

# **Managing Natural Resource Conflicts in Kenya through Negotiation and Mediation**

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# Managing Natural Resource Conflicts in Kenya through Negotiation and Mediation

By Kariuki Muigua\*

## Abstract

*With the promulgation of the 2010 Constitution of Kenya, the use of Alternative Dispute Resolution (ADR) mechanisms and Traditional Dispute Resolution Mechanisms (TDRMs) in managing natural resource conflicts was formalised. The Constitution envisages a situation where conflicts, and specifically the natural resource ones, should first be dealt with using ADR and TDRMs and only resort to court where necessary. Communities are required to make legitimate attempts to resolve the matter using the most appropriate mechanisms available to them. Despite this, there has not been evidence of genuine attempts at taking up these processes in managing natural resource conflicts, which are still prevalent and a cause of concern. While singling out negotiation and mediation, the author examines the opportunities that ADR mechanisms and particularly negotiation and mediation present in realising the goal of effective management of natural resource conflicts in Kenya through discussing the advantages associated with the processes and why they may be the most preferred means of natural resource conflict management.*

## 1.0 Introduction

In this paper, the author critically discusses the effective management of natural resource conflicts through the use of negotiation and mediation. The paper contends that the existing national legal and institutional framework for the management of natural resource conflicts has been insufficient to effectively deal with the natural resource conflicts.

With the promulgation of the 2010 Constitution of Kenya, the law makers created an opportunity for exploring the use of ADR mechanisms and Traditional Dispute Resolution Mechanisms (TDRMs) in managing natural resource conflicts.<sup>1</sup> Notably, one of the principles of land policy as envisaged in the Constitution is encouragement of communities to settle land disputes through recognised local community initiatives consistent with the Constitution.<sup>2</sup> The implication of such provisions is that before a matter is referred for court adjudication,

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<sup>1</sup> Art. 159(2) (c), Constitution of Kenya 2010, Government Printer, Nairobi.

<sup>2</sup> Art. 60 (1) (g).

communities are required to make legitimate attempts to resolve the matter using the most appropriate mechanisms available to them. This is also reinforced by the fact that one of the functions of the National Land Commission is to encourage the application of traditional dispute resolution mechanisms in land conflicts.<sup>3</sup> This is a significant provision considering that land conflicts form the bulk of natural resource conflicts reported in the country, and the land issue is an emotive one.<sup>4</sup> There have been frequent and well documented reports of violent conflicts over access to and use of land in Kenya.<sup>5</sup> For example, recently, Narok and Kwale Counties suffered natural resource conflict albeit in varying degrees. In Narok, Kenya, clashes between Maasai and Kipsigis in Olposimoru, Narok County in December 2015 over what is believed to be natural resource related conflict resulted in human casualties and displacement.<sup>6</sup> In Kwale County, there have also been cases of violence related to natural resource exploitation.<sup>7</sup> In such instances, one may find that a few herdsmen may have been accused of ‘trespassing’ to graze in another community’s territory and were thus attacked. The resultant chaos in retaliation affects the whole community. For them, it is not about arresting the involved individuals and arraigning them in court. It is about protecting the interests of the whole community and thus, any approaches to managing the conflict must involve the whole community or their representatives and address all of their concerns.

Despite the fact that the existence of legal and institutional framework in the country is meant to deal with natural resource conflicts, it has not offered much in stemming the natural resource conflicts due to inadequacies within the structure. Natural resource conflicts in Kenya are still prevalent and a cause of much concern. It has been noted that the contribution of the

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<sup>3</sup> Art. 67(2) (f).

<sup>4</sup> Government of Kenya, *Report on the Commission of Inquiry into Land Law Systems in Kenya on Principles of a National Land Policy Framework, Constitutional Position of Land and New Institutional Framework for Land Administration* (Government Printer Nairobi, 2002); See also A.M. Akiwumi, et al, Report of the Judicial Commission Appointed to Inquire into Tribal Clashes in Kenya, 31st July, 1999.

<sup>5</sup> The Akiwumi Report of the Judicial Commission Appointed to Inquire into Tribal Clashes in Kenya (31st July, 1999) notes the contribution of the issue of land to violent conflicts in Kenya due to the way it is treated with fervent sentimentality and sensitivity and in many ways, considered explosive. The Report at pg. 53 notes that “Whereas, the constitution guarantees the right of ownership of property anywhere in the country, the peaceful co-existence of the forty two tribes that live within our national borders, appears to have been profoundly undermined by diverse man-made problems that are either directly or indirectly connected to land.”

<sup>6</sup> Agutu, N., ‘GSU deployed in Narok after two killed in Maasai, Kipsigis clashes,’ The Star Newspaper, Dec. 26, 2015, 3:00 pm, Nairobi, available at [http://www.the-star.co.ke/news/2015/12/26/gsu-deployed-in-narok-after-two-killed-in-maasai-kipsigis-clashes\\_c1265922](http://www.the-star.co.ke/news/2015/12/26/gsu-deployed-in-narok-after-two-killed-in-maasai-kipsigis-clashes_c1265922) [Accessed on 2/01/2016]; see also AfriQua, ‘Narok land disputes threaten water resources,’ 18/03/2015, available at <http://onesafedrop.org/192/narok-land-disputes-threaten-water-resources/> [Accessed on 2/01/2016]; Khamadi, S., ‘Counties struggle to gain control over local natural resources in Kenya,’ Wednesday January 9th, 2013, available at <http://landquest.internewskeny.org/counties-struggle-to-gain-control-over-local-natural-resources-in-kenya/> [Accessed on 2/01/2016].

<sup>7</sup> Musyoka, A., ‘Kenya: Four Killed at Kinango in Clash Over Grazing Land,’ The Star Newspaper, Dec. 19, 2014, Nairobi, available at <http://allafrica.com/stories/201412190701.html> [Accessed on 2/01/2016]; See also generally, Constitution and Reform Education Consortium (CRECO), *Building a Culture of Peace in Kenya: Baseline Report On Conflict-Mapping and Profiles of 47 Counties in Kenya*, April, 2012, ISBN: 978-9966-21-158-3. Available at [https://www.humanitarianresponse.info/system/files/documents/files/CRECO\\_2012.pdf](https://www.humanitarianresponse.info/system/files/documents/files/CRECO_2012.pdf) [Accessed on 3/01/2016].

issue of land to violent conflicts in Kenya is due to the way land is “treated with fervent sentimentality and sensitivity and in many ways considered explosive.”<sup>8</sup> The emergence of multi-party politics in Kenya was perceived by many communities as a move to marginalize and dispossess them of land. The multi-party politics were thus influenced by tribal considerations with their roots in economic and considerations making it easier to incite politically based tribal violence.<sup>9</sup>

Land clashes that occurred in Kenya in 1992 and 1997 have been attributed to inequitable allocation of land resources and poor government policies and programmes perceived as favouring some factions at the expense of others. The issues of the use of environmental resources underlie the numerous conflicts that have occurred in Kenya. The post-election violence in 2007-08 can be traced, to a large extent, to contests over access to and use of natural resources in Kenya and the harboured feelings of alienation and discrimination in access and benefit sharing of the accruing benefits.<sup>10</sup>

It is against this background that the author examines the opportunities that ADR mechanisms and particularly negotiation and mediation present in realising the goal of effectively managing natural resource conflicts in Kenya.

## 2.0 Defining Concepts in Conflict Management

Conflict is viewed as a process of adjustment, which itself can be subject to procedures to contain and regularize conflict behaviour and assure a fair outcome.<sup>11</sup>

Notably, conflicts can be managed, transformed, resolved or settled depending on the approach adopted. While this paper is written with a bias towards conflict management through negotiation and mediation, it is important to explain the other concepts for purposes of clarity.

Conflict management is defined as the practice of identifying and handling conflicts in a sensible, fair and efficient manner that prevents them from escalating out of control and becoming violent.<sup>12</sup> Conflict management is seen as a multidisciplinary field of research and

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<sup>8</sup> Government of Kenya, et al, Report of the Judicial Commission Appointed to Inquire into Tribal Clashes in Kenya, 31st July, 1999.

<sup>9</sup> Ibid.

<sup>10</sup> See Machel, G. & Mkapa, B., *Back from the Brink: the 2008 mediation process and reforms in Kenya*, (African Union Commission, 2014).

<sup>11</sup> Rummel, R.J., ‘Principles of Conflict Resolution,’ Chapter 10, *Understanding Conflict and war: Vol. 5: The Just Peace*.

<sup>12</sup> Engel, A. & Korf, B., ‘Negotiation and mediation techniques for natural resource management,’ Prepared in the framework of the Livelihood Support Programme (LSP), An interdepartmental programme for improving support for enhancing livelihoods of the rural poor, (Food And Agriculture Organization Of The United Nations, Rome, 2005), available at

[http://peacemaker.un.org/sites/peacemaker.un.org/files/NegotiationandMediationTechniquesforNaturalResourceManagement\\_FAO2005.pdf](http://peacemaker.un.org/sites/peacemaker.un.org/files/NegotiationandMediationTechniquesforNaturalResourceManagement_FAO2005.pdf) [Accessed on 9/01/2016].

action that addresses how people can make better decisions collaboratively.<sup>13</sup> Thus, the roots of conflict are addressed by building upon shared interests and finding points of agreement.<sup>14</sup>

Conflict transformation focuses on long-term efforts oriented towards producing outcomes, processes and structural changes. It aims to overcome revealed forms of direct, cultural and structural violence by transforming unjust social relationships and promoting conditions that can help to create cooperative relationships.<sup>15</sup>

Conflict settlement deals with all the strategies that are oriented towards producing an outcome in the form of an agreement among the conflict parties that might enable them to end an armed conflict, without necessarily addressing the underlying conflict causes.<sup>16</sup> Settlement is an agreement over the issues(s) of the conflict which often involves a compromise.<sup>17</sup> Parties have to come to accommodations which they are forced to live with due to the anarchical nature of society and the role of power in the relationship. Basically, power is the defining factor for both the process and the outcome.<sup>18</sup>

Settlement may be an effective immediate solution to a violent situation but will not thereof address the factors that instigated the conflict. The unaddressed underlying issues can later flare up when new issues or renewed dissatisfaction over old issues or the third party's guarantee runs out.<sup>19</sup> Settlement mechanisms may not be very effective in facilitating satisfactory access to justice (which relies more on people's perceptions, personal satisfaction and emotions). Litigation and arbitration are coercive and thus lead to a settlement. They are formal and inflexible in nature and outcome.<sup>20</sup>

Conflict resolution deals with process-oriented activities that aim to address and resolve the deep-rooted and underlying causes of a conflict.<sup>21</sup> Conflict resolution mechanisms include negotiation, mediation in the political process and problem solving facilitation.<sup>22</sup> It has rightly been observed that whereas concerns for justice are universal, views of what is just and what is unjust are not universally shared, and as such, divergent views of justice often cause social

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<sup>13</sup> Anderson, J., et al, 'Addressing Natural Resource Conflicts through Community Forestry: Setting the Stage,' available at <http://www.fao.org/docrep/005/ac697e/ac697e13.htm#TopOfPage> [Accessed on 17/01/2016].

<sup>14</sup> Ibid.

<sup>15</sup> Engel, A. & Korf, B., 'Negotiation and mediation techniques for natural resource management,' op cit.

<sup>16</sup> Ibid.

<sup>17</sup> Bloomfield, D., "Towards Complementarity in Conflict Management: Resolution and Settlement in Northern Ireland", *Journal of Peace Research*, Vol. 32, No. 2(May, 1995), P.152.

<sup>18</sup> Baylis, C., and Carroll, R., "Power Issues in Mediation", *ADR Bulletin*, Vol. 1, No.8 [2005], Art.1, p.135.

<sup>19</sup> Bloomfield, D., "Towards Complementarity in Conflict Management: Resolution and Settlement in Northern Ireland", op. cit. p. 153; See also Mwagiru, M., *Conflict in Africa; Theory, Processes and Institutions of Management*, (Centre for Conflict Research, Nairobi, 2006), p. 42.

<sup>20</sup> See generally Mwagiru, M., *Conflict in Africa: Theory, Processes and Institutions of Management*, op. cit.

<sup>21</sup> Engel, A. & Korf, B., 'Negotiation and mediation techniques for natural resource management,' op cit.

