gazette notice published periodically.

The County Environment Committees replaced the District Evaluation Committees that existed before the enactment of EMCA Amendment 2015. Thus, these committees take the role of District Evaluation Committees which according to Regulation 7 of the EMCA regulations, 2009, were in charge of supervising, regulating, organizing and checking every detail of wetland resource within the region (now County). This means, the role of the County Environmental Committees overlap that of KWS as regards monitoring of wetlands. Further this role by the Committees is not anchored on the principle legislation establishing them but on the subsidiary legislation issued by the CS for Environment.

#### **(d) Institutions Charged with Designation of Sites of International Significance**

Ministry of Environment and Natural Resources headed by respective CS is the institutions mandated under Section 42(2) of EMCA to declare wetlands protected sites through gazette notice. The EMCA provide for declaration of protected sites but not declaration of wetlands sites of international importance. Further, despite the international instrument including the Ramsar Agreement calling for institutional coordination, the EMCA does not provide for consultation with other relevant agencies when the CS exercises his power of designating protected wetland site. Further,

However, in implementing authority granted at section 42 (3) of EMCA, the minister (CS) for environment issued the EMCR 2009 and brought out the procedure for declaring protected sites under regulation 9. Thus, regulation 9 requires the CS for Environment to consider opinion of

relevant lead agencies or act on recommendation of NEMA in declaring a protected wetland sites. Moreover, the requirement for consultation is framed in discretionary terms, hence it's not mandatory for the CS to comply with regulation 9. The failure by the principal legislation (EMCA) to mandate the CS to discuss with relevant agencies when exercising the power of designating wetlands site is a weakness of the law in contradiction of the measures advocated for conserving and prudently utilizing wetlands. Wetlands sites have technical scientific characteristics. It requires technical persons with scientific knowledge to assist in determining the hydrology, botany, zoology and ecology of the sites before designating them. Thus, the need for consultation in determining the wetlands' international and national significance as required by the Ramsar Agreement is crucial. According to EMCA, NEMA is not mandated to designate protected wetlands sites. However as stated above, regulations 9 imposes a function on NEMA to advise or recommend to the CS on declarations of protected wetlands sites. This function would have more weight for compliance if it was provided under a principal legislations and not subsidiary legislation.

#### **(e) Institutions on Participation of Local Communities and Indigenous People**

Member States of Ramsar agreement agreed to form and support native groups and local people to take part in management of wetlands. This was aimed at strengthening laws, polices and economic, systems in protection of wetlands. Hence, involvement of the public in managing the resources support motivation and capability of society to take actions whenever necessary. Thus, there has to be a clear legal support for institutions to carry out this task.

The Kenyan legal framework does not comprehensively support institutions to involve local persons and home-grown groups in managing wetlands. EMCA lays out general principles on environmental management. It outlines principles guiding Courts of laws specialized in handling Environment and Land cases under section 3(5) (a). The principle entails public contribution in formulation of guidelines strategic actions and procedures for managing the environment. The law also outlines the functions of NEMA under section 9 which include initiating proposals for plans to improve learning about the environment, civic awareness and community participation. Apart from generally laying out the principle of public participation, the law neither defines nor lay out criteria that guides the public participation. There is no well-defined systems to assist the

established entities articulate opinions and observations of the local community about wetland management under EMCA. However, the Water Act, 2016, promotes public involvement in managing water resources by establishing clearly defined institutions. Section 24 of the Water Act provides for establishment of Basin Water Resource Committee whose composition include 4 persons who are residents of the basin area. Further, section 29 of the Act sets up Users Associations of water resources at sub-basin level which is a community groups aimed at enhancing cooperation in managing the resources and settlement of clashes regarding consumption of the resources. This kind of structures specifically for management of wetlands are wanting notwithstanding the crucial services of wetlands to human life and the entire environment. Consequently, wetlands which are outside the bracket of water resources such as the are mismanaged for lack of legal support.

The law is also silent on the institutions responsible for documenting the customary knowledge on wetland conservation. No specific institution has been mandated to deal with the whole process of classifying and recognizing the traditional knowledge, documenting the data and ensuring it is preserved.

