Managing Environmental Conflicts through Participatory Mechanisms for Sustainable Development in Kenya

Kariuki Muigua, Ph.D.

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Kariuki Muigua*

Abstract

This paper offers some reflective thoughts on the place of participatory approaches in management of natural resource based conflicts as a means to an end in achieving lasting peace which is considered to be an important element of sustainable development. The author discusses various approaches to conflict management that can help communities actively participate in peacebuilding for sustainable development as far as natural resource based conflicts are concerned.

1. Introduction

Conflicts do not occur in vacuum, and to a large extent, they are dependent on the context. Indeed, it has been argued that the governance of natural resources is especially important in the context of divided societies because control over the benefits from local natural resources is often a chief motivator of ethnic or identity-based conflicts.[1] Natural resource based conflicts also are, directly and indirectly connected to and/or impact human development factors and especially the quest for social-economic development.[2]

The Constitution of Kenya outlines the national values and principles of governance which must bind all State organs, State officers, public officers and all persons whenever any of them: applies or interprets the Constitution; enacts, applies or interprets any law; or makes or implements public policy decisions.[3] These values and principles include: patriotism, national unity, sharing and devolution of power, the rule of law, democracy and *participation of the people*; human dignity, equity, *social justice*, *inclusiveness*, equality, human rights, non-

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[1] Haysom, N. & Kane, S., 'Negotiating natural resources for peace: Ownership, control and wealth-sharing,' Centre for Humanitarian Dialogue, Briefing Paper, October 2009, p. 5.
[2] Wilson, C. & Tisdell, C., 'Conflicts over Natural Resources and the Environment: Economics and Security,' *Working Papers on Economics, Ecology and the Environment, Working Paper No. 86*, September 2003; Lumerman, P., et al, 'Climate Change Impacts on Socio-environmental Conflicts: Diagnosis and Challenges of the Argentinean Situation,' (Initiative for Peacebuilding 2011).
[3] Constitution of Kenya 2010, Art. 10(2).

discrimination and protection of the marginalised; good governance, integrity, *transparency and accountability*; and *sustainable development* (emphasis added).[4]

Similarly, so as to realize sustainable, equitable, efficient and productive management of land, the constitution provides for the encouragement of communities to settle land disputes through recognized local community initiatives consistent with the constitution.[5]

The Constitution of Kenya requires the State to, inter alia: ensure sustainable exploitation, utilisation, management and conservation of the environment and natural resources, and ensure the equitable sharing of the accruing benefits; encourage public participation in the management, protection and conservation of the environment; and utilise the environment and natural resources for the benefit of the people of Kenya.[6] Further, every person has a constitutional duty to cooperate with State organs and other persons to protect and conserve the environment and ensure ecologically sustainable development and use of natural resources.[7]

It has rightly been argued that giving voice to communities and explaining the details of these conflicts helps them regain power in decision-making process and create a model of active democracy enabling them to help protecting their own territory and environment.[8] It is against this background that this paper offers some thoughts on the place of participatory conflict management mechanisms in the sustainable development agenda and ways of effectively managing them as part of efforts towards achieving sustainable development.

Participatory approaches are defined as institutional settings where stakeholders of different types are brought together to participate more or less directly, and more or less formally, in some stage of the decision-making process.[9] Participatory mechanisms in resource management and conflict management are preferred because they do the following: facilitate effective co-operation, communication, and participation of different interest groups; help identify and raise awareness of cross-sectoral issues of management; and strengthen and empower local

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[4] Constitution of Kenya 2010, Art. 10(3).
[5] Ibid., Article 60 (1) (g).
[6] Constitution of Kenya 2010, Art. 69(1).
[7] Ibid, Art. 69(2).
[8] CDCA, 'Why environmental conflicts?' Available at http://cdca.it/en/perche-i-conflitti-ambientali [Accessed on 18/10/2017].
[9] Hove, SVD, 'Between consensus and compromise: acknowledging the negotiation dimension in participatory approaches,' Land Use Policy, Vol. 23, Issue 1, January 2006, pp. 10–17.

institutional capacity, indigenous knowledge networks, and adaptive capacity.[10] This discourse is thus centred on the active participation of communities in decision making in not only management of resources but also management of any related conflicts.

2. **Place of Conflict Management in Sustainable Development Discourse: Social Aspects of Sustainable Development**

The Sustainable Development Goals seek to realize the human rights of all and to achieve gender equality and the empowerment of all women and girls. They are integrated and indivisible and balance the three dimensions of sustainable development: the economic, social and environmental.[11] From this assertion, it is arguable that sustainable development cannot be achieved without ensuring that all the three dimensions are taken care of.

