

**Implementing Constitutional Provisions on
Natural Resources and Environmental
Management in Kenya**

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Abstract

This paper discusses the constitutional provisions on the policy, legal and institutional framework on natural resource and environmental management in Kenya. Mainly based on the current Constitution of Kenya 2010, the paper explores international best practices in environmental and natural resources management and highlights some of the weaknesses in the existing national framework. The author offers suggestions on plausible ways of effectively implementing the constitutional provisions on natural resources and the environment, in order to achieve sustainable development.

1. Introduction

The Constitution of Kenya 2010 provides for the obligations of the State with respect to the environment. This paper discusses the constitutional provisions covering the policy, legal and institutional framework on natural resource and environmental management in Kenya. It seeks to examine the opportunities where, the constitutional framework exists but the required implementation tools are either non-existent or underdeveloped. The author offers suggestions on some of the most plausible ways of effectively implementing these provisions.

The paper first briefly discusses the content of the provisions of the Constitution of Kenya 2010 relating to the environment and what they ideally mean. Secondly, the paper examines select policy, legal and institutional framework on natural resource and environmental management in Kenya, the challenges they face and the extent to which they reflect the spirit of the Constitution. Finally, the author proffers suggestions on how best to realise the implementation of the environmental obligations as spelt out under the Constitution.

2. Constitution of Kenya 2010 and Natural Resource and Environmental Management

The Constitution of Kenya provides for obligations meant to ensure sustainable management of natural resources and the environment, which lie against both the State and individual persons. This section briefly looks at these functions as encapsulated by the Constitution.

2.1 State Obligations in Environmental and Natural resources Governance

Constitutionalisation of environmental rights is now one of the universally accepted approaches to environmental conservation and management.¹ This approach can be argued to have been informed

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by the adoption of a human rights approach to environmental matters. The link between human rights and the environment may have first been established by the *Stockholm Declaration* in 1972.² It has also become the norm worldwide for the duties of the state in respect of the environmental management and conservation to be spelt out in the Constitution. It is against this background that the Constitution of Kenya 2010 outlines the obligations of the State in respect of the environment as including the duty to: ensure sustainable exploitation, utilisation, management and conservation of the environment and natural resources³, and ensure the equitable sharing of the accruing benefits; work to achieve and maintain a tree cover of at least ten per cent of the land area of Kenya; protect and enhance intellectual property in, and indigenous knowledge of, biodiversity⁴ and the genetic resources of the communities; encourage public participation in the management, protection and conservation of the environment; protect genetic resources and biological diversity⁵; establish systems of environmental impact assessment, environmental audit and monitoring of the environment; eliminate processes and activities that are likely to endanger the environment; and utilise the environment and natural resources for the benefit of the people of Kenya.⁶

The Preamble to the Constitution of Kenya, which is meant to be a declaration by the citizenry, may be construed to mean that the duty to conserve and sustainably manage the environment does not only lie against the State but also every individual person.⁷ In relation to the foregoing obligations, the Constitution places a duty on every person to cooperate with State organs and other persons to protect and conserve the environment and ensure ecologically sustainable development and use of natural resources.⁸ The Preamble to the Constitution of Kenya acknowledges the need to be respectful

¹ See generally, Boyd, D.R., 'The Effectiveness of Constitutional Environmental Rights,' *Yale UNITAR Workshop*, April 26/27, 2013, available at <https://environment.yale.edu/content/documents/00003438/Boyd-Effectiveness-of-Constitutional-Environmental-Rights.docx?1389969747> [Accessed on 23/07/2016]; See also Daly, E. & May, J.R., 'Comparative environmental constitutionalism,' *Jindal Global Law Review*, April 2015, Volume 6, Issue 1, pp 9–30; See also, Mwenda, A. & Kibutu, T.N., 'Implications of the New Constitution on Environmental Management in Kenya,' *Law, Environment and Development Journal*, Vol. 8, No. 1, 2012, p. 78.

² UN General Assembly, *United Nations Conference on the Human Environment*, 15 December 1972, A/RES/2994.

³ The Constitution interprets "natural resources" to mean the physical non-human factors and components, whether renewable or non-renewable, including—sunlight; surface and groundwater; forests, biodiversity and genetic resources; and rocks, minerals, fossil fuels and other sources of energy (Art. 260).

⁴ Generally, biodiversity is defined to include the variability among living organisms, from all sources including terrestrial, marine and other aquatic ecosystems and the ecological complexes of which they are part; this includes diversity within species, between species and of ecosystems (Article 2, United Nations Environment Programme, 1760 UNTS 79; 31 ILM 818 (1992); The Convention on Biological Diversity, adopted during the Earth Summit in Rio de Janeiro, promotes biodiversity, sustainable use, and the sharing of benefits arising out of the utilization of genetic resources. The Convention provides for national reporting of efforts to implement the provisions of the Convention).

⁵ The Convention on Biological Diversity (CBD) adopted at the Earth Summit in Rio de Janeiro, Brazil, is a global convention which aims to achieve three objectives: the conservation of biological diversity; the sustainable use of its components; and the fair and equitable sharing of benefits from the use of genetic resources. Kenya is a signatory to this Convention and it is therefore bound by its provisions in promoting the realisation of the three objectives.

⁶ Art. 69(1).

⁷ We, the people of Kenya—.....Respectful of the environment, which is our heritage, and determined to sustain it for the benefit of future generations...Committed to nurturing and protecting the well-being of the individual, the family, communities and the nation:....

⁸ Art. 69(2).

of the environment, which is the people's heritage, and also expresses the determination to sustain it for the benefit of future generations.⁹

Considering that the Constitution is the supreme law of the land, all the other sectoral laws on environment and natural resources management ought to be aligned to the constitutional provisions. The reality however, is that some of the laws are yet to be aligned and thus making it difficult to achieve the constitutional objectives on environment and natural resources governance.

2.2 Obligations of Citizens in Environment and Natural Resources Management: Co managers or Mere Spectators?

Article 69(2) of the Constitution of Kenya places a duty on every person to cooperate with State organs and other persons to protect and conserve the environment and ensure ecologically sustainable development and use of natural resources. While this is a positive step in environmental management and conservation, the provision can be faulted as being inadequate. The duty is only limited to cooperation with the state. Thus, it is the State and its organs that are to take initiative in management and the rest are only expected to offer support and follow any direction given. However, there are additional provisions for the citizenry to take active measures in the quest for attaining sustainable development.

The Constitution has gone a step further to provide for active involvement of communities in sustainable environmental and natural resources matters through seeking court's intervention. Citizenry have a role of ensuring that their rights in relation to the environment are not violated, by way of litigation.¹⁰ This is also captured in the various statutes such as the Forest Act, which provides that persons can sue for enforcement of environmental rights.¹¹ The Constitution also recognises the right of every person to a clean and healthy environment, which includes the right— to have the environment protected for the benefit of present and future generations through legislative and other

⁹ Preamble, Constitution of Kenya 2010.

¹⁰ Art. 22(1) provides that every person has the right to institute court proceedings claiming that a right or fundamental freedom in the Bill of Rights has been denied, violated or infringed, or is threatened; Art. 70(1) provides that if a person alleges that a right to a clean and healthy environment recognised and protected under Article 42 has been, is being or is likely to be, denied, violated, infringed or threatened, the person may apply to a court for redress in addition to any other legal remedies that are available in respect to the same matter. Furthermore, on application under clause (1), the court may make any order, or give any directions, it considers appropriate— to prevent, stop or discontinue any act or omission that is harmful to the environment; to compel any public officer to take measures to prevent or discontinue any act or omission that is harmful to the environment; or to provide compensation for any victim of a violation of the right to a clean and healthy environment (Art. 70(2)). For the purposes of this Article, an applicant does not have to demonstrate that any person has incurred loss or suffered injury (Art. 70(3)). The right to seek legal redress is also guaranteed under s. 3(3) of the Environmental Management and Co-ordination Act, No. 8 of 1999.

¹¹ Forest Act, No. 7 of 2005, s.58(1) provides that every citizen of Kenya, and any person who is ordinarily resident in Kenya, who has reason to believe that the provisions of this Act have been, are being or are about to be violated, may petition the High Court for- a) a declaration that the provisions of this Act are being, have been or are about to be contravened; b) an injunction restraining any specified person from carrying out such a contravention; c) the writ of mandamus against any officer or person who has failed to perform any duty imposed by or under this Act; and d) any remedy at law or equity for preventing or enforcing the provisions of this Act.

measures, particularly those contemplated in Article 69; and to have obligations relating to the environment fulfilled under Article 70.¹²

As already observed, active participation of citizens makes them appreciate and support government efforts and also take part in conservation measures. However, there has not been meaningful participation of the public in environmental and natural resource management matters since majority of the sectoral laws only provide for public participation as a mere formality and not as an empowerment tool as envisaged in international human rights instruments.¹³ A good example is the *Environmental Management and Co-ordination Act 1999* (EMCA), which is the environmental framework law, meant to provide for the establishment of an appropriate legal and institutional framework for the management of the environment and for the matters connected therewith and incidental thereto. Where the framework law provides for consultations, the same are purely meant to be between the state agencies charged with environmental governance. Even where a decision is likely to affect the interests of communities, the Act only provides for unilateral decision by the Cabinet Secretary in charge to ensure that such welfare is well taken care of.¹⁴ Thus, it is possible to have a scenario where the protectionist approaches adopted in most of these sectoral laws end up undermining efforts towards achieving sustainable development instead of boosting the same. The *Agenda 21*¹⁵ under chapter 23 calls for full public participation by all social groups, including women, youth, indigenous people and local communities in policy-making and decision-making. It is in recognition of the fact that unless all these groups are equitably and meaningfully involved in the decision making policies, especially those on sustainable development then the Government efforts would either fail or prove inadequate.

The need for public participation is also affirmed under the *Rio Declaration* which largely adopts an anthropocentric approach to environmental conservation and sustainable development in general. Principle 1 thereof is to the effect that human beings are at the centre of concerns for

¹² Art. 42.

¹³ See Principle 10 of the *Rio Declaration*, which affirms that environmental issues are best handled with participation of all concerned citizens, at the relevant level. At the national level, each individual should have appropriate access to information concerning the environment that is held by public authorities, including information on hazardous materials and activities in their communities, and the opportunity to participate in decision-making processes. States should also facilitate and encourage public awareness and participation by making information widely available. Effective access to judicial and administrative proceedings, including redress and remedy, should also be provided. The *Aarhus Convention* also establishes a number of rights of the public (individuals and their associations) with regard to the environment. The Convention provides for *inter alia*: the right of everyone to receive environmental information that is held by public authorities ("access to environmental information"); the right to participate in environmental decision-making ("public participation in environmental decision-making"); and the right to review procedures to challenge public decisions that have been made without respecting the two aforementioned rights or environmental law in general ("access to justice") (*Aarhus Convention*, Articles 4, 5, 6 & 9 respectively. Although the *UNECE Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters, or Aarhus Convention*, is a European region legal instrument, its provisions have gained international recognition and approval especially considering the fact that it reflects Principle 10 of the Rio Declaration on Environment and Development).

¹⁴ See also the *Environmental (Impact Assessment and Audit) Regulations, 2003*, Legal Notice 101 of 2003, Regulation 17 which provides for public participation albeit inadequately.

¹⁵ United Nations Conference on Environment & Development Rio de Janeiro, Brazil, 3 to 14 June 1992.

sustainable development. They are entitled to a healthy and productive life in harmony with nature. This is also captured under Principle 10 of thereof which affirms that environmental issues are best handled with participation of all concerned citizens, at the relevant level. At the national level, each individual should have appropriate access to information concerning the environment that is held by public authorities, including information on hazardous materials and activities in their communities, and the opportunity to participate in decision-making processes. States should also facilitate and encourage public awareness and participation by making information widely available. Effective access to judicial and administrative proceedings, including redress and remedy, should also be provided.

While the Constitution of Kenya has not been very clear on the specific role of communities as far as environmental governance is concerned, it has however addressed the right of communities to seek legal redress. Art. 22(1) guarantees that every person has the right to institute court proceedings claiming that a right or fundamental freedom in the Bill of Rights has been denied, violated or infringed, or is threatened. Art. 70(1) also provides that if a person alleges that a right to a clean and healthy environment recognised and protected under Article 42 has been, is being or is likely to be, denied, violated, infringed or threatened, the person may apply to a court for redress in addition to any other legal remedies that are available in respect to the same matter. For the purposes of this Article, an applicant does not have to demonstrate that any person has incurred loss or suffered injury.¹⁶ The right to seek legal redress is also guaranteed under s. 3(3) of the *Environmental Management and Co-ordination Act*.¹⁷ The State should ensure that communities play a key role in these efforts and thus, there is need to align these laws with the current Constitution.

3. Policy, Legal and Institutional Framework on Natural Resource and Environmental Management in Kenya: The Disconnect

Policies and laws on natural resources and environment in Kenya should be aligned to reflect the requirements and spirit of the Constitution. This section examines the extent to which select existing legislation on resources such as natural resources include land, water, forests, minerals, and wildlife reflect the spirit of Article 69 and the Constitution in general as far as resource management is concerned.

¹⁶ (Art. 70(3)).

¹⁷ No. 8 of 1999, Laws of Kenya; See also *Environmental Management and Co-ordination (Amendment) Act, 2015* which expands the provisions to include the right to clean and healthy environment and also the right of a person to file suit on his behalf or on behalf of a group or class of persons, members of an association or in the public interest (s. 3).

3.1 Resource Management Approaches

It is arguable that some of the current laws on natural resources management in Kenya still suffer from adopting approaches that defeat any efforts aimed at achieving sustainable development. This section briefly interrogates some of these laws and the specific approaches that they adopt.

i. Wildlife, Biodiversity and Forest Management Approaches

The *Forest Act, 2005*¹⁸ was enacted, as an attempt to provide for involvement of local communities living around any forest in the management of those forests.¹⁹ The Act provides for Community Forest Associations, where local communities come together and form an association, through which they can manage forest resources around them and benefit from the sustainable utilization of forest produce.²⁰ The Forests Act (2005) introduced participatory forest management, through the engagement of local communities, and the promotion of the private sector investment in gazetted forest reserves, accompanied by associated institutional and organisation change, notably the establishment of the Kenya Forest Service (KFS)²¹, and the formation of Community Forest Associations (CFAs)²².

