

**"PUBLIC PARTICIPATION IN ENVIRONMENTAL DECISION-MAKING IN KENYA:
ANALYSIS OF LAW AND POLICY"**

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DECLARATION

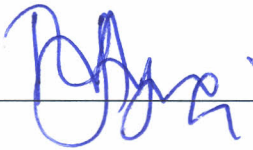
I, JANE WANJIRU NDIBA, do hereby declare that this is my original work and has not been submitted and is not currently being submitted for a degree in any other University.

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DATE 17-11-2011

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This dissertation is submitted for examination with my approval as University Supervisor.

SIGNED 

DATE 17/11/2011

ROSE AYUGI MASINDE

DEDICATION

This work is dedicated to all those who sacrifice their precious time and dedicate it to the preservation and improvement of the environment. May their input bear fruits in their generation and of those to come.

ACKNOWLEDGMENTS

Of the giving thanks for helping to pursue this study, the inadequacy of language lets me down, and the range of helpers too wide for individual names to be mentioned. From my supervisor, Rose Ayugi Masinde who has helped me to flesh out paucity of thought sometimes without proper acknowledgement, to practitioners and academics who inspire me, to friends and colleagues who had the good grace in sharing ideas and workloads, the list of persons to whom I am indebted stretches, like Banquo's line of kings, to the crack of doom.

The Almighty has been the unseen captain in the tempestuous sea of academic scholarship, without whom this study would have been ineffectual.

But to you Mom, Daddy, sons Barny and Ronny, my Brothers and Sisters, this debt will never be repaid.

To you Moses Kanyeke, your love and unwavering support has propelled me to this heights.

As to whether I have succeeded in my objectives or not, you, the reader is the final arbiter, but such were my noble targets and I harbour no excuses in this regard.

LIST OF ACRONYMS

ASALs	Arid and Semi-Arid Lands
CBCRM	Community-Based Coastal Resource Management
CREEL	Centre for Environmental Legal Research & Education
DNLP	Draft National Land Policy, 2008
EDM	Environmental Decision-making
EIA	Environmental Impact Assessment
IUCN	International Union for Conservation of Nature
NEMA	National Environmental Management Authority
NET	National Environmental Tribunal
NGOs	Non-Governmental Organisations
UNECE	United Nations Economic Commission for Europe
UNEP	United Nations Environmental Programme
WSSD	World Summit on Sustainable Development

LIST OF STATUTES

The Constitution of the Republic of Kenya, 2010

The Constitution of the Republic of Kenya, as amended in 2008

The Environmental Management and Coordination Act, No. 8 of 1999

The Forests Act, 2005, (Act No. 7 of 2005).

The Local Government Act 1977 (Chapter 265, Laws of Kenya)

The Mining Act, 1940,(Chapter 306, Laws of Kenya, Amended by Act 18 of 1986).

The Official Secrets Act, (Chapter 187, Laws of Kenya, Revised ed.1989).

The Physical Planning Act, (Chapter 286, Laws of Kenya, Revised ed.1996).

The Public Health Act, (Chapter 242, Laws of Kenya, Revised ed.1986).

The Water Act, 2002, (Act No. 8 of 2002)

Sessional Paper No. 6 of 1999 on Environment and Development

Subsidiary Legislation

The Environmental (Impact Assessment and Audit) Regulations, Legal Notice No.101 of 2003.

The Environmental Management (Impact Assessment and Audit) (Amendment) Regulations,
2007 Legal Notice No.133 of 2007.

LIST OF CONVENTIONS AND TREATIES

African Charter on Human and Peoples' Rights, 1981

The Economic Commission for Europe Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters, (Aarhus Convention), 1988

The Rio Declaration on Environment and Development, Rio De Janeiro, Brazil June 1992

The Stockholm Declaration of Principles for the Preservation and Enhancement of the Human Environment, Stockholm, Sweden, June 1972

The International Covenant on Civil and Political Rights, 1966

The Johannesburg Declaration on Sustainable Development, 2002

The World Charter for Nature, 1982

Universal Declaration of Human Rights, 1945

Vienna Convention on the Law of Treaties, 1969

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Bogonko v NEMA HC Miscellaneous Application Number 1535 of 2005,(2006)1 KLR(E&L),772.

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Wangari Maathai & Others-v-City Council of Nairobi &Others HCCC No.72 (1994)

ABSTRACT

In recent years public participation has become to be seen as a vital part of addressing environmental problems and bringing about sustainable development. In this context, vacating the limits of solely relying on technocratic bureaucratic monopoly of decision-making, allows governments to adopt policies and enact laws that are relevant to communities and take into account their needs. The principle of public participation holds that those who are affected by a decision have a right to be involved in the decision-making process. Public participation implies that the public's contribution will influence the decision.

Borrowing from the advancement of Public participation as part of a "people first" paradigm shift, this study challenges the concept that "big is better" and the logic of centralized hierarchies, advancing alternative concepts of "more heads are better than one" and arguing that public participation can sustain productive and durable change.

The right to public participation is to a considerable extent enshrined by laws of the land and the notion of public participation in environmental decision making (EDM) and is gaining currency in post-modern democratic practice. However, there is little concomitant and literal engagement of the people at the earliest stages of environmental assessments.

Access to environmental information for all who choose to participate in such decision-making is integral to the concept of environmental democracy. The policy of access to information, provides the foundation, and advocates providing basic information to the public. Informed with basic facts about the quality of their environment, citizens can become active participants in identifying and resolving issues at both local and national levels. Across the globe, many countries have adopted this policy and have shaped it to meet their particular needs. Advocacy in matters related to the environment has coalesced around the notion of public participation in

EDM. The role of the community sector in helping these decision-makers to make good decisions cannot be over-estimated.

While public participation has been advanced as a means of democratizing environmental management and conservation of the country's ecosystem, it is surprising that there are very limited compliance mechanisms or proper processes that have been put in place on how it can be actualized. Individuals and community groups find it very difficult to participate meaningfully in environmental decision-making unless they have access to information relevant to the decision to be made. Ideally, the public should have access to the same information as the decision-maker. In practice, this rarely occurs.

The study seeks to establish the nature and contours of public participation in EDM, with specific focus on the environmental legislations, policy and practice in Kenya; to establish the efficacy and efficiency of the provisions of environmental related law in advancing public participation in environmental matters in Kenya; to identify factors limiting the ability for participatory environmental decision making in Kenya; and, to make appropriate recommendations on policy, legislation and practice where weaknesses exist, with a view to strengthening public participation on environmental decision-making.

The study posits that unless homage is paid to these conundrums, ours is likely to be a mere perfunctory erection of legislative frameworks without proper ideological foundations or normative processes that nurture them. In this regard, the study states at the outset that public participation in EDM must entail a bold but radical remodification of the concept and its normative edifice. This will not be attained by merely creating institutions with lofty aims, but rather, in a deliberate process of political transformation that is interwoven with virtues of

democratic environmental governance and normative processes. Or else, public participation will continue to remain tucked somewhere between rhetoric and reality.

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CHAPTER ONE

INTRODUCTION TO THE STUDY

1.1 Introduction

Public Participation is a framework of policies, principles, and techniques which ensure that citizens and communities, individuals, groups, and organizations have the opportunity to be involved in a meaningful way in making decisions that will definitely affect them, or in which they have an interest. Public participation may involve both individual and collective voices- individual voices coming directly from citizens who choose to express their views, collective voices from communities, interest groups or other organizations able to synthesize or aggregate shared messages.

Effective public participation requires that citizens be informed and knowledgeable about the topic being discussed. They must be willing and able to be involved having the interest, the time, and the opportunity or access. Citizens must take responsibility for the quality of their participation and be accountable to each other for effective and efficient use of time and other resources.

According to Pring and Noé,¹ public participation is and all en-compassing label used to describe the various mechanisms that individuals or groups may use to communicate their views on a public issue". In the book *Human Rights in Natural Resources*, Pring and Noé recognize the difficulty of defining public participation, which is why their definition is not very precise. Sherry Arnstein, in her article "A Ladder of Citizen Participation,"² defines citizen participation as "the redistribution of power that enables the have-not citizens, presently excluded from the political and economic processes, to be deliberately included in the future". It needs to be noted that Arnstein's definition is rather old and that the public is not completely excluded anymore from political and economic process. The public may also include other types of actors than mere citizens. The fact that she mentions citizen "power" in her definition makes it relevant still

¹ Pring, G., Noé, Susan Y., "International Law of Public Participation," in Zillman et al. (eds.), *Human Rights in Natural Resource Development*, (New York: Oxford, Oxford University Press, 2002), p. 15.

² Arnstein, Sherry R., "A Ladder of Citizen Participation," *Journal of the American Institute of Planners*, July 1969, Vol. 35, No. 4.

because that is what participation is about; giving the public more power in decision-making. She also emphasizes the promotion of public participation, which was in her time of greater importance because it was still a relatively new concept. From the onset, one comes to the realization that public participation means different things to different people.

The notion of public participation in environmental decision making (EDM) is gaining currency in post-modern democratic practice. It reflects increasing recognition that environmental issues must be addressed by all those affected by their outcome and not just by governments and industrial sectors. It captures the principle of equal rights for all those in the environment debate - including the public, community groups, advocates, industrial leaders, workers, governments, academics and health care professionals. For those whose daily lives reflect the quality of their environment, participation in environmental decision-making is as important as in education, health care, finance and government.

Participation applies to the idea of engaging people at the earliest stages of environmental assessments, but in most cases, this takes place as an immediate precursor to decision making. In some cases, public participation is focused on providing input to ongoing decisions about implementation. Public participation is then considered as a means for citizens to voice their concerns in environmental matters and as a tool of the resulting decision. This can be exemplified by the procedure of public participation in the evaluation of environmental impact assessment and as a tool of expanded democracy which consequently improves the legitimacy of the resulting decisions.

There is an increased desire among citizens to participate in decisions that will affect them, and an increasing need for the policy development process to be informed by input from diverse sources, especially from those involved or affected.

Decision making is the cognitive process leading to the selection of a course of action among alternatives. Every decision making process produces a final choice. It can be an action or an

opinion.³Therefore, environmental decision making entails a rational process within the context or realm of the environment.

Access to environmental information, and to justice, for all who choose to participate in such decision-making is integral to the concept of environmental democracy. The policy of access to information, provides the foundation, and advocates providing basic information to the public. Informed with basic facts about the quality of their environment, citizens can become active participants in identifying and resolving issues at both local and national levels.

1.2 Background to the Study

In recent years, advocacy in matters related to the environment has coalesced around the notion of public participation in EDM.⁴Administrative decisions underpin most environmental law regimes. Decisions made by ministers, bureaucrats and members of institutions can be literally life or death decisions for the environment. The role of the community sector in helping these decision-makers to make good decisions cannot be under-estimated. What is of great concern is that both institutional and legal framework has not been harmonized to enable effective public participation. While public participation has been advanced as a means of democratizing environmental management and conservation of the country's ecosystem, it is surprising that there are very limited compliance mechanisms or proper processes that have been put in place on how it can be actualized.

The right to public participation in EDM is one of the procedural rights provided by international conventions and legal instruments, as well as our own municipal laws. These rights which include right of access to information and justice, are generally viewed as a mechanism for ensuring the protection of fundamental rights to a clean environment.⁵

One of the foremost outcome of the United Nations Conference on Environment and Development (UNCED), Rio de Janeiro, 3-14 June 1992 (informally referred to as the Earth

³ Definition available at http://psychology.wikia.com/wiki/Decision_making (last accessed 30th March, 2011).

⁴Sexton, K., Alfred A. Marcus, K. William Easter and Timothy D. Burkhardt., *Better Environmental Decisions*, (Washington DC: Island Press, 1999), p.32.

⁵ Rehbinder, E., "Democracy, Access to Justice and Environment at the International Level," CRIDEAU, CNRS/IRNA, p. 134.

Summit or the Rio Summit) in 1992 Principle 10 and Agenda 21 was the increased emphasis on public participation in environmental decision-making (EDM).

Trends in environmental governance, as exemplified in international legal instruments such as Principle 1 of the Stockholm Declaration on the Human Environment, Principle 10 of the Rio Declaration on Environment and Development and more recently, the United Nations Economic Commission for Europe (UNECE) Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters (the Aarhus Convention”),⁶ emphasize procedural rights such as access to information, public participation in decision-making and access to justice.

Article 1 of the Aarhus Convention specifically states that “... each Party shall guarantee the rights of access to information, public participation in decision-making, and access to justice in environmental matters in accordance with the provisions of this Convention.”⁷

World Charter for Nature, 1982⁸

The World Charter for Nature, 1982 is trite on public participation. It provides that “all persons in accordance with their national legislation shall hence have the opportunity to participate, individually or with others in decision-making in issues of direct concern to the environment”.⁹

⁶ The United Nations Economic Commission for Europe (UNECE) Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters was adopted on 25 June 1998 in the Danish city of Aarhus (Århus) at the Fourth Ministerial Conference as part of the “Environment for Europe” process. It entered into force on 30 October 2001. The Convention provides for the right of everyone to receive environmental information that is held by public authorities (“access to environmental information”). This can include information on the state of the environment, but also on policies or measures taken, or on the state of human health and safety where this can be affected by the state of the environment. Applicants are entitled to obtain this information within one month of the request and without having to say why they require it. In addition, public authorities are obliged, under the Convention, to actively disseminate environmental information in their possession; the right to participate in environmental decision-making. Arrangements are to be made by public authorities to enable the public affected and environmental non-governmental organisations to comment on, for example, proposals for projects affecting the environment, or plans and programmes relating to the environment, these comments to be taken into due account in decision-making, and information to be provided on the final decisions and the reasons for it (“public participation in environmental decision-making”); the right to review procedures to challenge public decisions that have been made without respecting the two aforementioned rights or environmental law in general (“access to justice”).

⁷ Article 1, Aarhus Convention. See also a commentary on the article in Stec, S. and Casey-Lefkowitz, S., “The Aarhus Convention: An Implementation Guide,” (United Nations: New York and Geneva, 2000), p. 86.

⁸ Available at <http://www.unep.org/law/PDF/UNEPEnv-LawGuide&PrincN05.pdf> (accessed on 20/05/2010).

⁹ See paragraph 13 of the World Charter on Nature.

The Universal Declaration of Human Rights¹⁰

The Universal Declaration of Human Rights (UDHR) at Article 19 states that “everyone has the right to freedom of opinion and expression; this right includes freedom to hold opinions without interference and to seek, receive and impart information and ideas through any media and regardless of frontiers.”¹¹ It implies that the governed must therefore have and perceive that they have a voice in governance through representation, deliberation and some other form of action.¹²

Principle 10 of the Rio Declaration on Environment and Development

Principle 10 of the Rio Declaration states thus:

“Environmental issues are best handled with participation of all concerned citizens, at the relevant level. At the national level, each individual shall have appropriate access to information concerning the environment that is held by public authorities, including information on hazardous materials and activities in their communities, and the opportunity to participate in decision-making processes. States shall facilitate and encourage public awareness and participation by making information widely available. Effective access to judicial and administrative proceedings, including redress and remedy, shall be provided.”¹³

Johannesburg Principles on Sustainable Development and the Rule of Law

The Johannesburg Principles on Sustainable Development and the Rule of Law declared “a strong desire to see, inter alia, the improvement in the level of public participation in environmental decision-making”.¹⁴ There is as yet no Africa-wide (or a sub-regional) instrument, which similarly defines the nature and components of participatory environmental governance.¹⁵ However, legal instruments such as the Aarhus Convention highlight the extent and means by which guarantees on procedural rights can strengthen and support substantive rights. With the enactment of the Environmental Management and Coordination Act, 1999 and lack of

¹⁰ Available at www.un.org/en/documents/udhr/ (accessed 20/05/2010).

¹¹ Article 19, Universal Declaration of Human Rights.

¹² Webler, T., “Right” discourse in citizen participation: An Evaluative Yardstick, in *Fairness and Competence in Citizen Participation*, (Dordrecht: Kluwer Academic, 1995).

¹³ <http://www.unep.org/Documents.Multilingual/Default.asp?documentid=78&articleid=1163> (last accessed on 20/05/10).

¹⁴ Johannesburg Principles on Sustainable Development and the Rule of Law, available at <http://www.unep.org/law/symposium/Principles.htm> (accessed 20/05/2010).

¹⁵ See Bisset, R., “Methods of Consultation and Public Participation,” in John Wiley and Sons, (eds.), *EIA in Developing and Transitional Countries*, 2000.

comprehensive review of a raft of other legislations which have been in existence before, there is no doubt that a lot of debate may be raised on what participatory EDM entails.¹⁶

Enhanced transparency and legal reform can help strengthen a society facing acute pressure on resources. However, it should be noted that even with appropriate legal mechanisms, public participation cannot be effective without some fundamental prerequisites which include: access to information, financial resources, and education and training.

1.3 Statement of the Problem

Yet again, contested discourses will revolve around the structures, spheres and the nature of participation. Are the laws and policies put in place to bolster public participation in EDM effective? What are the irreducible normative elements which effective EDM should entail? What challenges stand in the way of effective public participation in EDM?

Across the globe, there is increasing awareness of the fragility of the biosphere in which the mankind inhabits, coupled with a growing desire to get involved in its protection. In Kenya, environmental protection is an increasingly pressing issue. Not only are pollution and ecological degradation becoming ever more serious, but also people are more and more unsatisfied about the situation. The speed with which the environment is being polluted far outstrips the efforts expended in cleaning it up. Why is this? Kenya has a large population but few resources, and the production and consumption methods are too out of date. But at the root of the problem lies a more significant cause- the lack of effective public participation in EDM in Kenya. There is a tendency of decisions almost entirely being determined by experts without recourse to the general public. The major problem is that environmental protection laws are not strictly observed and implemented due to a lack of democratic legal mechanisms for public participation among other factors.

The problems of environmental management in Kenya ran deep. Of fundamental concern, the first Constitution, that had been the Supreme law of the land since independence, did not contain explicit environmental provisions. The provisions on environmental governance were only by

¹⁶ The right of public participation is provided for in the Environmental Management and Coordination Act at section 3, as well as other sections, most which are discussed in the ensuing chapters of the study.

inference when it guaranteed the right to life. An argument had therefore been advanced to the effect that the right to life encompasses the right to a clean and healthy environment.¹⁷ With the enactment of a new Constitution there is now entrenchment of the right to a clean and healthy environment. This right extends to the right to have the environment protected for the benefit of present and future generations through legislation and other measures.¹⁸ To further bolster this, Part Two of Chapter Five, and article 69(1)(d) in particular, enjoins the State(in mandatory terms) to encourage public participation in the management, protection and conservation of the environment. Additionally, the notion of public participation is by inference. The first Constitution of Kenya protected individual fundamental rights' and freedoms, some of which are relevant to public participation in EDM.¹⁹ Invariably, the most important was section 80, guaranteeing every person the right to assemble freely and associate with other persons, and the right to form or belong to associations. Belying these seemingly well-packaged rights were a number of handicaps, the most notable being lack of an express provision on the right to information, and by extension, environmental information.