<sup>22</sup> Kenneth Cloke, "The Culture of Mediation: Settlement vs. Resolution", *The Conflict Resolution Information Source*, Version IV, December 2005.

conflicts.<sup>23</sup> This is attributed to the fact that frequently, the parties involved in conflicts are convinced that their own view is the solely valid one.<sup>24</sup> It is, thus, suggested that since there is no access to an objective truth about justice, conflicts may be reconciled by the judgement of an authority accepted by all parties or by a negotiated agreement between the parties: agreements are just when the parties are equally free in their decision and equally informed about all relevant facts and possible outcomes.<sup>25</sup>

Natural resource conflicts are defined as social conflicts (violent or non-violent) that primarily revolve around how individuals, households, communities and states control or gain access to resources within specific economic and political frameworks.<sup>26</sup> They are the contests that exist as a result of the various competing interests over access to and use of natural resources such as land, water, minerals and forests. Natural resource conflicts mainly have to do with the interaction between the use of and access to natural resources and factors of human development factors such as population growth and socio-economic advancement.<sup>27</sup>

Natural resource conflicts can, arguably, involve three broad themes: actors (or stakeholders, groups of people, government structures and private entities), resource (land, forests, rights, access, use and ownership) and stakes (economic, political, environmental and socio-cultural).<sup>28</sup> As a result, it is contended that conflicts can be addressed with the actor-oriented approach, resource-oriented approach, stake-oriented approach or a combination of the three.<sup>29</sup> Despite this, there are key principles such as, inter alia, participatory approaches<sup>30</sup>, equitable representation, capacity building, context of the conflict and increased access and dissemination of information, that must always be considered.<sup>31</sup>

Natural resource conflicts are sensitive considering that they arise from the need for people to satisfy their basic needs.<sup>32</sup> To them, justice would mean affording them an opportunity

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<sup>23</sup> Montada, L., 'Justice, Conflicts, and the Justice of Conflict Resolution,' *International Encyclopedia of the Social & Behavioral Sciences* (Second Edition, 2015), pp. 937–942.

<sup>24</sup> Ibid.

<sup>25</sup> Ibid.

<sup>26</sup> Funder, M., et al, 'Addressing Climate Change and Conflict in Development Cooperation Experiences from Natural Resource Management,' p. 17, (Danish Institute for International Studies, DIIS, 2012), available at <https://www.ciaonet.org/attachments/20068/uploads> [Accessed on 10/01/2016].

<sup>27</sup> Toepfer, K., "Forward", in Schwartz, D. & Singh, A., *Environmental conditions, resources and conflicts: An introductory overview and data collection* (UNEP, New York, 1999). p.4

<sup>28</sup> Anderson, J., et al, 'Addressing Natural Resource Conflicts through Community Forestry: Setting the Stage,' *Annex C - Summary of Discussion Papers*, (FAO), available at <http://www.fao.org/docrep/005/ac697e/ac697e13.htm#TopOfPage> [Accessed on 2/01/2016].

<sup>29</sup> Ibid.

<sup>30</sup> Participatory approaches are defined as institutional settings where stakeholders of different types are brought together to participate more or less directly, and more or less formally, in some stage of the decision-making process. (Hove, SVD, 'Between consensus and compromise: acknowledging the negotiation dimension in participatory approaches,' *Land Use Policy*, Vol. 23, Issue 1, January 2006, PP. 10–17.

<sup>31</sup> Anderson, J., et al, 'Addressing Natural Resource Conflicts through Community Forestry: Setting the Stage,' op cit.

<sup>32</sup> FAO, 'Negotiation and mediation techniques for natural resource management,' available at <http://www.fao.org/3/a-a0032e/a0032e05.htm> [Accessed on 07/02/2016].

to get what they feel entitled to and anything less, means that they resort to other means of possessing the same. This way, conflicts become inevitable. Conflict resolution mechanisms such as negotiation and mediation affords the parties an opportunity to negotiate and reach a compromise agreement, where all sides get satisfactory outcome.<sup>33</sup> This is particularly important in ensuring that there will be no future flare-up of conflict due to unaddressed underlying issues.<sup>34</sup>

It is, therefore, arguable that resolution mechanisms have better chances of achieving parties' satisfaction when compared to settlement mechanisms. However, it is important to point out that these approaches should not be used mutually exclusively but instead there should be synergetic application of the above approaches. Further, conflict management processes are not mutually exclusive and one can lead to another.<sup>35</sup> Each of the approaches has their success story where they have been effectively applied to achieve the desired outcome. The scope of this paper is, however, limited only to conflict resolution mechanisms namely negotiation and mediation.

### 3.0 Causes and Effects of Conflicts

There are many factors that determine the emergence, persistence, and even management of conflicts. The understanding of these factors is essential in developing policies that effectively limit and manage conflict. The factors range from internal to relational and contextual factors.<sup>36</sup>

It has rightly been observed that in the majority of cases of resource conflicts, one or more of the following drivers are usually at play: conflict over resource ownership; conflict over resource access; conflict over decision making associated with resource management; and conflict over distribution of resource revenues as well as other benefits and burdens.<sup>37</sup> These conflict drivers have contributed to most of the natural resource conflicts in Kenya and should therefore be adequately addressed in managing the conflicts.<sup>38</sup>

The structure of relations between parties to the conflict and the way parties interpret the same may affect the course of the conflict and its management. The relation factors include differences

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<sup>33</sup> Warner, M., 'Conflict Management in Community-Based Natural Resource Projects: Experiences from Fiji and Papua New Guinea,' *Working Paper No. 135*, (Overseas Development Institute, April, 2000), p. 16.

<sup>34</sup> See generally Mwangi, M., *Conflict in Africa: Theory, Processes and Institutions of Management*, op. cit.

<sup>35</sup> Chidhakwa, Z., 'Managing conflict around contested natural resources: a case study of Rusitu Valley area, Chimanimani, Zimbabwe,' *Natural Resource Conflict Management Case Studies: An Analysis of Power, Participation and Protected Areas*, (Southern Alliance for Indigenous Resources).

<sup>36</sup> Louis, K., "Factors Shaping the Course of Intractable Conflict." *Beyond Intractability*. Eds. Guy Burgess and Heidi Burgess. Conflict Research Consortium, University of Colorado, Boulder. Posted: October 2003. <[http://www.beyondintractability.org/essay/factors\\_shaping\\_intractable\\_conflict/](http://www.beyondintractability.org/essay/factors_shaping_intractable_conflict/)>.

<sup>37</sup> The United Nations Department of Political Affairs and United Nations Environment Programme, *Natural Resources and Conflict: A Guide for Mediation Practitioners*, (2015, UN DPA and UNEP), p. 11.

<sup>38</sup> Campbell, D.J., et al, 'Land use conflict in Kajiado District, Kenya,' *Land Use Policy*, Vol.17, Issue 4, October 2000, pp. 337-348; Yamano, T, et al, 'Land Conflicts in Kenya: Causes, Impacts, and Resolutions,' *FASID Discussion Paper 2005-12-002*, available at [www3.grips.ac.jp/~yamanota/Land Conflicts in Kenya \(FASID DP\).pdf](http://www3.grips.ac.jp/~yamanota/Land Conflicts in Kenya (FASID DP).pdf) [ Accessed on 17/01/2016].



in sizes (group conflicts), economic endowment (resources), coerciveness between the parties, and cultural patterns of conduct. They also include the nature and degree of integration between adversaries in economic, social, and cultural domains. So that a conflict between groups that depend on each other's produce will be easy to manage because each party is feeling the strain of the conflict resulting from scarcity of the produce from the other party.<sup>39</sup> However, abundance of resources, just like scarcity, can also cause conflicts. The African continent is awash with examples of countries that have suffered from "curse of natural resources" – where countries with great natural resource wealth tend to grow more slowly than resource-poor countries.<sup>40</sup>

It has been argued that conflicts associated with natural resources are often due to different perceptions regarding who should benefit from the conflicts, and are an indicator of resource availability, evolution of tenure rights and systems, accessibility and control over the resource.<sup>41</sup> They are believed to result from an imbalance in the power structure, where these power imbalances can exhibit themselves through unequal distribution of natural resource use and tenure rights.<sup>42</sup> Further, it is asserted that conflicts show transition within societies, which can be positive if it expresses need for change or the ability of institutions to adapt to social, economic and/or environmental conditions. On the other hand, conflicts can have a negative impact if the changes that result from them cause further marginalisation of certain groups of society, such as the poor, women and minorities.<sup>43</sup>

Where conflict cannot be contained in a functional way, it can erupt in violence, war, and destruction, loss of life, displacements, long-term injuries, psychological effects as a result of trauma suffered especially in case of violent conflicts, and deep fear, distrust, depression, and sense of hopelessness.<sup>44</sup>

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<sup>39</sup> See Aylinga, R.D. & Kelly, K., 'Dealing with conflict: natural resources and dispute resolution,' *The Commonwealth Forestry Review*, Vol. 76, No. 3, 15th Commonwealth Forestry Conference Papers (1997), pp. 182-185.

<sup>40</sup> Sachs, J.D & Warner, A.M, 'Natural Resources and Economic Development: The curse of natural resources,' *European Economic Review*, Vol. 45, Issues 4–6, May 2001, PP. 827–838 AT P. 827. For instance, there have been internal natural resource conflicts that may be attributed to resource abundance: South Sudan, Liberia, Sierra Leone, Democratic Republic of Congo, Congo -Brazzaville, Central African Republic, amongst others; See also generally, G. King & V. Lawrence, Africa, "A Continent in Crisis: The Economic and Social Implications of Civil War and Unrest among African Nations," *EDGE*, Final Spring 2005, June, 2005; see also, M. Jenkins & E. Umoh, Africa in Conflict and Crisis: Critical Perspectives on the Role of Conflict Diamonds and Oil on the Livelihood of Sierra Leone and Nigeria.' Autumn, 2002; *Wiwa v. Royal Dutch Petroleum Co.*, 226 F.3d 88 (2d Cir. 2000), cert. denied, 532 U.S. 941(2001); Institute for Environmental Security, "What is Environmental Security?"

Available at [http://www.envirosecurity.org/activities/What\\_is\\_Environmental\\_Security.pdf](http://www.envirosecurity.org/activities/What_is_Environmental_Security.pdf) [Accessed on 17/1/2016].

<sup>41</sup> Traore, S. & Lo, H., 'Natural Resource Conflicts and Community Forestry: A West African Perspective,' in FAO, *Annex C - Summary of Discussion Papers*, available at <http://www.fao.org/docrep/005/ac697e/ac697e13.htm#TopOfPage> [Accessed on 2/01/2016].

<sup>42</sup> Ibid.

<sup>43</sup> Ibid.

<sup>44</sup> See G. Machel & B. Mkapa, *Back from the Brink: the 2008 mediation process and reforms in Kenya*, (African Union Commission, 2014).

Conflict also often produces significant environmental degradation.<sup>45</sup> It is difficult to justify environmental protection when other more immediate concerns exist as a result of the conflict. Therefore, environmental damage from accelerated resource extraction may be severe.

Scholars have stressed that human needs are among the major causes of conflicts. It is argued that deep-rooted conflicts are caused by the absence of the fundamental needs of security, identity, respect, safety, and control which many find non-negotiable.<sup>46</sup> As such, if they are absent, the resulting conflict will remain intractable until the structure of society is changed to provide such needs to all. For instance, the need for identity has been described as a fundamental driver of intractable conflict.<sup>47</sup> Threats to identities often invite very negative responses from people who see the same as a way of protecting their essence.<sup>48</sup>

The clash of interests can take many forms. For instance, it could be over resources such as land, food, territory, water, energy sources, and natural resources.<sup>49</sup> Such conflicts range from, to whom the resources should be distributed to, to whether the resources should be distributed and how the distribution should be undertaken. Conflict could also arise over power and control of the resources.<sup>50</sup> There are also conflicts over identity.<sup>51</sup> These concern the cultural, social and political communities to which people feel tied. Conflicts over status may arise and have to do with whether people believe they are treated with respect and dignity and whether their traditions and social position are respected.<sup>52</sup> In addition, the conflicts could be caused by differences of values, particularly those embodied in systems of government, religion, or ideology.<sup>53</sup> Further, conflicts have been associated with the changing norms, values, and world views about property rights within formerly subsistence-based (or pastoralist) communities.<sup>54</sup> Indeed, this scenario is not new to Kenya, where recently, there was witnessed violence in areas around Kajiado town

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<sup>45</sup> Ballet, J., et al, 'Social Capital and Natural Resource Management: A Critical Perspective,' *The Journal of Environment & Development*, Vol. 16 No. 4, December 2007, pp. 355-374, p. 367.

<sup>46</sup> John Burton, *Conflict: Human Needs Theory* (New York: St. Martin's Press), 1990; Herbert Kelman, *International Behavior: A Social Psychological Analysis* (New York: Holt, Rinehart and Winston), 1965.

<sup>47</sup> Jay Rothman, *Resolving Identity-Based Conflicts* (San Francisco: Jossey Bass), 1997. See also John Paul Lederach, *Building Peace: Sustainable Reconciliation in Divided Societies* (United States Institute of Peace), 1998.

<sup>48</sup> Chidhakwa, Z., 'Managing conflict around contested natural resources: a case study of Rusitu Valley area, Chimanimani, Zimbabwe,' op cit, p. 202.

<sup>49</sup> Buckles, D & Rusnak, D, 'Conflict and collaboration in natural resource management,' (International Development Research Centre, 2005), p. 2.

<sup>50</sup> Ibid, p. 2.

<sup>51</sup> See Rothman, J., *Resolving Identity-Based Conflict: In Nations, Organizations, and Communities*. (San Francisco: Jossey-Bass Publishers, 1997).