In view of the foregoing, there is need for distinct legal framework creating village committees that would specifically focus on wetland management or legal establishment of locally based structures at countryside such as Community Action Clubs or Regional Action Clubs among others.<sup>201</sup> These will help in bringing flexibility with local communities and the private sector on wetland use. A legal framework with clear systems creating local organizations and well-defined working conditions would strengthen achievement of the wetland conservation and wise use goal.<sup>202</sup> There should also be clear legal mandate on an institution that will take charge of documenting and protecting the indigenous knowledge of the communities on wetland conservation.

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<sup>201</sup> C. Shine and C. De Klemm, *Wetlands, Water and the Law. Using law to advance wetland conservation and wise use*, (IUCN, IUCN Environmental Policy and law paper no. 38, 1999), 77

<sup>202</sup>Michael Bowman, 'The Ramsar Convention on Wetlands: Has it Made a Difference?' <[http://ramsar.rgis.ch/pdf/key\\_law\\_bowman2.pdf](http://ramsar.rgis.ch/pdf/key_law_bowman2.pdf)> accessed on 20/03/2019

#### **(f) Development of Institutional Capacity and Resources: Training of Staff**

Wise utilization and conservation of wetlands not only requires establishment of institutions by Member States of Ramsar agreement, but calls upon parties to develop the capacity of these institutions. Parties to the agreement have a duty to classify and apply measures which would endorse effective operation of such institutions and provide appropriate amounts of skilled staff.<sup>203</sup> Some of the relevant institutions are weak in service delivery as a result of shortage of skilled staff, resources, equipment and enforcement personnel such as wetland managers.

Kenya is faced with inadequate personnel knowledgeable in the effective management of wetland resources.<sup>204</sup> A case in point in carrying out EIA review process as reported by regional coordinator of East African Network for Environmental Compliance and Enforcement, previously employed by NEMA as senior legal officer, one Gerphas Opondo, is that ordinarily NEMA evaluates 1600 reports every year. Generally, every district in Kenya should have a DEO who is in charge of assisting NEMA in monitoring and auditing developments projects. However, due to monetary limitations facing NEMA, there are several without DEO. In other circumstances, there are DEO's within the districts but no staff to assist in carrying out essential technical evaluations to certify that there is no threat or destruction to the environment or to approve the outcome of assessment conducted by developer as contained in the impact assessment report presented. This state of affairs is confirmed by Murefu Barasa, a specialist in renewable energy. According to Barasa, in most cases NEMA does not inspect development activities in isolated areas due to lack of resources. Barasa also noted that actual state of affairs is that minor projects are not scrutinized with the same alertness as bigger developments on the notion that they have reduced impacts to the environment generally although the fact is that minor projects like waste disposal site could still have a huge harmful environmental impact. Mr. Barasa observed that generally NEMA lacks human, financial and other resources thus leading to insufficient audits or monitoring of projects that have high risk of harmful environmental impacts. As such, there is no guarantee of compliance with rules and procedures or implementation of systems put in place to mitigate harmful impacts. Eventually, supervision of projects is carried out by developers themselves with little oversight

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<sup>203</sup> C. Shine and C. De Klemm, *Wetlands, Water and the Law. Using law to advance wetland conservation and wise use*, (IUCN, IUCN Environmental Policy and law paper no. 38, 1999), page 71

<sup>204</sup> Sessional Paper on National Wetlands Conservation and Management, Final Draft (revised) April 2008, at 18

from NEMA to guarantee accuracy of the findings.<sup>205</sup> This situation adversely affect the objective of wise use of wetlands in Kenya and result into increase of destruction and disappearance of wetlands. Hence, the legal framework need to be reviewed to provide for adequate funding, staffing, and training to enable the responsible institutions and officers effectively manage the environment.