Individuals and community groups can never participate meaningfully in environmental decision-making unless they have access to information relevant to the decision to be made.²⁰ Ideally, the public should have access to the same information as the decision-maker. In practice, this rarely occurs.

It is surprising that while public participation in EDM is perhaps the political buzzword of our time, yet it remains highly bureaucratic as legal framework and policies are framed in a way to the effect that power reposes in the centre, with some margin of appreciation given to the people to implement policies and programmes.

It appears that the bulk of the analysis of public participation in EDM and related concepts are largely functional and structural. Put differently, the concepts are largely discussed in terms of

¹⁷ G.M. Wamukoya and F.D.P. Situma, (eds.), *Environmental Management in Kenya: A Guide to the Environmental Management and Coordination Act*, (Nairobi: Centre for Research and Education Environmental Law, 2000).

¹⁸ Article 42 of the Constitution of the Republic of Kenya, 2010.

¹⁹ These freedoms and guarantees appear in Chapter V of the Constitution of 1969 and include freedoms of speech, assembly, and association; the right to life; and the right to the protection of the law

²⁰ Petkova, E., Maurer, C., Henninger N. and Irwin, F., *Closing the Gap*, (World Resources Institute, 2002).

centralised powers and allocation of democratic management to the people at the lower cadres of the society, popularly referred to as the “grassroots”.

The desired position is effective legal mechanisms for enabling that participation which should be sufficient to assist any person in participating effectively in environmental decision of a given type. Unfortunately, in Kenya, there exist at least 66 pieces of unharmonised legislation on the management and conservation of the environment, making enforcement, and even a proper understanding of them very difficult.

Little attention is paid to the normatively of the fundamental concepts of participatory decision making, and the ideology and the political philosophy that underlies them. This thin view of EDM has divorced it from potential to nurture democratic growth and environmental governance. This may explain why the debate on EDM portrays the issue as that of constitutional design, and not the inauguration of a new environmental political culture or ideology. This study does not make specific focus on the EDM mechanisms in any of the legislations. Rather, it looks at the level of direct or implied public participation aspects contained in them, and on a structural level.

While it is true that understanding of the theory and practice of enforcing the public’s inherent right to participate in EDM, there is little argument on the fact that the mission would not be complete without making out a case for not only illuminating the various provisions on public participation in EDM, but also in seeking to suggest ways of strengthening them.

1.4 Objectives of the Study

Based on the problems stated, the objective of this study is four-fold, viz:

- a) To establish the nature and contours of public participation in EDM, with specific focus on the environmental legislations, policy and practice in Kenya;
- b) To establish the efficacy and efficiency of the provisions of environmental related law in advancing public participation in environmental matters in Kenya;
- c) To identify factors affecting the ability participatory environmental decision making in Kenya; and,

- d) To make appropriate recommendations on policy, legislation and practice where weaknesses exist, with a view to strengthening public participation on environmental decision-making.

Equally important, the study posits that unless homage is paid to these conundrums, ours is likely to be a mere perfunctory erection of legislative frameworks without proper ideological foundations or normative processes that nurture them. In this regard, the study states at the outset that public participation in EDM must entail a bold but radical remodification of the concept and its normative edifice. This will not be attained by merely creating institutions with lofty aims, but rather, in a deliberate process of political transformation that is interwoven with virtues of democratic environmental governance and normative processes.

1.5 Literature Review

What distinguishes public participation in EDM from other forms of exercising power at lower levels of government? The study analyses past debates on EDM and related concepts and move on to advance a case for internalization of concepts, policies and practices that provide a critical start to enhanced environmental governance.

Following the seminal classification of Wamukoya, Ludeki and Wamae,²¹ some common definitions need clarification below. Stripped of all technicalities, public participation entails inviting members of the public, intergovernmental organisations to participate in the formation of policies and their execution and in decision-making on matters related to the environment. The fundamental subsets include Environmental Audit²², Environmental

²¹ George Wamukoya, Jael Ludeki and Wamae, T., *Environmental Legislation in Kenya*, (Nairobi: 1st edition, 2001).

²² EMCA 1999, at section 2 defines environmental audit as the systematic, documented, periodic and objective evaluation of how well environmental organisation, management and equipment are performing in conserving or preserving the environment.

Education,²³Environmental Impact Assessment,²⁴Environmental Management,²⁵Environmental Monitoring,²⁶ among others

Patricia Kameri-Mbote writing on the Legal and Policy Framework of environmental law in Kenya decries the ominous lack of definitive law on access to information. According to her, constitutional weaknesses are the primary reason behind the government's failure to make environmental information available to the wider public. Kameri-Mbote argues that juridical pronouncement on environmental decision-making have not remedied this constitutional lacuna by failing to establish a clear jurisprudence on environmental related matters, for instance *locus standi*.²⁷

Yet as things stand, Kenya's environmental legislation is scattered among 77 resource- and sector-specific laws. She proceeds to analyse the nature and scope of public participation designed by the legal framework in Kenya. She argues that procedural rights of access to information, participation in decision-making, freedom of association, and access to justice are indispensable to civil society's contribution to the environmental assessment process. Recognizing that environmental protection and conservation are prerequisites for sustainable development, greater emphasis must be placed on specific actions by relevant groups representing the civil society. She also argues for a clear policy framework for stakeholder participation and mechanisms to ensure stakeholder involvement, because both are essential prerequisites for the enjoyment of the right to freedom of association. This is important as it offers a perfect platform on which to modify legislative, institutional and administrative procedures and structures to address deficiencies in environmental decision making.

²³ Environmental education includes the process of recognizing values and clarifying concepts in order to develop skills and attitudes necessary to understand and appreciate the inter-relatedness among, his culture and his biophysical surroundings.

²⁴ Environmental impact assessment means a systematic examination conducted to determine whether or not a programme, activity or project will have any adverse impacts on the environment.

²⁵ Environmental management includes the protection, conservation and sustainable use of the various elements or components of the environment.

²⁶ Environmental monitoring means the continuous or periodic determination of actual and potential effects of any activity or phenomenon on the environment whether short-term or long-term.

²⁷ Patricia Kameri-Mbote, "Legal and Policy Framework in Public Involvement in Decision Making, Asia and East Africa, [On file with the researcher].

In yet another paper, Patricia Kameri-Mbote focuses on Strategic Planning and Implementation of Public Involvement in Environmental Decision-making as they relate to Environmental Impact Assessment in Kenya.²⁸ The paper was however written before constitution of NEMA and the Environmental Impact Assessment and Environmental Audit Regulations were gazetted.²⁹ The approach in this paper differs from the proposed study in that it focuses on public participation with specific address on environment impact assessment in the World Bank projects and specific sectoral laws. The paper therefore is limited in scope on other aspects of public participation and implementation under the institutions established under EMCA, 1999, and other sectoral and statutory provisions. However, the paper identifies some obstacles to public participation in decision-making in environmental matters. To this end, the paper is relevant to the study.

Weber couches the idea of public participation in the Hohfeldian context of rights and duties.³⁰ This repositioning shifts the debate to a level of the citizen as the rights-holder and the state and its agencies as the duty-bearers. If participation is perceived as an entitlement, then enforcement and accountability mechanisms become clearer. If that be so, one cannot understate the importance of formal acknowledgement of and commitment to international standards. What the text does not explore is a situation where the international position taken by the State and its agencies is not reflected in the legal framework or in the government's domestic policies and programmes. This concern arises out of a longstanding tendency of the various states in failing to respect their international commitments and the very standards they have participated in setting. This perspective is shared by Wheeler and Sillanpaa.³¹ Whatever suggestions for change, they should tap from a pool of knowledge about possible redress approaches from which the most appropriate one for a given set of circumstances exist. This is provided by the international standards, mainly couched in the form of conventions, to which most countries are party.

²⁸ See Patricia Kameri-Mbote, "Strategic Planning and Implementation of Public Involvement in Environmental Decision-Making as They Relate to Environmental Impact Assessment in Kenya", (IELRC Working Paper, 2000-3).

²⁹ EIA/EA Regulations were gazetted in 2003.

³⁰ Webler, T., *"Right" discourse in citizen participation: An Evaluative Yardstick*, Fairness and Competence in Citizen Participation, (Dordrecht: Kluwer Academic, 1995).

³¹ Wheeler, D. and Sillanpaa, M., *"The Stakeholder Corporation: A Blueprint for Maximizing Stakeholder Value,"* (Pitman, London, 1997).

If other scholars of participatory EDM have been merely prescriptive,³² even idealistic, the baton on how the idea of public participation should be actualized is best picked by Bisset. In his seminal submission in the text, he outlines the methods of putting to practice the various participatory processes in the environmental realm. He makes specific focus on Environmental Impact Assessment in developing and transitional countries. Since this study focuses on Kenya, the text invariably is of immense relevance.³³

A Guide to the Environmental Management and Coordination Act, 1999³⁴ aims at enhancing the understanding and public awareness in respect of the Act and its effective implementation. The text, printed both in Swahili and English, is testimony to the commitment to enhancing and broadening public awareness. The guide however does not take a critical approach to the provisions of EMCA 1999. It only elucidates the provisions. It however remains relevant for the reason that it helps in enriching the knowledge on the provisions of the Act.

An improvement on this text is to be found in the Environmental Legislation in Kenya, also consolidated by the Centre for Environmental Legal Research and Education (CREEL).³⁵ Noting that the laws relating to the environment are scattered, the need for a readily accessible collection of statutes and statutory instruments for ease of reference is obvious. The text brings together the most important and widely referred-to environmental-related statutes, statutory instruments and multilateral environmental agreements.

A publication by Yusuf J. Ahmed and George K. Sammy focuses on environmental impact assessment as an important tool in promoting sound environmental management in developing countries.³⁶ The text offers some practical solutions to the problems facing the implementation of the Environmental Impact Assessment (EIA) in developing countries of which Kenya falls.

³² Wilcox argues that most environmental theories are merely prescriptive and offer no pragmatic solutions to the environmental issues. To him, studies on matters related to the environmental must at all times offer workable solutions as opposed to adding up to the “heaps of commentary” on environmental issues. For a detailed discussion, see Wilcox, D., *The Guide to Effective Participation*, (New York. Joseph Rowntree Foundation, 1994).

³³ Bisset, R., “Methods of Consultation and Public Participation,” in John Wiley and Sons, (eds.), *EIA in Developing and Transitional Countries*, (2000).

³⁴ George Wamukoya and Francis D.P. Situma, (eds.), *A Guide to the Environmental Management and Coordination Act, 1999*, (Nairobi: Centre for Environmental Legal Research and Education).

³⁵ George Wamukoya, Jael Ludeki and Titus Wamae, *Environmental Legislation in Kenya*, (First Edition 2007).

³⁶ See Yusuf J. Ahmed and George K. Sammy, “*Guidelines to the Environmental Impact Assessment in Developing Countries*,” (Nairobi, UNEP, Hodden and Stoughton, 1985).

Although the authors focus is limited to EIA, the text finds relevance in the sense that EIA is one of the avenues through which public participation in environmental decision making can be manifested. The solutions suggested for resolving the challenges affecting public participation with regard to implementation of EIA are invaluable to this study.

Stuart Bell and Donald McGillivray sharply focus on public participation in environmental law and policy.³⁷ Their text states that in recent times, there have been significant moves towards increasing both the quantity and quality of public participation in many different areas of environmental decision-making and access to justice in environmental matters. The text links the main pillars that are crucial in ensuring the public's right of participation in environmental decision-making and informs this study in assessing Kenya's situation.

According to Okidi, the principle of public participation in environmental matters lies in the empowerment of the civil society in decision-making or, more sharply, it may empower members of the public to seek enforcement of environmental protection through judicial and/or administrative procedures.³⁸ He states that public participation may ultimately be provided for through at least three legal machineries. He lists constitutional entrenchment as part of the Bill of Rights as the first. Secondly, the mechanism of review by the public in Environmental Impact Assessment, which entails full disclosure of the project, possible impact, alternatives to the project, and the measures to mitigate the possible impacts. In this regard, public participation may lead to modification or even cancellation of the proposed project. Thus the legal empowerment of individuals and public participation is an essential condition of a good environmental law and practice. The third machinery is through the operationalisation of *locus standi* for the public in environmental causes. He however concedes that the character of grant of public participation may vary from country to country.

³⁷ Stuart Bell and Donald McGillivray, *Environmental Law*, (Oxford: Oxford University Press, 6th Edition, 2006).

³⁸ Okidi, C. O., "Concept, Function and Structure of Environmental Law" in Okidi, C. O., Kamari-Mbote, P. & Akech Migai, (eds.), *Environmental Governance in Kenya: Implementing the Framework Law*, (Centre for Advanced Studies in Environmental Law and Policy, CASELAP, 2008), p. 30.

1.6 Theoretical Framework

The study is based on the conceptual framework that in the decision making process in environmental matters, there is need to engage public participation in order to promote democratic governance in environmental matters. This study relies on sociological school of law. Those who adopt this approach, a sociological approach to law, are skeptical of the rules presented in the statute books and are concerned with what really happens on ground,- ``the law in action.’’³⁹

Participatory democracy strives to create opportunities for all members of a political group to make meaningful contributions to decision-making, and seeks to broaden the range of people who have access to such opportunities. Because so much information must be gathered for the overall decision-making process to succeed, technology may provide important forces leading to the type of empowerment needed for participatory models, especially those technological tools that enable community narratives and correspond to the accretion of knowledge.

In between these two theories lies a range of compromise theories seeking to reconcile some of the inherent inconsistencies in our aspirations such as a desire for increased public participation and a desire for greater expertise and efficiency in decision-making.

According to Schultz and Crockett,⁴⁰ political rights and freedom of information promote the cause of environmental interest groups, which in turn raise public awareness and encourage environmental legislation. This effect works through environmental groups and public opinion at large. _Better informed actors, in turn, are more likely to act on environmental problems, raising environmental quality.⁴¹

This study is premised on the idea that since most environmental decisions are concerned with establishing rights and responsibilities over the use of common natural resources (such as water, land, air and biodiversity), environmental laws should therefore enshrine substantive rights of public participation. This will provide checks and balances on administrative government and

³⁹ M.D A. Freeman, *Lloyd's Introduction to Jurisprudence*, (London: Sweet & Maxwell, 7th edn, 2001), p.659.

⁴⁰ Schultz,C.B.,and T.R..Crockett, "Economic Development, Democratization, and Environmental Protection in Eastern Europe" *Boston College Environmental Affairs Law Review*, 1990, vol.18, pp.53–84.

⁴¹ *Ibid*.

improve the quality of decisions. Public participation can also enable advocacy on behalf of interest groups not normally represented (such as a conservation group advocating for the protection of biodiversity). Further, the principle of intergenerational and intragenerational equity are realizable only by allowing public participation in decision-making on the very resources they are expected to utilize, while ensuring that the future generations are not denied the availability of the same resources.

1.7 Justification of the Study

The study is justified in several ways. The topic of study is particularly relevant in view of the fact that at its fundamental level, public participation is perceived as sub-set of environmental management. This linkage is premised on the fact that the environment anchors and shapes facets of human live from basic health to the human sense of aesthetics and spirituality. Humans shape and are shaped by the environment, and are increasingly aware of the need for proper, better environmental management.

It follows from the analysis above that as this study demonstrates, the legislations on the environment are stripped of a new political thinking or culture. As noted from practice, there is little, if any, genuine value thinking or political education on the virtues and pitfalls of public participation in EDM. The result is that the discourse on EDM has been accorded low, even tainted focus. Environmental management has been appropriated by elites, each with their own motives.

Additionally, the study attempts to address a unique and hitherto rarely examined aspect of environmental decision-making. It is imperative that the contours of debate now transit from the slurs and labels associated with the discourse on EDM to substantive issues. More specifically, if public participation in EDM is to deliver on its promise of democratic environmental governance, the inter-linkages between the ideas must be unequivocally embedded in the psyche of the public. Absent this repositioning, public participation in EDM will be a mere, if not perfunctory process of importation and experimentation with ideals and theories, not values of democratic environmental governance. This means viewing public participation not only in terms of statutory design, and the patent outcomes associated with it, but also its role in fostering democratic environmental management and its generic processes.

In the succeeding chapters of the study, it is clear that an ideal participatory EDM inevitably signals an endorsement of particular values. The ensuing subsequent processes and outcomes must be based on an unambiguous ideology or normative democratic theory. Obviously, while the promise of public participation evokes a lot of prospects, the fears and the pitfalls as outlined in the study must be taken seriously and extinguished.

1.8 Hypotheses

The study tests two hypotheses: First, that the various sectoral and statutory provisions in the legislations on the environment have been ineffective in expanding the scope of public participation in decision-making in Kenya.

Secondly, that the ineffectiveness of these statutory provisions in expanding the scope of public participation have been due to lack of a proper ideology or culture of environmental reforms, which would enable access to information, sensitization, capacity building and financial and human resource mobilization. The outcome of this test is likely to build a case for an ideological and cultural reform.

1.9 Research Questions

The research seeks to answer the following questions:

- a) To what extent are the existing legal and policy provisions effective in promoting public participation in environmental decision making;
- b) Is there adequate capacity in Kenya for the moulding of a culture or ideology that integrates public participation, and if not, how then can they be moulded or repackaged for utmost efficacy or efficiency?
- c) What major factors affect public participation in EDM?

1.10 Fundamental Assumptions

It is assumed that the researcher will be able to access all the relevant records of publications (text books and articulated papers) in the realm of environmental decision-making at the various public and private libraries (of the civil societies engaged in environmental issues), including Library of National Environmental Management Authority, the various Provincial and District Environment Committees, Public Complaints Committee, National Environmental Action Plan

Committee, the Standards Enforcement and Review Committee, the National Environmental Tribunal, the University of Nairobi and other similar institutions. It is also assumed that the respondents will be as candid as to answer questions honestly. A study of this kind is likely to involve unavoidable human factors-people may respond differently to different questions regardless of the institution's own policies. This may influence the behaviour of the respondents.

An assumption has also been made in respect of the fact that no significant amendments (that affect the selected topic) shall be made to the Environmental Management and Coordination Act, 1999, or any other environmental-related legislation during the period of study.

1.11 Research Methodology

The study shall benefit from secondary data, namely publications on public procurement. This will comprise handbooks, newsletters, journals, published reports, policy briefs, statutes, case law and case digests. Unstructured interviews shall also be carried for purposes of in-depth information and analysis.

a) Library Research

There is a dearth of publications (text books and articulated papers) specifically related to the topic of study. However, reliance shall be placed on the sources named in the Assumptions Section.

b) Internet Browsing

This method of research will be crucial in gauging the global opinion on the levels of public participation in environmental decision-making.

c) Newspaper Reports

The newspapers being one of the media of communication have been adept at exposing the depth of improper and incompetent environmental management. This will serve as a reservoir of information and opinion in this study

d) Unstructured Interviews

Recourse shall be had to interviews with professionals in the environment realm and those who participated in the drafting of Environmental Management and Coordination Act, 1999 and those who have participated in the formulation of Government environmental policies in the past

respectfully. Those actively involved in the implementation of environmental policy shall also be interviewed.

e) Comparative Analysis

An analysis will be made on environmental decision-making at the international level and other related initiatives in other countries.