One of the functions of a forest conservation committee in respect of each forest conservancy area under the Act is, in consultation with the Board, to assist local communities to benefit from royalties and other rights derived from flora or fauna traditionally used or newly discovered by such communities.²³ However, one of the most glaring shortcomings in this provision is the exclusion of communities in such deliberations. This is because, although the Act provides that such a committee will include four persons knowledgeable in forestry matters nominated by forest associations operating in the conservancy area, it is noteworthy that such associations are optional and an area may not necessarily have such associations.²⁴ It is also worth mentioning that the associations, as envisaged in structure in the Act, only target formally educated people and locks out those who may possess traditional ecological knowledge but not necessarily formal environmental law knowledge.²⁵ In such an instance, the interests of the affected community may not be fully represented since they may have been locked out. As such, their participation may be limited and only exist as a formality and legal requirement, without necessarily benefitting the communities in question.

¹⁸ No. 7 of 2005, Laws of Kenya.

¹⁹ Part IV, SS. 45-48.

²⁰ S.2: "forest community" means a group of persons who- a) have a traditional association with forest for purposes of livelihood, culture or religion; b) are registered as an association or other organization engaged in forest conservation.

²¹ S.4, No. 7 of 2005.

²² No. 7 of 2005, S. 45.

²³ Ibid, s. 13(3) (e).

²⁴ Ibid, s. 13(4).

²⁵ S. 45(3) of the Forest Act 2005 outlines the formal requirements of such an association, before registration.

The Constitution of Kenya recognises culture as the foundation of the nation and as the cumulative civilization of the Kenyan people and nation.²⁶ Further, the Constitution obligates the State to, inter alia—promote all forms of national and cultural expression through literature, the arts, traditional celebrations, science, communication, information, mass media, publications, libraries and other cultural heritage; recognise the role of science and indigenous technologies in the development of the nation; and promote the intellectual property rights of the people of Kenya.²⁷ The important role of communities in resource management has recently been acknowledged and this is commendable. For instance, the National Land Commission Chairman was recently quoted as saying that resettling traditional forest-dwelling communities in their natural habitats can play an important role in restoring the country’s forest cover.²⁸ He added that such people have the traditional skills needed to help the Government conserve the forests.²⁹ He also affirmed the importance of a rights based approach to environmental conservation, where he asserted that securing the tenure rights of forest communities is the best way to protect their human rights while securing the forests for the nation.³⁰ If the Commission adopts such an approach, they are likely to boost chances of succeeding in environmental conservation and enhancing meaningful and active participation of communities in natural resources and environmental conservation, especially with regard to forests.

It is also arguable that the Act does not specifically spell out how communities are to be involved in decision-making processes. Where CFAs are formed, it is noteworthy that the Act does not have substantive provisions on how such associations can participate in decision-making processes. They are portrayed as recipients of instructions from the KFS so that they can even be deregistered where it deems fit to the Director of KFS to do so.³¹ Thus this Act seems to have adopted both incentive based and protectionist approaches to management, both of which have not had any major success. Even where CFAs have been formed, the same cannot be said to have been very successful due to a number of reasons. Considering that CFAs involve a limited number of people, they may not be said to be representative of the majority and therefore even where they receive benefits, the same may not flow to the rest of population.

Secondly, CFAs are registered by few people who are interested in doing so and the same are not necessarily representatives of the majority of the people. This means, therefore, that even where they make decisions regarding formulation and implementation of forest programmes consistent with the traditional forest user rights of the community concerned, the same cannot be said to be a

²⁶ Art. 11(1), Constitution of Kenya 2010.

²⁷ Art. 11(2), Constitution of Kenya 2010.

²⁸ Kibet L., ‘Swazuri reveals plans to recognise forest settlers,’ *The Standard*, Thursday, July 28, 2016 (The Standard Group, Nairobi, 2016), p. 2.

²⁹ *Ibid.*

³⁰ *Ibid.*

³¹ S. 48, Forest Act 2005.

representative voice of the majority. Community, in this context and as defined in the Act, does not necessarily mean the whole community.

In addition to the foregoing challenges, the *Forest Policy 2014* also identifies key issues and challenges in the forestry sector which needs to be addressed. First, there has been ineffective regulatory mechanisms and inadequate law enforcement. These challenges are compounded by dwindling public land meaning that forestry development has to expand into private and community land, which need incentives and clear methods of engagement to encourage investments in commercial forestry on private land.³² The forest Policy acknowledges that the promulgation of the Constitution brought new requirements for natural resource management such as public participation, community and gender rights, equity in benefit sharing, devolution and the need to achieve 10% forest cover among others.³³ Therefore, the need to enact supporting legislation following the promulgation of the constitution is required to minimize conflicts between industry, communities and governments at both national and county levels over resource management and benefit sharing. In addition, forest governance needs to take into account emerging issues and best practices at global, regional and national level.³⁴

With regard to wildlife biodiversity, it has been observed that many of the regions with abundant and diverse wildlife communities remaining in East Africa are occupied by pastoralists.³⁵ Further, it has also been documented that recent studies show that the majority of the local people around protected areas have negative feelings about state policies and conservation programmes. The alienation of grazing land for the exclusive use of wildlife and tourists has a very direct impact upon the pastoralist communities, and prompts them to raise questions about African wildlife policy – as if it leads to a ‘people versus animals’ conflict.³⁶ The local communities continue to incur wildlife-related losses and insecurity rather than benefits, while the government and foreign investors continue to draw large amounts of foreign income from parks through the lucrative tourism industry.³⁷

The National Wildlife Conservation and Management Policy, 2012 (Wildlife Policy 2012) observes that since Kenya is rich in natural resources, including a vast array of wildlife, and due to its species’ richness, endemism and ecosystem diversity, under the Convention on Biological Diversity Kenya is categorized as a mega-diverse country.³⁸ Accordingly, the Policy affirms the need for different conservation priorities and measures, for each of the ecosystems. This is accredited to a

³² Forest Policy, 2014, para. 2.1.1.

³³ Ibid, para. 2.1.1.

³⁴ Ibid, para. 2.1.2.

³⁵ Okech, R.N., ‘Wildlife-community conflicts in conservation areas in Kenya,’ *African Journals Online*, p. 65. Available at <http://www.ajol.info/index.php/ajcr/article/download/63311/51194> [Accessed on 22/07/2016].

³⁶ Ibid.

³⁷ Ibid, p. 74.

³⁸ Republic of Kenya: Ministry of Forestry and Wildlife, *National Wildlife Conservation and Management Policy, 2012*, p. 1.

combined set of attributes which include: variability in climate, topography, diversity in ecosystems and habitats ranging from mountain ranges to semi-arid and arid areas to marine and freshwater.³⁹

Wildlife is required to contribute directly and indirectly to the local and national economy through revenue generation and wealth creation.⁴⁰ Notably, the Policy observes that Kenya's wildlife is increasingly under threat and consequently opportunities are being lost for it to positively contribute to economic growth, wealth creation and increased employment. Much of this wildlife occurs outside the protected areas on lands owned by communities and other different organizations/persons. Communities consider the presence of wildlife on their land as a burden rather than an opportunity for gaining benefits.⁴¹

From the Policy, it is also worth noting that Kenyan communities have lived amongst, and used, wildlife resources since time immemorial without formal policy and legislation. These communities ensured conservation of the wildlife resource through cultural and social bonds, and traditional practices. Sacred beliefs centred on certain wildlife species ensured that conservation principles became part of their way of life.⁴² It has been observed that when colonial governments were established in Africa, they placed the control and management of all wildlife and the lands on which it existed under state ownership. Local communities were, in all except a few cases, forcibly relocated and alienated from the resources they, or their chiefs, formerly had the right to own and control. The argument for this was that they did not have the knowledge, the will, or the training to manage the wildlife in a sustainable way.⁴³ Communities around these protected areas were seen as the principal threat to wildlife, and the governments, wildlife authorities in particular, focused their attention on barring members of the community from disturbing the areas and the wildlife therein, and this continued even with post-colonial governments.⁴⁴

The *Wildlife Conservation and Management Act, 2013*⁴⁵ was enacted, as a result of the Wildlife Policy 2012, to provide for the protection, conservation, sustainable use and management of wildlife in Kenya and for connected purposes.⁴⁶ The Act affirms that benefits of wildlife conservation should be derived by the land user in order to offset costs and to ensure the value and management of wildlife do not decline; wildlife conservation and management should be exercised in accordance with the principles of sustainable utilization to meet the benefits of present and future generations; and benefits accruing from wildlife conservation and management should be enjoyed and equitably

³⁹ Ibid.

⁴⁰ Ibid.

⁴¹ Ibid.

⁴² Ibid, p.2.

⁴³ Songorwa, A.N., et al, 'Community-Based Wildlife Management in Africa: A Critical Assessment of the Literature,' *Natural Resources Journal*, vol. 40, summer, 2000, pp. 603-643 at pp. 603-604.

⁴⁴ Ibid, p. 604.

⁴⁵The Wildlife Conservation and Management Act, No. 47 of 2013.

⁴⁶ Ibid, Preamble.

shared by the people of Kenya.⁴⁷ The Act provides for consumptive wildlife use activities, which include, game farming, ranching, live capture, research involving off-take, cropping and culling.⁴⁸ However, hunting is prohibited as a form of consumptive utilization.⁴⁹

The Act also provides for non-consumptive utilization of wildlife. A general permit may be issued by the Cabinet Secretary for non-consumptive wildlife user rights, including - wildlife-based tourism; commercial photography and filming; educational purposes; research purposes; cultural purposes; and religious purposes.⁵⁰

The functions of the Kenya Wildlife Service, under the Act, include, collecting revenue and charges due to the national government from wildlife and, as appropriate, develop mechanisms for benefit sharing with communities living in wildlife areas, and developing mechanisms for benefit sharing with communities living in wildlife areas.⁵¹

The Act further establishes the County Wildlife Conservation and Compensation Committee whose functions include: overseeing the preparation and implementation of management plans on community and private land under the provisions of this Act; ensuring that benefits derived from the use of wildlife resources are distributed in accordance with the provisions of this Act; and bringing together all relevant stakeholders within the county to actively harness their participation in the planning and implementation of projects and programmes related to the protection, conservation and management of wildlife resources in the county.⁵²

One of the requirements for issuance of a permit to any person desirous of undertaking bio-prospecting involving any wildlife resources is proof of: disclosure of all material information relating to the relevant bio-prospecting to the stakeholder, and on the basis of that disclosure, to obtain the prior consent of the stakeholders for the provision of or access to such resources; and the applicant and the stakeholder to have entered into-a material transfer agreement that regulates the provision of or access to such resources; and a benefit-sharing agreement that provides for sharing by the stakeholders in any future benefits that may be derived from the relevant bio-prospecting.⁵³ Where a community is involved, disclosure and agreement will be to the community in question.⁵⁴ Notable is

⁴⁷ Ibid, s.4.

⁴⁸ Ibid, s.80 (3).

⁴⁹ Ibid, s. 97 & s. 98; See also Eighth Schedule to the Act.

⁵⁰ Ibid, s. 80.

⁵¹ Ibid, s.7 (e) (f).

⁵² Ibid, s. 19(b) (c) (d).

⁵³ Ibid, s. 22(4). There is however the need to protect communities from bio-piracy as witnessed in the matter where British scientists from Leicester University worked with US firm Genencor to patent-utilise without consent, a microbe that lives in the caustic lakes of Kenya's Rift Valley (Muiruri, M., 'Kenya loses Sh70m to biopirates in Biopiracy,' (Northwest Resistance against Genetic Engineering). Available at <http://nwrage.org/content/kenya-loses-sh70m-biopirates> [Accessed on 27/07/2016]). This is just one of the many instances where communities have lost genetic resources to biopirates (See Biopirates Are Harming Indigenous Livelihoods, available at <https://www.newsrecord.co/biopirates-are-harming-indigenous-livelihoods/> [Accessed on 27/06/2016]). It is important that the trend is curbed through putting in place an effective framework.

⁵⁴ *Wildlife Conservation and Management Act, 2013*, s. 22(5).

the requirement that the Kenya wildlife Service shall, in all bio-prospecting involving any wildlife resources, be a joint partner on behalf of the people of Kenya.⁵⁵

Also significant is the provision that every person has the right to practice wildlife conservation and management as a form of gainful land use.⁵⁶ Further, every person has the right to reasonable access to wildlife resources and shall be entitled to enjoy the benefits accruing there-from without undue hindrance.⁵⁷ However, utilisation and exploitation of wildlife resources by any person whether individual land owner or in a conservation area, and wherever else should be practised in a manner that is sustainable and in accordance with regulations made under this Act.⁵⁸

The Act requires the Cabinet Secretary, in consultation with the land owner, the National Land Commission, the Commission on Revenue Allocation and in liaison with the Service, to formulate regulations and guidelines on access and benefit sharing.⁵⁹

In a bid to curb human-wildlife conflict, the Act provides that in furtherance of the spirit mutual co-existence in the framework of human – wildlife conflict, every decision and determination on the matter of conservation and management of the wildlife resource should not be exercised in a manner prejudicial to the rights and privileges of communities living adjacent to conservation and protected areas: Provided that in the parties should have due regard for the provisions of the appropriate and enabling laws, including laws on devolution and land management.⁶⁰ Where animals enter community's areas of living, only authorised officers may kill them where there is potential risk of injury, and any unauthorized persons who may kill a rogue animal, unless for self defence, may be prosecuted.⁶¹

The 2013 Act provides for County Wildlife Conservation Committees, Community Wildlife Associations and Wildlife Managers and community conservancies as institutions of promoting community participation. As far as regulation is concerned, the Act does away with an autonomous regulatory agency and instead gives powers of wildlife regulation and licensing to the Cabinet Secretary in charge of wildlife. The various institutions are mostly to advise the Cabinet secretary who then makes the final decision. It is therefore clear that the Act does not create clear channels for the communities to participate in decision making. The approach adopted is also broadly protectionist and does little to bring a change of attitude by local communities regarding wildlife diversity. While the Policy framework seems to acknowledge the importance of community inclusion, there is little evidence in the Act that the same was considered during deliberations to formulate the law.

⁵⁵ Ibid, s. 22(6).

⁵⁶ Ibid, s. 70(1).

⁵⁷ Ibid, s. 71(1).

⁵⁸ Ibid, s. 72(1).

⁵⁹ Ibid, s. 73; See also s. 76(1)-The Cabinet Secretary shall, upon advice by the Service, in consultation with the Commission on Revenue Allocation, formulate guidelines regarding incentives and benefit sharing, and the nature and manner in which the same shall be distributed.