In addition, the Sustainable Development Goals (SDGs) recognise the connection between peace and development and thus provide that sustainable development cannot be realized without peace and security; and peace and security will be at risk without sustainable development.[12] The SDGs Agenda also recognizes the need to build peaceful, just and inclusive societies that provide equal access to justice and that are based on respect for human rights (including the right to development), on effective rule of law and good governance at all levels and on transparent, effective and accountable institutions. Factors which give rise to violence, insecurity and injustice, such as inequality, corruption, poor governance and illicit financial and arms flows, are addressed in the Agenda. The aim is to redouble the efforts to resolve or prevent conflict and to support post-conflict countries, including through ensuring that women have a role in peace building and state building.[13]

Peace building generally goes beyond conflict management measures, as it involves developing institutional capacities that alter the situations that lead to violent conflicts.[14] In

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[10] KulvadeeKansuntisukmongkol, "Participatory approach to wetlands management**,"** *The Regional Training Course on Sustainable Use and Management of Wetlands5-20 November 2007*, available at www.unepscs.org/Wetlands_Training/Wetland Management/15

[11] United Nations, *Transforming our world: the 2030 Agenda for Sustainable Development*, A/RES/70/1, preamble.

[12] United Nations, *Transforming our world: the 2030 Agenda for Sustainable Development*, A/RES/70/1, para. 35.

[13] Ibid.

[14] See Maiese, M., 'Peacebuilding,' September 2003. Available at
http://www.beyondintractability.org/essay/peacebuilding [Accessed on
20/10/2017].

traditional African society, people engaged in acts that promoted peace through the various activities they engaged in. The alternative justice systems, traditions, customs and norms of a particular community played a pivotal role in conflict resolution.[15] Traditions, customs and norms were highly valued and adhered to by the members of the community.[16] Disregard of some of these beliefs could attract the wrath of the gods, ridicule and reprimand from members of the society hence ensuring that persons shunned conflict-causing conduct.[17] Thus, when such traditions, customs and norms were used in environmental conflicts management, they helped in inculcating environmental ethics into a community.

However, traditions, cultural norms and practices that may be considered repugnant and contrary to written laws and that hinder the participation of women in conflict management, should be discarded. A critical look at the cultures of most of African or Kenyan communities reveals that the role of women as compared to men in conflict management activities was and is still negligible.[18] For instance, among the Pokot and the Marakwet, women act as reference resource people but cannot challenge or influence decisions adopted by the male-dominated council of elders, the *Kokwo*. Among the Samburu, women are supposed to merely convey their suggestions through their male relatives. Such information may or may not be conveyed at all to the council of elders.[19]

Women empowerment is essential to enable them participate in the various conflict resolution fora as they are the majority of the victims of conflicts. Their role as carriers of life and agents of peace has not changed in modern society. As such their participation in conflict resolution activities should not be curtailed by the adoption of formal dispute resolution mechanisms or adherence to traditions hindering their role on the same. Women have the

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[15] See generally Kassa, G.N., "The Role of Culture and Traditional Institutions in Peace and Conflict: Gada System of Conflict Prevention and Resolution among the Oromo-Borana," Master's thesis, 2006. Available at http://urn.nb.no/URN:NBN:no-17988 [Accessed on 20/10/2017]; See also Mengesha, A. D., et al, 'Indigenous Conflict Resolution Mechanisms among the Kembata Society,' *American Journal of Educational Research*, Vol.*3*, No.2, 2015, pp.225-242.

[16] See generally, Nussbaum, B., "African culture and Ubuntu," *Perspectives*, Vol.17, No. 1, 2003, pp.1-12; See also Idang, G.E., 'African culture and values,' *Phronimon*, Vol.16, No.2, 2015, pp.97-111.

[17] Idang, G.E., 'African culture and values,' op cit. p.103.

[18] See Alaga, E., *Challenges for women in peacebuilding in West Africa*, (Africa Institute of South Africa (AISA), 2010); Cf. Ibewuike, V. O., African *Women and Religious Change: A study of the Western Igbo of Nigeria with a special focus on Asaba town*, (Uppsala, 2006). Available at https://uu.diva-portal.org/smash/get/diva2:167448/FULLTEXT01.pdf [Accessed on 20/2017].