#### **4.2.2 Integrated Multidisciplinary Wetland Management Approach**

T. Buhrs defines “Integrated Environmental Management” as a method of managing the environment that take into consideration it’s multifaceted and interconnected character. On the other hand, R.D Margerum describes “integrated environmental management” (IEM) as a management method which encourages an all-inclusive, unified management of the environmental systems through an ambitious and strategic process. Hence, integrated environmental management framework can be summed up as a management style that balances between growing the economy and the need to exploit natural resources sustainably.<sup>206</sup>

Member State to Ramsar agreement resolved to come up with ways that would integrate “multidisciplinary management approach” during preparation and execution of strategies and developments activities that have negative effects on wetlands and their support systems. This is aimed at ensuring prudent use of wetlands and enjoyment of maximum benefits of wetlands resources for all generations.<sup>207</sup> Recommendations for implementation of the concept of wise wetlands utilization approved in the year 1999 during 5<sup>th</sup> COP call for formation of high breed sectoral bodies nationwide whose structure may be composed of members from various government departments, commissions national wetland groups or other organizations to achieve harmonization and collaboration in managing wetlands. This kind of entities should be comprised of government representative from all sectors of the environment which in one way of another

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<sup>205</sup> B. Barczewski, ‘How well do Environmental Regulations work in Kenya: A case Study of the Thika Highway Improvement Project’ (2013) policy research paper, page 8 and 9 < <http://csud.ei.columbia.edu/files/2013/06/How-Well-Do-Environmental-Regulations-Work-in-Kenya.pdf>> accessed on 10/25/2019 page 8 and 9

<sup>206</sup> T. Buhrs, ‘Integrated Environmental Management: Towards A Framework for Application’ (Lincoln University. Christchurch, New Zealand, 1995) page. 1-19; R.D Margerum, ‘Integrated Environmental Management: lessons from the Trinity Inlet Management Program.’ (*Land Use Policy* 16 1999) page 179-190. <<https://iemerst633.wordpress.com/2014/08/31/what-is-integrated-environmental-management-iem/>>

<sup>207</sup> C. Shine and C. De Klemm, *Wetlands, Water and the Law. Using law to advance wetland conservation and wise use*, (IUCN, IUCN Environmental Policy and law paper no. 38, 1999), page 71

impacts on wetlands, for example water, agriculture, fishing, nature conservation, mining, fishing, wildlife, forestry among other sectors. The high breed entities should also consist of concerned non-governmental organizations dealing with nature conservation. Through their strategic plan, the member States to Ramsar agreement endorsed creation of countrywide Ramsar groups that will create a room for contribution and participation of agents from the executive and non-governmental establishments, strategic interested parties, native persons, the private groups and concerned groups as well as officers from land use management and planning.<sup>208</sup>

Although traditionally parties have been engaging nature conservation organizations in wetlands management, the guidelines for proper management of wetlands provides that prudent use of wetlands entails a lot more actions. It is acknowledged that the traditional nature conservation bodies are well-equipped to promote conservation a number of selected wetlands, however, it is stated that the desire for prudent use of wetlands can often be met by setting up a first class high breed authority from the various environmental sectors.<sup>209</sup>

There is also need for political will, legislation and adequate funds to support the operation of these institutions. Member States have a duty to ensure that their legal framework for conserving and promoting prudent utilization of wetlands are comprehensive in order to attain desired objectives. Hence, legislations on wetland management should apply to the whole ecosystems including the biodiversity therein. Where there is disintegration of the functions and powers of the responsible institutions, it becomes impossible for the law to effectively address the needs of the whole ecosystem. This demonstrates the need for review of the law to ensure the entities managing wetlands have the right powers and mandates.<sup>210</sup> The legal system in Kenya does not provide for this first class high breed sectoral entity to manage and maintain prudent use of wetlands.

NEMA is the overall institutions charged coordinating every issue concerning the environment. Other institutions like KWS, WRA, Counties and the government ministries have important roles in management of wetlands. However, an analysis of operations of these institutions shows that

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<sup>208</sup> Ibid 71-72

<sup>209</sup> C. Shine and C. De Klemm, *Wetlands, Water and the Law. Using law to advance wetland conservation and wise use*, (IUCN, IUCN Environmental Policy and law paper no. 38, 1999) page 72

<sup>210</sup> Ibid page 67

there is no inter-agency coordination at operational level. NEMA's management Board as stipulated at Section 10 of the EMCA does not represent a cross-sectoral body. The management board is comprised of Chair, permanent secretary ministry of environment, Director-general of NEMA acting as the Board's secretary, Principal Secretary in finance ministry or his substitute, other six persons who are not government employees selected by CS for environment and Attorney General of his substitute. This composition does not have the sectoral representation to promote conservation, coordination and integration of wetlands in the other sectors as required under the Ramsar Agreement and its guidelines. As stated above, first class high breed sectoral entity for managing use of wetlands should consist of officers from all government agencies dealing with environment, nature conservation, and other relevant subjects and this high breed body is lacking in our legal system.