⁶⁰ Ibid, s. 75(1).

⁶¹ Ibid, ss. 77-78.

If the affirmations in the Wildlife Policy are anything to go by, then the protectionist approaches adopted in management and conservation of biological diversity are not justified and do little to achieve the desired objectives of sustainable development. It has been suggested that there is need to adopt a more active participatory approach which is mainly informed by two additional principles: putting resources under local control; and giving local communities a decisive voice and representation through their own local institutions, which means participation in making decisions that affect them.⁶² These principle, it has been contended, intends to increase trust and confidence and strengthen leadership capabilities at the community level.⁶³ While it may not be necessarily important to devolve control and ownership, there is need for more active and quality community participation in decision-making processes.

4. Implementing the Constitutional Obligations of the State in Respect of the Environment

It has been observed that management regimes of public forests (and perhaps even other natural resources in Kenya), whether they are protectionist oriented or incentive-based are important in determining outcomes of conservation and sustainable use.⁶⁴ Kenya has historically adopted a protectionist model, where conservation strategies have been dominated by attempts to fence off or reserve areas for nature and exclude people from the reserved areas, and also involved the creation of protected areas (national parks, game reserves and national forest reserves), the exclusion of people as residents, prevention of consumptive use, and minimisation of other forms of human impact.⁶⁵ Broadly, this approach viewed development objectives of local communities as being in direct conflict with the objectives of biodiversity conservation.⁶⁶ It is for this reason that this section explores measures that may facilitate securing the dream of sustainable exploitation, utilisation, management and conservation of the environment and natural resources and equitable sharing of the accruing benefits. This is in recognition of the fact that the Constitution contemplates adoption of measures that not only promote sustainable management of resources but also actively and meaningfully engage communities in such efforts.

4.1 Sustainable and Inclusive Approaches to Environmental Management

As far as wildlife biodiversity is concerned, it has been contended that the involvement and support of local communities in wildlife conservation is a prerequisite to effective and long-term

⁶² See Songorwa, A.N., et al, 'Community-Based Wildlife Management in Africa: A Critical Assessment of the Literature,' op cit. p. 607; See also Colchester, M., 'Sustaining the Forests: The Community-Based Approach in South and South-East Asia,' (United Nations Research Institute For Social Development, 1992). Available at [http://www.unrisd.org/80256B3C005BCCF9%2F\(httpAuxPages\)%2F53024E4A3BAA768480256B67005B6396%2F\\$file%2Fdp35.pdf](http://www.unrisd.org/80256B3C005BCCF9%2F(httpAuxPages)%2F53024E4A3BAA768480256B67005B6396%2F$file%2Fdp35.pdf) [Accessed on 28/07/2016].

⁶³ Ibid.

⁶⁴ Guthiga, P.M., 'Understanding Local Communities' Perceptions Of Existing Forest Management Regimes of A Kenyan Rainforest,' *International Journal of Social Forestry (IJSF)*, 2008, Vol. 1, No.2, pp.145-166 at p. 146.

⁶⁵ Ibid, p. 146.

⁶⁶ Ibid.

conservation of wildlife and wildlands as part of the terrestrial biodiversity.⁶⁷ To this extent, it is argued that as a resource, wildlife must be of value to humans and contribute to human development. In other words, it must directly benefit the people who have the option to use the wildlands for other purposes.⁶⁸ Consequently, in spite of any existing controversies between the purely protectionist approach to wildlife management and the conservation approach, it is argued that it is the local communities who are to determine whether wildlife conservation is a priority form of land use.⁶⁹ It has been recommended that involving local communities in sustainable natural resource use and conservation must be encouraged. Arguably, no rural-based education about the use of such resources will succeed if local community needs and opinions are not met and incorporated in conservation practice and policies. If they do not benefit from biodiversity resources, and are not compensated for opportunity costs and wildlife-induced losses, they will not support the conservation of biodiversity.⁷⁰ Lastly, it has been suggested that a national land use plan can also help and will put into perspective land use practices that are compatible with the socio-economic needs, natural resource endowment, and ecological and climatic constraints within different regions of the country.⁷¹ There is however, hope in Kenya after the recently developed Draft National Land Use Policy 2016⁷² whose overall goal is to provide legal, administrative, institutional and technological framework for optimal utilization and productivity of land and land related resources in a sustainable and desirable manner at National, County and local level.⁷³

⁶⁷ Sibanda, B.M.C. & Omwega, A.S., 'Some Reflections on Conservation, Sustainable Development And Equitable Sharing of Benefits From Wildlife in Africa: The Case of Kenya and Zimbabwe,' *South African Journal Of Wildlife Research*, Vol. 26, No. 4, 1996, pp. 175-181 at p 175.

⁶⁸ Ibid.

⁶⁹ Ibid; see generally Grossman, E. (ed), 'Integrating Land Use Planning & Biodiversity,' (Defenders of Wildlife, Washington, D.C., 2003). Available at http://www.defenders.org/publications/integrating_land_use_planning_and_biodiversity.pdf [Accessed on 27/07/2016]; See also Kiss, A., 'Making Biodiversity Conservation A Land Use Priority,' available at <http://www2.gsu.edu/~wwwcec/special/AgiBookChapter2002.pdf> [Accessed on 27/07/2016]

⁷⁰ Okech, R.N., 'Wildlife-community conflicts in conservation areas in Kenya,' *African Journals Online*, op cit at p.78.

⁷¹ Ibid, p. 78; See also generally, Wehrmann, B. (ed), 'Land Use Planning: Concept, Tools and Applications,' (Deutsche Gesellschaft für Internationale Zusammenarbeit (GIZ) GmbH, Eschborn, 2012). Available at <https://www.giz.de/fachexpertise/downloads/Fachexpertise/giz2012-en-land-use-planning-manual.pdf> [Accessed on 27/07/2016]

⁷² Developed by the Ministry of Lands and Physical Planning, Kenya, May 2016.

⁷³ Ibid, para. 1.4. Specifically the policy shall offer a framework of recommendations and principles designed to ensure the maintenance of a land use system that will provide for:

- a) Land-use planning, resource allocation and resource management for sustainable development to promote public good and general welfare;
- b) environmental management and sustainable production initiatives in the utilization of land resources
- c) Coordination and integration of institutional linkages in planning at sectoral and cross-sectoral levels to foster collaboration and decision making among different land users.
- d) Optimum utilization of land resources to meet governance, social-economic, political and cultural obligations of the people of Kenya.
- e) Anchoring land development initiatives that will respond positively to the market demands.
- f) Integrated framework for the preparation of a National Spatial Plan and review of various land use plans.
- g) Mainstreaming of gender and special interest groups in land use planning and management.
- h) A comprehensive, efficient and affordable computer based land use information management system.
- i) An appropriate, accountable and democratic institution for land use conflicts resolution.
- j) Mitigating problems associated with poor land use;

The various sectoral laws and policies must be designed in way that protects the environment from degradation, and also involves communities in such measures, first through decision-making, and then encouraging active participation, whether through incentives or otherwise.

*Agenda 21*⁷⁴ which was adopted in 1992 to facilitate combating the problems of poverty, hunger, ill health and illiteracy, and the continuing deterioration of the ecosystems on which the human race depend for their well-being.⁷⁵ Notably, Clause 3.2 thereof provides that while managing resources sustainably, an environmental policy that focuses mainly on the conservation and protection of resources must take due account of those who depend on the resources for their livelihoods. Otherwise, it could have an adverse impact both on poverty and on chances for long-term success in resource and environmental conservation.⁷⁶ Governments, with the assistance of and in cooperation with appropriate international, nongovernmental and local community organizations, are also required to establish measures that will directly or indirectly *inter alia* rehabilitate degraded resources, to the extent practicable, and introduce policy measures to promote sustainable use of resources for basic human needs.⁷⁷

Clause 4.5 thereof notes that special attention should be paid to the demand for natural resources generated by unsustainable consumption and to the efficient use of those resources consistent with the goal of minimizing depletion and reducing pollution.⁷⁸

With regard to natural resources and equitable sharing of the accruing benefits, the International Finance Corporation, a member of the World Bank Group (WBG), argues that Governments face competing priorities when designing policies that determine when, how, and by whom the natural resources will be developed.⁷⁹ From a benefit-sharing perspective, such policies need to embrace the interests of current and future generations and the rights, interests, and needs of different levels of government, communities, and other stakeholders.⁸⁰ Further, with specific reference to extractives industry, the role of government in establishing a framework to manage and invest revenues derived from oil, gas, and mining projects is crucial to ensure that the sector contributes positively to sustainable development.⁸¹ Sustainable exploitation, utilisation, management and conservation of the environment and natural resources and equitable sharing of the accruing benefits are key in

⁷⁴ (A/CONF.151/26, vol.II), United Nations Conference on Environment & Development Rio de Janeiro, Brazil, 3 to 14 June 1992, Agenda 21.

⁷⁵ Ibid, Preamble.

⁷⁶ Ibid, Clause 3.2.

⁷⁷ Ibid, Clause 3.8.

⁷⁸ Ibid, Clause 4.5.

⁷⁹ International Finance Corporation, 'The Art and Science of Benefit Sharing in the Natural Resource Sector,' *Discussion Paper*, February 2015, p. 7. Available at

http://www.ifc.org/wps/wcm/connect/8e29cb00475956019385972fbd86d19b/IFC_Art+and+Science+of+Benefits+Sharing_Final.pdf?MOD=AJPERES&CACHEID=8e29cb00475956019385972fbd86d19b [Accessed on 13/07/2016].

⁸⁰ Ibid.

⁸¹ Ibid, p. 11.

fighting poverty and consequently, empowering communities for overall national development. Indeed, this is reflected in the *2030 Agenda for Sustainable Development*⁸², which recognises that eradicating poverty in all its forms and dimensions, including extreme poverty, is the greatest global challenge and an indispensable requirement for sustainable development. Some of the Agenda's key principles include sustainability and inclusivity.⁸³

4.2 Achieving Ten Percentage Forest Cover

It has rightly been argued that forest and landscape restoration is about more than just trees. It goes beyond afforestation, reforestation, and ecological restoration to improve both human livelihoods and ecological integrity. Key characteristics include the following: Local stakeholders are actively engaged in decision making, collaboration, and implementation; whole landscapes are restored, not just individual sites, so that trade-offs among conflicting interests can be made and minimized within a wider context; landscapes are restored and managed to provide for an agreed, balanced combination of ecosystem services and goods, not only for increased forest cover; a wide range of restoration strategies are considered, from managed natural regeneration to tree planting; and continuous monitoring, learning, and adaptation are central.⁸⁴

Further, a restored landscape can accommodate a mosaic of land uses such as agriculture, protected reserves, ecological corridors, regenerating forests, well-managed plantations, agroforestry systems, and riparian plantings to protect waterways. Restoration must complement and enhance food production and not cause natural forests to be converted into plantations.⁸⁵

Principle 8(a) of the *Non-Legally Binding Authoritative Statement of Principles for a Global Consensus on the Management, Conservation and Sustainable Development of All Types of Forests* (the Forest Principles of the United Nations Conference on Environment and Development (UNCED)⁸⁶ provide that efforts should be undertaken towards the greening of the world. Thus, all countries, notably developed countries, should take positive and transparent action towards reforestation, afforestation and forest conservation, as appropriate. Furthermore, Principle 8(b) provides that efforts to maintain and increase forest cover and forest productivity should be undertaken in ecologically, economically and socially sound ways through the rehabilitation, reforestation and re-establishment of trees and forests on unproductive, degraded and deforested lands, as well as through the management of existing forest resources. The United Nations Forum of

⁸² United Nations, *Transforming our world: the 2030 Agenda for Sustainable Development*, Resolution adopted by the General Assembly on 25 September 2015, A/RES/70/1; See also United Nations General Assembly, "The road to dignity by 2030: ending poverty, transforming all lives and protecting the planet," *Synthesis Report of the Secretary-General on the post-2015 Sustainable development agenda*. A/69/700. para.45.

⁸³ Ibid.

⁸⁴ World Resources Institute, 'Atlas of Forest and Landscape Restoration Opportunities,' available at <http://www.wri.org/resources/maps/atlas-forest-and-landscape-restoration-opportunities> [Accessed on 13/07/2016].

⁸⁵ Ibid.

⁸⁶ Report Of The United Nations Conference On Environment And Development (Rio De Janeiro, 3-14 June 1992), Annex III: Non-Legally Binding Authoritative Statement Of Principles For A Global Consensus on The Management, Conservation and Sustainable Development of All Types of Forests, A/CONF.151/26 (Vol. III).

Forests (UNFF) had developed four global objectives on forests, including an objective to “reverse the loss of forest cover worldwide through sustainable forest management, including protection, restoration, afforestation and reforestation, and increase efforts to prevent forest degradation”. Members had agreed to work globally and nationally and to make progress toward the achievement of these objectives by 2015.⁸⁷ The General Assembly of the United Nations also affirmed that social and economic development depends on the sustainable management of the planet’s natural resources. As such, the expressed determination to conserve and sustainably use oceans and seas, freshwater resources, as well as forests, mountains and drylands and to protect biodiversity, ecosystems and wildlife.⁸⁸

*Draft National Forest Policy, 2015*⁸⁹ provides for a framework for improved forest governance, resource allocation, partnerships and collaboration with the state and non-state actors to enable the sector contribute in meeting the country’s growth and poverty alleviation goals within a sustainable environment.⁹⁰ The overall goal of the Policy is sustainable development, management, utilization and conservation of forest resources and equitable sharing of accrued benefits for the present and future generations of the people of Kenya.⁹¹

The *Draft National Forest Policy, 2015* acknowledges that to achieve the national forest cover target of 10% of land area, the major afforestation effort will have to be in community and private lands. It also states that at present, tree cover on farms is increasing, especially in more densely populated with higher agricultural potential areas. This, according to the Policy, demonstrates that farmers recognize the benefits of tree growing in improving land productivity.⁹² The Policy also recommends that to achieve the foregoing target, the Government should: promote partnerships with land owners to increase on-farm tree cover and to reduce pressure on reserved forests; promote investment in farm forestry through provision of economic and non-economic incentives; promote on-farm species diversification; promote development of forest based enterprises; promote processing and marketing of farm forestry products; promote forestry development through irrigation; and promote forestry extension and technical services.⁹³

Further, the Policy emphasizes that participatory forest management and sound conservation practice has potential to improve forest protection, management and growth by involving relevant non-state actors and local communities in planning and implementation. Consequently, it

⁸⁷ United Nations Forum of Forests, *Global Objectives on Forests*, available at <http://www.un.org/esa/forests/documents/global-objectives/index.html> [Accessed on 13/07/2016].