1.12 Organisation of Chapters

1) Chapter One

This proposal, laying the framework and the basis of arguments shall form the first chapter. It will give an overview of the study, including the assumptions, hypotheses and theoretical framework.

2) Chapter Two

Chapter Two examines the nature and scope of public participation in environmental decision-making. It discusses some of the environmental values that an effective participatory environmental decision-making must embrace and key benefits of involving the public in EDM.

3) Chapter Three

Chapter Three explores public participation as provided in some selected multilateral agreements on the environment. It also examines public participation in EDM under the various environmental laws and policies obtaining in Kenya with regard to the extent to which they advance or undermine public participation. Finally, it addresses the jurisprudence in the area of public participation.

4) Chapter Four

Chapter Four explores the major factors affecting public participation in environmental decision-making in Kenya. It discusses the affronts affecting the development and effectiveness of participatory processes. It also explores the cost-benefits, and makes a comparative study on how the notion of public participation in environmental decision-making has been integrated into the environmental management in a number of countries across the globe.

5) *Chapter Five*

This Chapter makes recommendations for comprehensive and clear reforms for a people-centred participatory environmental decision making processes.

CHAPTER TWO

NATURE AND SCOPE OF PUBLIC PARTICIPATION IN ENVIRONMENTAL DECISION-MAKING

2.1 Introduction

This Chapter examines the nature and scope of public participation in environmental decision-making. It outlines the nexus between participatory environmental decision-making and democracy. It also discusses some of the environmental values that an effective participatory environmental decision-making must embrace.

2.2 Nature and Scope of Public Participation in Environmental Decision-Making

Public participation draws its origins from the history of mutual aid and collective action in social and ecological affairs in ancient human life. For many thousands of years, human communities established their livelihoods by gathering, hunting and fishing in a collective fashion. Human collaboration within small groups was essential to recognize edible and medicinal plants as well as to overpower animals, build shelter or find and carry water. Through times, "communities" gained their livelihoods by dealing together with the natural threats and opportunities in their surroundings, by developing productive technologies and practices and by producing knowledge and culture in the same process. A feature of most traditional human societies throughout the world is to retain under common property-thus common care and management-pasture, forests, fisheries, wildlife and wetlands, including lakes and rivers.⁴² Such communal resources are subjected to a variety of rules and regulations devised by the communities themselves, usually embedded in institutions that prove their worth through centuries of trial and errors. For the distant past much of this is inferred from indirect data, but in time close to us historical evidence abounds of human associations for various livelihood enterprises.⁴³

Political factors that have a bearing upon strategic environmental decisions include, inter alia, political ideology, political institutions such as political power groupings including political

⁴² Grazia Borrini-Feyerabend, Michelle Pimbert, et.al., "*Sharing Power: Learning-By-Doing In Co-Management Of Natural Resources Throughout The World*," (Tehran: IIED and IUCN/CEESP/CMWG, 2004), p. xxvii.

⁴³ Ibid.

parties, pressure and interest groups, political policy, legislation and political and executive authorities.⁴⁴

Over time, social organization for the management of natural resources has become fundamental attribute of human communities. Evidence suggests that local people's involvement in EDM can contribute significantly to maintaining or restoring ecological integrity and well-being.⁴⁵ Underlying the idea is the recognition that humans are part of the ecological system, and not separate from it. The environment is influenced and altered by patterns of human use.⁴⁶

Such an approach is usually associated with the devolution of decision-making and decentralized execution of decisions. The purpose is to provide for maximum involvement and responsibility in the service-provision as close to the user as possible. Public participation can be seen as more or less participatory along several dimensions, notably breadth(who is involved), timing(how early and how many points in the overall decision-making process they are involved), intensity (for example, the amount of time and effort participants spend and the degree of effort made by conveners to keep them involved), and influence.⁴⁷ Through this involvement an attempt is made to increase the legitimacy and acceptability of decisions and actions and to make a maximum number of people accept mutual responsibility for the execution of action by virtue of their intimate involvement with the service.⁴⁸

Proponents of public participation argue that those who must live with the outcome of an environmental decision should have some influence on it. According to Addun and Muzones, there are four basic principles that are required for community-based resource management. These are—

⁴⁴ E. Schwella and J.J. Muller, "Environmental Administration," in R.F. Fuggle & M.A. Rabie (eds.), *Environmental Management in South Africa*, (Johannesburg: Juta & Co. Ltd.), p.65.

⁴⁵ Meg Gawler (eds.), *Strategies for Wise Use of Wetlands: Best Practices in Participatory Management*, (Proceedings of Workshop held at the 2nd International Conference on Wetlands and Development, November 1998, Dakar Senegal).

⁴⁶ Ibid.

⁴⁷ Thomas Dietz and Paul Stern, "Public Participation in Environmental Assessment and Decision-Making in Authorising Organisation Panel on Public Participation in Environmental Impact Assessment and Decision-Making," (National Research Council of the National Academies, 2008), p.76.

⁴⁸ Ibid.

- a) *Empowerment*: These involve the actual transfer of economic and political power from the few to the impoverished many, and the operationalisation of community management and control;
- b) *Equity*: Communities as a whole, rather than a few individuals benefit
- c) *Sustainability*: Inter-generational equity, based in the carrying and assimilative capacity of the ecosystem;
- d) *Systems orientation*: the community functions in the context of other communities and stakeholders, just as resources are ecologically linked to wider ecosystems.⁴⁹

As will come out clearly in the succeeding chapters of the study, the architecture of environmental governance in Kenya has not attained the standards of strength which should reasonably be expected of it, owing to the encroachment by political and technical influences that erode the levels of democracy in environmental management. However, the problem is not specific to Kenya only. Present systems of organization in many government authorities worldwide are still based on concepts of bureaucracy, hierarchy, professional authority, disciplinary specialization and sectoral analysis.⁵⁰

In recent years, there have been significant moves towards increasing both the quantity and quality of public participation in many different areas of Environmental Decision Making (EDM). The exact nature of public participation in many different areas of EDM and access to justice in environmental matters is of the nature that is partly controlled by specific legislation and partly by economic and political conditions. The reasons for these are numerous. Public participation in decision making is a core issue of good environmental governance. Participation rights and representation, as well as accountability and transparency are among the key elements

⁴⁹ Addun, R.P. and D.M. Muzones, "Community-Based Coastal Resource Management (CBCRM): Tambuyog's Experience in the Phillipnes," in Claridge, G.F. & B. O'Callaghan (eds.), *Community Involvement in Wetland Mangement: Lessons from the Field*, (Wetlands International, Kuala Lumpur, 1997), pp. 219-230.

⁵⁰ Yasmin Von Schirnding in Ayre & Callway, *supra* at p.158. See also von Schirnding, Y., "Addressing Health and Environment Concerns in Sustainable Development, with Special Reference to Participatory Planning Initiatives such as Healthy Cities", City Development Strategies, 1997b, Vol 2.

of environmental governance.⁵¹ The rights of access to information and public participation in decision-making in environmental matters are among the three pillars of the Aarhus Convention. While African countries are not party to the Convention, it has some very progressive provisions which are worth emulating in the quest for truly participatory democratic governance.⁵²

According to the Aarhus convention (UNECE 1998), there are several domains for public participation in decision making, viz:

- Participation in decisions on specific activities;
- Participation concerning plans, programs and policies relating to the environment; and,
- Participation during the preparation of executive regulations and/or generally applicable legally binding normative instruments.⁵³

Public participation at different levels raises accountability and reliability of decisions, lessens risks of possible conflicts and inconsistencies and facilitates implementation.

The general public is involved in environmental law and decision-making in a number of ways. These include democratic accountability through the election of politicians who make environmental law and policy to more direct participation such as local consultation on individual planning or pollution control applications or the availability of Judicial Review remedies for a people meeting the requirements of *locus standi*. In recent years, there have been moves towards encouraging more public participation in environmental law and improving the quality of that participation.

The importance of public participation is recognized in Chapter Ten of the Rio Declaration which explicitly states that:

“Environmental issues are best handled with the participation of all concerned citizens, at the relevant level. At the national level, each individual shall have access to information

⁵¹ World Resources, (eds.), *Decisions for the Earth: Balance, Voice and Power*, (World Resources Institute, Washington D.C. 2002-2004).

⁵² The UNECE. Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters, The Fourth Ministerial Conference in the ‘Environment for Europe’ process, (Denmark. Aarhus, June 25, 1998).

⁵³ Ibid.

concerning the environment that is held by public authorities...and the opportunity to participate in decision-making processes ...”⁵⁴

The Declaration obligates the State to facilitate and encourage public awareness and participation by making information widely available. Additionally, Chapter 23 of Agenda 21, on strengthening the role of major groups, provides that individuals, groups and organizations should have access to information relevant to the environment and development, held by national authorities, including information on products and activities that have or are likely to have a significant impact on the environment, and information on environmental protection matters.

Public participation in decision making is an essential part of the environmental impact assessment (EIA) process, which has become a widely applicable tool for environmental decision making in the world since late twentieth century, ensuring consideration of environmental concerns within planning. Different countries practice different levels of public involvement. While more successful democracies have gone much forward in this sense, some of the newly emerged democracies have introduced EIA systems just recently.

The progressions are evident by requirements imposed on a developer to actively solicit input from the general public in the area and from other individuals or groups who may have an interest in the Project. These groups usually include community associations; municipal governments; regional planning agencies; neighbours; groups concerned with economic development, social change; environmental protection or resource management matters. The results of this public involvement forms an integral part of the EIA and are then fully documented in the Environmental Impact Assessment reports along with the developer's response to the concerns raised by the public.

2.3 Stages of Public Participation

Public participation as a process goes through four stages of activities, namely, information gathering, information dissemination, consultation and participation that culminate in some level of decision making power. These stages can occur simultaneously but when starting off a new programme of public participation, one would need to start with the first two stages (in sequence) before a higher level of engagement with stakeholders can be successful.

⁵⁴ Principle 10 of the Rio Declaration.

These stages are briefly described in the following:

i) Information Gathering

The first stage of public involvement is to understand the issues and stakeholders that affect -and are affected by -a particular project or programme. The important types of information are social, cultural, economic and political. This understanding will help in doing a stakeholder analysis to determine the key stakeholders. Ideally, this stage should try to encourage an active, participatory relationship between those who seek and those who provide relevant information. An effective way to accomplish this ideal is to undertake information gathering in conjunction with the second stage, information dissemination.

ii) Information Dissemination

At this stage, information is provided to all stakeholders. Dissemination can take a variety of forms and should aim to provide information that is understood and useful to the stakeholders. Thus, the knowledge that the key stakeholders gained in the first stage should be used to design the information methods and materials. The next stage can not be reasonably achieved if stakeholders are not adequately informed about the project and its implications.

iii) Consultation

This stage goes one step beyond dissemination and creates an opportunity for stakeholders to discuss and negotiate their needs and preferences. It is here that ideas from stakeholders can start to affect project design. This step is crucial in the sense that it sets the rules and creates the opportunities by which stakeholders can influence a final decision (the final stage). A participatory structure would seek to eliminate, or at least reduce, the barriers to entry for the key stakeholders.

iv) Participation

The final stage is participation where stakeholders are able to directly contribute their ideas and preferences. In other words, they take part in decision making. It is during this stage that projects, policies and everyday resource decisions are put into practice, and costs and benefits are allocated. It is important to stress that the output of this stage will almost always be political in the sense that stakeholders will almost always possess different preferences about the distribution of costs and benefits.

It is important that within these stages, there will need to be interactive processes of planning, implementation, monitoring and evaluation. For example, to conduct an information gathering exercise, the approach, methods and materials to be used needed to be planned ahead of time. Before actually carrying out the exercise, it would be useful to pre-test the materials (perhaps a questionnaire) and improve them until you are confident that they will work. In general, all participatory activities in the field should be observed and evaluated so that they can be refined for future work.

2.4 Environmental Values in Environmental Decision-Making

Environmental management does not take place in a vacuum, but with its own matrix of values, practices and moral standpoints relating to man's interaction with the natural environment. Environmental values can loosely be defined as "what people believe to be important about the environment and thus what should be the priorities for environmental policy and ultimately environmental law."⁵⁵

Environmental values affect the way in which law is made and the way it operates on a practical level. Although there is no direct connection between the two, there are many ways in which values play a part in the operation of an environmental regulatory system. These may be general shifts in public opinion or they may be generated by specific interest groups, as stipulated here below:-

⁵⁵ J. Alder & D. Wilkinson, *Environmental Law and Ethics*, (London: Macmillan press, 1999), pp17-18.

2.4.1 Triggering the Formulation of New Policy and Law

The rules which make up environmental law are a consequence of the establishment of political aims and goals and the scientific standards which form a framework for the law. The ignition of the policy “fuse”, however can be brought about by shifts in environmental values, in the sense that new priorities are identified and action called for.⁵⁶

2.4.2 Influencing the Interpretation and Enforcement of Environmental Laws

The day-to-day interpretation of environmental law shifts slowly to reflect changing public values. Judicial attitudes can reflect these shifts. One example is how the precautionary principle, biodiversity damage, or sustainable development, which concepts were unknown 30 years ago have had a significant impact on the way laws are interpreted and made today.

2.4.3 Influencing Individual Decision-Making

The principle of sustainable development and the precautionary principle are particularly difficult to transform into legal rules. In the context of policy formulation and individual decision-making, however, the principles can be fleshed and applied in a practical manner with practical consequences. For example, we can see the effect of public perception of environmental risks and associated values in the sequence of planning cases which suggest that even where such perception of risk are “unsubstantiated”, they may still be taken into account when making development decisions.⁵⁷

2.4.4 Influencing the Regulated

Changing public values can affect those who are regulated. For example, regulated companies may change their behaviour in response to shifting consumer values even where their activities are officially sanctioned and supported at the highest level.

2.4.5 Assisting with the Legitimacy of Environmental Laws

Just as values provide a trigger for new environmental laws, they also ensure that laws are considered to be legitimate by those who are regulated and the general public. Where

⁵⁶ Stuart Bell & Donald McGillivray, *Environmental Law*, (6th Edition, Oxford), p. 48.

⁵⁷ Ibid.

environmental legislation does not reflect contemporary values it becomes difficult to police as the regulated feel justified in ignoring “unfair” requirements.

To elicit effective public participation, it is imperative that the citizens understand the importance of environmental values, principles and benefits of sound environmental management. The principles are anchored on a universal understanding that matters of environment represent a common heritage of humankind, and common interest of humankind.

2.5 Benefits of Public Participation in Environmental Decision Making

Firstly, public participation allows a broad spectrum of members of the public to express their views regarding environmental issues and conditions confronting them and affecting their immediate domain. The utilization of these views in governmental decision-making on environmental issues results in better implementation of the goals of environmental protection and sustainable development. This is because the resultant decisions are beneficiaries of expanded knowledge base on the nature of environmental problems that are to be met by the decisions.⁵⁸

Secondly, developing environmental laws and policies is a very resource intensive area. Hence, the public input comes in handy, especially in developing countries, in supplementing scarce government resources for developing laws and policies. In addition, at the implementation stage, the public vigilance is critical for monitoring, inspection and enforcement of environmental laws and policies by identifying and liaising with appropriate authorities, environmental threats and violations.⁵⁹

Thirdly, public participation can help identify and address environmental problems at an early stage. This helps save reaction-time, energy and scarce financial resources, at least in the long-run. In addition, it improves the reactive, and often adversarial nature of government action

⁵⁸ Carl Bruch, “Regional Opportunities for Improving Environmental Governance through Access to Information, Public Participation, and Access to Justice,” a paper presented at the Eighth Session of the African Ministerial Conference on Environment (AMCEN), held at Abuja, Nigeria, 3rd to 6th April, 2000.

⁵⁹ Ibid.

which promises solutions to environmental problems mostly *post facto* and only if there is a physical complainant on board.⁶⁰

Lastly, public involvement in natural resource management also helps improve the credibility, effectiveness and accountability of government decision-making processes. This is a result of broad-based consensus for environmental programmes that flow from the involvement of the public at the infancy stages of the decision-making processes.

This truism is captured in the Local Government Declaration to the World Summit on Sustainable Development:

“We live in an increasingly interconnected, interdependent world. The local and the global are intertwined. Local government cannot afford to be insular and inward looking. Fighting poverty, exclusion and environmental decay is a moral issue, but also one of self-interest. Ten years after Rio, it is time for action by all spheres of government, all partners. And local action, undertaken in solidarity, can move the world.”⁶¹

Benefits of public participation are also realized more in some of the following areas:-

2.5.1 Exercising Caution

When considerable evidence indicates that an activity can harm human health or the environment, precautionary measures should be taken to prevent harm even if some of the cause-and-effect relationships have not been fully established scientifically.⁶² Additionally, the concept of public participation meshes in with the “precautionary principle” in the sense that in the absence of scientific certainty, policy makers and legislators must act in anticipation of environmental harm to ensure that this harm does not in fact occur.⁶³

⁶⁰ Ibid.

⁶¹ Rosalie Callway, in Georgina Ayre & Rosalie Callway (eds.), *Governance for Sustainable Development: A Foundation For The Future*, (London: Earthscan, 2005), p. 4.

⁶² This is based on the common sense idea behind the adage that it is “better safe than sorry”. For a discussion of the principle, see G. Tyler Miller, *Environmental Science: Working with the Earth*, (10th Edition, Thomson Brookes/Cole), p. 157.

⁶³ The reasoning behind this is that science cannot predict absolutely how, where or when impacts will occur or what their effects may be in human ecosystems. For a detailed discussion on this, see Bell and Gillivray, Chapter Three.

2.5.2 Improving the Quality of Decisions

The preamble to the Aarhus Convention emphasizes the role that public participation has to play in improving environmental decisions. It states that “improved access and public participation in decision-making enhance the quality and the implementation of decisions...” This can be done through such things as the input of specific expertise held by members of the public or through the elicitation of social and cultural values.

2.5.3 Environmental Problem Solving

One of the ways in which competing values can be resolved is through techniques of deliberation, that is “bottom-up” discussions in which all sides of an issue are debated in an attempt to reach a consensus on an issue. This goes along way in eliminating collusion while implementing decisions.

2.5.4 Promoting Environmental Citizenship

Environmental citizenship is loosely based upon the notion that individuals should take some responsibility for their own interaction with the environment. In promoting such citizenship, participation in environmental matters is critical. Engaging the public to play an active role in environmental policy-making and awareness of environmental issues are central to promoting environmental citizenship.⁶⁴

2.5.5 Improving Procedural Legitimacy

Increased involvement in decisions, access to good quality environmental information and ex-post review mechanisms, through such things as judicial review, increases the accountability of the decision-maker and makes the process more legitimate in the eyes of the public.⁶⁵

2.5.6 Eliciting Values

Promoting effective public participation in decision-making and widening access to environmental information is the best way of eliciting such values.