<sup>52</sup> EAIM, 'Peace and Stability Are Prelude to Economic Development and Prosperity,' available at <http://www.togoruba.org/togoruba1964/mainTogorubamap/mainMap/headingMap/English/2006/articlesFeb-2006/1802EAIM06-06EA.html> [Accessed on 10/02/2016].

<sup>53</sup> Adamu, A & Ben, A., 'Migration and Violent Conflict in Divided Societies: Non-Boko Haram violence against Christians in the Middle Belt region of Nigeria,' *Nigeria Conflict Security Analysis Network (NCSAN) Working Paper No. 1*, (World Watch Research, Abuja, Nigeria, March 2015).

<sup>54</sup> Armitage, D., 'Adaptive Capacity and Community-Based Natural Resource Management,' *Environmental Management*, Vol. 35, No. 6, pp. 703-715, p. 710.

with Maasai community seeking to 'evict foreigners' in the area.<sup>55</sup> The alleged foreigners are people who have bought land for residential homes and commercial purposes, through real estate land developers. They felt that their land was being taken away. Such incidences require collaborative conflict management techniques considering that there are deep-rooted issues and harboured feelings of alienation and discrimination that need to be adequately addressed. There is need to strike a balance between community interests and national interests on development. Otherwise, without such a balance erupting conflicts subsequently affect the course of development in the country.

There is also a school of thought that believes that public policy can also lead to natural resource conflicts. It is argued that specific policies, government programs, and their implementation have, in some areas, generated or aggravated conflicts, even when the intention was to reduce the conflict.<sup>56</sup> A good example of such policies would be those touching on property ownership, especially land, and where there is need to balance conservation and access to the resources by communities. A government policy to relocate people forcefully may degenerate into conflicts as witnessed in Mau forest eviction in Rift Valley Kenya.<sup>57</sup> There may be accusations of discriminatory relocation by the Government where some communities feel alienated. Indeed, such views may not be alien to the Kenyan scenario. For instance, according to the Business and Human Rights Resource Centre, an independent international human rights organisation, when Kenya discovered oil, there were fears that the legal regime was inadequate to regulate the industry and ensure that it does not fuel conflict within Kenya.<sup>58</sup> However, with the enactment of the current Constitution 2010, it was expected that this would change as it makes provisions for natural resource management and calls for community participation in the management of natural resources.<sup>59</sup>

In homogenous societies constitutional provisions on natural-resource ownership are expected to address national development or how natural resources are shared between governments and private interests. However, in divided societies, the constitutional treatment of natural resources

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<sup>55</sup> Sayagie, G., 'Tension as different clans from Narok, Kajiado both claim Nguruman,' Sunday Nation, November 9, 2014, (Nation media Group, Nairobi, 2014). Available at <http://www.nation.co.ke/counties/Narok-Kajiado-clans-Nguruman/-/1107872/2516170/-/c6b4t5/-/index.html> [Accessed on 10/02/2016]; Daily Nation, 'Clashes in Kitengela as traders fight over market,' (Nation media Group, Nairobi, September 8, 2015). Available at <http://www.nation.co.ke/photo/-/1951220/2865112/-/faabnp/-/index.html> [Accessed on 10/02/2016].

<sup>56</sup> Tyler, S.R., 'Policy Implications of Natural Resource Conflict Management,' available at <http://unpan1.un.org/intradoc/groups/public/documents/apcity/unpan022237.pdf> [Accessed on 10/01/2016].

<sup>57</sup> Amnesty International, et al, 'Nowhere to go: Forced Evictions in Mau Forest, Kenya,' *Briefing Paper, April 2007*; Sang J.K., Case study 3-Kenya: The Ogiek in Mau Forest, April 2001.

<sup>58</sup> Business and Human Rights Resource Centre, 'Steep Rise in Allegations of Human Rights Abuse as Boom in Investment Brings Hope of Prosperity Business and Human Rights in Eastern Africa: A Regional Briefing Paper,' April 2014, p. 7. Available at <http://business-humanrights.org/sites/default/files/media/documents/eastern-afr-briefing-bus-human-rights-apr-2014.pdf> [Accessed on 19/01/2016].

<sup>59</sup> Ibid, p. 7.

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is more concerned with how natural-resource wealth is shared among often antagonistic communities.<sup>60</sup> Conflicts do not occur in vacuum and to a large extent, they are dependent on the context. Indeed, it has been argued that the governance of natural resources is especially important in the context of divided societies because control over the benefits from local natural resources is often a chief motivator of ethnic or identity-based conflicts.<sup>61</sup> Natural resource conflicts also are, directly and indirectly connected to and/or impact human development factors and especially the quest for social-economic development.<sup>62</sup>

The Sustainable Development Goals (SDGs) recognise this connection and provide that sustainable development cannot be realized without peace and security; and peace and security will be at risk without sustainable development.<sup>63</sup> The SDGs go ahead to state that the new Agenda recognizes the need to build peaceful, just and inclusive societies that provide equal access to justice and that are based on respect for human rights (including the right to development), on effective rule of law and good governance at all levels and on transparent, effective and accountable institutions. Factors which give rise to violence, insecurity and injustice, such as inequality, corruption, poor governance and illicit financial and arms flows, are addressed in the Agenda. The aim is to redouble the efforts to resolve or prevent conflict and to support post-conflict countries, including through ensuring that women have a role in peacebuilding and Statebuilding.<sup>64</sup> They also call for further effective measures and actions to be taken, in conformity with international law, to remove the obstacles to the full realization of the right of self-determination of peoples living under colonial and foreign occupation, which continue to adversely affect their economic and social development as well as their environment.<sup>65</sup> Thus, conflicts management should be one of the key issues that should be addressed in the quest for sustainable development.

Within the Kenyan context, one of the most important natural resources is land and the Constitution provides that land in Kenya is to be held, used and managed in a manner that is equitable, efficient, productive and sustainable, and in accordance with the following principles: equitable access to land; security of land rights; sustainable and productive management of land resources; transparent and cost effective administration of land; sound conservation and

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<sup>60</sup> Haysom, N. & Kane, S., 'Negotiating natural resources for peace: Ownership, control and wealth-sharing,' Centre for Humanitarian Dialogue, Briefing Paper, October 2009, p. 8.

<sup>61</sup> Haysom, N. & Kane, S., 'Negotiating natural resources for peace: Ownership, control and wealth-sharing,' op cit, p. 5.

<sup>62</sup> Wilson, C. & Tisdell, C., 'Conflicts over Natural Resources and the Environment: Economics and Security,' *Working Papers on Economics, Ecology and the Environment, Working Paper No. 86*, September 2003; Lumerman, P., et al, 'Climate Change Impacts on Socio-environmental Conflicts: Diagnosis and Challenges of the Argentinean Situation,' (Initiative for Peacebuilding 2011).

<sup>63</sup> United Nations, *Transforming our world: the 2030 Agenda for Sustainable Development*, A/RES/70/1, para. 35.

<sup>64</sup> Ibid.

<sup>65</sup> Ibid.

protection of ecologically sensitive areas; elimination of gender discrimination in law, customs and practices related to land and property in land; and encouragement of communities to settle land disputes through recognised local community initiatives consistent with the Constitution.<sup>66</sup> This is in recognition of the fact that Kenya is a divided society with different communities who hold different values, attitudes and beliefs towards the land and its resources.

Further, it is also been observed that conflicts between biodiversity conservation and other human activities are intensifying as a result of growing pressure on natural resources and concomitant demands by some for greater conservation.<sup>67</sup> Consequently, approaches to reducing conflicts are increasingly focusing on engaging stakeholders in processes that are perceived as fair, i.e. independent and where stakeholders have influence, and which in turn can generate trust between stakeholders.<sup>68</sup> It is thus believed that increased trust through fair participatory processes makes conflict resolution more likely.<sup>69</sup> Arguably, central governments who are genuinely concerned about the sustainable use of their country's natural resources must, at a minimum, involve local communities in their management.<sup>70</sup> This means taking local communities into confidence and having confidence in them; it means engaging with their ideas, experiences, values, and capabilities and working with them, not on their behalf, to achieve resource-conservation objectives and community benefits.<sup>71</sup> It means being prepared to adjust national policies so that they can accommodate local interests, needs, and norms that are compatible with the long-term preservation of national ecosystems and their biological diversity.<sup>72</sup>

The Constitution of Kenya requires the States to, inter alia: ensure sustainable exploitation, utilisation, management and conservation of the environment and natural resources, and ensure the equitable sharing of the accruing benefits; encourage public participation in the management, protection and conservation of the environment; and utilise the environment and natural resources for the benefit of the people of Kenya.<sup>73</sup> Further, every person has a constitutional duty to cooperate with State organs and other persons to protect and conserve the environment and ensure ecologically sustainable development and use of natural resources.<sup>74</sup>

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<sup>66</sup> Constitution of Kenya 2010, Art. 60(1).

<sup>67</sup> Young, J.C., et al, 'The role of trust in the resolution of conservation conflicts,' *Biological Conservation*, Vol. 195, March 2016, pp. 196–202.

<sup>68</sup> Ibid.

<sup>69</sup> Ibid.

<sup>70</sup> Buckles, D. (ed), *Cultivating Peace: Conflict and Collaboration in Natural Resource Management*, (International Development Research Centre 1999), pp. vii-viii.

<sup>71</sup> Ibid.

<sup>72</sup> Ibid.

<sup>73</sup> Constitution of Kenya 2010, Art. 69(1).

<sup>74</sup> Ibid, Art. 69(2).

It is, therefore, arguable that one of the way of stemming natural resource conflicts would be striking a balance between conservation measures and access to resources by communities, through employing approaches that help in understanding the needs of the particular people and responding appropriately and consequently building trust within communities and between communities and the national government. It has also been argued that for conflict management to be successful there is need to conduct a historical analysis (with the participation of local people) so that the major issues can be identified, analysed and discussed.<sup>75</sup>

While conflicts cannot be avoided, there is a need to effectively manage them so as to ensure harmony amongst people and to prevent violence and the potential loss of lives and property. Management of natural resource conflicts also ensures security in terms of a guarantee of continued access to and use of the environmental resources necessary for to survival from generation to generation.

### 4.0 Natural Resource Conflicts Management in Kenya

Over the years, Kenya has been faced with conflicts over natural resources such as water, forests, minerals and land among others. Natural resource conflicts are unique and require being resolved expeditiously since they involve livelihoods of people. Communities depend heavily on natural resources for their livelihoods.<sup>76</sup> Renewable and non-renewable natural resources have conflict generating potential. Renewable resources include crop land, fresh water, free wood and fish. None renewable resources include petroleum and minerals.<sup>77</sup> Scarcities of agricultural land, forests, fresh water, and fish are those which contribute to the most violence. This can be partly attributed to lack of effective conflict management mechanisms that are respected by the people who are involved in the se and access to the resources aforesaid. Various groups, communities, developers, government and other organisations have differing ideas of how to access and utilize environmental resources. The conflicts if not addressed can escalate into violence, cause environmental degradation and undermine livelihoods.<sup>78</sup>

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<sup>75</sup> Chidhakwa, Z., 'Managing conflict around contested natural resources: a case study of Rusitu Valley area, Chimanimani, Zimbabwe,' *Natural Resource Conflict Management Case Studies: An Analysis of Power, Participation and Protected Areas*, (Southern Alliance for Indigenous Resources).

<sup>76</sup> Tyler, S. (ed), *Communities, Livelihoods, and Natural Resources: Action Research and Policy Change in Asia*, (International Development Research Centre, 2006), available at <http://www.idrc.ca/EN/Resources/Publications/openebooks/230-9/index.html> [Accessed on 17/01/2016]; Gomes, N., 'Access to water, pastoral resource management and pastoralists' livelihoods: Lessons learned from water development in selected areas of Eastern Africa (Kenya, Ethiopia, Somalia),' (Food and Agriculture Organization of the United Nations, 2006), available at <ftp://ftp.fao.org/docrep/fao/009/ah247e/ah247e00.pdf> [Accessed on 17/01/2016].

<sup>77</sup> Gizewski, P (1997) *Environmental Scarcity and Conflict*, Toronto, Canadian Security Intelligence Service p. 1.

<sup>78</sup> See generally Matiru V. (2000) *Conflict & Natural Resource Management*, Food & Agriculture Organisation (FAO); Buckles D & Rusnak D(1999) "Cultivating Peace: Conflict and collaboration in Natural Resource Management" IDRC/World Bank 1999 p. 3 & 4; Thayer DM (2003) "*Nature of Conflict over nature: Protected Areas, Transfrontier Conservation and the meaning of Development*" Saratunga Skidmore College-The School for International Training .