⁸⁸ Para. 33, United Nations, *Transforming our world: the 2030 Agenda for Sustainable Development*, Resolution adopted by the General Assembly on 25 September 2015, A/RES/70/1. Goal 15 thereof also requires Member States to protect, restore and promote sustainable use of terrestrial ecosystems, sustainably manage forests, combat desertification, and halt and reverse land degradation and halt biodiversity loss.

⁸⁹ Forest Policy, 2015 (Government Printer, Nairobi, 2015).

⁹⁰ Ibid, para. 1.1.9.

⁹¹ Para. 3.1.

⁹² Para. 4.5.

⁹³ Ibid.

recommends that the Government should: support non-state actors and local communities to undertake forest-related development activities and investments; promote stakeholders participation at all levels in forest sector planning, implementation and decision making; develop and implement strategies for forest resource conflict resolution and management; and strengthen linkages between forest research, education, industry and management institutions; develop institutional framework and mechanisms for effective participation of stakeholders in forest management develop and implement an equitable benefits sharing scheme in the forest sector; and support communities, commercial tree growers and land owners to invest in forestry as a viable land use option; promote partnerships in afforestation and reforestation programmes on public, private and community lands; and provide incentives to communities, commercial tree growers and landowners for forest management and conservation, and encourage voluntary conservation easements.⁹⁴

The *Draft National Land Use Policy 2016* requires that to address the low vegetation cover with other competing land uses, the government should: carry out an inventory of all land cover classifications; establish mechanisms to ensure protection and improvement of vegetation cover over time; incorporate multi stake holder participation in a forestation programmes and initiatives; develop a framework for incentives to encourage maintenance of forest cover; promote the use of alternatives and efficient production methods to reduce demand on forest products; and ensure public participation in stakeholder forums in the determination of planning zones.⁹⁵

It has been asserted that land users require long-term secure rights to use and harvest a piece of land before they will invest time and effort in sustaining its long-term productivity.⁹⁶ As a result of past land alienation policies, a significant portion of much of the developing world's forest lands now falls within the public domain, and has become a de facto open access resource.⁹⁷ If the people using these resources have no enforceable legal or customary rights (to cultivate, graze or collect forest products) they have no incentive to conserve the productive potential of the resources (soil, water, vegetation and animals). Tenurial systems are therefore important in any aspect of natural resource management.⁹⁸ Therefore, the argument is that in many countries it is unlikely that any real progress can be made toward sustainable forest management or forest landscape restoration until tenure issues are addressed and resolved. Arguably, resolution will only come by engaging key interest groups in a participatory and constructive dialogue with a commitment to an equitable outcome.⁹⁹

⁹⁴ Para. 8.2.

⁹⁵ Draft National Land Use Policy 2016, para. 3.8.3.

⁹⁶ Lamb, D. & Gilmour, D., *Rehabilitation and Restoration of Degraded Forests*. IUCN, Gland, Switzerland and Cambridge, UK and WWF, Gland, Switzerland, 2003. x +110 pp. at p. 66. Available at http://cmsdata.iucn.org/downloads/rehabilitation_and_restoration_of_degraded_forests.pdf [Accessed on 13/07/2016].

⁹⁷ Ibid.

⁹⁸ Ibid; see generally, *Rethinking Forest Partnerships and Benefit Sharing: Insights on Factors and Context that Make Collaborative Arrangements Work for Communities and Landowners*, Report No. 51575-GLB, (The International Bank for Reconstruction and Development / The World Bank, Washington, DC, 2009).

⁹⁹ Ibid, pp. 66-7.

The *Non-Legally Binding Authoritative Statement of Principles for a Global Consensus on the Management, Conservation and Sustainable Development of All Types of Forests* (the Forest Principles of the United Nations Conference on Environment and Development (UNCED)¹⁰⁰), are meant to contribute to the management, conservation and sustainable development of forests and to provide for their multiple and complementary functions and uses.¹⁰¹ Principle 2(b) thereof provides that forest resources and forest lands should be sustainably managed to meet the social, economic, ecological, cultural and spiritual needs of present and future generations. Furthermore, Principle 2(d) provides that governments should promote and provide opportunities for the participation of interested parties, including local communities and indigenous people, industries, labour, non-governmental organizations and individuals, forest dwellers and women, in the development, implementation and planning of national forest policies.

In a bid to deal with some of the highlighted challenges, there is a pending proposed law, Forest Conservation and Management Bill, 2015. The *Forest Conservation and Management Bill, 2015* is meant to give effect to Article 69 of the Constitution with regard to forest resources; to make provision for the conservation and management of forests; and for connected purposes. The proposed law is to apply to all forests on public, community and private lands.¹⁰² Among the guiding principles of the proposed law will be: public participation and community involvement in the management of forests; and consultation and co-operation between the national and county governments. The proposed law also requires the Cabinet Secretary, in consultation with the relevant stakeholders, develop a national forest management policy for the sustainable use of forests and forest resources, and which must be reviewed at least once in every five years.¹⁰³

The proposed law notably retains provisions for formation and registration a community forest association in accordance with the provisions of the Societies Act.¹⁰⁴ The management agreement between the Kenya Forest Service and the community forest association may permit the association to —collect medicinal herbs in the forest; harvest honey in the forest; harvest fuel wood in the forest; harvest grass in the forest or graze livestock in the forest; collect forest produce for community-based industries; carry out ecotourism or recreational activities in the forest; carry out scientific research or education activities in the forest; establish a plantation in the forest; develop community wood and non-wood forest based industries; and enjoy other benefits which, may from time to time, be agreed upon between an association and the Service: provided that — none of the activities specified in this section shall be carried out so as to conflict with the conservation of biodiversity; and the Director-

¹⁰⁰ United Nations, *Report Of The United Nations Conference On Environment And Development* (Rio De Janeiro, 3-14 June 1992), Annex III: *Non-Legally Binding Authoritative Statement Of Principles For A Global Consensus on The Management, Conservation and Sustainable Development of All Types of Forests*, A/CONF.151/26 (Vol. III).

¹⁰¹ *Ibid*, Preamble.

¹⁰² Forest Conservation and Management Bill, 2015, (Government Printer, Nairobi, 2015), clause 3.

¹⁰³ *Ibid*, clause 5.

¹⁰⁴ *Ibid*, Clause 47(1).

General may, in consultation with the association, prescribe rules for the conduct of the activities specified in this section.¹⁰⁵ Such forest user rights may, with the approval of the Director-General, be assigned either partly or all under a management agreement to a suitably qualified agent on mutually agreed terms.¹⁰⁶

The proposed law also provides that subject to Article 66¹⁰⁷ of the Constitution, investors in forests must share the benefits of their investment with local communities by applying various options including but not limited to infrastructure, education and social amenities.¹⁰⁸ This provision is in recognition of the fact that "benefits" mean quantifiable and non-quantifiable goods and services provided by forest ecosystems.¹⁰⁹ The other mechanism for benefit sharing as envisaged under this law is through joint management agreement. Clause 2 thereof interprets joint management agreements to mean authorization where the Service or the County Department responsible for forestry agrees to enter into partnership with other persons for the joint management of a specified forest area, specifying the contribution, rights and obligations of each party and setting out the methods of sharing the costs and benefits accruing from the forest so managed.¹¹⁰

¹⁰⁵ Ibid, clause 48.

¹⁰⁶ Ibid, Clause 49.

¹⁰⁷ Art. 66(1)- The State may regulate the use of any land, or any interest in or right over any land, in the interest of defence, public safety, public order, public morality, public health, or land use planning. (2) Parliament shall enact legislation ensuring that investments in property benefit local communities and their economies.

¹⁰⁸ Ibid, clause 52.

¹⁰⁹ Ibid, clause 2. *Legal Notice 160 of 2006 on the Environmental Management and Co-Ordination (Conservation of Biological Diversity and Resources, Access to Genetic Resources and Benefit Sharing) Regulations*, 2006 under Regulation 20 (1) provides that without prejudice to the generality of the foregoing, the holder of an access permit shall facilitate an active involvement of Kenyan citizens and institutions in the execution of the activities under the permit. (2) The facilitation by the holder of an access permit shall include enjoyment of both monetary and non-monetary benefits arising from the right of access granted and the use of genetic resources. (3) Monetary benefits include – (a) access fees or fee per sample collected or acquired; (b) up-front payments; (c) milestone payments; (d) payment of royalties; (e) license fees in case genetic resources are to be utilized for commercial purposes; (f) fees to be paid to trust funds supporting conservation and sustainable use of biodiversity; (g) salaries and preferential terms where mutually agreed; (h) research funding; (i) joint ventures; (j) joint ownership of relevant intellectual property rights; (4) Non-monetary benefits include – (a) sharing of research and development results; (b) collaboration, co-operation and contribution in scientific research and development programmes, particularly biotechnological research activities; (c) participation in product development; (d) admittance to ex situ facilities of genetic resources and to databases by participating institutions; (e) transfer to Kenya of genetic resources of knowledge and technology under fair and most favourable terms, including concessional and preferential terms where agreed, in particular, knowledge and technology that make use of genetic resources, including biotechnology, or that are relevant to the conservation and sustainable utilization of biological diversity; (f) strengthening capacities for technology transfer to Kenya; (g) institutional capacity building; (h) human and material resources to strengthen the capacities for the administration and enforcement of access regulations; (i) training related to genetic resources with the full participation of Kenya and where possible, in Kenya; (j) access to scientific information relevant to conservation and sustainable use of biological diversity, including biological inventories and taxonomic studies; (k) institutional and professional relationships that can arise from access and benefit sharing agreements and subsequent collaborative activities; (l) joint ownership of relevant intellectual property rights.

¹¹⁰ Clause 20(1) thereof provides that the county executive committee member responsible for forestry in each county may enter into joint management agreements with communities or individuals for the management of community forests or private forests.¹¹⁰ Clause 41(3) is also to the effect that the Service may enter into a joint management agreement for the management of any indigenous forest or part thereof with any person, institution, government agency or forest association.

Proposals for any concession on national and county public forests can only be approved where there is proof of, inter alia: preparation of environmental and social impact assessments as may be required under any other written law; and preparation of a concession area forest management plan that shall include inventories, reforestation or replanting programmes, annual operation plans and community user rights and benefits.¹¹¹

While the proposed law has attempted to create opportunities for community participation, the same falls short of constitutional threshold of active community participation in decision making. It also largely adopts the protectionist approach of its predecessors, where communities are only to receive instructions from the state organs and also receive some of the forest resources as mere incentives and not benefits adequate to make them appreciate conservation agenda of the state. Unilateral efforts to achieve at least ten percent tree cover may not bear much fruits since communities may feel used by the State organs without necessarily benefiting from the same.

Deforestation contributes to climate change and thus, it must be tackled as one of the means of achieving the sustainable development agenda. Kenya's efforts towards climate change mitigation are commendable. In March 2012, NEMA obtained accreditation as a National Implementing Entity (NIE) by the Adaptation Fund Board of the United Nations Framework Convention on Climate Change (UNFCCC)¹¹². This accreditation gave NEMA the mandate to offer vetting, approval and supervision of projects financed by the Adaptation Fund.¹¹³ Later on, NEMA submitted the Kenya Climate Change Adaptation Programme (KCCAP) Proposal to the AF Board for its consideration. The Proposal was approved and NEMA received approximately Ksh.1 Billion for its implementation. The National Environment Management Authority launched a Sh1 billion climate change programme titled 'Integrated Programme to Build Resilience to Climate Change and Adaptive Capacity of Vulnerable Communities in Kenya' that will be implemented in 14 counties. The launch was held on 29th January, 2016 at Boma Hotel, South C in Nairobi. The programme will be implemented in conjunction with three executing entities namely Coast Development Authority, Kenya Forestry Research Institute and Tana and Athi River Development Authority and eight other Sub Executing Entities.¹¹⁴ The Green Climate Fund (GCF) is a finance mechanism established under the UNFCCC.

¹¹¹ Ibid, clause 43.

¹¹² The ultimate objective of the Convention and any related legal instruments that the Conference of the Parties may adopt is to achieve, in accordance with the relevant provisions of the Convention, stabilization of greenhouse gas concentrations in the atmosphere at a level that would prevent dangerous anthropogenic interference with the climate system. Such a level should be achieved within a time-frame sufficient to allow ecosystems to adapt naturally to climate change, to ensure that food production is not threatened and to enable economic development to proceed in a sustainable manner. (UN General Assembly, *United Nations Framework Convention on Climate Change : resolution / adopted by the General Assembly*, 20 January 1994, A/RES/48/189, Art. 2)

¹¹³ National Environment Management Authority, 'Adaptation Fund and GCF programmes,' available at http://www.nema.go.ke/index.php?option=com_content&view=article&id=229&Itemid=461 [Accessed on 28/07/2016].

¹¹⁴ Ibid.

Furthermore, the Green Climate Fund (GCF)¹¹⁵ accepted the application of National Environment Management Authority (NEMA) based on its eligibility to be accredited as an Implementing Entity (IE) under the Green Climate Fund. The decision was made during the twelfth meeting of the GCF Board, held from 8th to 10th March 2016, in Songdo, Korea.¹¹⁶ NEMA is the national implementing entity for Adaptation Fund project pipeline in Kenya. Following the GCF accreditation, NEMA has become the first government institution in Kenya, accredited to have direct access for GCF funding of up to USD 10 million. This follows NEMA's application submitted in May 2015 to the GCF board for accreditation.¹¹⁷

In addition to the foregoing, the *National Climate Change Response Strategy 2010* (NCCRS)¹¹⁸, has identified the forestry sector as a strong vehicle for undertaking both mitigation and adaptation efforts and intends to exploit incentives provided within the framework of UNFCCC, especially the REDD mechanism, to implement sustainable forest management approaches.¹¹⁹ Kenya is also observer country to the UN-REDD Programme and it is a participant country to the Forest Carbon Partnership Facility (FCPF).¹²⁰ As part of its FCPF programme Kenya is developing its National REDD+ Strategy and implementation framework in addition to establishing a Forest Reference Level/Reference Emission Level and a National Forest Monitoring System.¹²¹

These efforts and initiatives should be supported as they demonstrate Kenya's commitment to climate change mitigation, a positive step towards attaining sustainable development.