[19] See generally, Adan, M., Pkalya, R. and Isabella, M., "Indigenous Democracy: Traditional Conflict Resolution mechanisms," *The Case of Pokot, Turkana, Samburu and Marakwet communities, ITDG, Nairobi* (2004), p.96.

capacity to negotiate and bring about peace, either directly or through creation of peace networks, among warring communities.[20] Their participation in conflict resolution should thus be enhanced for realisation of sustainable and lasting peace solutions.

Resort to courts searching for justice when peace is what is needed may thus destroy relationships rather than build and foster them in the Kenyan case. In such cases, reconciliation, negotiation, mediation and other traditional mechanisms that are ordinarily participatory in nature would be the better option.[21]

The SDGs Agenda also calls for further effective measures and actions to be taken, in conformity with international law, to remove the obstacles to the full realization of the right of self-determination of peoples living under colonial and foreign occupation, which continue to adversely affect their economic and social development as well as their environment.[22] Thus, conflict management should be one of the key issues that should be addressed in the quest for sustainable development.

Thus, sustainable development is not possible in the context of unchecked natural resource based conflicts. In recognition of this fact, Sustainable Development Goal (SDGs) 16 aims to 'promote peaceful and inclusive societies for sustainable development, provide access to justice for all and build effective, accountable and inclusive institutions at all levels'.[23] It is also noteworthy that SDGs seek to promote participation of local communities in natural resource management.[24] The process of managing natural resource based conflicts is an off-shoot of the right to access to environmental justice and by extension, environmental democracy. The right of access to justice

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[20] See generally, De la Rey, C., & McKay, S., Peacebuilding as a gendered process. *Journal of Social Issues*, Vol.62, No.1, 2006, pp.141-153; See also Paffenholz, T., et al, "Making Women Count - Not Just Counting Women: Assessing Women's Inclusion and Influence on Peace Negotiations," (Geneva: Inclusive Peace and Transition Initiative (The Graduate Institute of International and Development Studies) and UN Women, April 2016).Available at
http://www.inclusivepeace.org/sites/default/files/IPTI-UN-Women-Report-Making-Women-Count-60-Pages.pdf
[Accessed on 20/10/2017].
[21] See generally, Huyse, L., "Tradition-based Justice and Reconciliation after Violent Conflict: Learning from African Experiences." (2008). Available at 174.129.218.71/resources/analysis/upload/paper_060208_bis.pdf [Accessed on 15/09/2017]; See also Bar-Tal, D., "From Intractable Conflict through Conflict Resolution to Reconciliation: Psychological Analysis." *Political Psychology*, Vol.21, No. 2 (2000); see also Bloomfield, D., et al, (eds.), *Reconciliation after violent conflict: A handbook*, (International Idea, 2003).
[22] Ibid.
[23] United Nations, *Transforming our world: the 2030 Agenda for Sustainable Development*, A/RES/70/1, Resolution adopted by the General Assembly on 25 September 2015.
[24] Ibid, Goal 6b.

is essential as it affords the means by which the public challenge application of and implementation of environmental laws and policies.[25]

Environmental democracy which involves giving people access to information on environmental rights, easing access to justice in environmental matters and enabling public participation in environmental decision making, inter alia, is desirable in the Kenyan context.[26] *In The Matter of the National Land Commission [2015] eKLR,* the Supreme Court observed that the dominant perception at the time of constitution-making was that the decentralization of powers would not only give greater access to the social goods previously regulated centrally, but would also open up the scope for political self-fulfillment, through an enlarged scheme of actual participation in governance mechanisms by the people thus giving more fulfillment to the concept of democracy.[27]

An environmental conflict has been described as a particular social conflict characterised by: the qualitative or quantitative reduction of available environmental resources (water, biodiversity, arable land, raw materials and other finite common goods) due to the imposition of profitable projects by multinational companies and/or inappropriate policies by Governments, International financial organisations; and the escalation of protests by local residents and/or larger opposition movements in civil society, in an effort to protect the environment, common goods and people's rights.[28]

Environmental conflicts have been perceived as a symptomatic manifestation of a global model of economic development based on the exploitation of natural resources, disregard for people's rights and lack of social justice.[29] Furthermore, it has been suggested that there are about four key factors that contribute in the creation of environmental conflict: poverty,

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

[26] See generally, Hazen, S., Environmental Democracy, (<http.www.ourplanet.com). [Accessed on 18/01/2016]. Washington DC. Csaba Kiss and Michael Ewing (eds), "Environmental Democracy: An Assessment of Access to Information, Participation in Decision-making and Access to Justice in Environmental Matters in Selected European Countries." European Regional Report (published by The Access Initiative Europe.) available at http://www.accessinitiative.org [Accessed on 18/01/2016]; See also Art. 69(1) (d) of the Constitution of Kenya, 2010. The Constitution supports the notion of environmental democracy by providing that one of the obligations of the State in relation to the environment is to encourage public participation in the management, protection and conservation of the environment.