## Managing Natural Resource Conflicts in Kenya through Negotiation and Mediation

There is a legal and institutional framework in Kenya that is supposed to deal with natural resource conflicts and either resolve or manage them. These institutions include the courts of law, tribunals under various Acts,<sup>79</sup> the National Environmental Management Authority,<sup>80</sup> National Environmental Complaints Committee, Environment Tribunal and other various informal community based resource governance bodies.<sup>81</sup> The existing legal mechanism for managing natural resource conflicts as enshrined in the environmental law statutes include the courts of law both under civil and criminal law,<sup>82</sup> the National Environment Tribunal (NET),<sup>83</sup> National Environmental Complaints Committee (NECC),<sup>84</sup> Arbitral tribunals,<sup>85</sup> Statutory tribunals set up under various laws (such as the Land Adjudication Boards)<sup>86</sup> and customary law systems of conflict management.<sup>87</sup>

Some of the above conflict management mechanisms and institutions have not been very effective in managing natural resource conflicts. Courts, for instance, are formal, inflexible, bureaucratic and expensive to access. They address strict legal rights rather than the interest of the parties. The court system is adversarial in nature with limited room for negotiation and agreement on issues of interest to the parties. Law itself, has at times been a source of conflict rather than a conflict solver since it insists on pursuing personal rights rather than reaching agreed compromise and implementation of various laws may also lead to conflicting outcomes.<sup>88</sup> This is not to say that personal rights are to be ignored for what would be seen as the greater good of the community. However, there are instances where realisation of such personal rights may compromise the general stability of the society.

For instance, in the traditional community setup, there was need to balance community interests with that of individuals especially where such rights are claimed against the interests of an entirely different community. In such instances, the concerned communities will not look at those rights as accruing to individuals but to the community as a whole. Even where a threat arises, they perceive it as a threat to the whole community.<sup>89</sup>

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<sup>79</sup> They include the Central Land Appeals Board under the Land Control Act (Cap 302), amongst others.

<sup>80</sup> Established under S.7 of the EMCA (Cap 8 of 1999)

<sup>81</sup> Some communities like the Meru, Maasai, Giriama etcetera still have councils of elders who sit and resolve disputes that erupt within their respective communities.

<sup>82</sup> Environmental Management and Co-ordination Act, Act. No. 8 of 1999, Part XIII Section 137-146

<sup>83</sup> *Ibid*, Part. XII sections 125-136

<sup>84</sup> Environmental Management and Co-ordination (Amendment) Act, No. 5 of 2015, S. 20.

<sup>85</sup> These are mainly established under Arbitration Act, Act. No. 4 of 1995

<sup>86</sup> Established under Land Adjudication Act, Cap. 284, Laws of Kenya

<sup>87</sup> Patricia Kameri-Mbote, Towards greater Access to Justice in Environmental Disputes in Kenya: Opportunities for Intervention, IELRC Working 2005-1, available at <http://www.ielrc.org/content/w0501.pdf> <last accessed on 01/08/2008>

<sup>88</sup> Tyler, S.R., 'Policy Implications of Natural Resource Conflict Management,' 2006, available at <http://www.idrc.ca/>

<sup>89</sup> Ejizu, C.I., 'African Traditional Religions And The Promotion of Community-Living in Africa,' available at <http://www.afrikaworld.net/afrel/community.htm> [Accessed on 10/02/2016]; See also Baland, J.M & Platteau, J.P.,

A bottom-top approach to natural resource management, including conflict management, creates an opportunity to involve the local people who may have insiders' grasp of the issues at hand. It is for this reason that this paper advocates for use of conflict management approaches that incorporate public participation. Litigation, which is a state-sponsored approach to conflict management, not afford the affected parties a reasonable and fair opportunity to participate in finding a lasting solution. This is because, apart from the coercive nature of the process, litigation is also subject to other procedural technicalities which may affect its effectiveness.<sup>90</sup>

The national legal systems have been associated with a number of limitations which include, inter alia: inaccessibility to the poor, women, marginalized groups and remote communities because of cost, distance, language barriers, political obstacles, illiteracy and discrimination; failure to consider indigenous knowledge, local institutions and long-term community needs in decision-making; use of judicial and technical specialists who lack the expertise, skills and orientation required for participatory natural resource management; use of procedures that are generally adversarial and produce win - lose outcomes; providing only limited participation in decision-making for conflict parties; likely difficulty to reach impartial decisions if there is a lack of judicial independence, corruption among State agents, or an elite group that dominates legal processes; and use of highly specialized language of educated elite groups, favouring business and government disputants over ordinary people and communities.<sup>91</sup>

Conflicts need to be managed through interactive, participatory and inclusive approaches for the sake of balancing interests, power and adjusting parties' expectations, in order to avoid the potentially negative effects of conflict in a society. There is a need to strike a balance among the three component parts of a conflict, namely, goal incompatibility, attitudes and behaviour, in order to ensure a peaceful society where groups do not unduly use their power to suppress the perceivably weak groups or individuals.

### 5.0 Alternative Dispute Resolution (ADR) and Natural Resource Conflicts Management

Article 33 of the *Charter of the United Nations* outlines the conflict management mechanisms in clear terms and it forms the legal basis for the application of Alternative Dispute Resolution (ADR) mechanisms in disputes between parties be they States or individuals. It outlines the various conflict management mechanisms that parties to a conflict or dispute may

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'Compensations and Customary Rights in the Context of the Concessionaire Companies: An Economic Approach,' (International Growth Centre, September 25, 2013).

<sup>90</sup> Ojwang, J.B., "The Role of the Judiciary in Promoting Environmental Compliance and Sustainable Development," 1 *Kenya Law Review Journal* 19 (2007), pp. 19-29, p. 29.

<sup>91</sup> FAO, 'Negotiation and mediation techniques for natural resource management,' op cit.



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resort to. It provides that the parties to any dispute should, first of all seek a solution by *negotiation, enquiry, mediation, conciliation, arbitration, judicial settlement, resort to regional agencies or arrangements, or other peaceful means of their own choice* (emphasis added).<sup>92</sup> Despite this, ADR mechanisms have not been adequately utilized in management of natural resource conflicts in Kenya.

The phrase alternative dispute resolution refers to all those decision-making processes other than litigation including but not limited to negotiation, enquiry, mediation, conciliation, expert determination, arbitration and others. To some writers, however, the term '*alternative dispute resolution*' is a misnomer as it may be understood to imply that these mechanisms are second-best to litigation which is arguably not true.<sup>93</sup>

Alternative Dispute Resolution (ADR) mechanisms include mediation, conciliation, negotiation and traditional/community based dispute management mechanisms. ADR methods have the advantages of being cost effective, expeditious, informal and participatory. Parties retain a degree of control and relationships can be preserved. Conflict management mechanisms such as mediation encourages "win-win" situations, parties find their own solutions, they pursue interests rather than strict legal rights, are informal, flexible and attempts to bring all parties on board.<sup>94</sup>

As such ADR mechanisms allow public participation in enhancing access to justice as they bring in an element of efficiency, effectiveness, flexibility, cost-effectiveness, autonomy, speed and voluntariness in conflict management. Some like mediation and negotiation are informal and not subject to procedural technicalities as does the court process. They are effective to the extent that they will be expeditious and cost-effective compared to litigation.<sup>95</sup> The use of mediation in natural resource conflicts management is especially common in Canada.<sup>96</sup>

ADR Mechanisms are arguably most appropriate in enhancing access to justice as they allow the public to participate in the managing of their conflicts. This way less disputes will get to the courts and this will lead to a reduction of backlog of cases.

TDRMs include informal mediation, negotiation, problem-solving workshop, council of elders, consensus approaches among others. It has been observed that where traditional community leadership was strong and legitimate it had positive impacts in promoting local

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<sup>92</sup> United Nations, *Charter of the United Nations*, 24 October 1945, 1 UNTS XVI.

<sup>93</sup> P. Fenn, P., "Introduction to Civil and Commercial Mediation", in Chartered Institute of Arbitrators, *Workbook on Mediation*, (CIArb, London, 2002), pp. 50-52.

<sup>94</sup> Fenn, P., "Introduction to Civil and Commercial Mediation", op. cit, p.10.

<sup>95</sup> Article 159 (2) (d) provides that justice shall be administered without undue regard to procedural technicalities.

<sup>96</sup> Dorcey, A.H.J. & Riek, C.L., 'Negotiation-Based Approaches to the Settlement of Environmental Disputes in Canada,' *Workshop on Political Theory and Policy Analysis*, 1987; Berkes, F., et al, 'Co-Management: The Evolution Of The Theory And Practice of Joint Administration Of Living Resources,' TASO Research Report, Second Series, No. 1, *Paper Presented at the Second Annual Meeting of IASCP University of Manitoba, Winnipeg, Canada*, Sept. 26-29, 1991.

people's priorities in natural resource management.<sup>97</sup> The traditional and customary systems for managing conflict are associated with a number of strengths which include: they encourage participation by community members, and respect local values and customs; are more accessible because of their low cost, their flexibility in scheduling and procedures, and their use of the local language; they encourage decision-making based on collaboration, with consensus emerging from wide-ranging discussions, often fostering local reconciliation; they contribute to processes of community empowerment; informal and even formal leaders may serve as conciliators, mediators, negotiators or arbitrators; and finally, long-held public legitimacy provides a sense of local ownership of both the process and its outcomes.<sup>98</sup>

In light of Article 159 (2) (c) and in relevant cases, the ADR mechanisms should be used in managing certain community disputes such as those involving use and access to natural resources among the communities in Kenya, for enhanced access to environmental justice and environmental democracy.

While most of the foregoing ADR mechanisms can effectively be applied in the management of natural resource conflicts management, this paper is biased towards negotiation and mediation and explores at a greater length the application of the two mechanisms in conflicts. This is because the author is not keen on settlement mechanisms but resolution mechanisms and the two main approaches in resolution are negotiation and mediation.

The process of managing natural resource conflicts is an off-shoot of the right to access to environmental justice and by extension, environmental democracy. The right of access to justice is essential as it affords the means by which the public challenge application of and implementation of environmental laws and policies.<sup>99</sup>

Natural resource conflicts are unique as they involve people's lives. Left to escalate, suffering and death may be the undesirable result. The conflict management mechanisms referred to herein as ADR have certain advantages that make them suitable for use in resolution of natural resource conflicts. For example, the mechanisms that allow for maximum party autonomy such as negotiation, conciliation and mediation are cost effective flexible, informal and leave room for parties to find their own lasting solutions to problems. They are thus particularly suitable for the resolution of natural resource conflicts.

Courts and formal tribunals are sometimes inflexible, bureaucratic and do not foster the maintenance of cordial relations between the parties. Parties come out of the proceedings before

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<sup>97</sup> Shackleton, S., et al, 'Devolution And Community-Based Natural Resource Management: Creating Space for Local People to participate and Benefit?' *Overseas Development Institute Natural Resource Perspectives*, No. 76, March 2002, p.4.

<sup>98</sup> FAO, 'Negotiation and mediation techniques for natural resource management,' op cit.

<sup>99</sup> *Ibid.*

such courts and tribunals bitter and discontented. It has been argued that through ADR, multiparty "win-win" options are sought by focusing on the problem (not the person) and by creating awareness of interdependence among stakeholders.<sup>100</sup> This is justified on the fact that among the issues that influence negotiation attitudes, interdependence is of central importance, as actors' attitudes and behaviour are shaped by the fact that they will need to coexist after the period of negotiation.<sup>101</sup> Notably it can be said that the attributes of party autonomy, flexibility, all-inclusiveness, informality and acceptability by all parties can be exploited to come up with acceptable solutions to environmental problems and natural resource conflicts. It has compellingly been suggested that mediation, through the intervention of an impartial third party into a dispute, deals well with significant value differences, which are considered extremely difficult to resolve where there is no consensus on appropriate behaviour or ultimate goals.<sup>102</sup> Further, ADR, drawing on the strengths of mediation techniques such as identification and reframing, can address value conflict, through specific techniques which include: transforming value disputes into interest disputes; identifying superordinate goals (both short- and long-term); and avoidance.<sup>103</sup>

### 5.1 Negotiation and Natural Resource Conflicts Management

Negotiation is a process that involves parties meeting to identify and discuss the issues at hand so as to arrive at a mutually acceptable solution without the help of a third party. This refers to a process where parties themselves attempt to settle their differences using a range of techniques from concession and compromise to coercion and confrontation. It is also described as a process involving two or more people of either equal or unequal power meeting to discuss shared and/or opposed interests in relation to a particular area of mutual concern.<sup>104</sup> Negotiation is also defined as a process by which states and other actors communicate and exchange proposals in an attempt to agree about the dimensions of conflict termination and their future relationship.<sup>105</sup>

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<sup>100</sup> Buckles, D. (ed), *Cultivating Peace Conflict and Collaboration in Natural Resource Management*, (International Development Research Centre 1999), p.5.

<sup>101</sup> *Ibid*, p. 110.

<sup>102</sup> Daniels, S.E. & Walker, G.B., 'Collaborative Learning And Ecosystem-Based Management,' *Environ Impact Asses Rev*, Vol. 16, 1996, pp. 71-102, p. 82.

<sup>103</sup> *Ibid*.