Section 9 of EMCA requires NEMA to regulate different activities of managing the environment carried out by lead agencies and support incorporation of environmental concerns development strategies, project, procedures and rules. However, the provision does not mandate this institution to set out strategy for coordination with the other lead agencies to guide in implementation of this function. There is no guide on the area of coordination, whether it is financial or human resource. The obligation is merely a blanket function making it possible for the institution to avoid setting targets and measure its performance on this function.

Lack of inter-agency coordination at operational level as envisaged by the Ramsar Agreement and guidelines on wise use is demonstrated in various Sections of the law. For examples, Section 42 of EMCA that vests power on NEMA to license prohibited activities on wetlands after considering EIA. However, there is no requirement for NEMA to consult with relevant agency in the decision making process before authorizing the prohibited activities on the wetlands under this section.

Further, Section 60 of the EMCA mandates a lead agency to present their remarks in writing on reports of assessing environmental impacts when requested by NEMA's Director General. This means the mandatory requirement under this section is not for the DG to request for these comments from lead agencies but the submission of comments by the lead agency. The law neither



mandates the DG to request for comments from lead agencies on EIA study nor require a consultative decision on issuance of EIA license.

Additionally, under section 63 of the Act, NEMA is the final decision maker in issuance of the EIA license<sup>211</sup>. The Law does not for compel for consultative decision between NEMA and the other lead agencies in issuance of the EIA license for development projects.<sup>212</sup> Consequently, NEMA being the final decision maker, sometimes fails to request for comments from the lead agencies as required at section 60 of the statute or disregard concerns or remarks made by the lead agencies. For example, as reported, in the year 2010, the unit in-charge of monitoring efficiency checks in office of the then Prime Minister conducted a study of examining circumstances that led to issuance of EIA License to Silver Crest Limited to carry out construction in a Marine Park at Mombasa. The investigation revealed that NEMA ignored concerns made by KWS which is the lead agency in managing the Park and issued Impact Assessment License to the developer.<sup>213</sup> These scenario demonstrate the lacuna in inter-agency coordination and lack of mandatory consultative decision in the law on matter of environment. Resultantly, the call for prudent utilization of wetlands is defeated by developments projects and other activities performed on wetlands.

Section 2 of EMCA defines lead agency as any entity of the government which may be in form of department, state corporation parastatal, ministry which functions under authority of the law on managing any section of the environment of natural resources. Section 63 provides for DG to call for comments from lead agency for consideration before EIA license is issued. This include issuance of EIA license for carrying out activities on wetlands under section 42 of the Act. From the above definition, a lead agency is an entity functioning under law. Going by that definition, KWS is a lead agency as its establishing statute mandates it to manage a section of the environment. However this entity lacks legal power to support management of wetlands sites and

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<sup>211</sup> Environment Management and Coordination Act 1999, Section 63

<sup>212</sup> In the United States, for example, federal agencies must consult with the Fish and Wildlife Service (FWS) before undertaking or issuing permits for construction projects affecting rivers, lakes or other waterways.

<sup>213</sup> B. Barczewski, 'How well do Environmental Regulations work in Kenya: A case Study of the Thika Highway Improvement Project' (2013) policy research paper, <<http://csud.ei.columbia.edu/files/2013/06/How-Well-Do-Environmental-Regulations-Work-in-Kenya.pdf>> accessed on 10/25/2019

this may cause NEMA to disregard its opinion on development project or activities done on wetlands.

The water Act does not expressly provides for integration of wetlands into the broader water management programmes. There is need to make the services of wetlands-related ecosystems and water-related ecosystem an essential factors for consideration in managing water resources to achieve evolution to a sustainable and productive economy.<sup>214</sup>

Devolution of environment management to the counties has brought fresh institutional coordination challenges to management of wetlands in Kenya. There is no clarity on the roles played by the different national entities such as NEMA which have offices in the counties and the County environment committees. All these institutions are expected to implement the national policies on environment as per the Constitution and to management the environment as per EMCA. There is no legal framework that separate their roles for clarity and efficient service delivery.