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

[28] CDCA, 'Why environmental conflicts?' Available at http://cdca.it/en/perche-i-conflitti-ambientali [Accessed on 18/10/2017].

[29] Ibid.

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vulnerable livelihoods, migration and weak state institutions – all problems that are present at the local level.[30]

It is also argued that environmental factors often interact with the visible drivers of ethnic tensions, political marginalisation and poor governance to create a causal framework that allows degradation to affect livelihoods, interests and capital – which, in turn, lead to conflict.[31]

While environmental conflicts may involve many factors and issues[32], as seen above, the scope of this paper is restricted to natural resource based conflicts as characterised by competition for environmental resources. Natural resource based conflicts are defined as social conflicts (violent or non-violent) that primarily revolve around how individuals, households, communities and states control or gain access to resources within specific economic and political frameworks.[33] They are the contests that exist as a result of the various competing interests over access to and use of natural resources such as land, water, minerals and forests. Natural resource based conflicts mainly have to do with the interaction between the use of and access to natural resources and factors of human development factors such as population growth and socio-economic advancement.[34]

Natural resource based conflicts continue to negatively affect Kenyans owing to the many weaknesses of the present legal and institutional framework. It is noteworthy that most of the sectoral laws mainly provide for conflict management through the national court system.

The national legal systems governing natural resource conflicts management are based on legislation and policy statements that are administered through regulatory and judicial institutions, where adjudication and arbitration are the main strategies for addressing conflicts,

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[30] Barnett, J., & Adger, W. N., 'Climate change, human security and violent conflict,' *Political Geography*, Vol.26, 2007, pp. 639-655, at p.643 (As quoted in Akins, E., "Environmental Conflict: A Misnomer?" *Environment, Climate Change and International Relations*: 99, available at http://www.e-ir.info/2016/05/12/environmental-conflict-a-misnomer/].

[31] Akins, E., "Environmental Conflict: A Misnomer?" *Environment, Climate Change and International Relations*: 99, available at http://www.e-ir.info/2016/05/12/environmental-conflict-a-misnomer/ [Accessed on 18/10/2017]; See also Sosa-Nunez, G. & Atkins, E., *Environment, Climate Change and International Relations*, (E-International Relations, 2016). Available at http://www.e-ir.info/wp-content/uploads/2016/05/Environment-Climate-Change-and-International-Relations-E-IR.pdf [Accessed on 18/10/2017].

[32] See also Dukes, E.F., "What we know about environmental conflict resolution: An analysis based on research," *Conflict resolution quarterly,* Vol. 22, No. 1-2, 2004, pp. 191-220.

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

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

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with decision-making vested in judges and officials who possess the authority to impose a settlement on disputants.[35] Further, decisions are more likely to be based on national legal norms applied in a standardized or rigid manner, with all-or-nothing outcomes. Thus, contesting parties often have very limited control over the process and outcomes of conflict management.[36] In Kenya, where these conflicts may be clan-based or community based, courts offer little help in terms of achieving lasting peace due to the settlement nature of the outcome. Thus, conflicts are likely to flare up later.[37]

Arguably, central and county governments who are genuinely concerned about the sustainable use of their country's natural resources must, at a minimum, involve local communities in their management.[38] This means taking local communities into confidence and having confidence in them; it means engaging with their ideas, experiences, values, and capabilities and working with them, not on their behalf, to achieve resource-conservation objectives and community benefits.[39] It means being prepared to adjust national policies so that they can accommodate local interests, needs, and norms that are compatible with the long-term preservation of national ecosystems and their biological diversity.[40]

The traditional and customary systems for managing conflict are associated with a number of strengths which include: they encourage participation by community members, and respect local values and customs; are more accessible because of their low cost, their flexibility in scheduling and procedures, and their use of the local language; they encourage decision-making based on collaboration, with consensus emerging from wide-ranging discussions, often fostering local reconciliation; they contribute to processes of community empowerment; informal and even formal leaders may serve as conciliators, mediators, negotiators or arbitrators; and finally, long-held public legitimacy provides a sense of local ownership of both the process and its outcomes.[41] Such processes are important in not only coming up with lasting peace solutions but also meaningful participation in resource management both of which are important elements in the quest for sustainable development.