<sup>104</sup> Negotiations in Debt and Financial Management 'Theoretical Introduction to Negotiation: What Is Negotiation?', Document No.4, December 1994,

Available at [http://www2.unitar.org/dfm/Resource\\_Center/Document\\_Series/Document4/3Theoretical.htm](http://www2.unitar.org/dfm/Resource_Center/Document_Series/Document4/3Theoretical.htm) [Accessed on 13/12/2015].

<sup>105</sup> Bercovitch, J. & Jackson, R., 'Negotiation or Mediation?: An Exploration of Factors Affecting the Choice of Conflict Management in International Conflict,' *Negotiation Journal*, January 2001, Vol. 17, Issue 1, pp 59-77, p. 60.

There are various approaches to negotiation which include: positional negotiation; principled negotiation; and interest-based negotiation.<sup>106</sup> Positional negotiation is associated with firstly, separating the people from the problem; secondly, focusing on interests, not positions; thirdly, inventing options for mutual gain; and finally, insisting on objective criteria.<sup>107</sup> As such the focus of negotiations is the common interests of the parties rather than their relative power or position. The goal is to avoid the overemphasis of how the dispute arose but to create options that satisfy both the mutual and individual interests.<sup>108</sup> Principled negotiation on the other hand, decides issues on their merits rather than through a haggling process focused on what each side says it will and will not do. It suggests that a negotiator should look for mutual gains whenever possible, and that where various interests conflict, negotiators are encouraged to have a result based on some fair standards independent of the will of either side.<sup>109</sup> Interest-based negotiation shifts the focus of the discussion from positions to interests, raising a discussion based on a range of possibilities and creative options, for the parties to arrive at an agreement that will satisfy the needs and interests of the parties.<sup>110</sup>

Since the aim of negotiation as discussed within the context of this paper is to arrive at "win-win" solutions, positional bargaining is not recommended as the general approach to negotiation because arguing over hard-line positions may produce unwise agreements, prove inefficient, endanger an ongoing relationship and also lead to formation of coalition among parties whose shared interests are often more symbolic than substantive.<sup>111</sup>

Negotiations are seen as preferable due to their unstructured often lack of formal procedures, suggesting a format which caters to the uniqueness of each negotiation.<sup>112</sup> The import of this is that due to the flexibility nature of the process, it is possible for parties to agree to settle on what works for them in a given scenario. Negotiation affords parties autonomy in the process and over the outcome for purposes of ensuring that they come up with creative solutions. By taking a collaborative rather than a competitive approach to negotiation, parties can attempt to find a solution satisfactory to both parties-making both sides feel like winners.<sup>113</sup>

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<sup>106</sup> R. Fisher, *et al*, *Getting to Yes: Negotiating an Agreement without Giving In*, *op cit*, pp. xxvi-xxvii.

<sup>107</sup> Roger Fisher and Ury, W., *Getting to Yes-Negotiating Agreement Without Giving in* *Op cit*., p. 42; See also Ireland Law Reform Commission, *Consultation Paper on Alternative Dispute Resolution*, July 2008, p. 43.

<sup>108</sup> *Ibid*.

<sup>109</sup> *Ibid*.

<sup>110</sup> UNESCO-IHP, "Alternative Dispute Resolution Approaches And Their Application In Water Management: A Focus On Negotiation, Mediation And Consensus Building" Abridged version of Yona Shamir, *Alternative Dispute Resolution Approaches and their Application*, Accessible at <http://unesdoc.unesco.org/images/0013/001332/133287e.pdf> [Accessed on 19/01/2016]

<sup>111</sup> *Ibid*, p.23.

<sup>112</sup> FAO, 'Alternative Conflict Management: The Role of Alternative Conflict Management in Community Forestry,' available at <http://www.fao.org/docrep/005/x2102e/X2102E02.htm>

<sup>113</sup> A. French, *Negotiating Skills*, (Alchemy, 2003), p. viii.

The outcome of a collaborative approach to negotiations is: improved relationships; a better chance of building trust and respect; self-confidence; more enjoyment; less stress; and more satisfactory results.<sup>114</sup>

As a vital first step in negotiation, it is important that the parties have conceptual clarity of the different issues, especially the difference between ownership issues, regulatory-authority control issues, and issues relating to the treatment of natural-resource revenues.<sup>115</sup> Separating people from the issues allows the parties to address the issues without damaging their relationship and also helps them to get a clearer view of the substantive problem.<sup>116</sup>

With regard to natural resource management, public participation has been described as a form of negotiation, where there is joint decision-making among parties with interdependent yet incompatible interests.<sup>117</sup> Principled negotiation has advantages that can facilitate mutual agreement on issues and consequently achieve conflict resolution. Negotiation is hailed as a process that can lead to empowerment of village-level and government participants and increased awareness of the conflicts and their causes.<sup>118</sup> Through participation of communities in decision-making through negotiation, conflicts can be resolved or averted since each party is afforded an opportunity to raise their concerns in a joint forum where they can all be addressed with the aim of reaching a consensus or compromise.

It has been pointed out that in a conflict-oriented natural resources situation, one must learn and communicate about: technical, legal, and financial issues at hand; procedural issues; perceptions, concerns, and values of other participants; one's own goals, and those of others; personalities; communication styles; one's own set of options; and relative benefits of different strategies.<sup>119</sup> Thus, the lead negotiators ought to have a good grasp of the issues at hand. This is one of the ways that they can adequately address not only their needs and interests but also those of opponents so as to facilitate a win-win situation.<sup>120</sup>

Negotiation may not always work and as such, parties may be required to try another approach by inviting a third party where they have reached a deadlock and cannot work out a consensus or a compromise. The third party comes in to help the parties clarify issues, interests and needs. Negotiation with the help of a third party is called mediation. Negotiation leads to

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<sup>114</sup> Ibid.

<sup>115</sup> Haysom, N. & Kane, S., 'Negotiating natural resources for peace: Ownership, control and wealth-sharing,' Centre for Humanitarian Dialogue, Briefing Paper, October 2009, p. 26.

<sup>116</sup> Fisher, R. and Ury, W., *Getting to Yes-Negotiating Agreement Without Giving in*, op cit., pp. 10-11

<sup>117</sup> Daniels, S.E. & Walker, G.B., 'Collaborative Learning And Ecosystem-Based Management,' *Environ Impact Asses Rev*, Vol. 16, 1996, pp. 71-102, pp. 78-79.

<sup>118</sup> Castro, A.P. & Nielsen, E. (eds), 'Natural resource conflict management case studies: an analysis of power, participation and protected areas,' (Food and Agriculture Organization of the United Nations, 2003), p. 224.

<sup>119</sup> Ibid, p. 79.

<sup>120</sup> Ury, W., *Getting to Yes with Yourself and Others*, (HarperThorsons, 2015), pp. 147-148.

mediation in the sense that the need for mediation arises after the conflicting parties have attempted negotiation, but have reached a deadlock.<sup>121</sup>

## **5.2 Mediation and Natural Resource Conflicts Management**

Mediation is a voluntary collaborative process where individuals who have a conflict with one another identify issues, develop options, consider alternatives and reach a consensual agreement.<sup>122</sup> Trained and untrained mediators open communications to resolve differences in a non-adversarial confidential manner. It can also refer to a private and non-binding form of conflict management where an independent third party (neutral) facilitates the parties reaching their own agreement to settle a dispute. It is a structured process where the settlement becomes a legally binding contract.<sup>123</sup>

Mediation is also defined as the intervention in a standard negotiation or conflict of an acceptable third party who has limited or no authoritative decision-making power but who assists the involved parties in voluntarily reaching a mutually acceptable settlement of issues in dispute. Within this definition, mediators may play a number of different roles, and may enter conflicts at different levels of development or intensity.<sup>124</sup> Mediation can be classified into two forms namely: Mediation in the political process and mediation in the legal process.

Mediation in the political process is informed by resolution as against settlement. It allows parties to have autonomy over the choice of the mediator, the process and the outcome. The process is also associated with voluntariness, cost effectiveness, informality, focus on interests and not rights, creative solutions, personal empowerment, enhanced party control, addressing root causes of the conflict, non-coerciveness and enduring outcomes. With these perceived advantages, the process is more likely to meet each party's expectations as to achievement of justice through a procedurally and substantively fair process of justice.<sup>125</sup>

In relation to natural resource conflicts, it is arguable that an approach that seeks to eliminate the root causes of conflict are to be preferred considering the great importance attached to these resources. Human needs and desires are continuous and therefore, there is need to ensure that the unavoidable conflict that is bound to arise is controlled or eliminated altogether. Scholars believe that participatory and collaborative planning is useful in preventing conflicts

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<sup>121</sup> M. Mwangi, *Conflict in Africa; Theory, Processes and Institutions of Management*, (Centre for Conflict Research, Nairobi, 2006), pp. 115-116.

<sup>122</sup> J.G. Merrills, *International Dispute settlement*, (Cambridge University Press, Cambridge, 1991).

<sup>123</sup> Fenn, P., "Introduction to Civil and Commercial Mediation," op cit p. 10.

<sup>124</sup> Moore, C., *The Mediation Process: Practical Strategies for Resolving Conflict*, 3rd, (San Francisco: Jossey-Bass Publishers, 2004).

<sup>125</sup> See generally Muigua, K., "Resolving Environmental Conflicts through Mediation in Kenya" Ph.D. Thesis, 2011, *Unpublished*, University of Nairobi.

resulting from government actions or policies.<sup>126</sup> This view may be validated in relation to Kenya, where the Constitution recognises the significance of public participation in decision-making and governance matters. For instance, among the national values and principles of governance that are binding on all State organs, State officers, public officers and all persons whenever any of them— applies or interprets this Constitution; enacts, applies or interprets any law; or makes or implements public policy decisions, include inter alia, democracy and participation of the people; equity, social justice, inclusiveness, equality, non-discrimination and protection of the marginalised; good governance, integrity, transparency and accountability.<sup>127</sup>

Mediation in the legal process is a process where the conflicting parties come into arrangements which they have been coerced to live or work with while exercising little or no autonomy over the choice of the mediator, the process and the outcome of the process. This makes it more of a settlement mechanism that is attached to the court as opposed to a resolution process and defeats the advantages that are associated with mediation in the political process.<sup>128</sup>

The salient features of mediation (in the political process) are that it emphasizes on interests rather than (legal) rights and it can be cost - effective, informal, private, flexible and easily accessible to parties to conflicts. These features are useful in upholding the acceptable principles of justice: *expedition; proportionality; equality of opportunity; fairness of process; party autonomy; cost-effectiveness; party satisfaction* and *effectiveness of remedies* (emphasis added).<sup>129</sup> This makes mediation a viable process for the actualization of the right of access to justice. While both processes may be recommended for use in resolving natural resource conflicts in Kenya, mediation in the political process is to be preferred due to its obvious advantages, as highlighted above.

Kenya resorted to mediation coupled with negotiation after the post-election conflict through the Koffi Annan initiative<sup>130</sup>. Mediation offers a conflict management mechanism where all parties come to the table and with the help of the mediator find their own solutions. It was ADR that saved Kenya from the brink of total anarchy. However, mediation often work best in

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<sup>126</sup> Ibid.

<sup>127</sup> Art. 10, Constitution of Kenya 2010.

<sup>128</sup> Ibid, Chapter4; See also sec.59A, B, C& D of the Civil Procedure Act on Court annexed mediation in Kenya; See also Mediation (Pilot Project) Rules, 2015.

<sup>129</sup> See Maiese, M., "*Principles of Justice and Fairness*," in Burgess, G. and Heidi Burgess, H. (Eds.) Conflict Information Consortium, *Beyond Intractability*, University of Colorado, Boulder (July 2003).

<sup>130</sup> Koffi Annan, the former Secretary General of the United Nations mediated the all-out conflict that was labeled the 'post-election' violence in 2007 – 08 in Kenya. Essentially the long-term causes of the conflict were issues relating to access to and use of natural resources. The initiative resulted in the signing of the peace agreement formalized in the National Accord & Reconciliation Act.

a conflict in which the parties have had a significant prior relationship or when the parties have an interest in continuing a relationship in the future.<sup>131</sup>

In the Koffi Annan initiative, mediation was used in the face of the apparent failure or impotence of the legal and institutional mechanisms for the resolution of political conflict in Kenya. A critical look at ADR methods in the resolution of natural resource conflicts is worthwhile considering the many positive attributes and potential for involving the public and reaching of acceptable solutions that can withstand the test of time. Mediation is democratic and ensures public participation in decision making, especially in matters relating to natural resources management.

Mediation in the informal context leads to a resolution and in environmental management, it involves parties' participation in development planning, decision making and project implementation. The parties must be well informed so as to make sound judgements on environmental issues. Indeed, it has been observed that natural-resource negotiations are often a high-stakes, high-risk game, and one important role the mediator can therefore play is to empower the parties by providing them with the knowledge to have the confidence to negotiate.<sup>132</sup> The import of this is that they must be well versed with mediation as a process but also the needs of each of the parties. This way, they would be able to know the appropriate approaches and skills to put into play.