⁶⁴ J. Steele, “Participation and Deliberation in Environmental Law: Exploring a Problem-Solving Approach”, *Oxford Journal of Legal Studies*, 2001, p. 415.

⁶⁵ *Ibid.*

2.6 Conclusion

It is only after the citizens embrace the benefits, values and principles of environmental management that they will see the need to participate in environmental decision making. There will be an attitudinal shift from perceiving environmental management as a preserve of only those in authority and therefore far removed from them, to regarding it as that of a shared responsibility.

The wider the democratic space, the more likely effective public participation is to be achieved. Effective public participation can only be achieved on a platform of established systems of governance in a democracy.

The next chapter will examine public participation under the various environmental laws obtaining in Kenya with a disciplined discussion of Environmental Impact Assessment (EIA), with regard to the extent to which they advance or undermine public participation. It will also explore the policy framework of EDM.

CHAPTER THREE

THE LEGAL AND POLICY FRAMEWORK OF ENVIRONMENTAL PARTICIPATION IN KENYA

3.1 Introduction

This Chapter examines public participation under the various environmental laws and policy obtaining in Kenya and in the realm of international law, with a disciplined discussion of Environmental Impact Assessment (EIA) with regard to the extent to which they advance or undermine public participation.

It seeks to assess how participatory the EIA is in Kenya, and whether the common citizen has sufficient knowledge of EIA guidelines. It also examines the extent of public involvement in practice. The discussion provides answers as to whether EIA information is accessible or easily accessible to the public, and whether there are any difficulties in the nature of the language and media of communication. Next, it assesses whether the general public is interested in EIA activities. It also discusses the jurisprudence of public participation in EDM in Kenya.

Public participation in decision making is one of the most important components of the environmental impact assessment process. There are different levels of public participation in decision making in the world, according to the size of participation and degree of actual influence of public on decision making. The lowest level of participation implies informing public about the decision. Higher levels envisage involving public in decision making at different extents. For instance, consultation implies possibility of sending comments and participation in public hearings. An administrative agency, responsible for decision making, is obliged to take into consideration public comments and opinions and give feedback. Higher levels of participation imply more active involvement, for instance, during workshops when public can make active contribution to the process of forming a decision. The highest levels of participation envisage tight collaboration with public on all levels of decision making. Finally, empowerment means putting decision making in the hands of public.

It is now well-established that public participation in EDM is essential for local level development in general, and in the management of natural resources, in particular. The principle may be directed at empowerment of the civil society in EDM or, more sharply, it may empower members of the public to seek enforcement of environmental protection through judicial and/ or administrative procedures.

Public participation may ultimately be provided for through at least three legal machineries. First, such a right may be entrenched in the national constitutions, often as part of the Bill of Rights. The second mechanism may be in the public participation in the review of EIA. As originally developed in the United States, and now practiced worldwide including in Kenya, the EIA process requires full disclosure of the project, possible impact, alternatives to the project, and the measures to mitigate the possible impacts. Public participation may, in fact, lead to modification or even cancellation of the proposed project. Thus the legal empowerment of individuals and public participation is an essential condition of a good environmental law and practice. Thirdly, it may operate through direct *locus standi* for the public in environmental causes. However, the character of grant of public participation may vary from country to country.

3.2 International Legal Framework for Environmental Democracy

It is important to place the discussion on public participation in the context of international standards that espouse it. It is in this regard that international treaties on environment are put in place to confer rights and obligations on parties, following the doctrines of *pacta sunt servanda* and *pacta tertiis nec nocent nec prosunt*. In other words, such treaties have legally binding force only to a country that has expressed consent to be bound. There is only the specific qualification in Article 18 of the Vienna Convention on Law of Treaties to the effect that a country is under an obligation not to frustrate the obligations of a treaty it has signed or ratified or when a State has expressed consent but before entry into force.

The global environmental discourse emphasizes the need for public participation in environmental governance. The Stockholm Declaration⁶⁶ and the Rio Declaration⁶⁷ recognize the

⁶⁶ Stockholm Declaration on the Human Environment, Stockholm, June 1972.

⁶⁷ Principle 10, Rio Declaration on Environment and Development, Rio de Janeiro, June 1992.

need to involve the populace in environmental decision-making. Public participation in environmental governance is recognized as a vital element that ensures decisions made in the environmental sphere are arrived at after broad-based consultation and are acceptable to the people they are likely to affect.⁶⁸

The notion of environmental democracy is not a sudden development, but one that has been evolving over years, from general declarations to more concrete entitlements and commitments of citizens and governments respectively.⁶⁹ As early as 1948, the Universal Declaration on Human Rights (UDHR) provided the framework for generalized access to information⁷⁰ and justice.⁷¹ The International Covenant on Civil and Political Rights (ICCPR) promulgated in 1966 sought to guarantee the right of access and dissemination of information. In particular, the ICCPR secured the freedom of citizens of the member countries “to seek, receive and impart information and ideas of all kinds [environmental issues included].”⁷²

The World Charter for Nature urges, in paragraph 13, that all persons shall, through national laws, have the opportunity to participate individually or with others, in decision-making in environmental matters.

The African Charter on Human and Peoples’ Right (ACHPR) of 1981 guaranteed citizens of the rights of access to information,⁷³ participation⁷⁴ and justice.⁷⁵ These rights, under the Charter, were granted in addition to the right of citizens to “a general satisfactory environment favorable to their development.”

3.2.1 Stockholm Declaration

Principle 1 of the Stockholm Declaration asserts the fundamental right to freedom, equality and adequate conditions of life in an environment of a quality that permits a life of dignity and well being. The duty or responsibility to improve the environment for the present and future

⁶⁸ Ibid.

⁶⁹ (2008) 1 LSKJ p. 159 at 160.

⁷⁰ Article 19 of UDHR.

⁷¹ Ibid, articles 8 and 10, UDHR.

⁷² Article 19(2), the International Covenant on Civil and Political Rights (ICCPR).

⁷³ Article 9(1) of the African Charter on Human and Peoples’ Rights.

⁷⁴ Article 13, the African Charter on Human and Peoples’ Rights.

⁷⁵ Article 3 and 7, the African Charter on Human and Peoples’ Rights.

generations is also recognized. This was the foundation for democratizing the environmental sphere that was to follow. The aim was to allow people to realize their environmental rights even as they carry out their responsibility of improving the environment for the present and future generations.

Principle 19 of the Declaration advocates for education in environmental matters for the younger generation as well as adults giving due consideration to the underprivileged in order to broaden the basis for an enlightened opinion and responsible conduct by individuals, enterprises, communities in protecting and improving the environment in its full human dimension. The call for an “enlightened opinion” presupposes participation in decision-making, even in matters related to the environment.

3.2.2 Rio Declaration

This Declaration crystallized the emergent norms of public involvement in environmental issues.⁷⁶ It marked the international recognition of the access rights by the 178 states that signed. It develops the theme of environmental democracy further by creating new levels of cooperation among states, key sectors of societies and people.⁷⁷

It obligates governments to establish a process for citizens and civil society to obtain environmental information, participate in environmental decision-making and access justice on environmental matters. Agenda 21 which was adopted in 1992 to implement the principles in the Rio Declaration reflected the rights of access to information, public participation in decision-making and access to justice in environmental matters.

A direct interpretation of Principle 10 is that each individual's right of access to information concerning the environment is guaranteed, as the member states are obligated to facilitate the rights of access to information, public participation in decisions making and access to justice in environmental matters. This access right includes entitlement to information on hazardous material and activities by persons likely to be affected by the same. States are also implored to create opportunities for participation in decision-making. In this regard, the state is obliged to

⁷⁶ Rio Declaration on Environment and Development, available at www.unep.org/documents/default.asp?documentID=78&articleID=1163 (accessed on 21st October, 2009).

⁷⁷ Ibid.

encourage public awareness and participation by making information widely available and capacity building. There is also an obligation upon states to implement measures that guarantee effective access to the justice system available for redressing and remedying violation of environmental rights and laws.

Principle 10 thus can be said to have assumed a key place in the sustainable development framework. It is now the embodiment of one of the 12 core principles of the Rio Declaration, namely, right of environmental democracy/ participation. The work towards sustainable development depends on the population having easy access to information, being able to participate in decision-making processes and having access to justice in environmental matters. Together with the Brundtland Report of 1987, the Rio Declaration of 1992 conveyed the clear message that active public participation is a prerequisite for achieving sustainable development and solving environmental problems of the world.

3.2.3 The Aarhus Convention

This is the 1988 United Nations Economic Commission for Europe Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters. The Convention has been hailed as “the most ambitious venture in the area of ‘environmental democracy’ so far undertaken under the auspices of the United Nations.”⁷⁸ It lays down an elaborate set of basic rules that are aimed at promoting public involvement in environmental matters and improve enforcement of environmental law. It grants the public access to environmental information, provides for participation in environmental decision-making, and allows the public to seek judicial redress when environmental laws are infringed, including breaches of the rights of access to information and to justice. As such it represents a milestone in strengthening democracy in environmental policy-making and environmental protection, and improves the effectiveness of environmental policies.

The Convention was negotiated among the countries of the United Nations Economic Commission for Europe (UNECE). The Convention safeguards the right of every person to obtain information on environment in custody of a public authority without need for

⁷⁸ <http://www.unece.org/env/php> (accessed 12/10/2009).

justification⁷⁹ or proof of citizenship. The words “environmental information” is broadly defined to afford the right of access to information the widest construction.⁸⁰ It further provides for both active⁸¹ and passive⁸² publicity in relation to the environment. The distinguishing factor is the conditions for issue of such information by the public authority. Thus, with regards to passive publicity, the information is issued at the instance of the public.⁸³

This form of information must be provided promptly given that it is usually motivated by some anxiety on the part of the applicant. The public authority is required to provide the information at the latest within one month. However, it may extend the time of provision of such information by a further month provided it informs the applicant and proffers reasons for such extension.⁸⁴

The public may request information from any public authority. Authorities may refuse to avail information in certain cases specifically listed in the Convention.⁸⁵ However, the Convention affords these express exceptions a strict interpretation. The interpretation must also be so as to ensure the refusal is for the benefit of public interest. Furthermore, the authority must justify its refusal, with the person requesting the information being able to appeal against this decision.⁸⁶

3.3 Public Participation in Environmental Impact Assessment in Kenya

Public participation seeks to ensure environmental democracy and requires that the public, especially local communities should participate in the environment and development decisions that affect their lives.⁸⁷

EIAs have two roles - legal and educational. The legal one is quite straight forward: to ensure that development projects such as a housing estate, a road/bridge or some such construction project has a minimal impact on the environment in its entire ‘lifecycle’. It sets out the obligations of Parties to assess the environmental impact of certain activities at an early stage of

⁷⁹ Aarhus Convention, article 4.

⁸⁰ Ibid, Article 2(3), Aarhus Convention.

⁸¹ Ibid, Article 5, Aarhus Convention.

⁸² Ibid, Article 4, Aarhus Convention.

⁸³ Ibid.

⁸⁴ Article 4(5), Aarhus Convention.

⁸⁵ Article 4(3) and (4), Aarhus Convention.

⁸⁶ Article 4(7), Aarhus Convention.

⁸⁷ Goran Hyden & John Mugabe, “Governance and Sustainable Development in Africa,” in H.W.O. Okoth-Ogendo & Godber W. Tumushabe, (eds.), *Governing the Environment*, (Nairobi: ACTS Press, 1999).

planning. It also lays down the general obligation to notify and consult each other on all major projects under consideration that are likely to have a significant adverse environmental impact.

The educational one is equally important and probably a forerunner to the legal role - to educate everyone one involved - professionals and users included, of the potential environmental impacts of human activity.

When properly designed and implemented, an Environmental Impact Assessment (EIA) is a powerful tool for ensuring that environmental issues are given due consideration during project design, allowing the benefits of the project to be maximized, while reducing the environmental and social costs of development.⁸⁸

In Kenya, the EIA has to be conducted according to the requirements of the Kenya Environmental Management and Co-ordination Act (1999) and in compliance with World Bank standards. An EIA document submitted to the enforcement authority, National Environmental Management Authority (NEMA), enables the issuing of an Environmental Impact Assessment License.⁸⁹

The first step of the EIA procedure is developing and submitting a project report by the proponent.⁹⁰ This report should state the nature of the project; the location of the project including the physical area that may be affected by the project's activities; the type of activities to be carried out during the project construction, operation and decommissioning phases; the project design; the materials to be used, products and by-products, including waste to be generated by the project and the respective disposal methods; the project's potential environmental impacts and the mitigation measures to be taken during and after project implementation; an action plan for the prevention and management of possible accidents during the project cycle; a plan to ensure the health and safety of the workers and neighbouring

⁸⁸ Ministry of Lands, "National Land Policy," (Government Printer, 2009), paragraph, 140.

⁸⁹ Section 63 of EMCA 1999 provides that the Authority may, after being satisfied as to the adequacy of an environmental impact assessment study, evaluation or review report, issue an environmental impact assessment licence on such terms and conditions as may be appropriate and necessary to facilitate sustainable development and sound environmental management. See also the Environmental (Impact Assessment and Audit) (Amendment) Regulations, 2009.

⁹⁰ Section 58(1) of EMCA, 1999.

communities; the economic and socio-cultural impacts to the local community and the nation in general; the project budget any other information the authorities may require.⁹¹

The project report is to be prepared by a registered environmental impact assessment expert.⁹² The authorities will issue the license when they consider that the project will have no significant environmental impacts or that the project report discloses sufficient mitigation measures. On the other hand, when the project will have a significant environmental impact and the project report discloses no sufficient mitigation measures, the authorities will request the proponent to perform an environmental impact assessment study.⁹³

During the process of conducting an environmental assessment study, the proponent will, in consultation with the authorities, seek the views of persons who may be affected by the project. After the authorities have approved the project report, the proponent will obtain a public opinion by publicizing the project and its anticipated effects and benefits; holding at least three public meetings with the affected parties and communities to explain the project and its effects and to obtain their oral or written comments; ensuring that appropriate notices are sent out at least one week prior to the meetings and that the venue and times of the meetings are convenient for the affected communities and other concerned parties; and ensuring, in consultation with the authorities, that a suitably qualified coordinator is appointed to receive and record both oral and written comments and any translations thereof received during all public meetings for onward transmission to the authorities.⁹⁴ The authorities may require any project proponent to carry out, at his own expense, further evaluation or environmental impact assessment studies, reviews or submit additional information to ensure that the environmental impact assessment study, review or evaluation report is as accurate and comprehensive as possible.

Environmental Impact Assessment studies and reports required under this Act are to be conducted or prepared, respectively, by individual experts or a firm of experts authorized for that

⁹¹ Environmental (Impact Assessment and Audit) (Amendment) Regulations, 2009, Regulations 16 and 18(1) (a) – (d).

⁹² Section 58(5), EMCA 1999.

⁹³ Section 58(2), EMCA 1999.

⁹⁴ See Regulation 17 of the Environmental (Impact Assessment and Audit) (Amendment) Regulations, 2009.

purpose by the authorities.⁹⁵ The authorities are mandated by law to maintain a record of all individual experts or firms of experts duly authorized by it to conduct or prepare environmental impact assessment studies and reports. The record is a public document available for consultation during reasonable hours by any person with payment of a prescribed fee.

The Kenyan legislation on environment ensures the second level of participation – consultations with public, which implies possibility for sending written comments and participation in public hearings.

3.4 Public Participation under the Water Act, 2002

The Water Act, 2002, was operationalised on 18th March, 2003. It was enacted to provide for the management, conservation, use and control of water resources and for the acquisition and regulation and management of water supply and sewerage services. The Act also repeals the Water Act, Chapter 372 and certain provisions of the Local Government Act.⁹⁶

Section 11 of the Act empowers the Minister, in consultation with the public to formulate, and publish in the Gazette, a national water resources management strategy in accordance with which water resources of Kenya shall be managed, protected, used, developed, conserved and controlled. The strategy prescribes the principles, objectives, procedures and institutional arrangements for the management, protection, use, development, conservation and control of water resources.⁹⁷

Water Resources management Authority, is required by section 16 to appoint a catchment area advisory committee whose public representation is ensured through the appointment of representatives of farmers, or pastoralists within the catchment area concerned.⁹⁸ The committees are established by the Act to advise officers, in relation to the catchment area for which it is appointed, water resources conservation, use and apportionment; grant adjustment, cancellation,

⁹⁵ Regulation 14(1) of the Regulation 17 of the Environmental (Impact Assessment and Audit) (Amendment) Regulations, 2009.

⁹⁶ See the Preamble to the Water Act, 2002.

⁹⁷ Section 11, Water Act, 2002.

⁹⁸ Section 16 (3) (c), Water Act, 2002.

or variation of any permit, and any other matters pertinent to the proper management of water resources.⁹⁹

Under section 25 of the Act, a permit is required for any use of water from a water resource, except as provided by section 26;¹⁰⁰ the drainage of any swamp or other land; the discharge of a pollutant into any water resource. Section 29 states that an application for a permit has to be made to the Authority. The application is then subjected to public consultation, and where applicable, to environmental impact assessment in accordance with the requirements of the Environmental Management and Coordination Act, 1999. The Act provides that any person opposed to the grant of a permit may object in writing to the Authority, which is duty-bound to determine an application for a permit as soon as is practicable after it is lodged, and in any case within six months.¹⁰¹

Section 36 vests in the Authority powers of rationalization or review, if it is desirable that water use in respect of one or more water resources , including ground water within a specific geographic area so requires, with a view to achieving sustainable allocation of water from a water resource which is under stress; achieving equity in allocations; promoting beneficial use of water in the public interest; facilitating efficient management of water resources; or, protecting water resource quality. The Act mandates the Authority to prepare proposed allocation schedule, specifying how water from the water resources in question is to be allocated. It then subjects it to public consultation before preparing a preliminary allocation schedule and publishing it in the Gazette.¹⁰² Under section 36(4), any person who is dissatisfied with the preliminary allocation schedule may appeal to the Water Appeals Board within thirty days of publication in the Gazette.

The Act also places on the Authority the duty to establish and maintain a register of permits in force together with details of the permits and their terms and the results of monitoring and

⁹⁹ Section 16(2) (a)-(c).

¹⁰⁰ Section 26 provides for exemptions to the requirement of a permit where water is abstracted for domestic use, without the employment n of works; for any development of ground water, where none of the works necessary for the development are situated within one hundred metres of any body surface(other than in a closed spring), or within a ground water conservation are; or for storage of water in, or abstraction of water from, a dam constructed in any channel or depression which the authority has declared by way of Gazettement, not to constitute a watercourse.