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[35] FAO, 'Negotiation and mediation techniques for natural resource management,' op cit.
[36] Ibid.
[37] See generally Mwagiru, M., Conflict in Africa: Theory, Processes and Institutions of Management, op. cit.
[38] Buckles, D. (ed), *Cultivating Peace: Conflict and Collaboration in Natural Resource Management*, (International Development Research Centre 1999), pp. vii-viii.
[39] Ibid.
[40] Ibid.
[41] FAO, 'Negotiation and mediation techniques for natural resource management,' op cit.

3. Managing Natural Resource Based Conflicts for Sustainable Development in Kenya

Within the Kenyan context, one of the most important natural resources is land. The Constitution provides that land in Kenya is to be held, used and managed in a manner that is equitable, efficient, productive and sustainable, and in accordance with the following principles: equitable access to land; security of land rights; sustainable and productive management of land resources; transparent and cost effective administration of land; sound conservation and protection of ecologically sensitive areas; elimination of gender discrimination in law, customs and practices related to land and property in land; and encouragement of communities to settle land disputes through recognised local community initiatives consistent with the Constitution.[42] This is in recognition of the fact that Kenya is a diverse society with different communities who hold different values, attitudes and beliefs towards the land and its resources.

Natural resource based conflicts in Kenya are still prevalent and a cause of much concern. It has been noted that the contribution of the issue of land to violent conflicts in Kenya is due to the way land is "treated with fervent sentimentality and sensitivity and in many ways considered explosive."[43]

There have been frequent and well documented reports of violent conflicts over access to and use of land in Kenya.[44] For example, recently, Narok and Kwale Counties suffered natural resource conflict albeit in varying degrees. In Narok, Kenya, clashes between Maasai and Kipsigis in Olposimoru, Narok County in December 2015 over what is believed to be natural resource based conflict resulted in human casualties and displacement.[45] In Kwale County, there have also been

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[42] Constitution of Kenya 2010, Art. 60(1).

[43] Government of Kenya, et al, Report of the Judicial Commission Appointed to Inquire into Tribal Clashes in Kenya, 31st July, 1999.

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

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

cases of violence related to natural resource exploitation.[46] In such instances, one may find that a few herdsmen may have been accused of 'trespassing' to graze in another community's territory and were thus attacked. The resultant chaos in retaliation affects the whole community. For them, it is not about arresting the involved individuals and arraigning them in court. It is about protecting the interests of the whole community and thus, any approaches to managing the conflict must involve the whole community or their representatives and address all of their concerns.

Land clashes that occurred in Kenya in 1992 and 1997 have been attributed to inequitable allocation of land resources and poor government policies and programmes perceived as favouring some factions at the expense of others. The issues of the use of environmental resources underlie the numerous conflicts that have occurred in Kenya. The post-election violence in 2007-08 can be traced, to a large extent, to contests over access to and use of natural resources in Kenya and the harboured feelings of alienation and discrimination in access and benefit sharing of the accruing benefits.[47]

Further, it is also been observed that conflicts between biodiversity conservation and other human activities are intensifying as a result of growing pressure on natural resources and concomitant demands by some for greater conservation.[48]

Consequently, approaches to reducing conflicts are increasingly focusing on engaging stakeholders in processes that are perceived as fair, i.e. independent and where stakeholders have