The Bali Principles of Climate Justice of 2002 (Bali Principles)¹²² acknowledge that if consumption of fossil fuels, deforestation and other ecological devastation continues at current rates, it is certain that climate change will result in increased temperatures, sea level rise, changes in agricultural patterns, increased frequency and magnitude of "natural" disasters such as floods, droughts, loss of biodiversity, intense storms and epidemics. Further, deforestation contributes to climate change, while having a negative impact on a broad array of local communities. The Bali Principles also affirm the fact that the impacts of climate change are disproportionately felt by small island states, women, youth, coastal peoples, local communities, indigenous peoples, fisherfolk, poor

¹¹⁵ This fund is established to fund climate change adaptation and mitigation projects in developing countries. The Fund is a unique global initiative to respond to climate change by investing into low-emission and climate-resilient development. GCF is accountable to the United Nations. It is guided by the principles and provisions of the UN Framework Convention on Climate Change (UNFCCC). It is governed by a Board of 24 members, comprising an equal number of members from developing and developed countries. The Green Climate Fund is the only stand-alone multilateral financing entity whose sole mandate is to serve the Convention and that aims to deliver equal amounts of funding to mitigation and adaptation.

¹¹⁶ National Environment Management Authority, 'Adaptation Fund and GCF programmes,' op cit.

¹¹⁷ Ibid.

¹¹⁸ See para. 4.2.5.2, Government of Kenya, 2010.

¹¹⁹ The REDD Desk, *REDD in Kenya*, available at <http://theredddesk.org/countries/kenya> [Accessed on 28/07/2016].

¹²⁰ Ibid.

¹²¹ Ibid; See also Gichu, A. & Chapman, S., *Overview of REDD+ in Kenya*, REDD+ Law Project -Briefing Paper, July 2014. Available at <http://www.4cmr.group.cam.ac.uk/filecab/redd-law-project/20140821%20BP%20Overview%20of%20REDD-%20in%20Kenya.pdf> [Accessed on 28/07/2016].

¹²² Available at <http://www.ejnet.org/ej/bali.pdf> [Accessed on 28/07/2016].

people and the elderly. Also noteworthy is the assertion that the local communities, affected people and indigenous peoples have been kept out of the global processes to address climate change. The Principles also acknowledge that unsustainable production and consumption practices are at the root of this and other global environmental problems. The impacts of climate change also threaten food sovereignty and the security of livelihoods of natural resource-based local economies. They can also threaten the health of communities around the world-especially those who are vulnerable and marginalized, in particular children and elderly people. More importantly, the *Bali Principles* acknowledge in the Preamble that combating climate change must entail profound shifts from unsustainable production, consumption and lifestyles, with industrialized countries taking the lead.¹²³

4.3. Realising the State's Role in Facilitating Equitable Benefit Sharing for Social Sustainability

The proposed legislation *Natural Resources (Benefit Sharing Bill)*¹²⁴ seeks to establish a system of benefit sharing in resource exploitation between resource exploiters, the national government, county governments and local communities, to establish the natural resources benefit sharing authority and for connected purposes. The Act applies with respect to petroleum and natural gas, among other natural resources. The Act provides for guiding principles to include transparency and inclusivity, revenue maximization and adequacy, efficiency and equity and accountability.¹²⁵ The legislation seeks to set up a Benefit Sharing Authority which will be mandated to coordinate the preparation of benefit sharing agreements between local communities and affected organizations,

¹²³ Though non-binding, the *Bali Principles* give some recommendations that can boost efforts to achieve sustainable development. These include, inter alia: the need to reduce with an aim to eliminate the production of greenhouse gases and associated local pollutants; the rights of indigenous peoples and affected communities to represent and speak for themselves; Governments' responsibility for addressing climate change in a manner that is both democratically accountable to their people and in accordance with the principle of common but differentiated responsibilities; fossil fuel and extractive industries be held strictly liable for all past and current life-cycle impacts relating to the production of greenhouse gases and associated local pollutants; clean, renewable, locally controlled and low-impact energy resources in the interest of a sustainable planet for all living things; the right of all people, including the poor, women, rural and indigenous peoples, to have access to affordable and sustainable energy; the need for solutions to climate change that do not externalize costs to the environment and communities, and are in line with the principles of a just transition; the need for socio-economic models that safeguard the fundamental rights to clean air, land, water, food and healthy ecosystems; the rights of communities dependent on natural resources for their livelihood and cultures to own and manage the same in a sustainable manner, and avoiding the commodification of nature and its resources; recognition of the right to self-determination of Indigenous Peoples, and their right to control their lands, including sub-surface land, territories and resources and the right to the protection against any action or conduct that may result in the destruction or degradation of their territories and cultural way of life; the right of indigenous peoples and local communities to participate effectively at every level of decision-making, including needs assessment, planning, implementation, enforcement and evaluation, the strict enforcement of principles of prior informed consent, and the right to say "No"; the need for solutions that address women's rights; the right of youth as equal partners in the movement to address climate change and its associated impacts; education of present and future generations, emphasising on climate, energy, social and environmental issues, while basing itself on real life experiences and an appreciation of diverse cultural perspectives; the need for we, as individuals and communities, to make personal and consumer choices to consume as little of Mother Earth's resources, conserve our need for energy; and make the conscious decision to challenge and reprioritize our lifestyles, re-thinking our ethics with relation to the environment and the Mother Earth; while utilizing clean, renewable, low impact energy; and ensuring the health of the natural world for present and future generations; and the rights of unborn generations to natural resources, a stable climate and a healthy planet.

¹²⁴ 2015 (Government Printer, Nairobi, 2015).

¹²⁵ S. 4.

review and where appropriate determine the royalties payable to an affected organization engaged in natural resource exploitation, identify counties that require to enter into benefit sharing agreement for the commercial exploitation of natural resources within the counties oversee the administration of funds sets out for county projects as identified and determined under and benefit sharing agreement, monitor the implementation of any benefit sharing agreement entered between a county and an affected organization, conduct research regarding the exploitation and development of natural resources and benefit sharing in Kenya recommend on better exploitation of natural resources in Kenya, determine appeals arising out of conflict and advise the national government on policy/enactment of legislation relating to natural resource benefit sharing.¹²⁶ There is need to actively involve communities in the implementation of this law to ensure that they are not left out as far as benefit sharing is concerned. The approach should be one that ensures that communities feel part of the resource management strategies and not mere spectators where they are not consulted even on the best approaches to benefit sharing.

There is also the proposed National Assembly's *Community Land Bill, 2015* which is meant to give effect to Article 63 (5) of the Constitution; to provide for the recognition, protection and registration of community land rights; management and administration of community land; to provide for the role of county governments in relation to unregistered community land and for connected purposes.¹²⁷ Clause 36 provides that subject to any other law, natural resources found in community land should be used and managed—sustainably and productively; for the benefit of the whole community including future generations; with transparency and accountability; and on the basis of equitable sharing of accruing benefits. This provision thus requires all those charged with administration of such jointly owned resources to not ensure equitable sharing of accruing benefits but also sustainable and productive use and management of the same. The requirement for transparency and accountability is meant to give the community channels of ensuring that the resources are not wasted or mismanaged.

Where need for concessions arise, the proposed law provides that an agreement relating to investment in community land should be made after a free, open consultative process and should contain provisions on the following aspects — an *environmental, social, cultural and economic impact assessment* (emphasis added); stakeholder consultations and involvement of the community; continuous monitoring and evaluation of the impact of the investment to the community; payment of compensation and royalties; requirement to re-habilitate the land upon completion or abandonment of the project; measures to be put in place to mitigate any negative effects of the investment; capacity

¹²⁶ Clause 6, *Natural Resources (Benefit Sharing Bill)*, 2015.

¹²⁷ Preamble, *Community Land Bill, 2015* (Government Printer, Nairobi, 2015).

building of the community and transfer technology to the community; and any other matters necessary for determining how local communities will benefit from investments in their land.¹²⁸

It is important to point out that for the community to benefit through the ways contemplated above, they must be willing to take up opportunities that would be brought their way. They must be made to understand that the expected benefits will not only come in monetary terms only and must be made aware of the various non-monetary forms that benefits may accrue to them, envisaged under the *Nagoya Protocol*.¹²⁹ The various means of accessing benefit sharing are also captured under the *Legal Notice 160 of 2006 on the Environmental Management and Co-Ordination (Conservation of Biological Diversity and Resources, Access to Genetic Resources and Benefit Sharing) Regulations*, 2006 which makes provisions for benefit sharing on genetic resources.¹³⁰ These Regulations may therefore offer useful guidelines on how to ensure that genetic resources are conserved and also benefit concerned groups of people, as envisaged under the Constitution. Some of the forms of benefits would only be made possible through concerted efforts from both sides, that is, the concerned community and the investor and possibly with assistance from the county or national governments.¹³¹

¹²⁸ Ibid, Clause 37.

¹²⁹ Annex to the *Nagoya Protocol* provides for both monetary and non-monetary forms of benefits. It envisages monetary benefits which may include, but not be limited to: access fees/fee per sample collected or otherwise acquired; up-front payments; milestone payments; payment of royalties; licence fees in case of commercialization; special fees to be paid to trust funds supporting conservation and sustainable use of biodiversity; salaries and preferential terms where mutually agreed; research funding; joint ventures; and joint ownership of relevant intellectual property rights (*Annex to the Nagoya Protocol on Access and Benefit-sharing*).

¹³⁰ Regulation 20 (1) without prejudice to the generality of the foregoing, the holder of an access permit shall facilitate an active involvement of Kenyan citizens and institutions in the execution of the activities under the permit. (2) The facilitation by the holder of an access permit shall include enjoyment of both monetary and non-monetary benefits arising from the right of access granted and the use of genetic resources. (3) Monetary benefits include – (a) access fees or fee per sample collected or acquired; (b) up-front payments; (c) milestone payments; (d) payment of royalties; (e) license fees in case genetic resources are to be utilized for commercial purposes; (f) fees to be paid to trust funds supporting conservation and sustainable use of biodiversity; (g) salaries and preferential terms where mutually agreed; (h) research funding; (i) joint ventures; (j) joint ownership of relevant intellectual property rights; (4) Non-monetary benefits include – (a) sharing of research and development results; (b) collaboration, co-operation and contribution in scientific research and development programmes, particularly biotechnological research activities; (c) participation in product development; (d) admittance to ex situ facilities of genetic resources and to databases by participating institutions; (e) transfer to Kenya of genetic resources of knowledge and technology under fair and most favourable terms, including concessional and preferential terms where agreed, in particular, knowledge and technology that make use of genetic resources, including biotechnology, or that are relevant to the conservation and sustainable utilization of biological diversity; (f) strengthening capacities for technology transfer to Kenya; (g) institutional capacity building; (h) human and material resources to strengthen the capacities for the administration and enforcement of access regulations; (i) training related to genetic resources with the full participation of Kenya and where possible, in Kenya; (j) access to scientific information relevant to conservation and sustainable use of biological diversity, including biological inventories and taxonomic studies; (k) institutional and professional relationships that can arise from access and benefit sharing agreements and subsequent collaborative activities; (l) joint ownership of relevant intellectual property rights.

¹³¹ The Genetic Resources Research Institute (GeRRI), under the Kenya Agricultural and Livestock Research Act of 2013, a semi-autonomous research Institute, is responsible for conserving plant genetic resources, animal and microbial genetic resources. Genetic resources are essential basic building blocks utilized in research to develop improved technologies for enhanced agricultural production. This Institution should work closely with communities and other stakeholders in order to promote effective conservation and use of resources for food security assurance, agricultural resilience and economic growth, besides achieving sustainable development.

The International Finance Corporation (IFC) suggests practical processes for sharing benefits with communities.¹³² One of the ways that this can be achieved is through maintaining active relationships built on trust with communities through appropriate and effective communication. This implies that genuine consultations and participation in decision-making will happen whenever possible and that perceptions and expectations are closely aligned with reality. They also propose carrying out comprehensive, participatory baseline studies of the community's socioeconomic, cultural heritage, and socio-environmental context before project development, agreeing to joint objectives for the project's community programs, monitoring outcomes (including community feedback), and responding as needed. This, according to IFC, helps address misconceptions, manage expectations, and assuage fears or concerns.¹³³

There is also the suggestion on establishing robust grievance mechanisms that are understood, accessible and linked directly to project performance measures. Where justified, third party mediation may be required.¹³⁴ Foundations and other long-term approaches may also be good vehicles to achieve community development objectives if they ensure broader stakeholder participation and helping identify areas of focus and consistency of priorities across actors, such as company, governments, donors, and communities. Finally, integrating project development and community development plans as effectively as practicable with local and national government planning to support development aspirations and balance the expectations and demands of different communities may be useful.¹³⁵

There is need to ensure that the any model that is put in place guarantees a fair and equitable benefit-sharing, with terms and provisions which clearly spell out the model to be used in determining the accruing benefits and the associated costs, in order to determine the investments (and compromises) from all parties and stakeholders involved.¹³⁶

¹³² Lohde, L.A., *The Art and Science of Benefit Sharing in the Natural Resource Sector*, (International Finance Corporation, February 2015), p. 61. Available at

http://www.ifc.org/wps/wcm/connect/8e29cb00475956019385972fbd86d19b/IFC_Art+and+Science+of+Benefits+Shar ing_Final.pdf?MOD=AJPERES&CACHEID=8e29cb00475956019385972fbd86d19b [Accessed on 13/07/2016].

¹³³ Ibid, p. 61.

¹³⁴ Art. 47(1) of the Constitution of Kenya guarantees that every person has the right to administrative action that is expeditious, efficient, lawful, reasonable and procedurally fair (See also *Fair Administrative Action Act*, No. 4 of 2015). Further, Art. 48 obligates the State to ensure access to justice for all persons and, if any fee is required, it shall be reasonable and shall not impede access to justice. Art. 60(1) (g) provides that one of the principles of land policy in Kenya is encouragement of communities to settle land disputes through recognised local community initiatives consistent with this Constitution. Furthermore, one of the functions of the National Land Commission include to encourage the application of traditional dispute resolution mechanisms in land conflicts (Art. 67(2) (f). Also relevant is Art. 159(2)(c) which requires that in exercising judicial authority, the courts and tribunals should be guided by the principles which include, inter alia—promotion of alternative forms of dispute resolution including reconciliation, mediation, arbitration and traditional dispute resolution mechanisms, subject to clause (3). The foregoing provisions provide a good platform upon which communities and other stakeholders can enjoy grievance mechanisms that are easily understood, accessible and linked directly to project performance measures.