¹⁰¹ See section 29 in entirety.

¹⁰² Section 36 (2) and (3), Water Act, 2002.

enforcement action taken by the Authority regarding each permit.¹⁰³ Information kept in the register is required to be made accessible by the public on payment of the prescribed fee.

With regard to groundwater, where the Authority is satisfied that, in any area, special measures for conservation of ground water are necessary in the public interest, for the protection of public water supplies; or, for the protection of water supplies use for industry, agriculture or other private purposes, it may, following public consultation, by order published in the Gazette declare the area to be a ground water conservation area.¹⁰⁴ Where this is done, the Authority may impose such requirements, and regulate or prohibit such conduct or activities, in or in relation to a groundwater conservation area as it may think necessary to impose, regulate or prohibit for the protection of the area and its groundwater.

Under section 49, the Minister is empowered to formulate and publish in the Gazette, a national water services strategy after public consultations. The strategy is meant to institute arrangements to ensure that at all times there is in every area of Kenya a person capable of providing water supply and, to design a programme to bring about the progressive extension of sewerage to every centre of population in Kenya.¹⁰⁵

Section 56 of the Act requires a licence for a person to be able to provide water services to more than twenty households, or to supply more than twenty-five thousand litres of water a day for domestic purposes. Similarly a licence is required for the supply of more than one hundred thousand litres of water a day for any purpose.¹⁰⁶ An application for a licence must be subject to public consultation, and where applicable to environmental impact assessment in accordance with the requirements of the Environment Management and Conservation Act, 1999.¹⁰⁷ Any person opposed to the grant of a licence may object in writing to the Authority.

¹⁰³ Section 43(1), Water Act, 2002.

¹⁰⁴ Section 44 (a) and (b), Water Act, 2002.

¹⁰⁵ Section 49(3)(a) and (b), Water Act, 2002.

¹⁰⁶ Section 56(1), Water Act, 2002.

¹⁰⁷ Section 56(6), Water Act, 2002.

3.5 Public Participation under the Forests Act, 2005¹⁰⁸

The philosophical basis of the enactment of this Act, operationalised in February, 2007, is stated in the preamble. It was enacted to provide for the establishment, development and sustainable management, including conservation and rational utilization of forest resources for the socio-economic development of the country.

The Act identifies the various categories of stakeholders that will contribute to the development of forestry in Kenya. A participatory, cross-sectoral approach is established to enable contributions from governmental to non-governmental organizations and institutions to the development of forestry. Thus the Act creates an enabling environment for the facilitation and promotion of private sector involvement in forestry management.

The Act, under section 46 encourages community participation by allowing members of a forest community to register a community forest association under the Societies Act. Once such an association has been registered, it may apply to the Director for permission to participate in the conservation and management of a state forest or local authority forest in accordance with the provisions of the Act.¹⁰⁹

Section 60 empowers the Director to maintain registers of all licences issued under the Act; private forests registered under section 25 and the owners thereof; local authority forests; all associations participating in the conservation and management of forests under the Act; and, all forest management plans.¹¹⁰ All registers maintained under this section are to be open for inspection at the office of the Director by members of the public during official working hours.

Under section 63(1), development of management plans and management arrangements are subservient to environment impact assessment and other mechanisms under EMCA, 1999. The Third Schedule of the Act makes provisions as to public consultation. The first section thereof stipulates that where the Act imposes a requirement for public consultation, the responsible authority is required to publish a notice in relation to the proposal; in the Gazette; in at least two

¹⁰⁸ Act Number 7 of 2005.

¹⁰⁹ Section 46 (1) and (2). There is a proviso to the effect that no application under this section shall be made where there is an existing prior agreement or licence.

¹¹⁰ Section 60 (1)(a)-(e), Forest Act, Number 7 of 2005.

national newspapers; in at least one newspaper circulating in the locality to which the proposal relates; and, in at least one Kenyan radio station broadcasting in that locality.¹¹¹

The responsible authority is required to make arrangements for the public to obtain copies, at reasonable cost, of documents relating to the proposal which are in the possession of the responsible authority.¹¹²

The responsible authority is required to consider any written comments or objections received on or before the date by which the comments or objections are required to be received. It is also supposed to consider any comments, whether in writing or not, received at any public meeting held in relation to the proposal at which the responsible authority was represented, or pursuant to any other invitation, to comment.¹¹³

The Act stipulates that the responsible authority shall publish notice of the fact that a copy of the decision in writing of the responsible authority in relation to the proposal, and of the reasons thereof, is available for public inspection at the premises at which details of the proposal may be inspected.¹¹⁴ The Schedule also states that where rules are made under the Act, the responsible authority must cause a public meeting to be held in relation to the proposal before the responsible authority makes its decision on the proposal.¹¹⁵

3.6 Public Participation under the Physical Planning Act, Chapter 286 Laws of Kenya
This Act came into operation in 1998. The Act provides for the preparation and implementation of physical development plans.¹¹⁶

A regional physical development plan may be prepared by the Director with reference to any Government land, trust land or private land within the area of authority of a county council for the purpose of improving the land and providing for the proper physical development of such land, and securing suitable provision for transportation, public purposes, utilities and services, commercial, industrial, residential and recreational areas, including parks, open spaces and

¹¹¹ Section 1(a) to (d) of the Third Schedule, Forest Act, Number 7 of 2005.

¹¹² Section 2 of the Third Schedule, Forest Act, Number 7 of 2005.

¹¹³ Section 3(a) and (b), Forest Act, Number 7 of 2005.

¹¹⁴ Section 4 of the Third Schedule, Forest Act, Number 7 of 2005.

¹¹⁵ Section 5 of the Third Schedule, Forest Act, Number 7 of 2005.

¹¹⁶ See preamble of the Act.

reserves and also the making of suitable provision for the use of land for building or other purposes.¹¹⁷

Under section 19 (1) the Director is required to, not later than thirty days after the preparation of a regional physical development plan, notify in writing to the local authority whose area is affected by the plan to make representation in respect of the plan and publish a notice in the Gazette and in such other manner as he deems expedient to the effect that the plan is open for inspection at the place or places and the times specified in the notice. The notice requests any interested person who desires to make any representations against, or objections to the plan, to write to the Director not later than sixty days after the date of the first publication of the notice or such date as is specified in the notice.¹¹⁸

Under subsection (3) thereof, the Director may in his discretion accommodate or decline to accommodate such representations or objections to the plan, and in either case, shall within thirty days of his decision, notify the petitioner in writing accordingly, and shall give reasons in the case of decline.

If the petitioner is aggrieved by the decision of the Director he may appeal to the relevant liaison committee under section 13 against such decision and to the National Liaison Committee under section 15 if he is aggrieved by the decision of the respective liaison committee.¹¹⁹

Section 21 states that a Minister shall within 14 days after he has approved the regional physical development plan, cause to be published in the Gazette, by the Director a notice to the effect that the plan has been approved with or without modification and may be inspected at the places and times specified in the notice during normal working hours. The consequence is that an approved plan has the full force and effect in the area to which it relates, and every person is required to comply with the requirements of an approved plan.¹²⁰

¹¹⁷ Section 16(1) of the Physical Planning Act, Chapter 286 Laws of Kenya.

¹¹⁸ Section 19(2), Physical Planning Act, Chapter 286 Laws of Kenya.

¹¹⁹ Section 19(4), Physical Planning Act, Chapter 286 Laws of Kenya.

¹²⁰ Section 21(2), Physical Planning Act, Chapter 286 Laws of Kenya.

Section 22(1) empowers the Director to submit to the Minister proposals for the revocation or modification of an approved regional physical development plan.¹²¹ The Director is required to publish in the Gazette a notice of the proposed revocation or modification of the approved plan stating the period within which representations or objections to the proposed modification or modification may be made to the Director.¹²² The Minister may approve or refuse to approve the proposed revocation or modification of the approved plan.

Section 43 states that the Director, an officer or a local authority has the power to demand the production of , and may make extracts from, all registers or other records or any deeds or instruments belonging to , or in the custody or possession of any public officer or any person and in which are contained particulars of any land or property affected by any physical development plan.¹²³

However, any information obtained by such Director, officer or a local authority under section 43 is required to be treated in confidence and shall not be divulged to any other person except by an order of court in connection with any legal proceedings. The provisions of Official Secrets Act apply to this.¹²⁴

3.7 Public Participation under the National Land Policy

Kenya had not had a clearly defined or codified National Land Policy since independence until 2009. This, together with the existence of many land laws, some of which are incompatible, has resulted in a complex land management and administration system. From the advent of colonialism, Kenya has been grappling with the land question, which subsequent government regimes have been unable to or are unwilling to solve. The land question has manifested itself in many ways including fragmentation, breakdown in land administration, disparities in land ownership and poverty. This has resulted in environmental, social, economic and political problems including deterioration in land quality, squatting and landlessness, disinheritance of

¹²¹ Section 22(1), Physical Planning Act, Chapter 286 Laws of Kenya.

¹²² Section 22(2), Physical Planning Act, Chapter 286 Laws of Kenya.

¹²³ Section 43, Physical Planning Act, Chapter 286 Laws of Kenya.

¹²⁴ Section 44, Physical Planning Act, Chapter 286 Laws of Kenya.

some groups and individuals, urban squalor, underutilization and abandonment of agricultural land, tenure insecurity and conflict.¹²⁵

To address these problems, the Government embarked on the formulation of a National Land Policy whose vision is to guide the country towards a sustainable and equitable use of land. The land policy has thus been formulated to address the critical issues of land administration, access to land, land use planning, restitution of historical injustices, environmental degradation, conflicts, unplanned proliferation of informal urban settlements, outdated legal framework, institutional framework and information management.¹²⁶

Although Kenya does not yet have a national environmental conservation policy, there have been concerted efforts to have guidelines put in place under the National Land Policy. It takes the position that in order to sustainably manage land- based agro-cultural natural resources, the government shall encourage preparation of participatory environmental action plans by communities and individuals living near environmentally sensitive areas to preserve culture and socio-economic aspects.¹²⁷

The Policy also recognizes EIA and Audit as key land management tools and strives to encourage public participation in the monitoring and protection of the environment.¹²⁸

3.8 Public Participation in other Policy Initiatives

Kenya has developed several sector specific policies for the sound management of the environment. This requires a holistic approach across the various sectors to ensure a balance between development processes and environmental conservation dubbed sustainable development.

¹²⁵ Rosemary Wachira, “National Land Policy for Poverty for Reduction and Economic Growth,” Directorate of Physical Planning, A paper presented during the Decision Makers’ Meeting in Namibia. December 2006, p. 6.

¹²⁶ See Ministry of Lands, National Land Policy, Government Printer, 2009.

¹²⁷ Ibid. Paragraph 131.

¹²⁸ Ibid. paragraph 140(c).

3.8.1 Public Participation under the National Policy on Natural Resource Information Management, 2007

The policy provides a national framework for handling natural resource data and information. This includes generation, access and utilization of natural resource data and information aimed at enhancing the sound management of natural resources and aid national development planning. It also encourages integrated environmental information management and reporting whereby the information from different institutions and organizations is gathered from different ecosystems such as forests, agro-ecosystems, savannah, and freshwater, marine and coastal ecosystems. The data is collated, analyzed and the resulting information shared to support sound decision-making.

Although this policy does not address climate change, it provides the platform for collection of relevant data from different ecosystems to enhance the understanding of climate change and its manifestation. Data enables the prediction of occurrences, land use changes, different patterns and trends. This has enabled better environmental governance geared towards alleviation of adverse effects of climate change.

3.8.2 Public Participation under Forest Policy, 2005

The Forest Policy documents the role of forestry in protecting the environment through reduced soil erosion and providing carbon sinks. Increased forest cover improves water conservation and sustainable development. Re-afforestation is a key intervention to climate change and the policy calls for concerted efforts in increasing forest cover and save biodiversity. The Kenya Forest Service must work closely with the local communities through Community Forest Associations.

3.8.3 Public Participation under the National Policy for Sustainable Development of ASALS of Kenya 2007

The policy attempts to address challenges such as land degradation, water scarcity, livelihoods and the available practical solutions to problems affecting the local nomadic pastoralist communities. The policy recognizes the role of community participation in identifying, planning, implementation and evaluation of development projects and programmes in order to achieve sustainable development. The communities are expected to adopt coping mechanisms that enable them to adapt to climate change. The policy urges the government to review the land laws and discourage the sub-division of group ranches and other communal land in order to ensure that

they remain economically viable. The ASALs have fragile ecosystems and hence requires large areas to be productive.

The policy calls for the enhancement of the capacity of local communities in order to appreciate the importance of data and information relating to climate change which will help to avert or minimize the effects of climate change- related natural disasters. Early warning will serve to ensure timely actions and improve the state of preparedness. The policy articulates the importance of conservation, sustainable utilization and management of the environment and natural resources as an integral part of the ASAL planning and development efforts.

The policy recognizes the importance of water resources and its role in supporting livelihoods and development in the ASALs. In this regard, the policy proposes the protection and management of water catchment areas and promotion of community based water projects.

Pastoralists and agro-pastoralists have over the years developed highly resilient production systems that are well adapted to the hostile climatic environment in the ASAL districts. As such, the policy calls for the preservation of indigenous knowledge and associated technologies in order to enhance the survival of local communities. In addition, the policy also seeks to undertake intensive natural resource inventory as well as research on the interaction of human population dynamics and the environment.

3.9 Public Participation in the Draft National Environmental Policy, 2008

This draft document was generated out of the realization of a need to seal the gaps and challenges that have emerged within the last ten years since the coming into place of EMCA, 1999. One of the fundamental objectives of the Policy, if promulgated, is to promote and enhance collaboration, synergy, partnerships and participation in the protection and conservation of the environment by all the stakeholders.

3.10 Public Participation in the New Constitution of Kenya, 2010

As Okidi¹²⁹ states, one of the legal machinery of providing public participation is entrenching it in the national Constitution as part of the Bill of Rights. It can therefore be safely argued that the inclusion of provisions directly relating to the environment is in realization of the importance of public participation in environmental governance.¹³⁰ For the first time in Kenya, the Constitution explicitly recognized the importance of our environment and classified environmental rights as fundamental human rights provides that every person has the right to clean and healthy environment. This right calls for the provisions of Article 69 and 70 to be adhered to. In particular, Article 69(1)(d) provides that the State shall encourage public participation in the management, protection and conservation of the environment. Noteworthy also is the fact that among the national values and principles of governance spelt out in the Constitution to guide state organs and officials is participation of the people.¹³¹

The totality of the foregoing is that apart from the specific provisions of the Constitution on public participation in environmental governance, a lot more in the form of the spirit of the Constitution as envisaged at Article 10(2) (a).

3.11 Jurisprudence of Public Participation in EDM in Kenya

3.11.1 Rules on Standing

The fact that the issue of standing has been more than one mentioned in this discourse is quite telling on the important niche it occupies in the jurisprudence on public law. As Makoloo et al state, traditionally, public law remedies were not available except at the instance of those who sought to protect their property. Ratepayers and taxpayers for example, were treated with care; those with more intangible interests were generally not given standing unless a clear commercial interest could be shown or they had been granted a right to be object by a statute.¹³²

¹²⁹ Supra, note 15.

¹³⁰ Article 42 Chapter Four-Bill Of Rights-Part 2, the Constitution of Kenya, 2010.

¹³¹ Article 10 of the Constitution of Kenya, 2010.

¹³² Makoloo et al, p. 25.

Owing to the restrictive, and sometimes sloppy, interpretation of standing by the courts alluded to in the previous sections of this Report; it is prudent to delve in little detail the epistemological account of the notion. Cheryl Loots writes thus of *locus standi*:

“The term ‘*locus standi*’ is difficult to define, as it has been used to refer to different factors that affect a party’s right to claim relief from [a] civil court. In the first instance, the term is used to refer to the capacity of a party to litigate. A minor, for instance, who is not assisted by his guardian, lacks locus standi. An association may lack locus standi because its constitution does not give it the power to litigate. Locus standi in this sense has been well documented in the law of persons, corporations, associations and partnerships. I shall not deal with it, save to endorse the suggestion made by Beck, that it would be less confusing if this concept were referred to as ‘capacity to sue’ rather than ‘locus standi.’”¹³³

She further contends that the notion of locus standi is used to refer to a plaintiff’s or applicant’s right to claim the relief that he seeks. A plaintiff applicant would be said to lack locus standi if he did not base his claim on an enforceable legal right. In attempting to establish this, the courts must address themselves to two enquiries: firstly, is the claim based on a legally enforceable right? Secondly, is the plaintiff or applicant who has brought the claim entitled to enforce that right? The notion of *standi*, therefore concerns itself only with the second inquiry. Put simply, standing becomes an issue secondary to the establishment as to whether an enforceable right exists. The problem, in this regard, has been that the courts have been quick to treat or perceive the two enquiries as an indivisible whole, with the result that in many cases where *locus standi* is in issue flopping when in fact a right of action existed.¹³⁴

The point to be distilled from here is that, the success of individuals or organisations in bringing up cases of a public nature is exigent upon how the courts deal with the issue of *locus standi*. In *Wangari Maathai & 2 Others v City Council of Nairobi & 2 Others*,¹³⁵ the plaintiffs had sued the defendant and sought declarations that the sub-division, sale and transfer of a piece of land was irregular and *ultra vires* the powers of the City Council, and that the subsequent issuance of a Certificate of Title for the said piece of land by the Commissioner of Lands was irregular and contrary to law. Further, they sought a permanent injunction to restrain the third defendant, the

¹³³ Loots, Cheryl, “Locus to Claim Relief in the Public Interest in Matters Involving the Enforcement of Legislation,” *The South African Law Journal*, 1987, pp. 131-147 at 131-2.

¹³⁴ *Ibid.*

¹³⁵ HCCC No. 72 of 1994.

beneficiary of the allocation, from carrying out any connection on the plot in question. In opposing the plaintiffs' claim, the defendants contended that the latter had no *locus standi* to bring the proceedings before the court since they (the plaintiffs) had not shown they would suffer any "private injury."

The court narrowly interpreted the notion of *locus standi*. It sought to establish whether the plaintiffs had "sufficient interest" as well as a "unique interest" over and above that of the public generally. The court subsequently ruled against the plaintiffs' right to sue, stating that whereas a public authority may take action explicitly to protect the environment, a private litigant might only take court action to seek redress for a private injury. Any environmentally protective effect resulting from the private action would be purely incidental. Where a private individual wishes to bring an action to redress a private injury to the public, he has to seek the permission of the Attorney General to use his name in an action known as "relator" action.