Further, there is no legal framework to guide the 47 counties on co-management measures adhered towards one goal of natural resources and wetlands management. Different approaches are applied by the different County governments, posing a challenge in realizing the sustainable utilization of wetlands. Moreover, there is need for legal framework to strike a balance between central and devolved governments on regulating the environment to guarantee implementation of measure agreed for prudent use and conservation of wetlands. Decentralization of power that exist currently poses a risk of discrepancy in interpreting and applying the wise use concept in the country. National laws should be reviewed to specify objectives of wetlands management that can be applied as framework bring about uniformity in county legislations on the overall management of wetlands.<sup>215</sup> The law should also mandates county government to collaborate with each other in conservation of wetlands especially those that that cross their boundaries and are shared between the respective counties.

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<sup>214</sup> Russi D., ten Brink P., Farmer A., Badura T., Coates D., Förster J., Kumar R. and Davidson N., *The Economics of Ecosystems and Biodiversity for Water and Wetlands*. IEEP, London and Brussels (2010).

<sup>215</sup> Shine C. and De Klemm C, *Wetlands, Water and the Law. Using law to advance wetland conservation and wise use*, (IUCN, IUCN Environmental Policy and law paper no. 38 (1999), page 73

### **4.3 CONCLUSION**

A relevant wetland management body need to have a legitimate mandate backed by political will and sufficient funding. In absence of these, it will be improbable for established management institutions to have authority and firm stand in advocating for effective management with government entities whose functions are not related with environment or to prevent relegating of many wetlands. The discussion above has brought out the overlapping roles of the various institutions on management of wetlands. Consideration should therefore be given to amending statutory responsibilities of main sectoral bodies and incorporate express obligations for wetland conservation and promotion of prudent use of the resource in executing their mandates. There should also be clear guide on coordination of these institutions.

There is need for institutional development specifically for wetland that will focus on the implementation of the Ramsar Agreement and recommendation. Presently, overall wetlands management is vested in NEMA, yet this entity has several other mandates under EMCA and Regulations under that law. This results into the wetland messages being diluted and overshadowed by the wider goals of other national policy objects. Further, there are high chances that NEMA, which has a large stake in natural resources management and due to the broad mandates given, will unlikely be driven to allocate sufficient staff in managing wetlands. Further, the existing staff of the Authority will be burdened and pressed to deal with the bigger issues and be likely to disregard managing wetlands. Establishing a separate institution on wetland has prospective of attracting responsiveness of lawmakers, policymakers and public generally to deliberate improved and robust interventions in regulating utilization of wetlands.

## CHAPTER FIVE

### 5.0 CONCLUSION AND RECOMMENDATIONS

#### 5.1 CONCLUSION

This study has demonstrated that proper management of wetlands is vital for human lives and the environment. The wetland ecosystem has great benefits both to the environment (eco-centric) and to human development (anthropocentric) when managed in a sustainable way. To mention but a few, wetlands control floods and prevent soil erosion. They discharge and recharge water resources, purify water, assist in carbon storage and reducing global warming as well as providing habitat for biodiversity. These benefits makes wetlands protection a central point in sustainable development. The benefits outweigh the value of terrestrial ecosystem. However, despite all these facts those in charge of formulating policies and making decisions repeatedly have underrated benefits and essential services offered by wetlands to human beings, other living organisms and environment general.<sup>216</sup>

The Ramsar agreement is a global instrument which specifically caters for wetland ecosystem. It calls for prudent utilization and conservation of wetlands. Kenya is a party to this instrument hence she is committed to carry out specific obligations in compliance with the instrument. These obligations include selecting wetlands sites of international benefits and other wetland protected areas, prudent utilization of wetlands, integrating wetlands into national development strategies, enhancing law and policy development to manage every wetland, apply monetary and commercial enticements for local groups and businesses to encourage them in conserving wetlands, support participation of all stakeholders in regulating wetlands management and establishing wetland register for the country to aid in trailing condition of wetland.<sup>217</sup>

Despite committing to comply with these obligations under the Ramsar Agreement, Kenya's wetlands are still facing extreme burden from human action.<sup>218</sup> The resource is deteriorating at a

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<sup>216</sup> Global Wetland Outlook, 'Executive Summary' (2008)

<sup>217</sup> Ibid

<sup>218</sup> Republic of Kenya, Final Draft (revised) Sessional Paper on National Wetlands Conservation and Management, April 2008, at page 20

high rate. All the human desire for commercial developments, settlement and farming is satisfied through encroachment of wetlands areas. Kenya has legislated a number of laws and set up organizations that take part in managing wetlands. However, continuous degradation of the ecosystem has proved that the legal system is weak and inadequate to manage the wetlands to sustainable levels.