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Accessed on 2/01/2016]; Recent conflicts have also been reported as follows: Macharia, M., 'Kenya: Resources Conflict Uproots Hundreds of Kenyan Families,'(CAJ News Agency, 6/10/2017), available at
 http://allafrica.com/stories/201710060488.html [Accessed on 17/10/2017]; Clifton, M., 'The untold story of the conflict in Laikipia, Kenya,' (Animals 24-7, 17/03/2017). Available at http://www.animals24-7.org/2017/03/17/the-untold-story-of-the-conflict-in-laikipia-kenya/ [Accessed on 17/10/2017]; Kenya Red Cross Society, 'Baringo residents struggle with drought and conflict over resources,' (ReliefWeb, 22/02/2017), available at
https://reliefweb.int/report/kenya/baringo-residents-struggle-drought-and-conflict-over-resources   [Accessed   on   17/10/2017]; Abuya, W.O., "Resource conflict in Kenya's titanium mining industry: Ethno-ecology and the redefinition of ownership, control, and compensation," *Development Southern Africa,* Vol. 34, Iss. 5, 2017.
[46] Musyoka, A., 'Kenya: Four Killed at Kinango in Clash Over Grazing Land,' The Star Newspaper, Dec. 19, 2014, Nairobi, available at http://allafrica.com/stories/201412190701.html [Accessed on 2/01/2016]; See also generally, Constitution and Reform Education Consortium (CRECO), *Building a Culture of Peace in Kenya: Baseline Report On Conflict-Mapping and Profiles of 47 Counties in Kenya*, April, 2012, ISBN: 978-9966-21-158-3. Available at https://www.humanitarianresponse.info/system/files/documents/files/CRECO_2012.pdf [Accessed on 3/01/2016].
[47] See Machel, G. & Mkapa, B., *Back from the Brink: the 2008 mediation process and reforms in Kenya*, (African Union Commission, 2014).
[48] Young, J.C., et al, 'The role of trust in the resolution of conservation conflicts,' *Biological Conservation*, Vol. 195, March 2016, pp. 196–202.

influence, and which in turn can generate trust between stakeholders. [49] It is thus believed that increased trust through fair participatory processes makes conflict resolution more likely.[50]

Although the existence of legal and institutional framework in the country is meant to deal with natural resource based conflicts, arguably, it has not offered much in stemming the natural resource based conflicts due to inadequacies within the structure.

One of the ways of stemming natural resource based conflicts would be striking a balance between conservation measures and access to resources by communities, through employing approaches that help in understanding the needs of the particular people and responding appropriately and consequently building trust within communities and between communities and the national government. For conflict management to be successful there is a need to conduct a historical analysis (with the participation of local people) so that the major issues can be identified, analysed and discussed.[51]

The Kenyan legal system has always preferred litigation as a mechanism for conflict resolution yet courts of law are often inaccessible to the poor, marginalized groups and communities living in remote areas. This is due to the cost of litigation, distance to the courts, language barriers, political obstacles, among other factors. Cases could run for years without a possible solution in sight. Courts and formal tribunals are sometimes inflexible, bureaucratic and do not foster the maintenance of cordial relations between the parties. Parties come out of the proceedings before such courts and tribunals bitter and discontented. It has been argued that through Alternative Dispute Resolution (ADR)[52], multiparty "win-win" options are sought by focusing on the problem (not the person) and by creating awareness of interdependence among stakeholders.[53] This is justified on the fact that among the issues that influence negotiation attitudes, interdependence is of central importance, as actors' attitudes and behaviour are shaped by the fact that they will need to coexist after the period of negotiation.[54]

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[49] Ibid.

[50] Ibid.

[51] Chidhakwa, Z., 'Managing conflict around contested natural resources: a case study of Rusitu Valley area, Chimanimani, Zimbabwe,' *Natural Resource Conflict Management Case Studies: An Analysis of Power, Participation and Protected Areas*, (Southern Alliance for Indigenous Resources). Available at http://www.fao.org/3/a-y4503e/y4503e09.pdf

[52] Also Known as Appropriate Dispute Resolution.

[53] Buckles, D. (ed), *Cultivating Peace Conflict and Collaboration in Natural Resource Management*, (International Development Research Centre 1999), p.5.

[54] Ibid, p. 110.

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ADR Mechanisms and Traditional Dispute Resolution Mechanisms (TDRMs) are arguably more appropriate in enhancing access to justice as they allow the public to participate in the managing of their conflicts. This way less disputes will get to the courts and this will lead to a reduction of backlog of cases. Natural resource based conflicts are unique as they involve people's lives. Left to escalate, suffering and death may be the undesirable result. The ADR conflict management mechanisms have certain advantages that make them suitable for use in resolution of natural resource based conflicts. For example, the mechanisms that allow for maximum party autonomy such as negotiation, conciliation and mediation are cost effective flexible, informal and leave room for parties to find their own lasting solutions to problems. They are thus particularly suitable for the resolution of natural resource based conflicts.