The Court followed the traditional approach in *Gouriet v Union of Post Office Workers*.¹³⁶ In this case, the House of Lords delivered themselves thus:

"...the jurisdiction of a civil court to grant remedies in private law is confined to the grant of remedies to litigants whose rights in private law have been infringed or are threatened with infringement. To extend that jurisdiction to the grant of remedies to unlawful conduct which does not infringe any rights of the plaintiff in private law is to move out of the field of private law into that of public law with which analogies may be deceptive and where different principles apply."¹³⁷

In respect of environmental cases, the High Court has in the recent past boldly supported a broad interpretation of *locus standi*. In *Peter Kinuthia Mwaniki & 2 Others v Peter Njuguna Gicheha, Limuru Butchers Union & 2 Others*¹³⁸ where the plaintiffs filed an application for an injunction restraining the defendants from constructing a slaughter house within Limuru Township. The plaintiffs alleged that the slaughterhouse would affect people's lives negatively when it starts to operate since there would be blood flowing from there which would obviously mix with sand and mud and spill into their homes and farm land. The plaintiffs adduced evidence to the effect

¹³⁶ [1978] AC 435.

¹³⁷ Ibid. at p. 500.

¹³⁸ HCCC No. 313 of 2000 at pp.18-19.

that they share a fence with the slaughter-house which also borders a church and children's home. The Court found for the plaintiffs and granted a permanent injunction against construction of the slaughterhouse. Aluoch, J. (as she then was), stated thus on the issue of *locus standi*:

“Though the matter of “locus” was not raised in the defence or the issues filed in Court, I nevertheless feel that I must refer to it, and say that the plaintiffs, though not the owners of the land in dispute, nevertheless have the authority to sue, such authority being derived from section 3(3) of the Environmental Management and Coordination Act, 1999...in this case I am satisfied that the plaintiffs have “locus” to file this suit in the High Court because their entitlement to a clean and healthy environment is “likely to be contravened” if the defendants who are members of the Limuru Butchers Union, start their operations of the slaughter of animals in the butchery they have built in defiance of all directions to stop the construction of a butchery whose operations will breach the provisions of the Act.”

Although the concept of “environmental governance” has yet to be precisely defined, it is already clear that domestic courts worldwide are playing an increasingly important role in developing, interpreting, applying and enforcing environmental law. This is anchored on the realization that one of the most important functions of a judiciary is to foster the creation of a body of environmental law. This includes the definition of the implications of the Rio Principles and their integration into the larger body of environmental law. The judiciary can help to strengthen the system of environmental liabilities and to incorporate the environmental dimension into decision-making.

The courts and the structures under EMCA have been at the forefront in fronting for public participation in Kenya. Quite encouraging is the fact that the human person is put central to the decision-making process. In *Karen v Endere*,¹³⁹ the plaintiff sought an injunction to restrain the defendant from directing storm and waste water into the plaintiff's dam or into the neighbouring dam situated at Simotwet Primary School. Earlier, the defendant had acceded to a request by the members of the community to desilt the dam at the primary school. The plaintiff submitted that the defendant had failed to conduct an environmental impact assessment before undertaking the rehabilitation of the dam. Further she contended that she was entitled to live in a clean environment without interference by any person. The defendant undertook the project before

¹³⁹ 1 KLR (E & L)701.

seeking the authority of the National Environmental Management Authority as provided by section 58–68 of the Environmental Management and Co-ordination Act and the Second Schedule paragraph four of the said Act. Perhaps the most important part of the decision was the holding that the defendant was required in law to consult all parties likely to be affected by the said dam in co-ordination with the National Environmental Management Authority before rehabilitating the dam. It had been established that the defendant breached the law by channeling storm water into the Simotwet Primary School without first complying with the provisions of the Environmental Management and Co-ordination Act. The Plaintiff was within her rights as provided under section 3 of the Environmental Management and Co-ordination Act to seek enforcement of the provisions of the said Act, if she was of the view that the defendant was likely to contravene its provisions and cause harm to the environment.

Justice Andrew Hayanga in *Rodgers Muema Nzioka v Tiomin Kenya Limited*¹⁴⁰ is unequivocal in public participation. In this case, Tiomin Kenya Ltd, the defendant, was a locally incorporated subsidiary of Tiomin Resources Inc. of Canada. Tiomin Kenya Limited obtained licences to prospect for titanium in Kwale District. The plaintiffs were the local inhabitants of the prospective mining area and brought this suit on their behalf and on behalf of other inhabitants. The plaintiffs sought an injunction to restrain the carrying out of the mining activity in Kwale and for a declaratory order that any mining carried out there would be illegal. They also prayed for general damages. The plaintiffs were concerned not only that Tiomin Kenya was not offering them adequate compensation but also that mining activity would result in numerous environmental and health problems which could not be adequately compensated in damages. They argued that Tiomin Kenya had not submitted an Environmental Impact Assessment Plan and that it had not been licenced under section 58 of the Environmental Management and Co-ordination Act, No 8 of 1999 (the EMCA). For its part, Tiomin Kenya stated that it was merely prospecting and not mining titanium and that it was acting pursuant to a licence issued under the Mining Act (cap 306). It stated that it was legally acting as an agent or nominee for Tiomin Resources Inc of Canada.

¹⁴⁰ Mombasa H.C.C.C. No. 97 of 2001; (2006) 1 KLR (E& L) 423

The court held that the granting of an interim injunction is an exercise of judicial discretion. The court will be guided by the traditional principles enunciated in the case of *Giella v Cassman Brown & Co Ltd*.¹⁴¹ If there is a distinct law of environment, it is not exclusive and most environmental disputes are resolved by the application of the principles of common law and administrative law, but the applicable law is the statute law which in this case was the EMCA. Perhaps, most importantly, the court emphasized that the Act entitled every person to a clean and healthy environment and imposed a duty to safeguard and enhance the environment. The High Court was empowered to adjudicate on environmental matters and given wide powers to effect redress where a complainant shows that his right to any of the elements of the environment is in danger. Therefore, there was no support for the argument that some of the plaintiffs did not have sufficient entitlement to bring the case to court or that they had no title deeds or that they were squatters. Moreover, section 11(2) of the Act stated that a claimant did not need to show that he had a right or interest in the property, environment or land alleged to be invaded. The defendants had not shown that they had submitted a Project Report and an Environmental Impact Assessment Report as required under section 58 of the EMCA.

The court also went on to make a pronouncement on another important legal point-*lex posteriori derogate priori*.¹⁴² Where the provisions of one statute are so inconsistent with the provisions of a similar but later one which does not expressly repeal the earlier Act, the courts admit an implied repeal. As a matter of statutory interpretation, the EMCA being a more recent statute than the Mining Act, it had to be construed as repealing the old Act where there was inconsistency. If the defendant had not fulfilled the requirements of section 58 of the EMCA, it was immaterial that it had been licensed under the Mining Act. The court stated that a Project Report and an Environmental Impact Assessment are both crucial and must be submitted. Failure to do so amounted to criminal offence. The absence of these reports would be inconsistent with the principle of sustainable development and the polluter pays principle.

In this case, the Court was concerned not so strictly with harm to the environment but rather the failure of decision-makers to take environmental factors into account in the manner prescribed

¹⁴¹ [1973] EA 358.

¹⁴² This doctrine portends that the latter law amends or repeals the earlier law.

under the EMCA. Regarding the balance of convenience, environmental degradation is not necessarily an individual concern or loss but a public loss. The convenience to be considered in such a matter is not only that of the parties but also of the public at large so that if the injunction is not issued, any form of feared degradation, danger to health and pollution will be to the detriment of the population. On a balance of probabilities, the applicants had made a case for an injunction.

The crucial role the public plays in EDM is further exemplified in the case of *Bogonko v NEMA*.¹⁴³ The applicant intended to put up a petrol station along the Kisii – Kericho Highway. He submitted an Environmental Impact Assessment (EIA) report to the respondent for approval on 25th April 2005. The respondent did not, however, respond to the said report within three months as envisaged under section 58 (8) of the Environmental Management and Co- ordination Act. In the absence of such a response, the applicant decided to proceed with the project, as permitted by section 58 (9) of the Act. The respondent stopped the project and handed the applicant a letter to the effect that the proposal for the project had been rejected. The applicant applied for judicial review orders and submitted that the respondent had failed to conduct public hearings to assess the acceptability of the proposal and therefore the respondent could not interfere with the applicant's statutory discretion under section 58 (9) of the Act. The applicant urged the court to give section 58 (8) and (9) their natural and literal interpretation so that the applicant could go ahead with his project. In turn, the respondent submitted *inter alia* that the applicant had failed to publish the Environmental Impact Assessment (EIA) for two successful weeks as required under section 59 of EMCA and hence the public was not accorded sufficient time to comment on the report. Further, the respondent contended that since the notice was published on 14th June 2005, the public should have been given 60 days to submit comments and to give it more time to consider the report and the comments thereon.

The court held that the purpose of advertisement is to ensure that members of public do see the proposed project and give their comments as to whether the project is viable or not. If they object to it, the reasons for such objection must be given. In this case the members of public were

¹⁴³ HC Miscellaneous Application Number 1535 of 2005.

denied sufficient opportunity to respond and make their comments. Since the applicant had failed to comply with section 59 (1) and yet was expressly notified by the respondent, he could not blame the respondents for failing to comply with section 58 (9) or respond to the applicant's Environmental Impact Assessment report, when he himself had failed to comply with the law. The delay in giving the decision was only one month which in view of the court was reasonable in the circumstances. An order of *certiorari* to quash the belated decision of the respondent would not be granted given that the public interest involved far outweighed the applicant's individual right to put up a petrol station. The application was therefore dismissed.

In *Jamii Bora Charitable Trust & Another v Director General of NEMA & Anor*¹⁴⁴ Jamii Bora, before the National Environment Tribunal, the suit was an appeal against the decision of NEMA by which it refused to issue the Appellant with an EIA Licence. The Appellant asked the Tribunal to set aside the decision and order the Authority to issue the Appellant with the Licence sought. The Authority had earlier on declined to issue the Licence on the ground that the majority of the local community, lead agencies and stakeholders had expressed strong objections to the project; the project site lay within the wildlife migratory corridor and dispersal area; the future cumulative impacts of the project were uncertain given the enormity of the project; (iv) the proposed mitigation measures would not adequately address the anticipated potential environmental impacts of the project; (v) the EIA Study Report did not offer any alternative sites for comparison purposes; and (vi) the project was not environmentally suitable since it would not enhance sustainable development and sound environmental management, among other grounds.

The Tribunal had the occasion to pronounce on the issues above and consequently, set aside the decision. However, it also pointed out that under section 60 of the Environmental Management and Coordination Act, 1999 (EMCA) and Regulation 20 of the Environmental (Impact Assessment and Audit) Regulations 2003; NEMA was required to take into account the views of lead agencies with regard to an EIA Study Report, which therefore were relevant considerations. The approvals granted by lead agencies to various aspects of a proposed project were relevant in considering the viability of the proposed project. In this respect, approvals for the construction of a road, for power supply, for drilling boreholes, for change of use were all relevant

¹⁴⁴ Tribunal Reference NET 2/3/2005.

considerations in determining the likely viability of this project. What the Act and the Regulations called for from the lead agencies were comments on the environmental issues within their mandate arising from the EIA Study Report. This spoke to the multiplicity of laws and the possibility (as indeed was the case here) of one lead agency granting a licence and the other declining. It forcefully cut out its province by holding that it does not sit on Appeal from the decisions of physical planning authorities. That function has been vested by Part V of the Physical Planning Act, Chapter 286 in the relevant Physical Planning Liaison Committee. Remedies to deal with irregularities, if any, with regard to the planning permission that has been obtained, or an alleged failure to comply with mandatory statutory requirements, such as the requirement to surrender a freehold title deed in exchange for a certificate of lease, must be sought within the framework of the relevant laws dealing with those issues. In the same vein, in the Tribunal's respectful view, Regulation 4(2) of the EIA Regulations - which suggests that other licensing authorities may not issue licences under their own statutes unless the applicant has already procured an EIA licence - was *ultra vires* section 58 of EMCA, 1999.

The Tribunal also pronounced on the nature of views that would be considered. The weight to be given to the views of members of the local community on a proposed project, however, was, in the Tribunal's view, dependent on the pertinence of the environmental issues upon which these views were based. Views which were not founded on pertinent environmental concerns posed by the proposed project, however strongly held, should not be allowed to influence the outcome of an EIA licence application.

3.12 Conclusion

The existence of legislative provisions that specifically dwell on public participation and of a policy document that recognizes public participation is a tacit acceptance of the crucial role the public plays in EDM. The fact that there is jurisprudence to support this confers a specific salience to public participation in EDM. However, this is not sufficiently reflected in practice. Also worth noting is the fact that multiplicity of laws dealing with different issues related to the environment is an affront to the realization of a fully participatory EDM. It's even worse when the said laws conflict with the provisions of other statutes.

There are other factors affecting public participation in EDM as discussed in the chapter below.

CHAPTER FOUR

MAJOR FACTORS AFFECTING PUBLIC PARTICIPATION IN ENVIRONMENTAL DECISION MAKING

4.1 Introduction

Across the world, environmental decisions are constantly being taken. Their settings vary, as do the people and groups involved. Environmental decisions occur within neighbourhoods, small businesses, corporate boardrooms and in the offices of local, state and national governments. They involve different people with different backgrounds. There is a constant need for understanding the various processes, actors and preconditions of decision-making processes for environmental management.

Chapter Four explores the major affronts in the way of effective public participation in environmental decision-making in Kenya. The chapter also discusses the factors affecting the development and effectiveness of participatory processes, as well as makes a comparative study on how the notion of public participation in environmental decision-making has been integrated into the environmental management in a number of countries across the globe.

Environmental decision-making (EDM) is certainly amongst the subject areas where the issues of democracy and participation are most exposed.¹⁴⁵ The environment anchors and shapes facets of human lives from basic health to our sense of aesthetics and spirituality. Human life shapes and is shaped by the environment, and mankind is increasingly aware of the need for both a science that describes the interconnections between humans and the environment, and an art that allows man to improve these interconnections or at least to steer away from making them worse.

4.2 Factors Affecting the Development and Effectiveness of Participatory Processes

4.2.1 Access Rights

As has been mentioned in the preceding discussions of this study-and which necessitates reiteration here- the idea of public participation is a concept subsumed in the coinage “environmental governance.” The term reflects increasing recognition that environmental issues

¹⁴⁵ Supra, note 4.

must be addressed by all, or at least a majority of those affected by their outcome, and not just by the minority comprising the governments and leading private sector actors.¹⁴⁶ Therefore, the government is obliged to disclose information that will enhance public participation in EDM. However, in most countries the extent of the information that can be divulged is a common problem. This is due to the need to protect certain interests especially those affecting government security and private enterprises.

To resolve this predicament, most countries have incorporated a right to information access in their laws, such as, Freedom of Information Act (USA), the Directive of Access to Information on Environment (EU) and the Act on the Public Nature of Administration (the Netherlands). These laws compel the respectful governments not only to provide the necessary information, but also include provisions for protecting certain interests.

The right to participate in EDM captures the principle of equal rights for all including the public, community groups, advocates, industrial leaders, workers, governments, academics and other professionals to be involved in environmental governance.¹⁴⁷ It connotes the rights of all whose daily lives are affected by the quality of the environment to participate in environmental decision-making as freely as they do in other public interest matters such as education, health care, finance and government.¹⁴⁸ Access to environmental information and justice for all those who choose to participate in such decision-making is integral to the concept of environmental democracy.¹⁴⁹

The three rights are also intertwined in that achievement and application of each impact on realization of the others. For instance, access to information ensures that all persons who choose to participate in environmental decision-making are equipped with the necessary , or at least,

¹⁴⁶ Albert Mumma, "Environmental Law in Kenya," a paper presented at the ICJ(K) members conference on "New Frontiers in the Law", held at Nyali Beach Hotel, March 11 to 14, 1999, p. 6.

¹⁴⁷ Susan Hazen, "Environmental Democracy," as quoted in Kariuki Muigua and Paul Musyimi, (2008) 1 LSKJ, p. 160. available at <http://www.ourplanet.com>.

¹⁴⁸ Ibid.

¹⁴⁹ Ibid. Generally, minimum requirements for existence of environmental democracy is the tripartite of the so-called "access rights" in environmental matters, namely, access to information, participation in decision-making, and access to justice. These three access rights have the common denominator that they empower individuals to have a meaningful voice in decisions that affect sustainable development.

basic facts about quality of their environment; citizens can become active participants in identifying and resolving environmental issues at local, national, regional and even global levels. That way, citizens become active participants in environmental governance. The resulting public participation increases vigilance and identification of anomalies that call for engagement of the mainstream justice system in resolution.

Hence the right of access to justice by all becomes the inevitable way to go if this increased vigilance is to realize real fruits. It is access to justice that avails the means by which the public ventilates for resolution of their reservations on the application of and implementation of environmental laws and policies.¹⁵⁰ Access to justice by all is also the most potent remedy when access to information or public participation have been wrongly denied and are incomplete in that it guarantees citizens the right to seek judicial review to remedy such denial and/ or deprivation.¹⁵¹

4.2.2 Level and Frequency of Decision-Making

Environmental decisions anchor themselves on three entities-businesses, governments and civil society at large. Facilitating interaction between them, and focusing on sustainable use of earth's resources, have been key challenges for developed and developing countries alike. A proper system should define what specific roles should be played by different actors so that innovation and creativity in environmental decisions can be fostered. It should determine how environmental decision making at various levels can be supported and promoted.

A clear process of decision-making should be put in place. It should spell out the decisions that need to be taken. They should provide answers to a number of issues that come into mind whenever these questions arise: At what level should this decision be taken? Should it be taken at the local or household level, or should it be taken at the district, provincial, regional or national level? Worthy of note is the fact that decisions taken at the local or household level have

¹⁵⁰ Csaba Kiss and Michael Ewing (eds.), *Environmental Democracy: An Assessment of Access to Information, Participation in Decision-Making and Access to Justice in Environmental Matters in Selected European Countries*, (European Regional Report published by the Access to Initiative Europe) , available at <<http://www.accessinitiative.org>> accessed 25th October, 2009).

¹⁵¹ See Migai Akech, "Land, Environment and the Courts in Kenya," A background paper for the Environment and Land Law Reports, February, 2006. available at <http://www.kenyalaw.org> (accessed 21st October, 2009).

implications at the local level only and more frequently cover every day activities, whereas decisions taken at the national or regional level are more infrequent and usually impact a larger constituency. This correlation between the level of decision-making and the frequency of decision making needs to be kept in mind. Critical to decision-making is of course the entity taking the decision. Who is taking the decision? Is it a single individual? Or is it a group?

4.2.3 Security Situation of a Country

The road towards the realization of environmental democracy, of which public participation is a key subset, depends on the levels of peace and stability and the degree of observance of constitutionalism in a country.

4.2.4 Availability of Resources

Ensuring environmental democracy, for example packaging information in a fashion that would enhance public participation would inevitably require financial wherewithal, without which very little can be achieved. Enhancing human capacity and skill has significant financial implications.