The existing inter-sectoral pieces of legislation are not comprehensive to cover wetlands management hence contributing to further loss of the wetlands. This study has enumerated several legal, policy and institutional weakness, gaps, and challenges barring effective handling and regulation of wetlands in Kenya. Lack of specialized institutions to manage wetlands like other sectors of the environment such as water, forest, wildlife, and forest that has also contributed to the constant encroachment and loss to wetlands. The study has brought out the absence of wider sectoral representation in institutions managing wetlands hence failing to advocate the integration of wetlands in all other sectors of the environment. There is no harmony of the various sectoral laws leading to unsustainable use of wetlands.

Therefore, it is a finding of this study that there is need for reforms of laws and organizations to remedy destruction and disappearance of wetland for the benefit of all the generations as detailed herein under recommendations.

## **5.2 RECOMMENDATIONS**

### **5.2.1 Comprehensive Legal Framework on Wetland**

There is need for legal reform to establish a comprehensive national legislation on wetlands. This legislation should enhance understanding of the benefit of wetlands, raise the level of appreciation of the resources and outline dangers facing them. It should clearly set out procedures, plans, techniques and incentives adapted specifically for wetlands and water systems. Existing laws need to be reviewed to give them strong basis for formation of institutions that specifically manages Ramsar wetlands spots and every other wetland within the territory.<sup>219</sup>

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C. Shine & C. De Klemm, *Wetlands, Water and the Law. Using law to advance wetland conservation and wise use*, (IUCN, IUCN Environmental Policy and law paper no. 38, 1999) page 81

### **5.2.2 Provisions on Cultural and Socio-Economic Use of Wetland**

Putting in place legal provisions that command stern protection systems on wetlands would result into conflict from the wetlands users and may also result to withdrawal of customary activities that are crucial in conserving the ecology of the wetlands. Hence, the legal system must consist of laws that promote multiple uses of wetlands consistently with maintenance of their functions and values. The law should therefore include measures that take account and promote traditional and economic uses of wetlands.<sup>220</sup>

### **5.2.3 Provisions that promote prudent utilization of wetlands on private lands**

Wetlands resources in Kenya are located on both common and private land. The law should thus set out comprehensive legal techniques that are support prudent use and protection of wetlands notwithstanding systems of land ownership. Thus, the financial and property laws should provide incentives for landowners to devote to continuing conservation of wetlands. Operation of these conservation techniques should then be scrutinized and assured by an appropriate Non-Governmental Organization in charge of nature conservation or a common/communal organization.<sup>221</sup>

### **5.2.4 Legal Support for a Knowledge Base through Inventories and Maps**

A wetland register makes it easy to locate and classify wetlands. These activities help in maintaining the ecological state of wetland areas as well as curbing destruction and disappearance of wetlands. Thus, a register of wetland is an important management instrument. The legislation should mandate establishment of wetland inventory program. The legal provision should also call for identification of wetlands areas that can be restored and nurturing fresh wetlands. Wetlands register has to define the borders of wetlands, their features, current usage, the necessary protection measures and detailed activities or works required for the conservation and for promoting prudent utilization of wetlands in harmony with sustainable measures for use of the resources.

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<sup>220</sup> Ibid page 83

<sup>221</sup> C. Shine & C. De Klemm, *Wetlands, Water and the Law. Using law to advance wetland conservation and wise use*, IUCN, IUCN Environmental Policy and law paper no. 38, (1999) page 81

Registers for wetlands are commonly done by means of production of maps. Maps are appropriate tools for outlining limitations of protected areas in a clear and certain way. Thus, the law should mandates the managing institution to have in place maps for all the wetlands in Kenya. An area listed in a substantive legislation as a wetland accompanied by its map, makes it more strongly protected than if stated by regulations only.