With the promulgation of the 2010 Constitution of Kenya, the law makers created an opportunity for exploring the use of ADR mechanisms and TDRMs in managing natural resource based conflicts.[55] Notably, one of the principles of land policy as envisaged in the Constitution is encouragement of communities to settle land disputes through recognised local community initiatives consistent with the Constitution.[56] The implication of such provisions is that before a matter is referred for court adjudication, communities are required to make legitimate attempts to resolve the matter using the most appropriate mechanisms available to them. This is also reinforced by the fact that one of the functions of the National Land Commission is to encourage the application of traditional conflict resolution mechanisms in land conflicts.[57] This is a significant provision considering that land conflicts form the bulk of natural resource based conflicts reported in the country, and the land issue is an emotive one.[58]

Natural resource based conflicts can, arguably, involve three broad themes: actors (or stakeholders, groups of people, government structures and private entities), resource (land, forests, rights, access, use and ownership) and stakes (economic, political, environmental and socio-cultural).[59] As a result, it is contended that conflicts can be addressed with the actor-

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[55] Art. 159(2) (c), Constitution of Kenya 2010, Government Printer, Nairobi.

[56] Art. 60 (1) (g).

[57] Art. 67(2) (f).

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

[59] Anderson, J., et al, 'Addressing Natural Resource Conflicts through Community Forestry: Setting the Stage,' *Annex C - Summary of Discussion Papers*, (FAO), available at

oriented approach, resource-oriented approach, stake-oriented approach or a combination of the three.[60] Despite this, there are key principles such as, inter alia, participatory approaches[61], equitable representation, capacity building, context of the conflict and increased access and dissemination of information, that must always be considered.[62]

Natural resource based conflicts are sensitive considering that they arise from the need for people to satisfy their basic needs.[63] To them, justice would mean affording them an opportunity to get what they feel entitled to and anything less, means that they resort to other means of possessing the same. This way, conflicts become inevitable. Conflict resolution mechanisms that are participatory in nature such as negotiation and mediation afford the parties an opportunity to negotiate and reach a compromise agreement, where all sides get satisfactory outcome.[64] This is particularly important in ensuring that there will be no future flare-up of conflict due to unaddressed underlying issues.[65]

Arguably, attributes of party autonomy, flexibility, all-inclusiveness, informality and acceptability by all parties can be exploited to come up with acceptable solutions to environmental problems and natural resource based conflicts. It has compellingly been suggested that mediation, through the intervention of an impartial third party into a dispute, deals well with significant value differences, which are considered extremely difficult to resolve where there is no consensus on appropriate behaviour or ultimate goals.[66]

Further, ADR, drawing on the strengths of mediation techniques such as identification and reframing, can address value conflict, through specific techniques which include:

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http://www.fao.org/docrep/005/ac697e/ac697e13.htm#TopOfPage [Accessed on 2/01/2016].

[60] Ibid.

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

[62] Anderson, J., et al, 'Addressing Natural Resource Conflicts through Community Forestry: Setting the Stage,' op cit.

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

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

[65] See generally Mwagiru, M., Conflict in Africa: Theory, Processes and Institutions of Management, op. cit.

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

transforming value disputes into interest disputes; identifying superordinate goals (both short- and long-term); and avoidance.[67]

TDRMs include informal mediation, negotiation, problem-solving workshop, council of elders, consensus approaches among others. It has been observed that where traditional community leadership was strong and legitimate it had positive impacts in promoting local people's priorities in natural resource management.[68]

Indigenous knowledge, cultures and traditional practices contribute to sustainable and equitable development and proper management of the environment.[69] Negotiation and mediation have more value to the local communities than just being means of conflict management. At least, they are means of sharing information and participating in decision-making. The two mechanisms have the unique and positive attributes which include their participatory nature that can be used to manage natural resource based conflicts and ensure that Kenyans achieve sustainable development.

Furthermore, the affected communities, in cases of decision making, can have guaranteed and meaningful participation in the decision making process by presenting proof and reasoned arguments in their favour, as tools for obtaining a socio-economic justice.[70] The Rio Declaration in principle 10 emphasises the importance of public participation in environmental management through access to justice thus: "Environmental issues are best handled with the participation of all concerned citizens, at the relevant level.… Effective access to judicial and administrative proceedings, including redress and remedy, shall be provided.[71] Participatory approaches have been increasingly advocated as effective decision-making processes to address complex

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[67] Ibid.

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

[69] Preamble, *United Nations Declaration on the Rights of Indigenous Peoples*. UN General Assembly, *United Nations Declaration on the Rights of Indigenous Peoples:* resolution / adopted by the General Assembly, 2 October 2007, A/RES/61/295.

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

[71] United Nations Conference on Environment and development, *Rio Declaration on Environment and Development*, Rio de Janeiro, Brazil, 1992.

environment and sustainable development issues.[72] 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).[73] They only need technical support from the Government and through collaboration, they can come up with lasting solutions.