4.2.5 Capacity of Justice Personnel

The capacity of the justice system for the interpretation of the environmental rights is central to sound and truly participatory environmental governance. The complexity of environmental management makes a compelling case for ensuring that relevant institutions retain a critical mass of well-trained personnel. This applies as much to the executive officers of the apex environmental bodies, as to the ombudsman, the tribunals and the courts charged with responsibility of implementing policies and enforcing environmental laws.

The issue of capacity gets an even more significant dimension when one considers the important role of the courts, environmental litigation and individuals in environmental management. Given the nascent nature of environmental training in Kenya, many judicial officers and lawyers, particularly the more senior cadres of these categories, are not well versed in environmental

concepts and principles. One result of this is the lack of capacity to engage effectively in environmental litigation.¹⁵²

4.2.6 Capacity of the Public and Civil Society

This essentially relates to the levels of awareness of individuals and communities about their rights and duties on environmental management. Although emerging policies and laws may make elaborate provisions aimed at promoting public participation, the degree of penetration will ultimately depend on the levels of publication. This has a direct impact on the people’s engagement in the implementation of environmental laws and policies.¹⁵³

The range of participation mechanisms available can thus be tailored to meet the needs and capacity of a particular society. Reformers may incorporate passive participation approaches, such as increased transparency and improved state-community relations, or more active participation mechanisms, such as complaint processes, citizen involvement in policy formation and decision-making, citizen oversight, lay auxiliaries, and “civilianization” of justice institutions. Some environmental issues are complex and have scientific effects that are beyond the understanding of the general public.

4.2.7 Outputs and Preconditions

Inherent to any decision is the intended outputs of the decision itself. These outputs can be limited in the space and time dimensions. They cover short term and local issues, or long term and international issues. It is indeed an analysis of the intended outputs that will start the process of informed decision making.

Parallel to the process of understanding the intended outputs is to understand what the necessary preconditions are for a decision to be taken. A number of preconditions need to be met even before the process of decision making can commence. It is important to determine what these preconditions are, with respect to the stakeholders involved in the decision-making process, and

¹⁵² Interview with Francis, an EIA Officer of the Enforcement and Compliance Department of NEMA on 26th October, 2009.

¹⁵³ Interview with Peter of the Environment, Education Information and Public Participation Department of NEMA on 26th October, 2009.

ensure that these preconditions are met. Preconditions may relate to an organization's aims and objectives, rules and regulations, or working methodologies for the decision-making process itself.

4.2.8 Access to Information in the Context of Environment Decision-Making

A key resource underlying any effective decision making process is information. The nexus between the right to information and popular participation within the context of human right to a decent environment is very close. This is so because without education or information about the environment and without access to relevant information on issues of concern, popular participation becomes meaningless.¹⁵⁴ Making sure that the right information is made available at the right level to the right decision maker at the right time is one of the most critical aspects of decision-making.¹⁵⁵ Access to information is a tool of monitoring government and private sectors activities in environmental matters. Dissemination of the relevant information to the public provides the broadest basis for informed decision-making. A governmental obligation to release information about its projects can increase public knowledge.¹⁵⁶

Invertly, an uninformed community cannot adequately protect itself, property, cultural heritage and other natural resources and further, it cannot initiate reforms in government policies and laws.¹⁵⁷ This includes policies on the right to participate in decision-making. An informed public can for instance, through their right to participate, prevent the execution of an ill-conceived development project, lobby for the regulation of hazardous facilities and take similar steps to protect itself from eminent harm. The nature of environmental deterioration which often arises only after a project is complete, and can be irreversible, compels early and complete data to make informed choices.¹⁵⁸

¹⁵⁴ See Government of Kenya Sessional Paper No. 6 on Information and Participation.

¹⁵⁵ The quality of human life, survival and well being depends upon knowledge of environmental risks and the ability to minimize or avoid them. See Schwartz M.L., "International Legal Protection for Victims of Environmental Abuse," Yale J. Int'l Law, 1993, vol. 18, pp. 368-70.

¹⁵⁶ See Shalton Alexander Kiss and Dinah Shalton, *International Environmental Law*, (3rd Edition, UNEP).

¹⁵⁷ Ogeto, *supra*.

¹⁵⁸ *Supra*, note 155 p. 372.

Access to information remains a challenge in Kenya owing to lack of a specific legislation to enable its realization. The Freedom of Information Bill has repeatedly failed to reach the assenting level to enable it to become law. Instead a culture of secrecy seems to have permeated every level of government where the public would have an interest in obtaining information relevant to them for purposes of development. Even in instances where legislation, for example, the EMCA 1999 provides for access to information, there is a cost element attached to it, limiting the levels of access to the common man. The predicament is further aggravated by a policy of secrecy entrenched by section 44 of the Physical Planning Act¹⁵⁹ by requiring that information obtained by an officer in the course of his duties be treated in confidence, and be concealed except by an order of court in connection with any legal proceedings. The Act further imports the provisions of Official Secrets Act. If the norm is that only an informed citizenry is able to participate fully in governance issues, then the provisions are a claw-back to the much important freedom of access to information, and to democracy.

The situation has further been made complex by the fact that even when the various government agencies have availed information on such media as the internet, the public remains handicapped by the limited availability of and capacity to access the internet. This invariably invites many questions- what kind of information is necessary to be collected? Who has that information? What is the quality and quantity of information available? Is additional information necessary? Another key aspect of information management is the format in which information is delivered to the decision maker or participant.

The answers to these questions may change as local conditions change. But it is absolutely essential to make sure that the package of answers are put together in order for the desired decision to be taken. In fact, determining this “desired decision” is itself a critical part of the decision making process. It can be interesting to see how the decisions to be taken change depending on who is taking them and at what level it is being taken. For example, decisions on global warming, which are essentially a global issue, may seem irrelevant at the local level. This means that the ordinary man on the street, or household, cannot take decisions directly related to

¹⁵⁹ Chapter 286, Laws of Kenya.

global warming. But they can take decisions relating to resource consumption, recycling, and waste generation, which cumulatively can lead to a reduction in global warming. It is this contextualization that is relevant to the decision taken and ensures that the intended output be generated.

It is important that a decision-support initiative has to be flexible enough to evolve in response to the input of the participants. If this does not happen, participation is, at best, superficial; at worst, illusory. If participation is not effective, the notion of democracy in the most essential of human endeavors - living adaptively and sustainably in a community, in an environment — is fiction.

The concept of empowering communities has been hotly debated and will continue to be so. Clearly, access to information is an effective tool in empowering communities and citizens' groups to approach industry on an equal footing - and to question and, if need be, challenge industrial and governmental decisions on the quality of the environment. This new approach to identifying and solving environmental problems involves a change of culture for many in government and industry.

4.3 Obstacles to Public Participation

Public participation programs, like any democratic process, are prone to myriad complications and criticisms. These challenges should be thoroughly evaluated so as to anticipate and remove any barriers to participation in advance. In particular, participatory mechanisms in EDM should address how to offset the lack of a participatory tradition, identify who to involve and when, resolve conflict between members of the “participating public,” define appropriate roles and responsibilities for local and international actors, as well as translate commitments into action. Further, it should account for spoilers gaining ground through the more open process, and navigate the sometimes competing needs for an open, locally-driven process and an outcome that is consistent with international standards.

There exist myriad obstacles to public participation. These comprise lack of express constitutional provisions; lack of legally anchored access to information; lack of an institutional framework for public awareness and education; capacity constraints in the environmental regulatory authorities; inadequate representation in the committees.

Granted, democracy at its most fundamental level, denotes a system of government in which either the actual governing is carried out by the people governed (direct democracy), or the power to do so is granted by them (representative democracy). The touchstone of whatever strand of democracy is the involvement of the people. That said, it would be defeatist to withhold information from the people for whom it is being held in trust. The level of public participation in environmental decision-making fundamentally depends on the amount of democratic space available in a country. It therefore follows that the realization of a fully participatory process would entail opening the space in a fashion that involves participation at the lowest levels, short of which it remains an affront.

In Kenya environmental issues are to a large extent dictated by subjective political interests. The effect is that the functions of regulatory institutions and ministries¹⁶⁰ are put paid to whims and caprices of the political class. An example is the scourge caused by human encroachment into the water catchment areas like the Mau forest. Attempts at reclamation have always been punctuated with political undertones that defy even the most basic of environmental knowledge and information. They have often ignored the stark reality that environmental impacts have neither political nor national boundaries.

The last three decades have witnessed major political and economic reforms in most regions of the world. The same period has experienced a renewed interest in participatory approaches as a way of promoting local democracy. This may be attributed to the perceived success of market economies, the failures of command and control systems and inefficiencies of the centralized state. Concurrently, the abuses of centralized authoritarian systems have led to a search for more responsive forms of government. New social pressures emanating from the influences of globalization, urbanization, and increasing human migration, have also led to a review of how government can better cope with these challenges.¹⁶¹

¹⁶⁰ In Kenya, the mainstream ministries concerned with protection of the environment comprise Ministries of Environment and Natural Resources; Water; Wildlife, and Forestry.

¹⁶¹ PLO – Lumumba, “Urban Governance : Powers of Urban Authorities over Settlement Control: The Kenyan Case,” a paper presented at the World Habitat Forum Organized by UN-HABITAT held on the 13th to 17th September, 2004 at Barcelona, Spain. September 2004.

It is the duty of urban authorities to maintain cleanliness and prevent nuisances pursuant to the Public Health Act.¹⁶² Urban authorities are further bestowed with powers over planning and land use by the Physical Planning Act. Section 30(1) provides that no person shall carry out development, in most cases housing projects, within the area of a local authority without development permission granted by the local authority. The Act further states that the local authority shall when considering a development application submitted to it have regard to the health, amenities and conveniences of the community generally and to the proper planning and the density of the development and land use.

There has been inadequate participation by communities in physical planning. The existing administration and delivery systems appear to be bureaucratic, expensive, undemocratic and prone to abuse. All the sections which provide for public participation in the statutes are couched in mandatory terms, where the members of the public are allowed to make representations in regards to projects that may potentially affect the environment. However, the point of departure appears to be the Physical Planning Act.

Physical Planning Act empowers the Minister to approve a regional physical development plan, with or without modification.¹⁶³ The representations made by the public may not be entrenched. The public is thus seen as a rubberstamp, making the entire process of consultation merely perfunctory.

This trend is seen also where proposals for the revocation or modification of an approved regional physical development plan have been received. Notwithstanding the availability of cogent representations or objections to a proposed modification, the Minister is empowered to approve or refuse to approve the proposed revocation or modification of the approved plan.

¹⁶² Section 116, Public Health Act, Chapter 242 Laws of Kenya.

¹⁶³ Section 21 of Physical Planning Act.

4.3.1 Financial Constraints

There appears to be a tendency in the developing world to prioritize other sectors over environment with regard to budgetary allocations. Sectors like education, health and defence are often given a relatively higher consideration than that afforded to environment. Environmental management is hampered by serious resource needs. NEMA and the lead agencies experience perennial budgetary shortfalls. This greatly undermines the ability of these agencies to perform their functions and achieve their stated objectives.¹⁶⁴ For example, the Government of Kenya in the Fiscal Year 2009/2010 allocated less than 10% of the total budget towards environment, with very little guidance as to what would go to the important area of environmental decision-making.¹⁶⁵ The limited resources given to environmental institutions in budgetary allocations may be an indicator of the level of the importance that the Government attaches to environmental management.

Central government budget appropriations provide an area of ongoing debate as ministers seek to obtain funds to support their portfolios. Public preferences are important. Allocation of money to unpopular activities or failure to allocate funds to perceived good causes not only transgresses the concept of consumer sovereignty, but also has implications for government popularity, and can result in inefficient allocation of resources. Consequently, it is important to have good information about public preferences for central government budget allocations, and particularly towards the protection of the environment.

4.3.2 Lack of Constitutional Anchorage

Kenya has, for more than 47 years, had a Constitution did not have explicit provisions on environmental issues. Reference to public participation in matters concerning the environment could only be made by inference to the provisions in Chapter Five providing for the freedoms of speech, assembly and association, the right to life¹⁶⁶ and secure protection of the law. These

¹⁶⁴ This came out in an interview on 26th October, 2009 with Peter of the Environment, Education, Information and Public Participation Department of NEMA.

¹⁶⁵ See Budget Speech for the Fiscal Year 2009/2010 available at www.treasury.go.ke (accesses 10/09/2009).

¹⁶⁶ Experts argue that the right to life provided in the Constitution encompasses the right to a clean environment. See G. M. Wamukoya, F.D.P. Situma (eds.), *Environmental Management in Kenya: A Guide to the Environmental Management and Coordination Act*, (Centre for Research and Education on environmental Law, 2000).

rights are however qualified by the enjoyment of rights by others and by public interest as provided by other laws.

This lack of constitutional anchorage has further been made worse by the fact EMCA 1999 does not operate to alleviate the need for constitutionalism in a manner that ensures the realization of the right to a clean environment, the right to participation and increased access to justice and information.

As has been discussed herein, several states recognize the right to a decent and healthy environment in their constitutions. Belgium, Brazil, Netherlands, Uganda, India, Japan, Haiti, Canada, Ethiopia blaze the trail towards this positive direction.¹⁶⁷ The effect is that the supremacy of the Constitution has given an imprimatur of superiority of the right to environment over other laws.

4.3.3 Lack of Legal Provisions for Access to Information

Right to information can narrowly be interpreted as the freedom to seek information, or more broadly, as a right to access information or even a right to receive it.¹⁶⁸ The poignant fact is that most existing systems of governance favour administrative or corporate secrecy, thereby monopolizing environmental information in the hands of governmental authorities or private stateholders. The sad reality is that a cloak of secrecy has been kept of information held by the government and its agencies, and the private sector.¹⁶⁹

Stockholm Declaration makes explicit provisions at paragraph 19 for the dissemination of knowledge and information as a form of empowerment.

4.3.4 Lack of Institutional Framework for Public Awareness and Education

Environmental Management and Coordination Act, 1999, makes no explicit provisions on public awareness and education. Yet one gets the feeling that it is not because the issue was forgotten at the enactment stage, it was just ignored. As late as in 2008, the Minister for Environment was

¹⁶⁷ See Kennedy Ogeto, "The Emergence of a Fundamental Right to a Decent Environment: A Portrait for Kenya," (LLM Dissertation, University of Nairobi, Unpublished, February 2002).

¹⁶⁸ p. 372.

¹⁶⁹ Durwood Zaelke, Donald Kaniaru & Eva Kruzikova (eds.), Making Law work: Environmental Compliance and Sustainable Development, vol 2. p. 27.

quoted as highlighting the need for concerted awareness and education on environmental matters. While addressing a group of scholars he said thus: “Environmental awareness, education, training and advocacy provide institutions and communities with knowledge upon which they are able to anchor their actions.”¹⁷⁰

While it is conceded that there exists a department within the Ministry of Environment whose responsibility is creation of awareness and education, there abound financial and human resource capacity constraints that remain unaddressed, if not ignored. The efforts trained at sensitization do not meet the international standards, and more specifically, the threshold stipulated by the Aarhus Convention.

4.3.5 Illiteracy

A subset of the lack of framework for public awareness and education is the problem of illiteracy. Traditionally, literacy has been commonly defined as the ability to read and write at an adequate level of proficiency that is necessary for communication. More recently, however, literacy has taken on several meanings. Technological literacy and mathematical literacy are examples. While it may be difficult to gauge the degree to which literacy has an impact on an individual happiness, one can easily infer that an increase in literacy leads to the improvement of one’s life and development of societies. Low levels of literacy therefore make it more arduous to impart environmental information to the general populace. Further, it has a great potential to impede the levels of appreciation of environmental impact of any particular project.

Under EMCA’s EIA Regulation 17(2), the proponent of the project is required to seek the views of the public after the approval of the project report by NEMA. While this affords an opportunity for public participation to a large extent, it has its own shortcomings as the public may not comprehend the adverse technical and scientific impact of a project on the environment.¹⁷¹ The public would need to be educated and explained to in very basic fashion the likely effect and, the nature of mitigating measures proposed by the project proponent. There is very little need to mention here that the subjective interests of the proponent have the potential to cloud his

¹⁷⁰ Kenneth Ogosia, Daily Nation, Tuesday November 25, 2008

¹⁷¹ Obonyo Levi, “Kenya Press, Media, TV, Radio, Newspapers: Basic Data” 2007 available at <http://www.pressreference.com/Gu-Ku/Kenya.html> (accessed 01/09/09).

explanation in such a way that he is likely not to disclose the negative aspects of the project which are likely to invite resistance and negative comments from the public. When the right of information is concealed from the public, or disclosure is partial, the public is not able to effectively participate in decision-making.

4.3.6 Inadequate Means of Communication

Involvement of the public at the earliest possible stage of a project can reduce the risk of political, economic and cultural conflicts that are likely to occur devoid of such participation. To achieve effective dissemination of information, the use of appropriate means of communication is imperative. The Environmental Management and Conservation Act, 1999 only mandates the National Environmental Management Authority to cause to be published for two successive weeks in the Gazette and in a newspaper circulating in the area or proposed area of the project. This invariably invites questions as to its efficacy.¹⁷² A sizeable proportion of the Kenyan population is illiterate or is stricken by the ravages of poverty to the point that the purchase of daily newspapers is far beyond their means. In regards to the Gazette, it usually is that those whose daily occupation are so likely to buy it, for example lawyers. Since the legal requirement is that it must be published in the daily newspapers, often written in English or Swahili languages, the legal obligation will have been discharged, yet this would not amount to effective communication.

Additionally, the information required under section 59(1)(a) to (d) is in summary fashion. This summary might contain scanty information which might not even provoke the public to participate, or to find it necessary to access the environmental Impact Assessment Register.

4.3.7 The Existence of a Fragmented Legal Regime and Policies on the Environment

The sector of environment is one that is regulated by a myriad of statutes. A number of permits are required before one is able to undertake any development project on land. For instance, one must get an authorization from the Director of Physical Planning, the City Council in addition to the approval from NEMA. Equally worth noting is the fact that under both the EMCA, 1999 and the Physical Planning Act, there are no requirements for prior consideration of one over the

¹⁷² See section 59(1) of EMCA, 1999.

other. The approvals can be sought in any in order as the two institutions run parallel to each other. The EIA licence may not be granted if the plans do not satisfy the requirements of the Authority, even when the plans may have been approved by the Director of Physical Planning and the Council authority. A classic example is to be found in the case *Jamii Bora Charitable Trust & Another v Director General of NEMA & Another*.¹⁷³ The case concerned a housing estate that was intended to be constructed in an area the respondents considered to be a wildlife migratory corridor. While the Director of Physical and Ol Kejuado County Council had given their very necessary approval, NEMA declined to issue a licence in favour of the applicant. In yet another case, *Nakumatt Holdings Ltd v NEMA*,¹⁷⁴ the Tribunal stated that it does not sit on appeal from the decisions of physical planning authorities. That function, the Tribunal held, had been vested by Part V of the Physical Planning Act in the relevant Physical Planning Liaison Committee. That remedies to deal with irregularities, if any, with regard to the planning permission that had been obtained, or an alleged failure to comply with mandatory statutory requirements, must be sought within the framework of the relevant laws dealing with those issues. The Tribunal also clarified one other important issue: Regulation 4(2) of the EIA Regulations-which suggests that other licensing authorities may not issue licences under their own statutes unless the applicant has already procured an EIA licence-is *ultra vires* section 58 of EMCA, 1999.