It is also important to identify the correct interest groups who are regarded as stakeholders in the allocation of resources and the extent of their respective rewards against the overall importance of natural resources to financing national development must be determined.<sup>133</sup> It is argued that to be successful, a process will need to engage a broad range of actors, including not only those who have legitimate claims to ownership of the resource, but also those who could be affected by the allocation of authorities over the resource or the distribution of its revenues.<sup>134</sup> In the case of Kenya, it would therefore mean going beyond the community especially where the resource in question is of national importance, such as water bodies.

The central quality of mediation is its capacity to reorient the parties towards each other, not by imposing rules on them, but by helping them to achieve a new and shared perception of their relationship.<sup>135</sup> In conflict resolution processes like mediation, the goal, then, is not to get

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<sup>131</sup> J.S. Murray, Alan Scott Rau & Edward F. Sherman, *Processes of Dispute Resolution: The Role of Lawyers*, University casebook series, Foundation Press, 1989, p. 47.

<sup>132</sup> Haysom, N. & Kane, S., 'Negotiating natural resources for peace: Ownership, control and wealth-sharing,' Centre for Humanitarian Dialogue, Briefing Paper, October 2009, p. 27.

<sup>133</sup> *Ibid.*, p. 28.

<sup>134</sup> *Ibid.*

<sup>135</sup> Lon L. Fuller, *Mediation—Its Forms and Functions*, 44 S. CAL. L. REV. 305 (1971) [Quoted in Ray, B., 'Extending The Shadow Of The Law: Using Hybrid Mechanisms To Develop Constitutional Norms In Socioeconomic Rights Cases' *Utah Law Review*, No. 3, 2009, pp.802-803.



parties to accept formal rules to govern their relationship, but to help them to free themselves from the encumbrance of rules and to accept a relationship of mutual respect, trust, and understanding that will enable them to meet shared contingencies without the aid of formal prescriptions laid down in advance.<sup>136</sup>

One criticism, however, is that in mediation, power imbalances in the process may cause one party to have an upper hand in the process thus causing the outcome to unfavourably address his or her concerns or interests at the expense of the other.<sup>137</sup> Nevertheless, in any type of conflict, it is a fact that power imbalances disproportionately benefit the powerful party. However, it may be claimed that inequality in the relationship does not necessarily lead to an exercise of that power to the other party's disadvantage.<sup>138</sup> Another weakness of mediation is that it is non-binding. It is thus possible for a party to go into mediation to buy time or to fish for more information. However, in *Thakrar V Cir Cittero Menswear plc (in administration)*, {2002} EWHC 1975 (ch), the English High Court held that a mediated settlement was an enforceable contract.<sup>139</sup> To deal with the problem of unenforceability, it has been affirmed before the parties go into mediation, there must be firstly, a mediation agreement binding the parties to mediation. After mediation, there is an agreement containing the terms of mediation. This agreement must be signed by all the parties to the mediation. In the agreement the parties agree that they were bound with the resolutions reached by the mediator. This final agreement is a document which can be tabled in court to show that one party is reneging from the agreed resolutions.<sup>140</sup> The results of mediation must be a mutual agreement between the parties to the dispute.<sup>141</sup> To achieve this, the mediator may consider incorporation of consensus building into the mediation, which seeks to build the capacity of people to develop a dialogue with each other, either directly or indirectly, to find a way forward based on consensus which generates mutual gains for all parties with the minimum of compromise and trade-off.<sup>142</sup> This can ensure that even when they reach the final stage, chances of having an outcome acceptable to all sides are enhanced.

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<sup>136</sup> Lon L. Fuller, *Mediation—Its Forms and Functions*, 44 S. CAL. L. REV. 305 (1971) [Quoted in Ray, B., 'Extending The Shadow Of The Law: Using Hybrid Mechanisms To Develop Constitutional Norms In Socioeconomic Rights Cases' *Utah Law Review*, No. 3, 2009, pp.802-803.

<sup>137</sup> See generally, Fiss, O., "Against Settlement" 93 *Yale Law Journal*, 1073 (1984).

<sup>138</sup> Abadi, S.H., The role of dispute resolution mechanisms in redressing power imbalances - a comparison between negotiation, litigation and arbitration, p. 3, *Effectius Newsletter*, Issue 13, (2011)

<sup>139</sup> As quoted in *Kenya Plantation & Agricultural Workers Union V Maji Mazuri Flowers Ltd* [2012] eKLR, Cause 1365 of 2011.

<sup>140</sup> *Greenhouse Management Limited v Jericho Development Company Limited* [2015] eKLR, Civil Case 49 of 2015.

<sup>141</sup> Ibid; See also *Stephen Kiprotich Saina v Francisco Okutoyi Ayot & another* [2014] eKLR, E&L 348 of 2013.

<sup>142</sup> Warner, M., 'Conflict Management in Community-Based Natural Resource Projects: Experiences from Fiji and Papua New Guinea,' op cit, p. 16.

## 6.0 Enhancing the Use of Negotiation and Mediation in Natural Resource Conflicts Management in Kenya

Whereas natural resource conflicts may not be fully eliminated but they can be managed in such a way that Kenya avoids the violence that has been witnessed in the recent past in contests involving access to and use of natural resources. Peace can be achieved through the use of negotiation and mediation to facilitate conflict resolution and transformation.

It is also noteworthy that ADR can only work in appropriate cases. There is a need to strengthen the existing legal and institutional framework for the resolution of natural resource conflicts so as to make it effective in the face of the ever increasing natural resource conflicts. Kenya should learn from other jurisdictions that have combined the legal and institutional frameworks with the tenets of ADR and gone on to manage natural resource conflicts effectively.<sup>143</sup> Kenya can learn and benefit from the case of Rwanda's mandatory mediation framework where carrying the agenda of local ownership of conflict resolution, the Rwandan government passed *Organic Law No. 31/2006* which recognises the role of *abunzi* or local mediators in conflict resolution of disputes and crimes.<sup>144</sup> The Constitution of Rwanda provides for the establishment in each Sector a "Mediation Committee" responsible for mediating between parties to certain disputes involving matters determined by law prior to the filing of a case with the court of first instance.<sup>145</sup> The Mediation Committee comprises of twelve residents of the Sector who are persons of integrity and are acknowledged for their mediating skills.<sup>146</sup> In other jurisdictions, there has been adoption of management approaches which attempts to mitigate resource development conflict involving disputed territory known under several names, such as *co-management*, *joint management*, or *joint stewardship* (emphasis added).<sup>147</sup> Co-management is an inclusionary, consensus-based approach to resource use and development. Through this approach, there is sharing of decision-making power with nontraditional actors in the process of resource management, whose nontraditional actors include those other than either state managers or industry, such as local resource users, environmental groups, or aboriginal

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<sup>143</sup> For example, Canada where it is provided under Rule 24.1 for Mandatory Mediation under Regulation 194 of the Revised Regulations of Ontario of 1990 made under the courts of Justice Act.

<sup>144</sup> M. Mutisi, "Local conflict resolution in Rwanda: The case of *abunzi* mediators", in M. Mutisi and K. Sansculotte-Greenidge (eds), *Integrating Traditional and Modern Conflict Resolution: Experiences from selected cases in Eastern and the Horn of Africa*, pp. 41-74 at p.41, African Centre for the Constructive Resolution of Disputes (ACCORD), Africa Dialogue Monograph Series No. 2/2012 Available at <http://accord.org.za/images/downloads/monograph/ACCORD-monograph-2012-2.pdf> [Accessed on 20/01/2016]

<sup>145</sup> Article 159, Constitution of Rwanda, 2003.

<sup>146</sup> *Ibid.*

<sup>147</sup> Campbell, T., 'Co-management of Aboriginal Resources,' (Adopted from *Information North*, Vol 22, no.1 (March 1996), Arctic Institute of North America), available at <http://arcticcircle.uconn.edu/NatResources/comanagement.html> [Accessed on 20/01/2016]

people.<sup>148</sup> This approach is also lauded for the fact that it stresses negotiation rather than litigation as a means to resolve conflict and its ability to combine western scientific knowledge and traditional environmental knowledge for the purpose of improving resource management.<sup>149</sup> Arguably, this can create feelings of mutual trust and participation, with room to raise and address concerns from all the involved parties. Natural resource conflicts are thus minimized or eliminated. Indeed, communities have often asserted their rights in natural resource exploitation and participation, and with success.<sup>150</sup> Trust does not however emerge simply through increased interactions (interpersonal trust) but from a genuine willingness to share power, in terms of knowledge and decision implementation, especially in situations where local stakeholders are dependent on and knowledgeable about natural resources.<sup>151</sup> Such trust-building, it is argued, requires effort and resources however, as well as developing opportunities for appropriate dialogue between stakeholders to identify shared problems and in turn shared solutions.<sup>152</sup>

Lessons from various jurisdictions can be used to enhance our conflict management capabilities. However, it is noteworthy that currently, there are efforts by the legal fraternity in Kenya to enhance legal and institutional frameworks governing mediation in general.<sup>153</sup> The *Civil Procedure Act*<sup>154</sup> provides for mediation of disputes.<sup>155</sup> There are also the *Mediation (Pilot Project) Rules, 2015*<sup>156</sup> which are meant to apply to all civil actions filed in the Commercial and Family Divisions of the High Court of Kenya at Milimani Law Courts, Nairobi, during the

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<sup>148</sup> Ibid.

<sup>149</sup> Ibid.

<sup>150</sup> Loon, J.V., 'Canada Natives Block Energy Projects: 'We Own It All',' *Bloomberg Markets*, January 27, 2014. Available at <http://www.bloomberg.com/news/articles/2014-01-27/harper-collides-with-native-canadians-natural-resources-claims> [Accessed on 20/01/2016]; See also Amnesty International, et al, 'Nowhere to go: Forced Evictions in Mau Forest, Kenya,' *Briefing Paper, April 2007*; Sang J.K., Case study 3-Kenya: The Ogiek in Mau Forest, April 2001; *Centre for Minority Rights Development (Kenya) and Minority Rights Group International on behalf of Endorois Welfare Council v. Kenya*, 276/2003, African Commission on Human and Peoples' Rights, 4 February 2010.

<sup>151</sup> Young, J.C., et al, 'The role of trust in the resolution of conservation conflicts,' op cit.

<sup>152</sup> Ibid, p. 202.

<sup>153</sup> W. Mutunga, Chief Justice & President Of The Supreme Court Of Kenya, 'Alternative Dispute Resolution and Rule of Law' For East African –Prosperity,' remarks By The Chief Justice At The East African Arbitrators Conference September 25, 2014. pp. 3-4. Available at <http://www.judiciary.go.ke/portal/assets/files/CJ%20speeches/Cjs%20Speech%20ADR%20-%20Sept.%2025,%202014,%20Windsor.pdf> [Accessed on 20/01/2016]; "Judiciary to adopt alternative dispute resolution mechanism," People Correspondent, *People Daily Newspaper*, 10 March, 2015. Available at <http://mediamaxnetwork.co.ke/peopledaily/139823/judiciary-adopt-alternative-dispute-resolution-mechanism/> [Accessed on 20/01/2016]. The Chief Justice of Kenya Dr. Willy Mutunga appointed twelve members to the Mediation and Accreditation Committee. The Committee is chaired by a serving Judge and it is responsible for determining the criteria for the certification of mediators, proposing rules for the certification of mediators, maintaining a register of qualified mediators, enforcing such code of ethics for mediators as may be prescribed and setting up appropriate training programmes for mediators.

<sup>154</sup> Cap 21, Laws of Kenya.

<sup>155</sup> Sections 2 and 59 Civil Procedure Act as Amended by the Statute Law (Miscellaneous Amendments) Act No. 17 of 2012, Government Printer, Nairobi, 2012, at pp.1092-1097.

<sup>156</sup> Legal Notice No. 197 of 2015, *Kenya Gazette Supplement No. 170*, 9<sup>th</sup> October, 2015, pp. 1283-1291 (Government Printer, Nairobi, 2015).

Judiciary's Pilot Project.<sup>157</sup> The Rules provide that every civil action instituted in court after commencement of the Rules, should be subjected to mandatory screening by the Mediation Deputy Registrar and those found suitable and may be referred to mediation.<sup>158</sup>

Non-Governmental Organisations (NGOs) have played an important facilitative and capacity building role in other jurisdictions, helping to bridge divergent views between local people and government agencies and manage conflict within or among communities.<sup>159</sup> NGOs working with local communities often have good will from the local people and hence, it is recommended that where there are negotiation and mediation talks, such organisations can play a major role in enhancing the communities' participatory capacity and boost the chances of reaching a mutually agreed outcome. They can achieve this through enhancing communities' access to information for informed decision-making as well as helping the community to understand the complex aspects of the law.<sup>160</sup>

Environmental democracy which involves giving people access to information on environmental rights, easing access to justice in environmental matters and enabling public participation in environmental decision making, inter alia, is desirable in the Kenyan context.<sup>161</sup> With regard to public participation in natural resource management, it has been argued that since most resource issues today are less dependent on technical matters than they are on social and economic factors, if a state is to maintain the land's health, they must learn to balance local and national needs.<sup>162</sup> It is argued that the state must learn to better work with the people who use and care about the land while serving their evolving needs.<sup>163</sup> *In The Matter of the National Land Commission [2015] eKLR*, the Supreme Court observed that the dominant perception at the time of constitution-making was that the decentralization of powers would not only give greater

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<sup>157</sup> Rule 2. "Pilot project" means the mediation program conducted by the court under these Rules. (R. 3).