¹³⁵ Lohde, L.A., *The Art and Science of Benefit Sharing in the Natural Resource Sector*, (International Finance Corporation, February 2015), op cit. p. 61.

¹³⁶ See generally, Jonge, B.D., 'What is Fair and Equitable Benefit-sharing?' *Journal of Agricultural and Environmental Ethics*, Vol. 24, 2011, pp.127–146.

4.4 Empowerment and Public Participation for Effective Natural Resources Management

It has been observed that an emphasis on responsibilities rather than rights echoes language from the Stockholm Declaration and subsequent instruments that emphasize the duty of each person to protect and improve the environment for present and future generations.¹³⁷ This, it is arguable, calls for empowerment of the citizenry to enable them carry out their duties towards environmental management effectively. The fact that the Constitution of Kenya¹³⁸ and EMCA¹³⁹ have already dispensed with the need to prove locus standi in environmental matters litigation presents a good opportunity for the citizenry, through relevant support, to hold government and private entities accountable as far as management of environmental resources is concerned.

In the case of *Joseph Leboo & 2 others v Director Kenya Forest Services & another*¹⁴⁰ the Learned Judge observed that “...in my view, any person is free to raise an issue that touches on the conservation and management of the environment, and it is not necessary for such person to demonstrate, that the issues being raised, concern him personally, or indeed, demonstrate that he stands to suffer individually. Any interference with the environment affects every person in his individual capacity, but even if there cannot be demonstration of personal injury, such person is not precluded from raising a matter touching on the management and conservation of the environment....Any person, without the need of demonstrating personal injury, has the freedom and capacity to institute an action aimed at protecting the environment. The plaintiffs have filed this suit as representatives of the local community and also in their own capacity. The community, of course, has an interest in the preservation and sustainable use of forests. Their very livelihoods depend on the proper management of the forests. Even if they had not demonstrated such interest that would not have been important, as any person *who alleges a violation of any law touching on the environment is free to commence litigation to ensure the protection of such environment....*”¹⁴¹ (emphasis added)

However, such suits require that the particular persons be first empowered through the relevant information, acquired either through formal, informal or non-formal education or general awareness on the relevant matters. The right to information must therefore be realized to facilitate enjoyment of environmental rights. This can be achieved through implementation of Article 35 of the Constitution, which guarantees the right to information.¹⁴²

¹³⁷ Shelton, D., ‘Human Rights, Health and Environmental Protection: Linkages in Law and Practice: A Background Paper for the WHO,’ op cit. p. 3.

¹³⁸ For the purposes of this Article, an applicant does not have to demonstrate that any person has incurred loss or suffered injury (Art. 70(3)).

¹³⁹ S.3 (4) A person proceeding under subsection (3) of this section shall have the capacity to bring an action notwithstanding that such a person cannot show that the defendant’s act or omission has caused or is likely to cause him any personal loss or injury provided that such action – (a) is not frivolous or vexatious; or (b) is not an abuse of the court process.

¹⁴⁰ [2013] eKLR, Environment and Land No. 273 of 2013.

¹⁴¹ Paras 25 & 28.

¹⁴² Art. 35(1) states that every citizen has the right of access to—(a) information held by the State; and (b) information held by another person and required for the exercise or protection of any right or fundamental freedom. Also relevant is the proposed legislation, *the Access to Information Act, 2015*, which is intended to give effect to Article 35 of the

The United Nations Development Programme (UNDP) recommends adoption of decentralised governance of natural resources, which concerns the ownership and control of, access to and use of resources, and involves decision making and the exercise of the powers over others.¹⁴³ It entails the process of transferring some of the decision-making powers and responsibilities (fiscal, administrative, legal and technical) to sub-national institutions at the grassroots' levels.¹⁴⁴ According to UNDP, decentralised governance of natural resources is considered one of the key strategies for promoting sustainable management, equitable decision-making, promoting efficiency, participatory governance and equitable sharing of benefits accrued from exploitation of natural resources at the local levels.¹⁴⁵

The Constitution provides for the role of devolved governance system in the management of natural resources and the environment. The Fourth Schedule to the Constitution¹⁴⁶ provides for the distribution of functions between the National Government and the County Governments. With regard to the environment and natural resources, the National Government obligations include protection of the environment and natural resources with a view to establishing a durable and sustainable system of development, including, in particular—fishing, hunting and gathering; protection of animals and wildlife; water protection, securing sufficient residual water, hydraulic engineering and the safety of dams; and energy policy.¹⁴⁷ On the other hand, the functions and powers of the county are, inter alia: implementation of specific national government policies on natural resources and environmental conservation, including— soil and water conservation; and forestry; and ensuring and coordinating the participation of communities and locations in governance at the local level and assisting communities and locations to develop the administrative capacity for the effective exercise of the functions and powers and participation in governance at the local level.¹⁴⁸

It has rightly been argued that citizens are one of a nation's greatest resources for enforcing environmental laws and regulations. This is because they know the country's land and natural attributes more intimately than a government ever will.¹⁴⁹ Further, their number makes them more pervasive than the largest government agency, and because citizens work, play, and travel in the environment, each has a personal stake in its beauty, health, and permanence.¹⁵⁰ Agenda 21 also tasks

Constitution; to confer on the Commission on Administrative Justice the oversight and enforcement functions and powers and for connected purposes. It classifies environmental information as part of the information that falls under information affecting public interest.

¹⁴³ United Nations Development Programme, *Decentralized Governance of Natural Resources*, available at <http://web.undp.org/drylands/decentralized-governance.html> [Accessed on 14/07/2016].

¹⁴⁴ Ibid.

¹⁴⁵ Ibid.

¹⁴⁶ (Article 185 (2), 186 (1) and 187 (2)), Constitution of Kenya.

¹⁴⁷ Fourth Schedule, Clause 22.

¹⁴⁸ Fourth Schedule, clauses 10 & 14.

¹⁴⁹ Roberts E. & Dobbins J., 'The Role of the Citizen in Environmental Enforcement,' (Environmental Law Institute. 1616 P Street. N.W. Washington. DC 20036, USA).

Available at <http://www.inece.org/2ndvol1/roberts.htm> [Accessed on 21/07/2016]

¹⁵⁰ Ibid.

the Government to do all that is necessary in giving communities a large measure of participation in the sustainable management and protection of the local natural resources in order to enhance their productive capacity.¹⁵¹

Thus, it is important to ensure that public participation is well captured in the policy and legal framework to facilitate sustainable management and conservation of environmental resources through approaches that are inclusive, participatory and deliberative in nature. The need for involvement of citizens in the environmental enforcement process has been recommended for several reasons. First, citizen participation in environmental enforcement taps the direct, immediate connection between individuals and their environment. This is because citizens are uniquely knowledgeable about their own communities. Their day-to-day observations give them access to information about environmental conditions that the government could never obtain. Involving citizens in environmental enforcement encourages productive use of this information.¹⁵² Second, the injection of varied, non-institutional perspectives and information sources into the enforcement process may improve the quality of enforcement decisions. Allowing and encouraging views from different groups to affect the outcome, may increase compliance, deter violations, and contribute to a more realistic and responsive environmental enforcement strategy.¹⁵³

Finally, public involvement in enforcement is believed to be a logical next step for democratic political systems that have encouraged public participation in the creation of environmental statutes and regulations.¹⁵⁴ Allowing citizens to have a concrete role in implementing the regime they helped to design strengthens public support for and awareness of environmental goals.¹⁵⁵ If citizens are denied a role in enforcement, or if they are not educated about and encouraged to assume a permitted role, even the most sophisticated system of environmental protection laws may exist only on paper. As such, developing and nurturing a role for the citizens in enforcement efforts could provide the missing ingredient necessary to make countries' environmental protection goals a reality.¹⁵⁶

In her acceptance speech, Nobel Laureate, the late Prof. Wangari Maathai, summarised the importance of environmental resources to livelihood sustenance and the central role that citizenry can play in solving environmental problems by stating that “.....*So, together, we have planted over 30 million trees that provide fuel, food, shelter, and income to support their children's education and household needs. The activity also creates employment and improves soils and watersheds. Through*

¹⁵¹ Agenda 21, clause 3.7(d).

¹⁵² Roberts E. & Dobbins J., ‘The Role of the Citizen in Environmental Enforcement,’ op cit.

¹⁵³ Ibid.

¹⁵⁴ Ibid; See also generally Rondinelli, D.A. (ed.), ‘Public Administration And Democratic Governance: Governments Serving Citizens,’ *7th Global Forum on Reinventing Government Building Trust in Government* 26-29 June 2007, Vienna, Austria, (United Nations, ST/ESA/PAD/SER.E/, United States of America, 2006).

¹⁵⁵ Ibid; See also Casey-Lefkowitz, n et al, ‘The Evolving Role Of Citizens In Environmental Enforcement,’ *Fourth International Conference On Environmental Compliance And Enforcement*, available at <http://www.inece.org/4thvol1/futrell.pdf> [Accessed on 16/07/2016]

¹⁵⁶ Ibid.

their involvement, women gain some degree of power over their lives, especially their social and economic position and relevance in the family....Initially, the work was difficult because historically our people have been persuaded to believe that because they are poor, they lack not only capital, but also knowledge and skills to address their challenges. Instead they are conditioned to believe that solutions to their problems must come from 'outside'. Further, women did not realize that meeting their needs depended on their environment being healthy and well managed. They were also unaware that a degraded environment leads to a scramble for scarce resources and may culminate in poverty and even conflict....In order to assist communities to understand these linkages, we developed a citizen education program, during which people identify their problems, the causes and possible solutions. They then make connections between their own personal actions and the problems they witness in the environment and in society.... (Emphasis added)”¹⁵⁷

To facilitate more equitable distribution of accruing benefits among local, often subsistence, and indigenous peoples, there are those who advocate for approaches incorporating community based natural resource management (CBNRM) and other approaches that protect the interests of the local people. The CBNRM approach is built upon three (3) assumptions: management responsibility over the local natural resources that is devolved to community level will encourage communities to use these resources up to sustainable levels; the “community” represents the interests of all its members; and communities are keen to accept management responsibility because they see the (long-term) economic benefits of sustainable utilisation, and they are willing to invest time and resources in natural resource management.¹⁵⁸

Decisions on policies and programs for resource management need to be based on broad citizen participation and the engagement of rural communities that have often been disenfranchised or marginalized.¹⁵⁹ Some of the main features of the revised policy framework for forest conservation and sustainable management include, inter alia: the devolution of community forest conservation and management, implementation of national forest policies and strategies, deepening the community participation in forest management through elaborate strategies of strengthening of community forestry associations, and the introduction of benefit-sharing arrangements; the adoption of an ecosystem approach for the management of forests, and recognition of customary rights, the vulnerable and marginalized groups, and user rights that support sustainable forest management and

¹⁵⁷ The Norwegian Nobel Institute, ‘Wangari Maathai: The Nobel Lecture (Oslo, December 10, 2004),’ available at http://nobelpeaceprize.org/en_GB/laureates/laureates-2004/maathai-lecture/ [Accessed on 16/07/2016].

¹⁵⁸ Shackleton, S. & Campbell, B. (eds), ‘Empowering Communities to Manage Natural Resources: Case Studies from Southern Africa,’ Center for International Forestry Research, March 2000, p. 10. Available at http://www.cifor.org/publications/pdf_files/Books/Empowering.pdf [Accessed on 20/07/2016].

¹⁵⁹ InterAction, *Environment & Climate: Overview-Our Work*, available at <https://www.interaction.org/project/environment/overview> [Accessed on 6/07/2016].

conservation; and the establishment of national programmes to support community forest management and afforestation/reforestation on community and private land.¹⁶⁰

4.5 Establishment of systems of environmental impact assessment, environmental audit and monitoring of the environment

The Constitution of Kenya requires the State to establish systems of environmental impact assessment, environmental audit and monitoring of the environment. The *Environment (Management and Coordination) Act* (EMCA)¹⁶¹ tasks National Environmental Management Authority (NEMA) with the responsibility of carrying out Environmental Audit of all activities that are likely to have significant effect on the environment. While Environmental Impact Assessment is conducted before commencement of any new development to minimise negative environmental impacts, for ongoing activities, an Environmental Audit ascertains if the activities in question have significant environmental effects.¹⁶² In Kenya, an environmental impact assessment study preparation is generally required to take into account environmental, social, cultural, economic, and legal considerations, and should—identify the anticipated environmental impacts of the project and the scale of the impacts; identify and analyze alternatives to the proposed project; propose mitigation measures to be taken during and after the implementation of the project; and develop an environmental management plan with mechanisms for monitoring and evaluating the compliance and environmental performance which should include the cost of mitigation measures and the time frame of implementing the measures.¹⁶³

Principle 17 of the *Rio Declaration on Environment and Development*, states that environmental impact assessment, as a national instrument, should be undertaken for proposed activities that are likely to have a significant adverse impact on the environment and are subject to a decision of a competent national authority. Effective Environmental Impact Assessment (EIA) has been described as ‘a process for identifying and considering the impacts of an action’. It is ‘not about rejecting development; rather it is about making sure that development proceeds with full knowledge of the environmental consequences’.¹⁶⁴ EIA may provide an opportunity for public scrutiny and participation in decision-making; introduce elements of independence and impartiality; and facilitate better informed judgments when balancing environmental and developmental needs.¹⁶⁵ Public

¹⁶⁰ Draft National Forest Policy, 2015, pp. i-ii.

¹⁶¹ No. 8 of 1999, Laws of Kenya (Government Printer, Nairobi, 1999), s.68.

¹⁶² FAO, ‘Environmental Impact Assessment (EIA) and Environmental Auditing (EA),’ available at <http://www.fao.org/docrep/005/v9933e/v9933e02.htm> [Accessed on 20/07/2016].

¹⁶³ Regulation 16, *Environmental (Impact Assessment and Audit) Regulations, 2003*, Legal Notice 101 of 2003.

¹⁶⁴ Ingelson, A., et al, ‘Philippine Environmental Impact Assessment, Mining and Genuine Development’, 5/1 *Law, Environment and Development Journal* (2009), p. 7, available at <http://www.leadjournal.org/content/09001.pdf> [Accessed on 20/07/2016].