The Government efforts as evidenced by bodies such as the National Cohesion and Integration Commission[74] should actively involve communities in addressing natural resource based conflicts in the country. While acknowledging that negotiation and mediation may not provide holistic solutions to the problem, they can still be used in tandem with other methods of conflict management to address problem of natural resource based conflicts in Kenya.

However, even where the use of ADR and TDRMs mechanisms is contemplated, there barely exists effective framework to oversee their utilisation. There is need to actualise the use of ADR and particularly negotiation and mediation in managing natural resource based conflicts as envisaged in the Constitution. ADR is not fully utilised in the Kenyan context. Therefore, the attributes of cost effectiveness, party autonomy, flexibility, amongst others, are hardly taken advantage of in the environmental arena. There is need to ensure that there is put in place a framework within which communities are actively involved in achieving peace for sustainable development.

Despite the need for ADR as a potential for resolving natural resource based conflicts, access to justice through litigation is, however, also a potent remedy when access to

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[72] Hove, S.V.D., 'Between consensus and compromise: acknowledging the negotiation dimension in participatory approaches,' *Land Use Policy*, Vol. 23, Issue 1, January 2006, p.10.

[73] 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 Art. 5 of the Treaty on European Union, C 326/1.

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

environmental information or public participation has been wrongly denied or is incomplete. It guarantees citizens the right to seek judicial review to remedy such denial and/or depravation.[75]

It is also contended that the community also needs the authority of the state to strengthen its ability to deal with large and powerful external interests, such as multinational corporations.[76] This is why there is need for the informal conflict mechanisms to work in synergy with the formal systems to ensure that the parties engage constructively. For instance, it has been observed that national legal systems may carry with them the following strengths: use of official legal systems strengthens the rule of State law, empowers civil society and fosters environmental accountability; they are officially established with supposedly well-defined procedures; they take national and international concerns and issues into consideration; they involve judicial and technical specialists in decision-making; where there are extreme power imbalances among the disputants, national legal systems may better protect the rights of less powerful parties because decisions are legally binding; and decisions are impartial, based on the merits of the case, and with all parties having equity before the law.[77]

There is therefore a need for the authorities to promote synergistic application of litigation, ADR and TDRMs in managing conflicts for sustainable development in Kenya.

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[75] See Akech, M., "Land, the environment and the courts in Kenya," *A background paper for The Environment and Land Law Reports*, February 2006, 1 KLR (E&L) xiv-xxxiv. Available at http//:www.kenyalaw.og [Accessed on 09/01/2016]; *The Fair Administrative Action Act*, 20l5 (No. 4 of 2015) which is an Act of Parliament to give effect to Article 47 of the Constitution provides under s. 6(1) that every person materially or adversely affected by any administrative action has a right to be supplied with such information as may be necessary to facilitate his or her application for an appeal or review in accordance with s. 5. S. 5(1) provides that in any case where any proposed administrative action is likely to materially and adversely affect the legal rights or interests of a group of persons or the general public, an administrator shall- issue a public notice of the proposed administrative action inviting public views in that regard; consider all views submitted in relation to the matter before taking the administrative action; consider all relevant and materials facts; and (d) where the administrator proceeds to take the administrative action proposed in the notice- (i) give reasons for the decision of administrative action as taken; (ii) issue a public notice specifying the internal mechanism available to the persons directly or indirectly affected by his or her action to appeal; and (iii) specify the manner and period within the which such appeal shall be lodged. In relation to access to information, Art. 35(1) (b) of the Constitution guarantees every person's right of access to information held by another person and required for the exercise or protection of any right or fundamental freedom. In addition to the foregoing, the proposed law, *Access to Information Act, 2016*, was enacted to give effect to Article 35 of the Constitution; to confer on the Commission on Administrative Justice the oversight and enforcement functions and powers. Notably, clause 2 defines "private body" to mean any private entity or non-state actor that, inter alia, is in possession of information which is of significant public interest due to its relation to the protection of human rights, the environment or public health and safety, or to exposure of corruption or illegal actions or where the release of the information may assist in exercising or protecting any right.

[76] Tyler, S.R., "Policy implications of natural resource conflict management." In *Cultivating peace: Conflict and collaboration in natural resource management*. IDRC, Ottawa, ON, CA, 1999.

[77] FAO, 'Negotiation and mediation techniques for natural resource management,' op cit.

4. Conclusion

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

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

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