<sup>158</sup> Rule 4(1).

<sup>159</sup> Shackleton, S., et al, 'Devolution And Community-Based Natural Resource Management: Creating Space for Local People to participate and Benefit?' op cit., p.4.

<sup>160</sup> See Maia, M., 'NGOs as Mediators: Their role in expertise, language and institutional exemption in urban development planning,' Working Paper No. 77, May 1996; See also Ahenkan, A., et al, 'Improving Citizens' Participation in Local Government Planning and Financial Management in Ghana: A Stakeholder Analysis of the Sefwi Wiawso Municipal Assembly,' *Journal of Public Administration and Governance*, Vol. 3, No. 2, 2013.

<sup>161</sup> See generally, Hazen, S., *Environmental Democracy*, (<<http://www.ourplanet.com>). [Accessed on 18/01/2016]. Washington DC. 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 Initiative Europe.) available at <http://www.accessinitiative.org> [Accessed on 18/01/2016]; See also Art. 69(1) (d) of the Constitution of Kenya, 2010. The Constitution supports the notion of environmental democracy by providing that one of the obligations of the State in relation to the environment is to encourage public participation in the management, protection and conservation of the environment.

<sup>162</sup> Daniels, SE & Walker, GB, 'Rethinking public participation in natural resource management: Concepts from pluralism and five emerging approaches,' p. 2.

Available at <http://dev.mtnforum.org/sites/default/files/publication/files/260.pdf> [Accessed on 3/01/2016].

<sup>163</sup> Ibid; Haysom, N. & Kane, S., 'Negotiating natural resources for peace: Ownership, control and wealth-sharing,' Centre for Humanitarian Dialogue, Briefing Paper, October 2009, p. 5.

access to the social goods previously regulated centrally, but would also open up the scope for political self-fulfilment, through an enlarged scheme of actual participation in governance mechanisms by the people thus giving more fulfilment to the concept of democracy.<sup>164</sup>

Sustainable development will need to draw upon the best knowledge available from the relevant scientific and stakeholder communities.<sup>165</sup> Public participation is required as it provides a forum whereby the scientific information and values of the publics and the agency can be integrated so that the final decision is viewed as both desirable and feasible by the broadest portion of society.<sup>166</sup> However, there should be fairness in public participation which means that all those affected by certain decisions are represented and, importantly, that procedures enable them to have an input into the format and content of discussions.<sup>167</sup>

The traditional approaches, which were mostly based on top down resource management approaches may leave out the necessary elements of meaningful public participation. This is because, they provide for formal public participation process in which it is assumed that a government agency makes decisions and the general public can give their comments without necessarily affording them a meaningful opportunity to do so.<sup>168</sup> An example of such approaches is what is provided in the Environmental Management and Coordination Act, 1999 (EMCA).<sup>169</sup> These include such tools as the use of Environmental Impact Assessment (EIA)<sup>170</sup> in environmental management and conservation efforts. While acknowledging that EIA can be a powerful tool for keeping the corporate including corporations in check, the general public should be empowered through more meaningful and participatory ways such as negotiation and mediation. This is the only way that the affected sections of population appreciate their role in conflict management and decision-making processes. The general public should also be involved in Strategic Environmental Assessment (SEA) which is the process by which environmental considerations are required to be fully integrated into the preparation of policies, plans and

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<sup>164</sup> In The Matter of the National Land Commission [2015] eKLR, para. 21; See also Muigua, K., *et al*, (2015) *Natural Resources and Environmental Justice in Kenya*, (Glenwood Publishers Limited, 2015, Nairobi).

<sup>165</sup> Daniels, SE & Walker, GB, 'Rethinking public participation in natural resource management: Concepts from pluralism and five emerging approaches,' *op cit*, p. 4.

<sup>166</sup> *Ibid*, p.4.

<sup>167</sup> Young, J.C., *et al*, 'The role of trust in the resolution of conservation conflicts,' *op cit*, p. 197. Young, J.C., *et al*, argue that in situations where values or interests conflict, for example over conservation objectives, two aspects of fairness are important: 'independence' and 'influence.' In the context of conservation conflicts, they define an 'independent' participatory process as one which is unbiased, i.e. where certain participants are not imposing their interests at the expense of others. They define 'influence' as a process that allows those involved to have an input that has a genuine impact on the process and outcomes of participation, one potential outcome being conflict resolution (p. 297).

<sup>168</sup> *Ibid*, p. 4.

<sup>169</sup> Act No. 8 of 1999, Laws of Kenya.

<sup>170</sup> EIA is defined as an environmental management tool aiming at identifying environmental problems and providing solutions to prevent or mitigate these problems to the acceptable levels and contribute to achieving sustainable development (N.M. Al Ouran, 'Analysis of Environmental Health linkages in the EIA process in Jordan,' *International Journal of Current Microbiology and Applied Sciences*, (2015) Vol. 4, No. 7, 2015, pp. 862-871, p. 862.)

programmes and prior to their final adoption.<sup>171</sup> The objectives of the SEA process are to provide for a high level of protection of the environment and to promote sustainable development by contributing to the integration of environmental considerations into the preparation and adoption of specified policies, plans and programmes.<sup>172</sup> Public participation in Strategic Environmental and Social Assessment (SESA) ought to be a more effective tool since it integrates the social issues that are likely to emerge and not just the environmental considerations.<sup>173</sup> These exercises, where conducted properly, should not be done as a mere formality and paper work.<sup>174</sup> The affected communities should be afforded an opportunity to meaningfully participate and give feedback on the likely effects on social, economic and environmental aspects of the community. Engaging them through negotiation and mediation where necessary, would avert future conflicts and allow any developmental activities enjoy social acceptance in the community. Thus, government activities and policies would not clash with the community expectations.

Under Principle 10 of the Rio Declaration the member states are obligated to facilitate the rights of access to information, public participation in decision making and access to justice in environmental matters. Access to justice through litigation is also a potent remedy when access to environmental information or public participation have been wrongly denied or are incomplete. It guarantees citizens the right to seek judicial review to remedy such denial and/or

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<sup>171</sup> Environmental protection Agency, 'Strategic Environmental Assessment,' available at <http://www.epa.ie/monitoringassessment/assessment/sea/#.Vi5tmGuJ2CA> [Accessed on 26/10/2015].

<sup>172</sup> Ibid; see also the *Environmental (Impact Assessment and Audit) Regulations, 2003*, Legal Notice 101 of 2003, Regulations 42, 43 & 47.

<sup>173</sup> Notably, the proposed law, *Energy Bill, 2015*, requires under clause 135 (1) (2)(d) that a person who intends to construct a facility that produces energy using coal shall, before commencing such construction, apply in writing to the Authority for a permit to do so. Such an application must be accompanied by, inter alia, a Strategic Environment Assessment and Social Impact Assessment licenses. Also notable are the provisions of s. 57A(1) of the *Environmental Management Co-ordination (Amendment) Act 2015* which are to the effect that all policies, plans and programmes for implementation shall be subject to Strategic Environmental Assessment. If fully implemented, this is a positive step towards achieving environmental security for all.

<sup>174</sup> See generally, United Nations, *Environmental Impact Assessment and Strategic Environmental Assessment: Towards an Integrated Approach*, (UNEP, 2004). Available at <http://www.unep.ch/etu/publications/textONUbr.pdf> [Accessed on 10/02/2016]; See also The World Bank, 'Strategic Environmental Assessment,' September 10, 2013. Available at <http://www.worldbank.org/en/topic/environment/brief/strategic-environmental-assessment> [Accessed on 10/02/2016]. The World Bank argues that policy makers in are subject to a number of political pressures that originate in vested interests. The weaker the institutional and governance framework in which sector reform is formulated and implemented, the greater the risk of regulatory capture. The World Bank observes that in situations such as these, the recommendations of environmental assessment are often of little relevance unless there are constituencies that support them, and with sufficient political power to make their voices heard in the policy process. While strong constituencies are important during the design of sector reform, they are even more important during implementation. It follows that effective environmental assessment in sector reform requires strong constituencies backing up recommendations, a system to hold policy makers accountable for their decisions, and institutions that can balance competing and, sometimes, conflicting interests. The World Bank thus affirms its recognition of the strategic environmental assessment (SEA) as a key means of integrating environmental and social considerations into policies, plans and programs, particularly in sector decision-making and reform.

depravation.<sup>175</sup> The Rio Declaration in principle 10 emphasizes the importance of public participation in environmental management through access to justice thus: “Environmental issues are best handled with the participation of all concerned citizens, at the relevant level.... Effective access to judicial and administrative proceedings, including redress and remedy, shall be provided.<sup>176</sup> Participatory approaches have been increasingly advocated as effective decision-making processes to address complex environment and sustainable development issues.<sup>177</sup>

The provision of effective avenues for resolution of natural resource conflicts is thus far the most practical way of ensuring access to justice, and by extension adhering to public participation principle. Scholars have asserted that participatory approaches should be thought of as located somewhere on a continuum between consensus-oriented processes in the pursuit of a common interest and compromise-oriented negotiation processes aiming at the adjustment of particular interests.<sup>178</sup>

Cultural, kinship and other ties that have always tied Kenyans together as one people have not died out. In many parts of the country Kenyans still believe in the principles of reciprocity, common humanity, and respect for one another and to the environment. However, it has been observed that the success of customary natural resource management strategies in managing conflict often depends on the enforcement capacities of traditional authorities. When the authority of traditional elite groups is declining, the capacities of those groups to render or enforce a decision may also be reduced.<sup>179</sup> It is also argued that customary practices

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<sup>175</sup> See Migai Akech, “Land, the environment and the courts in Kenya,” *A background paper for The Environment and Land Law Reports*, February 2006, 1 KLR (E&L) xiv-xxxiv. Available at <http://www.kenyalaw.org> [Accessed on 09/01/2016]; *The Fair Administrative Action Act*, 2015 (No. 4 of 2015) which an Act of Parliament to give effect to Article 47 of the Constitution provides under s. 6(1) that every person materially or adversely affected by any administrative action has a right to be supplied with such information as may be necessary to facilitate his or her application for an appeal or review in accordance with s. 5. S. 5(1) provides that in any case where any proposed administrative action is likely to materially and adversely affect the legal rights or interests of a group of persons or the general public, an administrator shall- issue a public notice of the proposed administrative action inviting public views in that regard; consider all views submitted in relation to the matter before taking the administrative action; consider all relevant and materials facts; and (d) where the administrator proceeds to take the administrative action proposed in the notice- (i) give reasons for the decision of administrative action as taken; (ii) issue a public notice specifying the internal mechanism available to the persons directly or indirectly affected by his or her action to appeal; and (iii) specify the manner and period within the which such appeal shall be lodged. In relation to access to information, Art. 35(1) (b) of the Constitution guarantees every person’s right of access to information held by another person and required for the exercise or protection of any right or fundamental freedom. In addition to the foregoing, the proposed law, *Access to Information Bill, 2015*, seeks to give effect to Article 35 of the Constitution; to confer on the Commission on Administrative Justice the oversight and enforcement functions and powers. Notably, clause 2 defines “private body” to mean any private entity or non-state actor that, inter alia, is in possession of information which is of significant public interest due to its relation to the protection of human rights, the environment or public health and safety, or to exposure of corruption or illegal actions or where the release of the information may assist in exercising or protecting any right.

<sup>176</sup> United Nations Conference on Environment and development, *Rio Declaration on Environment and Development*, Rio de Janeiro, Brazil, 1992.

<sup>177</sup> Hove, SVD, ‘Between consensus and compromise: acknowledging the negotiation dimension in participatory approaches,’ *Land Use Policy*, Vol. 23, Issue 1, January 2006, p.10.

<sup>178</sup> *Ibid*, p.16.

<sup>179</sup> FAO, ‘Negotiation and mediation techniques for natural resource management,’ op cit.

institutionalized within broader national legal frameworks may provide a good starting point to enhance traditional authorities' ability to deal with the challenges of contemporary natural resource management.<sup>180</sup> With regard to this, Kenya may be better positioned due to the Constitutional recognition for the application of TDRMs.<sup>181</sup> This may, therefore, help reposition the traditional authority especially as far as resolution of land conflicts within communities, as contemplated under Art. 60(1) (g) of the Constitution, is concerned.