The cases point to a situation where two or more statutory institutions whose role is to regulate human activity on land, and upon whom the legitimate expectation is that they discharge their functions in consistence with each other appear to be engaged in operational conflicts. The result is that either of them is opened up to numerous litigation challenging their processes.¹⁷⁵ The effect is not only that the public loses confidence in the capacity of these institutions to conserve the environment, but it is also costly in terms of financial resources and time. This erosion of confidence is reflected in the public apathy towards the participatory processes provided for by these statutes.

¹⁷³ Tribunal Referral NET 2/3/2005.

¹⁷⁴ Kenya Gazette No. 85 of 9th December, 2005 Vol. CVII No. 85 p. 3028.

¹⁷⁵ These sentiments were also echoed by Francis Chwanya of NEMA in an interview with the researcher on 26th October, 2009.

4.3.8 Lack of a Decentralized Environmental Management Framework

Decentralised management of natural resources is a new paradigm in Kenya’s environmental management scene. Command-and-control approach philosophy is what has predominantly informed the development of Kenya’s environmental regime. This approach relies on centralizing authority for delegation of responsibilities to other authorities or communities. It permits little room for participation of local communities.

Efforts to decentralize environmental management in Kenya have not reached the levels that can be said of it to have reached the nadir. Many of the decentralized authorities are not yet established. Where they exist, the authorities have not been adequately facilitated in terms of technical and resource needs.¹⁷⁶ Decentralisation efforts are also compromised by lack of awareness among the citizenry of the facilitating provisions of the new laws and policies, especially as relates to their rights and duties.

4.4 Conclusion

The rights of citizens and other members of the civil society in relation to environmental matters to information, public participation, and access to justice are indispensable if a nation is to foster sustainable development.¹⁷⁷ The goal of promotion of sustainable development is one that calls for co-operation of the government, private individuals, non-governmental organizations, businesses and other sectors of the society. The public involvement achieved through this cooperation helps enhance sustainable development efforts in diverse ways.

The effectiveness of participatory EDM will, in large part, be determined by how well the organizational and operational challenges to participation are met. In this sense, any participatory reform programs must effectively anticipate and remove common barriers to popular participation in EDM, decide whom to include and when, resolve disputes between members of the “participating public,” account for spoilers gaining ground through the more open process, and mitigate possible conflicts between domestic and international priorities. If these and other

¹⁷⁶ The interviews of Peter and Francis on 26th October, 2009. See p. 69 above.

¹⁷⁷ See Principle 10 of Rio Declaration on Environment and Development.

challenges are met, public participation holds the potential to advance proper and effective EDM in a manner that is consistent with sustainable environmental governance.

CHAPTER FIVE

CONCLUSIONS AND RECOMMENDATIONS: TOWARDS A PARTICIPATORY EDM IN KENYA

5.1 Introduction

The final chapter of this study seeks to synthesize the discussions in the preceding chapters in a way that may be useful to environmental managers and policy makers in arriving at comprehensive and clear reforms for a people-centred participatory environmental decision-making processes.

The great challenge that faces both present and future generations is environmental management for sustainable development. The various aspirations of society-social harmony, fairer income distribution, technological and industrial development, quality of life-all hinge on the capacity of mankind to manage the environment. These aspirations are to be filled if citizens acknowledge that they can influence their environment through knowledge and participation. Environmental management and awareness programmes are thus key components of a fully participatory environmental decision-making schema. In line with this, sustainable development can be seen as a social process of recognizing the totality of a revamped environmental system, and the possibility of ensuring a quality life for all.

No environmental management plan can be effective without participation of citizens, and the more information about the environment that is available to them, the more meaningful public participation will be. A commitment to sustainable development entails adopting participatory mechanisms that reach and involve a wide range of social groups. Devising strategies for a common future does not mean just setting out recommendations for better approaches on paper, but also achieving real changes in practice. One such way is its implication of a commitment to ethics that requires the assent and engagement of each citizen. Adopting a sustainable management strategy requires a radical shift in cultural, economic, political and social practices, but citizens will only reform their cultural and social behaviour if they understand the importance of adopting new attitudes.

However, these new mechanisms for participation should not be restricted to mere consultation, in the way that they have been as reflected in practice and in the statutes. They should have the

real power to influence environmental management, whether carried out by government agencies or private sector agencies, so that the formulation of public policies becomes central to the sustainable development strategy. This means that sustainable development cannot be implemented without incorporating mechanisms that increase the decentralization of power, democracy and social inclusiveness.

The World Conservation Union requires parties to adopt legislation and other regulatory measures necessary to enable the public to, *inter alia*, have access to environmental information and participate in decision –making.¹⁷⁸ Similar requirements have been consequently addressed in various environmental treaties, and on the domestic front, in Sessional Paper Number 6 of 1999 dealing with environment and development. It remains to be seen whether the ensuing legislation and establishment of regulatory authorities reflect the lofty ideals into practice.

A number of developing countries with economies in transition have initiated processes of strengthening public participation schemes, following the adoption of Principle 10 of the Rio Declaration in 1992 at the Earth Summit.

Principle 10 promotes public participation in environmental decision-making and access to information and justice in environmental matters. Some countries committed to the implementation of Principle 10 have pointed to the challenges of implementing its public participation provisions [such as lack of skills and resources] and called for the development of training and capacity building programmes in this area.

Programmes facilitating the implementation of principle 10 should facilitate the exchange of experiences in the area of public participation; develop practical and flexible guidance and training material to assist countries in making informed choices regarding desired participation processes, and support skills building for governmental and other decision-making officials.

Recognizing the importance of this issue, Paragraph 128 of the World Summit on Sustainable Development Plan of Implementation, 2002 states:

¹⁷⁸ Article XVI of IUCN.

“...ensure access, at the national level, to environmental information and judicial and administrative proceedings in environmental matters, as well as public participation in decision-making, so as to further principle 10 of the Rio Declaration on Environment and Development, taking into full account principles 5, 7 and 11 of the declaration.”¹⁷⁹

5.2 Enactment of a Statute on Access to Information

The enactment of access to information law has railroaded a couple of times in the past. The government should now hasten and pass freedom of access to information law in order to enhance public participation.

While accepting that change is always a challenge and will take time to complete, what is clear is that the little efforts directed towards improving access to information have opened the door for the public to influence decisions affecting their well-being. The door will not be closed: it will need to open even wider as providing basic data leads to requests for more specific information. Together, the new term of environmental democracy and the established concept of access to information can lead all nations to a healthier, sustainable environment.

Efforts to have legislation on access to information has for the last decade and a half hit a snag. With the facilitation of the civil society, Kenya has drafted a Freedom of Information Bill. The Bill aims to establish systems and processes to promote proactive publication and dissemination of information. The Bill also consolidates the right to access information through enhancing maximum disclosure of information and facilitating the right of all persons to access information in the possession of the government and public authorities.

The prevailing political climate across time has always impeded the enactment of this Bill. It has twice failed to pass through all the stages of law-making in Parliament, owing to the legislature's poor prioritization and lack of a critical mass of political goodwill to ensure its passage. However, with the inclusion of the right of access to information under Section 35, there is a ray of hope that the Bill will be enacted.

¹⁷⁹ See World Summit on Sustainable Development, Johannesburg, South Africa, and August 26- September 4, 2002, available at <www.worldsummit2002.org> (accessed 7th November, 2009).

5.3 Sensitization and Awareness

Environmental education, both formal and informal, is vital to changing peoples' attitude to appreciate environmental concerns. Formal education is important to increase awareness, improve extension services, sensitize people on environmental issues and build institutional capacities. Non-formal education benefits people outside the formal education system. Public awareness empowers the public to develop a strong sense of responsibility on environmental issues.¹⁸⁰

There is need to promote awareness and educate the public on the adverse effects on the environment likely to be caused by developments. Engaging the civil society in this venture is advisable, including carrying out research and collecting information for the benefit of the public.

Public interest in EIA activities has not been sufficiently tapped. It is imperative that involvement techniques should be checked for effectiveness. Going to meet the public say in a public place such as the church as opposed to inviting them in a hotel may be more effective. It is therefore important to understand the public dynamics (how they spend their time and where to get them).¹⁸¹

NEMA, through its Environmental and Awareness Department needs to take a more proactive approach on informing the public about their roles during pre-post and ex-ante EIA activities and to utilize the strong character of the civil society in Kenya.

5.4 Enhancing Effective Communication

Effective communication is of paramount importance and , in fact, a prerequisite to effective participation. In most cases, the English and Kiswahili languages are predominantly used as the media of communication in Kenya. In addition, even though local area language (mother tongue)

¹⁸⁰ Paragraph 10.2.1 Draft National Environmental Policy, 2008.

¹⁸¹ Nick Okello, Wim Douven, Jan Leentvaar and Lindsay Beevers, Breaking Kenyan Barriers to Public Involvement in Environmental Impact Assessment (Environmental Science and Water Engineering Departments, UNESCO-IHE, Delft Netherlands. Article based on MSc Thesis 2008)

has been used in some in some quotas to interpret EIA proceedings for local communities, the use of this technique is not extensive. EIA information needs more translation to local indigenous languages in media such as posters and pamphlets. Also, better interactive mechanisms of public participation at different stages for example a visit to success developments of related projects during scoping can help the affected community members understand different aspects of the project and participate in an informed way. This will also enhance the community's sense of ownership to the project.

5.5 Creating Partnerships and Linkages

Partnerships, by their very nature, represent a sustained commitment to move forward together to reach a higher common objective. To ensure an inclusive partnership and stakeholder involvement in decision-making, ways must be found to ensure wide representation from across the private sector and civil society organizations; and, ensure that community voices are brought forward. This is because private sector, civil society actors and communities play a central role in environmental conservation and management.¹⁸²

The government could consider creating eco-societies as has been established in some countries like Japan. The societies care for sunlight, water, land use planning. This very important partnership has the potential to restrain unplanned development, among other activities aimed at protecting the environment.

Such partnerships would create, strengthen and support formal and informal opportunities and mechanisms for public participation in which development activities that affect the environment are discussed and decided upon. Partnership between and among government institutions and diverse sectors of the civil society in decision-making should be encouraged, and existing opportunities for them be broadly utilized and replicated. These mechanisms should also ensure that the participatory processes are made known to all stakeholders.

In some countries, there are explicit legal frameworks for public consultation and participation in EDM. For example, it is now compulsory for the Ecuadorian government to consult its citizens

¹⁸² Paragraph 10.6, Draft National Environmental Policy, 2008.

as part of the process of decision making on environmental matters. The process of achieving this regulation is aimed at improving environmental governance in Ecuador.¹⁸³ In Europe, the youth have formed a network that convenes and make their voices heard in the process of environment and health policy making.¹⁸⁴

In his maiden speech, Pan Yue strongly advocated public participation and stated that:

“...China’s environmental challenge will only be met through public in EDM. We must understand clearly that public participation is the right and interest of the people endowed by law. The government has the obligation to respond to and to protect this right”.¹⁸⁵

If Kenya was emulate this example it would go along in enlarging right to participation in EDM.

In addition, even though local area language (mother tongue) has been used in some quotas to interpret EIA proceedings for local communities, the use of this technique is not extensive. EIA information needs more translation to local indigenous languages in media such as posters and pamphlets. Also, better interactive mechanisms of public participation at different stages for example a visit to successful developments of related projects during scoping can help the affected community members understand different aspects of the project and participate in an informed way. This will also enhance the community’s sense of ownership to the project.

5.6 Increasing Budgetary Allocation to the Environment Sector

Environment is the receptacle to all human activities. Therefore a significant level of efforts should be directed towards protecting it. This would invariably need more financial allocation by the government in its annual budget.

Rapid change is difficult for any society. There are parts of all the countries of the world where there is resistance, and even a backlash, to these changes. There is a worldwide political and personal discussion underway on how best to ultimately protect the environment. However,

¹⁸³ Jonathan Talbot, Ecuador’s Citizens have a Voice in Environmental Decision-Making: 2006 Success Story, available at www.accessinitiative.org/blog/2006/11/ecuadora (accessed 8th November, 2009).

¹⁸⁴ See for instance, the Youth Environment and Health Network, Fifth Ministerial Conference on Environment, (Parme, Italy on10th-12th March 2010). One of the agenda being to widen their network.

¹⁸⁵See Pan Yue, “Environmental Protection and Public Participation” 2004. (Mr. Pan was the Deputy Director of China’s State Environment Protection Administration(SEPA). See www.china dialogue.net (accessed 10/11/2011).

without concomitant political goodwill and initiative, all these will come to nought. An interview with the officers from NEMA decried little financial allocation to the Authority.¹⁸⁶

5.7 Enhancing Institutional Resource Personnel

NEMA seems not to have a critical mass of personnel to implement the statute. It is barely managing to retain a single officer, the District Environmental Officer (DEO), in each district. Indeed some districts are yet to get their DEOs. Some District Environmental Committees are either yet to be set up or they remain dormant. Virtually all the four directorates of NEMA are grossly understaffed. If one adds to this the fact that only a handful of environmental inspectors have been appointed so far, one begins to appreciate how much ground still needs to be covered before EMCA institutions can start living up-to the promise for which they were established.¹⁸⁷

5.8 Harmonising co-ordination and the Question of Policy

As is clear from the preceding chapters, matters of environment are to be found in a plethora of statutes. The various sectoral ministries, departments, and agencies continue to perform important environmental management functions in their respective sectors. Most of these institutions continue to operate under the sectoral laws and policies inherited from the colonial era. This creates conflict and confusion as between the institutions created by the statutes. The way out of this problem is to enhance harmonized co-ordination of all the institutions that administer legislation on environment for greater efficiency and collaboration. This, undoubtedly, would require a lot of human, time and financial effort, but will result in wider and quality public participation.

The key distinct feature today is that virtually all of them purport to be re-orienting their management approaches from centralized models to more open ones, with a view to ensuring participation of stakeholders and enhancing legitimacy of their work. To this end, some have forged co-operative arrangements, for example, between KWS and local communities in the development of wildlife sanctuaries and preservation of wildlife corridors. Similar arrangements

¹⁸⁶ These sentiments were also echoed by Francis and Peter of NEMA in an interview the researcher held on 26th October, 2009.

¹⁸⁷ Interviews with Francis and Peter of NEMA in an interview the researcher held on 26th October, 2009.

are being institutionalized in the fisheries sector through the introduction of Beach Management Units.

It is also worth noting that many of these institutions are becoming more accommodative to collaborative arrangements with their counterparts and NGOs. These developments are attributable as much to the changing paradigms in environmental management as to the growing reforms in political governance in the country. However, the fact remains that any such initiatives not based on comprehensive legal provisions are, at best, tenuous, for they depend on the goodwill and benevolence of the government institution in question, or many times, on the head of the institution.

Achieving the goals of our major environmental legislation will not be possible without a concerted recognition of the role of individuals and real tools for fostering environmental citizenship. Government agencies are increasingly required to demonstrate a relationship between their activities and environmental results- which are becoming less dependent on regulations and more on the choices we make as individuals. The development of new tools and forums for engaging citizens in environmental decisions, and harnessing their willingness to implement solutions will be key challenges for agencies as they strive to balance their statutory responsibilities with the need for promoting community-based and community-backed decisions. The new tools and forums will include enactment of necessary laws and policies geared towards, *inter alia*, promoting public engagement, access to information and establishment of citizen's organizations.

As a stop gap measure, it would be instructive to create an environmental conservation policy that deeply entrenches participation in environmental decision-making. The policy would align itself with the major international conventions relating to public participation in environmental decision-making, for example, the Aarhus Convention. The Convention establishes a number of rights of the public (individuals and their associations) with regard to the environment. The Parties to the Convention are required to make the necessary provisions so that public authorities (at national, regional or local level) will contribute to these rights to become effective. The Convention provides for:

- a) the right of everyone to receive environmental information that is held by public authorities ("access to environmental information"). This can include information on the state of the environment, but also on policies or measures taken, or on the state of human health and safety where this can be affected by the state of the environment. Applicants are entitled to obtain this information within one month of the request and without having to say why they require it. In addition, public authorities are obliged, under the Convention, to actively disseminate environmental information in their possession;
- b) the right to participate in environmental decision-making. Arrangements are to be made by public authorities to enable the public affected and environmental non-governmental organisations to comment on, for example, proposals for projects affecting the environment, or plans and programmes relating to the environment, these comments to be taken into due account in decision-making, and information to be provided on the final decisions and the reasons for it ("public participation in environmental decision-making");
- c) the right to review procedures to challenge public decisions that have been made without respecting the two aforementioned rights or environmental law in general ("access to justice").

5.9 Depoliticizing Environmental Concerns

There is need to distinguish matters of environmental concern from the realm of politics. Putting environment subservient to politics has had the undesirable effect of tinkering with the platform of human life. Kenya has had its share of this through human encroachment to water catchment areas and forests like Karura, Mau, among others.

There is need for people to be made aware that environmental impacts go beyond political boundaries. So profound are the effects of environmental activities that they even go beyond national boundaries.

5.10 Conclusion

Certain key issues stand out in this study. First, the lack of a comprehensive policy for participatory EDM is compromising Kenya's ability to marshal the competencies of the diverse stakeholders in environmental management. In the circumstances, it remains difficult to identify specific agenda and targets around which NEMA should rally the stakeholders, local authorities,

the civil society and the citizenry. There is need to develop a comprehensive policy for Kenya, taking into account the recommendations for enhancing participatory EDM.

Second, environmental management is hampered by serious resource needs. NEMA and the lead agencies experience perennial budget shortfalls. This greatly undermines the ability of these lead agencies to perform their functions and achieve their stated objectives. The limited resources given to environmental institutions in budgetary allocations may be an indicator of the priority that the Government attaches to environmental management. The environment agencies could do better with more resource allocations.

Third, efforts to decentralize environmental management in Kenya are yet to return their promise. Many of the decentralized authorities are not yet established. Where they exist, the authorities have not been adequately facilitated in terms of technical and resource needs. Decentralization efforts are also compromised by lack of awareness among the citizenry of the facilitating provisions of the new laws and policies, especially as relates to their rights and duties. There is need to accelerate the processes of operationalising new laws. There is also need for education and awareness creation about new environmental policies and legislation, more than has been the case.

Fourth, there are structural gaps in the design of institutional arrangements for managing the environment in Kenya. These gaps include overlapping mandates and comprise independence of some institutions. There is requires the government's law and policy makers to accelerate revision and harmonization of sectoral laws and policies.

Finally, there is need to enhance capacities of all institutions involved in environmental management in Kenya.

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