¹⁶⁵ Birnie, P. & Boyle, A., “*International Law and the Environment*”, (2nd ed. Oxford University Press, 2002), p.131-132; See also Muigua, K., ‘Environmental Impact Assessment (EIA) in Kenya,’ available at <http://www.kmco.co.ke/attachments/article/109/A%20Paper%20on%20Environmental%20impact%20assessment.pdf>

participation is believed to be an integral part of the environmental impact assessment process as it creates an opportunity for concerned citizens to express their views on natural resource development.¹⁶⁶ Public participation is also encouraged under EIA because, after stakeholders have had the opportunity to express their opinions, they may be more inclined to accept the final outcome decided by the regulators, as they have had the opportunity to express their views.¹⁶⁷

The mandatory requirements for Environmental Impact Assessment, Strategic Environmental Assessment¹⁶⁸ and Strategic Environmental and Social Assessment (SESA) also present viable channels through which communities can actively participate in sustainable development agenda in the country.¹⁶⁹ Section 115 of the *County Governments Act 2012*¹⁷⁰ provides that Public participation in the county planning processes shall be mandatory and be facilitated through— mechanisms provided for in Part VIII¹⁷¹ of the Act; and provision to the public of clear and unambiguous information on any matter under consideration in the planning process, including— clear *strategic environmental assessments* (emphasis added); clear environmental impact assessment reports; expected development outcomes; and development options and their cost implications.

Involving communities in identifying and eliminating processes and activities that are likely to endanger the environment is recommended since communities are conscious of such activities that can compromise their livelihoods. This may be informed by the *principle of subsidiarity*, where, arguably, the local communities are the best placed to address the burning environmental issues such as pollution, degradation and over-utilisation (emphasis added).¹⁷² They only need technical support from the Government and through collaboration, they can come up with lasting solutions. Where they are not well informed, public awareness through civic education and agricultural field trainings can help them identify the issues. Where funds are allocated for environmental protection, the local people should adequately be represented in deciding the most urgent issues that ought to be addressed. The various sectoral laws, including wildlife, water, forests and wetlands have come up with special kitty

¹⁶⁶ Ingelson, A., et al, 'Philippine Environmental Impact Assessment, Mining and Genuine Development', op cit, p. 6; See also Okello, N., et al, 'The doing and un-doing of public participation during environmental impact assessments in Kenya,' *Impact Assessment and Project Appraisal*, Vol. 27, No.3, 2009, pp.217-226.

¹⁶⁷ Ibid, p. 6.

¹⁶⁸ "strategic environmental assessment" means a formal and systematic process to analyse and address the environmental effects of policies, plans, programmes and other strategic initiatives (s.2, *Environmental Management and Co-ordination (Amendment) Act*, No. 5 of 2015); S. 57A, EMCA, No. 8 of 1999; See also the *Environmental (Impact Assessment and Audit) Regulations, 2003*, Legal Notice 101 of 2003, Regulations 42 & 43.

¹⁶⁹ One of the Policy Statements in the *National Environment Policy 2013* is that the Government will ensure Strategic Environmental Assessment (SEA), Environmental Impact Assessment, Social Impact Assessment and Public participation in the planning and approval of infrastructural projects (para. 5.6).

¹⁷⁰ An Act of Parliament to give effect to Chapter Eleven of the Constitution; to provide for county governments' powers, functions and responsibilities to deliver services and for connected purposes.

¹⁷¹ Ibid, Ss. 87-92.

¹⁷² See the *East African Community Protocol on Environment and Natural Resources Management, 2005*. Art. 4 (2) (p). One of the principles of environment and natural resources management is: the principle of subsidiarity in the management of the environment and natural resources; See also generally, *Protocol (No 2) on the application of the principles of subsidiarity and proportionality*, annexed to the Treaty on European Union and the Treaty on the Functioning of the European Union by the Treaty of Lisbon of 13 December, 2007; See also Article 5 of the Treaty on European Union, C 326/1.

to facilitate conservation and effective management of resources. Communities ought to be evidently and adequately represented in committees dealing with such kitty to curb corruption and improve management.

There is also need to establish efficient systems of Strategic Environmental Assessment (SEA), Environmental Impact Assessment (EIA), Strategic Environmental and Social Assessment (SESA) and Environmental Audit and Monitoring of the environment and Environmental Security Assessment (ESA). Strategic Environmental Assessment (SEA) is defined as the process by which environmental considerations are required to be fully integrated into the preparation of *policies, plans and programmes* and prior to their final adoption (emphasis added).¹⁷³ 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.¹⁷⁴ Environmental impact assessment means a systematic examination conducted to determine whether or not a programme, activity or project will have any adverse impacts on the environment.¹⁷⁵ Environmental audit means the systematic, documented, periodic and objective evaluation of how well environmental organisation, management and equipment are performing in conserving or preserving the environment.¹⁷⁶ Strategic Environmental and Social Assessment (SESA) is a more effective tool since it integrates the social issues that are likely to emerge and not just the environmental considerations.¹⁷⁷

These exercises should not be just a matter of formality and paper work.¹⁷⁸ 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.

¹⁷³ Environmental protection Agency, 'Strategic Environmental Assessment,' available at <http://www.epa.ie/monitoringassessment/assessment/sea/#.Vi5tmGuJ2CA>. S. 57(2), EMCA, provides that for the avoidance of doubt, the plans, programmes and policies (referred to in the Act) are those that are- (a) subject to preparation or adoption by an authority at regional, national, county or local level, or which are prepared by an authority for adoption through a legislative procedure by Parliament, Government or if regional, by agreements between the governments or regional authorities, as the case may be; (b) determined by the Authority as likely to have significant effects on the environment.

¹⁷⁴ Ibid; See also the *Environmental (Impact Assessment and Audit) Regulations, 2003*, Legal Notice 101 of 2003, Regulations 42 & 43.

¹⁷⁵ *Environmental Management and Co-Ordination Act*, No 8 of 1999 (Government Printer, Nairobi, 1999), s.2.

¹⁷⁶ Ibid.

¹⁷⁷ 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.

¹⁷⁸ 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 20/07/2016]; 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 26/10/2015]. 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

4.6 Judicial Activism

It has rightly been argued that there are other regulatory approaches to achieving environmental protection and public health that are not rights-based. These include economic incentives and disincentives, criminal law, and private liability regimes which have all formed part of the framework of international and national environmental law and health law.¹⁷⁹ For instance, *the Environmental Management and Co-ordination (Amendment) Act, 2015*¹⁸⁰ amends section 48 of EMCA by inserting subsection (3) to the effect that where a forested area is declared to be a protected area under section 54(1), the Cabinet Secretary may cause to be ascertained, any individual, community or government interests in the land and forests and shall *provide incentives to promote community conservation* (emphasis added).¹⁸¹ Such an approach can boost the State's efforts in sustainable development.

In *Peter K. Waweru v Republic*,¹⁸² the Court observed that ...environmental crimes under the Water Act, Public Health Act and EMCA cover the entire range of liability including strict liability and absolute liability and ought to be severely punished because the challenge of the restoration of the environment has to be tackled from all sides and by every man and woman.... It went further to state, —...In the name of environmental justice water was given to us by the Creator and in whatever form it should never ever be the privilege of a few – the same applies to the right to a clean environment.¹⁸³ The Court also affirmed the broad scope of the right to clean and healthy environment by stating, *inter alia*, that ‘the right of life is not just a matter of keeping body and soul together because in this modern age that right could be threatened by many things including the environment. The right to a clean environment is primary to all creatures including man; it is inherent from the act of creation, the recent restatement in the Statutes and the Constitutions of the world notwithstanding.’¹⁸⁴

Kenyan Courts' position in the foregoing case was reflected in the practice of Indian Courts. The Supreme Court of India held in *Subhash Kumar v. State of Bihar*,¹⁸⁵ that the “right to life

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.

¹⁷⁹ Shelton, D., ‘Human Rights, Health and Environmental Protection: Linkages in Law and Practice: A Background Paper for the WHO,’ p. 3.

Available at http://www.who.int/hhr/information/Human_Rights_Health_and_Environmental_Protection.pdf [Accessed on 20/07/2016].

¹⁸⁰ No. 5 of 2015, Laws of Kenya.

¹⁸¹ S. 31, *Environmental Management and Co-ordination (Amendment) Act, 2015*.

¹⁸² [2006] eKLR, Misc. Civ. Applic. No. 118 of 2004.

¹⁸³ p.14.

¹⁸⁴ *Ibid*, p.8.

¹⁸⁵ AIR 1991 SC 420, 1991 (1) SCC 598.

guaranteed by article 21 of the Constitution includes the right of enjoyment of pollution-free water and air for full enjoyment of life.” Further, in the case of *Dr. Mohiuddin Farooque v. Bangladesh, represented by the Secretary, Ministry of Irrigation, Water Resources and Flood Control and Others*¹⁸⁶, the Supreme Court interpreted the right to life to include the protection and preservation of the environment and ecological balance free from pollution of air and water. In another Indian case of *K. Ramakrishnan and Others v State of Kerala and Others* (smoking case), the Court stated that “The word ‘life’ in the Constitution has not been used in a limited manner. A wide meaning should be given to the expression ‘life’ to enable a man not only to sustain life but also to enjoy it in a full measure. The sweep of right to life conferred by Article 21 of the Constitution is wide and far-reaching so as to bring within its scope the right to pollution free air and the “right to decent environment.”(Emphasis added)¹⁸⁷

Therefore, in the enforcement of other Constitutional rights such as economic and social rights and the right to life under the Constitution, courts should accord such provisions broad interpretations so as to address any environmental factors that impede access to the resources necessary for enjoyment of the right in question. These include *inter alia*, right to the highest attainable standard of health, which includes the right to health care services, including reproductive health care; to accessible and adequate housing, and to reasonable standards of sanitation; to be free from hunger, and to have adequate food of acceptable quality; and to clean and safe water in adequate quantities.¹⁸⁸

In addition to the active role taken up by national courts, India also has the National Green Tribunal, commonly referred to as green courts, established in October 2010 under the *National Green Tribunal Act 2010*¹⁸⁹ for effective and expeditious disposal of cases relating to environmental protection and conservation of forests and other natural resources including enforcement of any legal right relating to environment and giving relief and compensation for damages to persons and property and for matters connected therewith or incidental thereto.¹⁹⁰ It is a specialized body equipped with the necessary expertise to handle environmental disputes involving multi-disciplinary issues.¹⁹¹

The advantage with the green tribunal of India is that it is administered by persons with specialised knowledge and experience in environmental matters and they may not necessarily be judicial officers. It thus combines expert members with judicial officers. This is arguably a better approach than the Kenyan one where the Environment and Land Court comprises exclusively judicial

¹⁸⁶ 48 DLR 1996 (SC Bangladesh, 1996).

¹⁸⁷ AIR 1999 Ker 385, p.11.

¹⁸⁸ Constitution of Kenya, Art. 43(1).

¹⁸⁹ No. 19 of 2010, Laws of India.

¹⁹⁰ National Green Tribunal, available at <http://www.greentribunal.gov.in/> [Accessed on 28/07/2016].

¹⁹¹ Ibid; Pradeep, B. & Madhur, Y., ‘New Judicial Roles and Green Courts in India,’ available at http://inece.org/conference/9/papers/Bakshi_India_Final.pdf [Accessed on 28/07/2016].

officers, albeit with judicial training.¹⁹² Having on board non-judicial members with specialised knowledge in environmental matters may help come up with better approaches to environmental and natural resource management. Access to environmental justice also becomes easier.¹⁹³ They can work more closely with mainstream courts to promote sustainable development.

The Court should be able to step in and protect the environment without necessarily looking for immediate proof of likely violation of the right to clean and healthy environment. To facilitate the same, the Constitution gives courts the power to make any order, or give any directions, it considers appropriate – to prevent, stop or discontinue any act or omission that is harmful to the environment, or to any public officer to take measures to prevent or discontinue any act or omission that is harmful to the environment, or to provide compensation for any victim of a violation of the right to a clean and healthy environment.¹⁹⁴ An applicant seeking such orders from courts does not have to demonstrate that any person has incurred loss or suffered injury. The Constitution provides that an applicant does not have to demonstrate that any person has incurred loss or suffered injury.¹⁹⁵ However, to succeed in their plea one must demonstrate that their Right under Article 42 has been or is likely to be denied, violated, infringed or threatened.¹⁹⁶

The *suo moto* powers of the Court in environmental matters is also reflected under provisions of the *Environment and Land Act*.¹⁹⁷ It is also important to point out that the Courts are under a constitutional obligation under Article 10 to uphold the principles of sustainable development. This includes protecting the environment for the sake of future generations. The Court should, like in the case of *Peter K. Waweru (supra)*, be proactive in promoting environmental protection and conservation for sustainable development. Courts can take proactive measures to ensure conservation and protection of the environment for sustainable development. They can ensure that communities and other private persons enjoy environmental democracy especially where such communities approach courts seeking justice and access to environmental information, and demand enforcement of environmental laws or compensation for damage. Courts can work closely with such the local bodies to adequately and peaceably address conflict or disputes. Where state decision makers or such local bodies or tribunals attempt to bypass the legal requirements on public participation in decision-

¹⁹² Persons with specialised training can only appear as witnesses or to furnish in writing or otherwise, and to confirm on oath or affirmation, such expert opinion as may be relevant to any of the issues in the proceedings. (S. 19(4), *Environment and Land Court Act, 2011*).

¹⁹³ Desai, B.H. & Sidhu, B., 'On the Quest for Green Courts in India,' *Journal of Court Innovation*, Vol.3, No. 1, 2010, pp. 79-111.

¹⁹⁴ Art. 70(2).

¹⁹⁵ Art. 70(3); See also section 3(1) of Environment (Management and Conservation) Act, 1999 (EMCA)

¹⁹⁶ *Joseph Owino Muchesia & another v Joseph Owino Muchesia & another* [2014] eKLR, para. 34.

¹⁹⁷ No 19 of 2011, Laws of Kenya. S. 20(1)-Nothing in this Act may be construed as precluding the Court from adopting and implementing, on its own motion, with the agreement of or at the request of the parties, any other appropriate means of alternative dispute resolution including conciliation, mediation and traditional dispute resolution mechanisms in accordance with Article 159(2) (c) of the Constitution.

(2) Where alternative dispute resolution mechanism is a condition precedent to any proceedings before the Court, the Court shall stay proceedings until such condition is fulfilled.

making in matters that greatly affect the livelihoods of a particular group of people, courts can use its constitutional powers to enforce the law.