Mediation in the informal context was and has been an informal process. Informality of mediation as a conflict resolution mechanism makes it flexible, expeditious and speedier, it fosters relationships and is cost-effective. It also means that since parties exhibit autonomy over the process and outcome of the mediation process, the outcome is usually acceptable and durable. Similarly, mediation addresses the underlying causes of conflicts preventing them from flaring up later on. These positive attributes of mediation can only be realized if mediation is conceptualized as an informal process as it was in the customary, communal and informal context and not as a legal process.

In the informal set up mediation is seen as an everyday affair and an extension of a conflict management process on which it is dependent. Conflict management is thus heavily embedded in the way of life of most Kenyan communities. Mediation in the customary, communal and informal setting has operated and functioned within the wider societal context in which case it is influenced by factors such as the *actors, their communication, expectations, experience, resources, interests, and the situation in which they all find themselves* (emphasis added).<sup>182</sup> It is thus not a linear cause-and-effect interaction but a reciprocal give-and-take process.<sup>183</sup> Legislation should not kill mediation by annexing it to the court system and making it a judicial process but should instead strive towards creating a more conducive environment to make it more effective and receptive to the needs of the people. Informal mediators may still have a big role to play in making mediation work in Kenya especially in relation to resolution of natural resource conflicts.

It has been suggested that government policies can create opportunities for mediation during disputes.<sup>184</sup> However, they must include mechanisms for judging the prospects of success at the outset and adopting contingencies to ensure the mediators' security if situations

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<sup>180</sup> Ibid.

<sup>181</sup> Art. 159.

<sup>182</sup> United Nations Development Programme, et al, 'Informal Justice Systems: Charting A Course For Human Rights-Based Engagement,' 2012; see also Albrecht, P., et al (eds), 'Perspectives on Involving Non-State and Customary Actors in Justice and Security Reform,' (International Development Law Organization, 2011).

<sup>183</sup> See Eilerman, D., 'Give and Take - The Accommodating Style in Managing Conflict,' August 2006, available at <http://www.mediate.com/articles/eilermanD5.cfm> [Accessed on 10/02/2016].

<sup>184</sup> Castro, A.P. & Nielsen, E. (eds), 'Natural resource conflict management case studies: an analysis of power, participation and protected areas,' op cit, p. 272.



deteriorate.<sup>185</sup> It is also contended that the community also needs the authority of the state to strengthen its ability to deal with large and powerful external interests, such as multinational corporations.<sup>186</sup> This is why there is need for the informal conflict mechanisms to work in synergy with the formal systems to ensure that the parties engage constructively. For instance, it has been observed that national legal systems may carry with them the following strengths: use of official legal systems strengthens the rule of State law, empowers civil society and fosters environmental accountability; they are officially established with supposedly well-defined procedures; they take national and international concerns and issues into consideration; they involve judicial and technical specialists in decision-making; where there are extreme power imbalances among the disputants, national legal systems may better protect the rights of less powerful parties because decisions are legally binding; and decisions are impartial, based on the merits of the case, and with all parties having equity before the law.<sup>187</sup>

It has been observed that the role, tasks, required skills, and modus operandi of a successful mediator will depend on the specific context of any dispute.<sup>188</sup> However, there is need for the mediators to acquire broad scale skills to enable them handle a wide range of issues in natural resource conflicts. The crucial characteristic of an effective mediator-facilitator in natural resource conflicts is said to be credibility with the main parties in the dispute, whether that credibility comes from technical expertise, professional experience, social status, kinship, or wisdom ("authority" is usually a poor criterion for selecting mediators).<sup>189</sup>

As for negotiation processes, it is also important to enhance capacity building within the communities. Capacity building is believed to be integral to developing a level-playing field, so less powerful stakeholders can participate equitably in a process of consensual negotiation.<sup>190</sup> It has been noted that successful problem-solving is a satisfying experience on a human level. Since the intended outcome of the negotiation is a win-win result,' the accomplishment of creating an innovative solution that maximizes joint as well as individual gains can be shared with the other side.<sup>191</sup> The process of reaching this goal is psychologically unifying, rather than divisive. Negotiation is thus an enjoyable and challenging personal experience, rather than a highly stressful battle of wits and words.<sup>192</sup>

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<sup>185</sup> Ibid.

<sup>186</sup> Tyler, S.R., 'Policy Implications of Natural Resource Conflict Management,' op cit.

<sup>187</sup> FAO, 'Negotiation and mediation techniques for natural resource management,' op cit.

<sup>188</sup> Tyler, S.R., 'Policy Implications of Natural Resource Conflict Management,' op cit, p. 272.

<sup>189</sup> Ibid, p. 273.

<sup>190</sup> Warner, M., 'Conflict Management in Community-Based Natural Resource Projects: Experiences from Fiji and Papua New Guinea,' *Working Paper No. 135*, (Overseas Development Institute, April, 2000), p. 30.

<sup>191</sup> Murray, JS, 'Understanding Competing Theories of Negotiation,' *Negotiation Journal*, April, 1986, pp. 179-186 at pp. 183-184.

<sup>192</sup> Ibid.

Communication is seen as capable of only taking place within an interactive process of participation that brings together those holding different standpoints.<sup>193</sup> In Kenya, devolution was designed and has been hailed as capable of opening channels for rural dwellers to communicate their priorities to government decision-makers and in some places improved community-government relations.<sup>194</sup> However, it has been observed that more powerful actors in communities tend to manipulate devolution outcomes to suit themselves.<sup>195</sup> As such, checks and balances need to be in place to ensure that benefits and decision-making do not become controlled by élites.<sup>196</sup>

Participatory approaches for environment and sustainable development decision-making should extend beyond the realms of advocacy, academic focus and institutional discourses into the realm of real life implementation.<sup>197</sup>

## 7.0 Conclusion

Sustainable development is not possible in the context of unchecked natural resource conflicts. As a recognition of this fact, Sustainable Development Goal (SDGs) 16 aims to ‘promote peaceful and inclusive societies for sustainable development, provide access to justice for all and build effective, accountable and inclusive institutions at all levels’.<sup>198</sup> It is also noteworthy that SDGs seek to promote participation of local communities in natural resource management.<sup>199</sup> Negotiation and mediation have more value to the local communities than just being means of conflict management. At least, they are means of sharing information and participating in decision-making. The two mechanisms have the unique and positive attributes which include their participatory nature that can be used to manage natural resource conflicts and ensure that Kenyans achieve sustainable development. Furthermore, the affected communities, in cases of decision making, can have guaranteed and meaningful participation in

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<sup>193</sup> Hove, SVD, ‘Between consensus and compromise: acknowledging the negotiation dimension in participatory approaches,’ op cit, p.12.

<sup>194</sup> Shackleton, S., et al, ‘Devolution And Community-Based Natural Resource Management: Creating Space for Local People to participate and Benefit?’ op cit., p.2; See also Muigua, ‘Empowering the Kenyan People through Alternative Dispute Resolution Mechanisms,’ *Paper Presented at the CIArb Africa Region Centenary Conference 2015*, held on 15-17 July, 2015 at Victoria Falls Convention Centre, Zambezi Sun Hotel, Livingstone, Zambia, ([www.kmco.ke](http://www.kmco.ke))

<sup>195</sup> Ibid, p.1.

<sup>196</sup> Ibid, p.1.

<sup>197</sup> Hove, SVD, ‘Between consensus and compromise: acknowledging the negotiation dimension in participatory approaches,’ op cit, p.15.

<sup>198</sup> United Nations, *Transforming our world: the 2030 Agenda for Sustainable Development*, A/RES/70/1, Resolution adopted by the General Assembly on 25 September 2015.

<sup>199</sup> Ibid, Goal 6b.

the decision making process by presenting proof and reasoned arguments in their favour, as tools for obtaining a socio-economic justice.<sup>200</sup>

Natural resource conflicts continue to negatively affect Kenyans owing to the many weaknesses of the present legal and institutional framework. It is noteworthy that most of the sectoral laws mainly provide for conflict management through the national court system. As already pointed out, national legal systems governing natural resource management are based on legislation and policy statements that are administered through regulatory and judicial institutions, where adjudication and arbitration are the main strategies for addressing conflicts, with decision-making vested in judges and officials who possess the authority to impose a settlement on disputants.<sup>201</sup> Further, decisions are more likely to be based on national legal norms applied in a standardized or rigid manner, with all-or-nothing outcomes. Thus, contesting parties often have very limited control over the process and outcomes of conflict management.<sup>202</sup> In Kenya, where these conflicts may be clan-based or community based, courts offer little help in terms of achieving lasting peace due to the settlement nature of the outcome. Thus, conflicts are likely to flare up later.<sup>203</sup>

Even where the use of ADR and TDR mechanisms is contemplated, there barely exists effective framework to oversee their utilisation. There is need to actualise the use of ADR and particularly negotiation and mediation in managing natural resource conflicts as envisaged in the Constitution. ADR is not fully utilised in the Kenyan context. Therefore, the attributes of cost effectiveness, party autonomy, flexibility, amongst others, are hardly taken advantage of in the environmental arena. There is need to ensure that there is put in place a framework within which communities are actively involved in achieving peace for sustainable development. The Government efforts evidenced by bodies such as the National Cohesion and Integration Commission<sup>204</sup> should actively involve communities in addressing natural resource conflicts in the country. While acknowledging that negotiation and mediation may not provide holistic solutions to the problem, they can still be used in tandem with other methods of conflict management to address problem of natural resource conflicts in Kenya. Alternative Dispute

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<sup>200</sup> Ristanić, A., 'Alternative Dispute Resolution And Indigenous Peoples: Intellectual Property Disputes in the Context of Traditional Knowledge, Traditional Cultural Expressions and Genetic resources,' (Lund University, April 2015), available at [https://www.law.lu.se/webuk.nsf/%28MenuItemById%29/JAMR32exam/\\$FILE/Alternative%20Dispute%20Resolution%20and%20Indigenous%20Peoples.%20Intellectual%20Property%20Disputes%20in%20the%20Context%20of%20Traditional%20Knowledge.pdf](https://www.law.lu.se/webuk.nsf/%28MenuItemById%29/JAMR32exam/$FILE/Alternative%20Dispute%20Resolution%20and%20Indigenous%20Peoples.%20Intellectual%20Property%20Disputes%20in%20the%20Context%20of%20Traditional%20Knowledge.pdf) [ Accessed on 08/01/2016].

<sup>201</sup> FAO, 'Negotiation and mediation techniques for natural resource management,' op cit.

<sup>202</sup> Ibid.

<sup>203</sup> See generally Mwagiru, M., *Conflict in Africa: Theory, Processes and Institutions of Management*, op. cit.

<sup>204</sup> This is a Commission established under s. 15 of the National Cohesion and Integration Act, 2008, No. 12 of 2008, Revised Edition 2012 [2008]. One of the functions of the Commission is to promote arbitration, conciliation, mediation and similar forms of dispute resolution mechanisms in order to secure and enhance ethnic and racial harmony and peace (s.25 (2) (g)).

## **Managing Natural Resource Conflicts in Kenya through Negotiation and Mediation**

Resolution mechanisms (ADR) and particularly negotiation and mediation, have intrinsic advantages that can facilitate effective management of natural resource conflicts. They are expeditious, cost effective, participatory and all-inclusive and thus, can be used to manage natural resource conflicts in way that addresses all the underlying issues affecting the various parties.

Natural resource conflicts, like all other kinds of conflicts, are inevitable in human interactions and if left unmanaged, they tend to degenerate into disputes that ruin the relations between persons or communities and yield undesired costs. The use of ADR in the resolution of natural resource conflicts is viable and should be exploited to its fullest. ADR is not a panacea to all the natural resource conflicts and environmental problems as it has many limitations and is also faced with many challenges. However ADR is worth working with in the environmental arena. The benefits accruing from ADR processes should be fully utilised in the Kenyan context to minimise or at least manage natural resource conflicts and ensure Kenya realises its goals of sustainable development and the Vision 2030.

ADR and Traditional dispute resolution mechanisms, especially negotiation and mediation, have been effective in managing conflicts where they have been used. Their relevance in natural resource conflicts has been recognized in the constitution.<sup>205</sup> They are mechanisms that enhance Access to Justice. Some mechanisms such as mediation and negotiation bring about inclusiveness and public participation of all members of the community in decision-making. Their effective implementation as suggested herein and in line with the constitution will bring about a paradigm shift in the policy on resolution of conflicts towards enhancing access to justice and the expeditious resolution of conflicts without undue regard to procedural technicalities.<sup>206</sup> This is especially so where natural resource-related conflicts are involved, unless the same are intractable and violent conflicts, where the coercive mechanisms, such as court system, may come in handy. These mechanisms should thus be applied and linked up well with courts and tribunals to promote access to justice and public participation.

Managing natural resource conflicts in Kenya through the enhanced use of negotiation and mediation is an exercise worth pursuing for the sake of attaining Environmental Justice and ultimately sustainable development.

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<sup>205</sup> See Art. 60(1) (g); Art. 159.

<sup>206</sup> Constitution of Kenya, Art. 159(2).

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