### **5.2.5 Legal Support for Establishing Data on Wetland**

Training and enhancing public perception on wetlands are essential for realizing the objective of managing and utilization of wetlands sustainably. The law should thus provide for enforcement of this function. Wetland information in Kenya is scanty and this hinders education and awareness. Modern technological systems such as operating on remote detection of data together with geographic information method may be used to provide information on point of reference on hydrological demonstration as well as flood management that facilitate effective protection and effective handling of wetlands. GIS and remote detection data are used for delineation and interpretation of data and assist in inventory, mapping, and monitoring.<sup>222</sup>

### **5.2.6 Public Participation in Wetlands Resource Management**

The law has to empower native groups and interested parties comprising of women's associations and NGOs, in decisions making process involving their environment which include wetlands management. It should lay down a procedure for identifying the local leaders and key stakeholders to take part in planning and application of activities for protecting and promoting prudent use of wetlands.

Further, laws should clearly make provisions for national institutions or public bodies tasked with general care and protection of all wetlands resources (both designated and others) and for implementing obligations of the Nation under the international instruments to ensure customary establishments and native groups, NGOs and all core interested parties are equipped with expertise through education and other facilities to boost their ability to take part in the protection of wetlands within their neighbourhood.

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<sup>222</sup> Jonna (1999) and Raju et al., (1993); Mohan and Shresta (2000) in C. Nandi, 'Wetlands and wetland biodiversity conservation and management scenario in India', J. Environ. & Sociobiol. : 8(1) : 43-56, (2011)

### **5.2.7 Legislation on Effective Management of Designated Sites:**

There has to be substantive legislative provisions on identifying and selecting wetlands to be listed as Ramsar sites. The legislation should also provide for strict handling, supervision and regulation of projects for economic growth set up on protected wetland sites.

### **5.2.8 Wetland Restoration**

The legislative provisions on wetland management should be focused on different ecosystems related to wetlands for example forestry and water bodies. The various law regulating other ecosystems related to wetlands should be reviewed and rationalized to cater for wetland restoration and general management of wetlands in addition to regulating their ecosystems. Existing sectoral legislations do not cater for wetlands restoration hence making the tasks difficult to accomplish.

### **5.2.9 Translate Relevant Texts and Guidelines of the International Conventions on Conservation to National Laws.**

Laws should be designed in line with methodologies and guidelines on protection of wetland developed internationally and agreed upon by Parties in their general Conferences. Essentially, legal context should be formulated and buttressed to aid the use of the mechanisms set out in various recommendations for implementation of the international conventions and treaties for example the requirement for establishment of wider sectoral representation for management of wetlands.

### **5.2.10 Institutional Structures**

Arranging institutions to operate efficiently is essential for fruitful operation of strategies and policies that tackle issues traversing numerous sectors. This arrangement can be in the form of one-window style of management whereby a number of diverse establishments form a group that is authorized to perform duties for all the organizations. Further, the key players and assignment of roles must be anchored in the law. Regulation and handling of wetland nationally is characterized by disintegration of roles with numerous departments and line ministries taking part in the system. For example, there is ministry of water, ministry of environment and ministry of wildlife headed by different authority with roles on managing wetlands without harmonization. The laws ought to have provisions that harmonize programmes planned for protecting and handling



wetlands. On the other hand, the law ought to change from the current sectoral management structure to a system that operate with multiple-use structures.

#### **5.2.11 Enhancing Capacity Building**

Proper actions need to be taken to empower persons and relevant organizations to obtain essential expertise and machinery for managing wetlands resources. The laws ought to plainly and precisely cater for growth of human resource to increase and intensify their abilities within private and civil service sectors including the local communities and NGOs on sustainable utilization of wetlands. Both formal and informal learning ought to be taken to local groups and users of wetlands.

#### **5.2.12 Improve Funding Channels**

There is a range of activities to be implemented for conservation and prudent utilization of wetlands. These activities can only be performed if there is adequate money allocated. The task of regulating protected sites of wetlands has to be protected by law to facilitate allocation of funds to the organizations in-charge of managing the resource. Further, the law may create a Trust for wetlands to operate nationally. This is openly created to lobby and manage monies from all sources and donate it toward development projects for wetlands. Regulation of the Trust will be by cooperation from various sectors. Formation and operation of a Trust system will encourage independence take regulation of funds to local levels making it a central fund for wetlands programmes and projects.

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