5. Conclusion

The existing policies, legal and institutional frameworks, as already highlighted in select statutes, appear to suggest that the sustainable management of resources agenda is one to be driven by the State, especially in terms of decision-making, and not the local community. The Constitution envisages a collaborative approach between communities and the State. Decision making processes still seem to be largely top-down in nature and communities are only afforded opportunities to apply for resource user rights, with little or no consultations regarding management. The Constitution creates an opportunity where, through devolution, communities are supposed to be empowered by devolving power from the state to local institutions of decision- making as a way of empowering local communities to manage natural resources and environmental matters. There is also need to put in place a framework that clearly defines the role of various stakeholders. The State should also consult widely when coming up with the methods of benefit sharing especially with regard to the local community. It is only through mobilizing the efforts of all the relevant stakeholders that the constitutional provisions on the environment and natural resources can effectively be implemented and make it possible to achieve sustainable development.

References

Bali Principles of Climate Justice of 2002, Available at <http://www.ejnet.org/ej/bali.pdf> [Accessed on 28/07/2016].

Biopirates Are Harming Indigenous Livelihoods, available at <https://www.newsrecord.co/biopirates-are-harming-indigenous-livelihoods/> [Accessed on 27/06/2016].

Birnie, P. & Boyle, A., “*International Law and the Environment*”, (2nd ed. Oxford University Press, 2002).

Boyd, D.R., ‘The Effectiveness of Constitutional Environmental Rights,’ *Yale UNITAR Workshop*, April 26/27, 2013, available at <https://environment.yale.edu/content/documents/00003438/Boyd-Effectiveness-of-Constitutional-Environmental-Rights.docx?1389969747> [Accessed on 23/07/2016]

Casey-Lefkowitz, n et al, ‘The Evolving Role of Citizens in Environmental Enforcement,’ *Fourth International Conference on Environmental Compliance and Enforcement*, available at <http://www.inece.org/4thvol1/futrell.pdf> [Accessed on 16/07/2016]

Colchester, M., ‘Sustaining the Forests: The Community-Based Approach in South and South-East Asia,’ (United Nations Research Institute For Social Development, 1992). Available at [http://www.unrisd.org/80256B3C005BCCF9%2F%2F53024E4A3BAA768480256B67005B6396%2F\\$file%2Fdp35.pdf](http://www.unrisd.org/80256B3C005BCCF9%2F%2F53024E4A3BAA768480256B67005B6396%2F$file%2Fdp35.pdf) (httpAuxPages) [Accessed on 28/07/2016].

Community Land Bill, 2015 (Government Printer, Nairobi, 2015).

Constitution of Kenya, 2010, (Government Printer, Nairobi, 2010).

Daly, E. & May, J.R., ‘Comparative environmental constitutionalism,’ *Jindal Global Law Review*, April 2015, Volume 6, Issue 1, pp 9–30

Desai, B.H. & Sidhu, B., ‘On the Quest for Green Courts in India,’ *Journal of Court Innovation*, Vol.3, No. 1, 2010, pp. 79-111.

Draft National Forest Policy, 2015 (Government Printer, Nairobi, 2015).

East African Community Protocol on Environment and Natural Resources Management, 2005.

Environment and Land Court Act, No. 19 of 2011, Laws of Kenya (Government Printer, 2011).

Environmental (Impact Assessment and Audit) Regulations, 2003, Legal Notice 101 of 2003, Laws of Kenya.

Environmental Management and Co-ordination Act, No. 8 of 1999, Laws of Kenya (Government Printer, Nairobi, 1999).

Environmental Management and Co-ordination (Amendment) Act, No. 5 of 2015, Laws of Kenya (Government Printer, Nairobi, 2015).

Environmental Management and Co-Ordination (Conservation of Biological Diversity and Resources, Access to Genetic Resources and Benefit Sharing) Regulations, 2006, Legal Notice 160 of 2006, Laws of Kenya. (Government Printer, Nairobi, 2006).

Environmental protection Agency, ‘Strategic Environmental Assessment,’ available at <http://www.epa.ie/monitoringassessment/assessment/sea/#.Vi5tmGuJ2CA>. [Accessed on 20/07/2016].

Fair Administrative Action Act, No. 4 of 2015, Laws of Kenya (Government Printer, 2015).

- FAO, 'Environmental Impact Assessment (EIA) and Environmental Auditing (EA),' available at <http://www.fao.org/docrep/005/v9933e/v9933e02.htm> [Accessed on 20/07/2016].
- Forest Act, No. 7 of 2005, Laws of Kenya (Government Printer, Nairobi, 2005).
- Forest Conservation and Management Bill, 2015, (Government Printer, Nairobi, 2015).
- Gichu, A. & Chapman, S., *Overview of REDD+ in Kenya*, REDD+ Law Project -Briefing Paper, July 2014. Available at <http://www.4cmr.group.cam.ac.uk/filecab/redd-law-project/20140821%20BP%20Overview%20of%20REDD-%20in%20Kenya.pdf> [Accessed on 28/07/2016].
- Grossman, E. (ed), 'Integrating Land Use Planning & Biodiversity,' (Defenders of Wildlife, Washington, D.C., 2003). Available at http://www.defenders.org/publications/integrating_land_use_planning_and_biodiversity.pdf [Accessed on 27/07/2016]
- Guthiga, P.M., 'Understanding Local Communities' Perceptions of Existing Forest Management Regimes of a Kenyan Rainforest,' *International Journal of Social Forestry (IJSF)*, 2008, Vol. 1, No.2, pp.145-166.
- Ingelson, A., et al, 'Philippine Environmental Impact Assessment, Mining and Genuine Development', 5/1 *Law, Environment and Development Journal* (2009), available at <http://www.leadjournal.org/content/09001.pdf>[Accessed on 20/07/2016].
- InterAction, *Environment & Climate: Overview-Our Work*, available at <https://www.interaction.org/project/environment/overview> [Accessed on 6/07/2016].
- International Finance Corporation, 'The Art and Science of Benefit Sharing in the Natural Resource Sector,' *Discussion Paper*, February 2015. Available at http://www.ifc.org/wps/wcm/connect/8e29cb00475956019385972fbd86d19b/IFC_Art+and+Science+of+Benefits+Sharing_Final.pdf?MOD=AJPERES&CACHEID=8e29cb00475956019385972fbd86d19b [Accessed on 13/07/2016].
- Jonge, B.D., 'What is fair and Equitable Benefit-sharing?' *Journal of Agricultural and Environmental Ethics*, Vol. 24, 2011, pp.127-146.
- Kibet L., 'Swazuri reveals plans to recognise forest settlers,' *The Standard*, Thursday, July 28, 2016 (The Standard Group, Nairobi, 2016).
- Kiss, A., 'Making Biodiversity Conservation a Land Use Priority,' available at <http://www2.gsu.edu/~wwwcec/special/AgiBookChapter2002.pdf> [Accessed on 27/07/2016]
- Lamb, D. & Gilmour, D., *Rehabilitation and Restoration of Degraded Forests*. IUCN, Gland, Switzerland and Cambridge, UK and WWF, Gland, Switzerland, 2003. x +110 pp. at p. 66. Available at http://cmsdata.iucn.org/downloads/rehabilitation_and_restoration_of_degraded_forests.pdf [Accessed on 13/07/2016].
- Lohde, L.A., *The Art and Science of Benefit Sharing in the Natural Resource Sector*, (International Finance Corporation, February 2015). Available at http://www.ifc.org/wps/wcm/connect/8e29cb00475956019385972fbd86d19b/IFC_Art+and+Science+of+Benefits+Sharing_Final.pdf?MOD=AJPERES&CACHEID=8e29cb00475956019385972fbd86d19b [Accessed on 13/07/2016].
- Muigua, K., 'Environmental Impact Assessment (EIA) in Kenya,' available at <http://www.kmco.co.ke/attachments/article/109/A%20Paper%20on%20Environmental%20impact%20assessment.pdf>

- Muiruri, M., 'Kenya loses Sh70m to biopirates in Biopiracy,' (Northwest Resistance against Genetic Engineering. Available at <http://nwrage.org/content/kenya-loses-sh70m-biopirates> [Accessed on 27/07/2016]).
- Mwenda, A. & Kibutu, T.N., 'Implications of the New Constitution on Environmental Management in Kenya,' *Law, Environment and Development Journal*, Vol. 8, No. 1, 2012.
- National Environment Management Authority, 'Adaptation Fund and GCF programmes,' available at http://www.nema.go.ke/index.php?option=com_content&view=article&id=229&Itemid=461 [Accessed on 28/07/2016].
- National Green Tribunal, available at <http://www.greentribunal.gov.in/> [Accessed on 28/07/2016].
- Natural Resources (Benefit Sharing Bill)*, 2015 (Government Printer, Nairobi, 2015).
- Okech, R.N., 'Wildlife-community conflicts in conservation areas in Kenya,' *African Journals Online*. Available at <http://www.ajol.info/index.php/ajcr/article/download/63311/51194> [13/07/2016]
- Okello, N., et al, 'The doing and un-doing of public participation during environmental impact assessments in Kenya,' *Impact Assessment and Project Appraisal*, Vol. 27, No.3, 2009, pp.217-226.
- Pradeep, B. & Madhur, Y., 'New Judicial Roles and Green Courts in India,' available at http://inece.org/conference/9/papers/Bakshi_India_Final.pdf [Accessed on 28/07/2016].
- Protocol (No 2) on the application of the principles of subsidiarity and proportionality*, annexed to the Treaty on European Union and the Treaty on the Functioning of the European Union by the Treaty of Lisbon of 13 December, 2007.
- Republic of Kenya, Draft National Land Use Policy 2016, Ministry of Lands and Physical Planning, May 2016 (Government Printer, 2016).
- Republic of Kenya, *National Climate Change Response Strategy 2010*, (Government of Kenya, Nairobi, 2010).
- Republic of Kenya, *National Wildlife Conservation and Management Policy, 2012*, (Government Printer, Nairobi, 2012).
- Roberts E. & Dobbins J., 'The Role of the Citizen in Environmental Enforcement,' (Environmental Law Institute. 1616 P Street. N.W. Washington. DC 20036, USA). Available at <http://www.inece.org/2ndvol1/roberts.htm> [Accessed on 21/07/2016]
- Rondinelli, D.A. (ed.), 'Public Administration And Democratic Governance: Governments Serving Citizens,' *7th Global Forum on Reinventing Government Building Trust in Government 26-29 June 2007*, Vienna, Austria, (United Nations, ST/ESA/PAD/SER.E/, United States of America, 2006).
- Shackelton, S. & Campbell, B. (eds), 'Empowering Communities to Manage Natural Resources: Case Studies from Southern Africa,' Center for International Forestry Research, March 2000, p. 10. Available at http://www.cifor.org/publications/pdf_files/Books/Empowering.pdf [Accessed on 20/07/2016].
- Shelton, D., 'Human Rights, Health and Environmental Protection: Linkages in Law and Practice: A Background Paper for the WHO.' Available at http://www.who.int/hhr/information/Human_Rights_Health_and_Environmental_Protection.pdf [Accessed on 20/07/2016].
- Sibanda, B.M.C. & Omwega, A.S., 'Some Reflections on Conservation, Sustainable Development And Equitable Sharing of Benefits From Wildlife in Africa: The Case of Kenya and Zimbabwe,' *South African Journal Of Wildlife Research*, Vol. 26, No. 4, 1996, pp. 175-181.

Songorwa, A.N., et al, 'Community-Based Wildlife Management in Africa: A Critical Assessment of the Literature,' *Natural Resources Journal*, vol. 40, summer, 2000, pp. 603-643.

The Norwegian Nobel Institute, 'Wangari Maathai: The Nobel Lecture (Oslo, December 10, 2004),' available at http://nobelpeaceprize.org/en_GB/laureates/laureates-2004/maathai-lecture/ [Accessed on 16/07/2016].

The REDD Desk, *REDD in Kenya*, available at <http://theredddesk.org/countries/kenya> [Accessed on 28/07/2016].

The World Bank, *Rethinking Forest Partnerships and Benefit Sharing: Insights on Factors and Context that Make Collaborative Arrangements Work for Communities and Landowners*, Report No. 51575-GLB, (The International Bank for Reconstruction and Development / The World Bank, Washington, DC, 2009).

The World Bank, 'Strategic Environmental Assessment,' September 10, 2013. Available at <http://www.worldbank.org/en/topic/environment/brief/strategic-environmental-assessment> [Accessed on 26/10/2015].

United Nations, Agenda 21, United Nations Conference on Environment & Development Rio de Janeiro, Brazil, 3 to 14 June 1992, (A/CONF.151/26, vol.II).

United Nations, *Report Of The United Nations Conference On Environment And Development* (Rio De Janeiro, 3-14 June 1992), Annex III: *Non-Legally Binding Authoritative Statement Of Principles For A Global Consensus on The Management, Conservation and Sustainable Development of All Types of Forests*, A/CONF.151/26 (Vol. III).

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

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 20/07/2016].

United Nations Development Programme, *Decentralized Governance of Natural Resources*, available at <http://web.undp.org/drylands/decentralized-governance.html> [Accessed on 14/07/2016].

United Nations Environment Programme, *The Convention on Biological Diversity*, 1760 UNTS 79; 31 ILM 818 (1992).

United Nations Forum of Forests, *Global Objectives on Forests*, available at <http://www.un.org/esa/forests/documents/global-objectives/index.html> [Accessed on 13/07/2016].

United Nations General Assembly, *United Nations Conference on the Human Environment*, 15 December 1972, A/RES/2994.

United Nations General Assembly, "The road to dignity by 2030: ending poverty, transforming all lives and protecting the planet," *Synthesis Report of the Secretary-General on the post-2015 Sustainable development agenda*. A/69/700.

United Nations General Assembly, *United Nations Framework Convention on Climate Change: resolution / adopted by the General Assembly*, 20 January 1994, A/RES/48/189.

Wehrmann, B. (ed), 'Land Use Planning: Concept, Tools and Applications,' (Deutsche Gesellschaft für Internationale Zusammenarbeit (GIZ) GmbH, Eschborn, 2012). Available at <https://www.giz.de/fachexpertise/downloads/Fachexpertise/giz2012-en-land-use-planning-manual.pdf> [Accessed on 27/07/2016]

Wildlife Conservation and Management Act, No. 47 of 2013, Laws of Kenya (Government Printer, Nairobi, 2013).

World Resources Institute, 'Atlas of Forest and Landscape Restoration Opportunities,' available at <http://www.wri.org/resources/maps/atlas-forest-and-landscape-restoration-opportunities> [Accessed on 13/07/2016].