

Natural Resource Conflicts in Kenya: Effective Management for Attainment of Environmental Justice

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Theme: Environmental Rule of Law and the Extractives Industry in Africa

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Abstract

Environmental justice is an ideal that can be achieved. Management of natural resources needs to be undertaken in a fair, inclusive and equitable way. However, this has not always been the case. There has been gaps in the law, practice and the available conflict management mechanisms. This paper explores the role that Alternative Dispute resolution mechanisms (ADR) can play in management of natural resource conflicts in the context of biodiversity, in order to achieve Environmental Justice and ensure equitable sharing of benefits accruing from natural resources. Although negotiation and mediation have prominently featured in the discussion, other conflict management mechanisms and their merits are also analysed in the context of natural resource conflicts. This is because, the various mechanisms have differing advantages and disadvantages owing to their distinctive nature. As such, the author makes a case for an integrated approach to natural resource conflict management.

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1. Introduction

This paper explores how Alternative Dispute Resolution Mechanisms (ADR), and especially negotiation and mediation, can be employed as effective tools for conflicts management and empowerment of people for participation in natural resource governance matters to improve the socio-economic aspects of communities through enhanced Environmental Justice and equitable sharing of accruing benefits.

The author argues that if the aspirations of the Kenyan people are to be met, then it has to be in a secure and peaceful environment and one that allows people to make decisions regarding their own affairs and are able to access justice. Such an environment would be based on the values of human rights protection, equality, freedom, democracy, social justice and the rule of law as envisaged in the preamble to the current Constitution of Kenya 2010.¹ For people to participate fairly and effectively, they need to be empowered, while ensuring that the participatory mechanisms that are used are not only effective but also accommodative in ensuring that the people get a voice in the whole process.

Empowerment in this context is understood to mean a multi-dimensional social process that helps people gain control over their own lives, through fostering power (that is, the capacity to implement) in people, for use in their own lives, their communities, and in their society, by acting on issues that they define as important.² It is also seen as a social-action process that promotes participation of people, organizations, and communities towards the goals of increased individual and community control, political efficacy, improved quality of community life, and social justice.³ It is the expansion of assets and capabilities of poor people to participate in, negotiate with, influence, control, and hold accountable institutions that affect their lives.⁴

An empowered people are capable of appreciating all the aspects of governance, and specifically natural resource governance, and where there is conflict they can effectively

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¹ Preamble, Constitution of Kenya, (Government Printer, Nairobi 2010).

² Nanette P.N. & Czuba, C.E., "Empowerment: What Is It?" *Journal of Extension*, Vol. 37, No. 5, October 1999, Commentary, 5COM1.

³ Wallerstein, N., "Powerlessness, empowerment and health: Implications for health promotion programs." *American Journal of Health Promotion*, 6(3), 197-205 (As quoted in Lord, J. and Hutchison, P., "The Process of Empowerment: Implications for Theory and Practice." *Canadian Journal of Community Mental Health*, 12:1, Spring 1993, pp. 5-22 at p. 4.)

⁴ World Bank, *Chapter 2. What Is Empowerment?* p.11. Available at <http://siteresources.worldbank.org/INTEMPowerment/Resources/486312-1095094954594/draft2.pdf> [Accessed on 12/12/2015].

participate in the process of finding solutions for justice and peace. The current Constitution of Kenya contemplates a situation where people will not only participate in governance matters through representative leadership but also get to actively voice their own views.⁵

2. Access to Justice and Rule of Law

Access to justice is an essential component of rule of law. Rule of law has been touted as the foundation for both justice and security.⁶ A comprehensive system of rule of law should be inclusive in that all members of a society must have equal access to legal procedures based on a fair justice system applicable to all. It promotes equality before the law and it is believed that rule of law is measured against the international law in terms of standards of judicial protection.⁷ Therefore, without the rule of law, access to justice becomes a mirage.

Realization of the right of access to justice can only be as effective as the available mechanisms to facilitate the same. It has correctly been noted that a right is not just the ability to do something that is among your important interests (whatever they are), but a guarantee or empowerment to actually do it, because it is the correct thing that you have this empowerment.⁸ In some instances, non-governmental organisations have come to the aid of some few communities in assisting them access justice through the judicial system. Access to courts is often difficult for the Kenyans due to the problems of high court fees, illiteracy, and geographical location of the courts, amongst many other hindrances.⁹ Notably, the Constitution creates various avenues for enhancing access to justice in Kenya. There are now several provisions specifically providing for access justice, public participation, ADR and traditional dispute resolution mechanisms and the overhaul of the judicial system.¹⁰

It has been contended that in the absence of access to justice, people are unable to have their voice heard, exercise their rights, challenge discrimination or hold decision-makers

⁵ Art. 10

⁶ United Nations Development Programme, 'Access to Justice and Rule of Law.' Available at http://www.undp.org/content/undp/en/home/ourwork/democraticgovernance/focus_areas/focus_justice_law/ [Accessed on 12/12/2015]

⁷ Dag Hammarskjöld Foundation, 'Rule of Law and Equal Access to Justice', p.1, Discussion Paper, January 2013. Available at http://www.sida.se/PageFiles/89603/RoL_Policy-paper-layouted-final.pdf [Accessed on 13/12/2015]

⁸ The Hendrick Hudson Lincoln-Douglas *Philosophical Handbook*, Version 4.0 (including a few Frenchmen), p. 4, Available at <http://www.jimmenick.com/henhud/hhldph.pdf> [Accessed on 13/12/2015].

⁹ The Danish Institute for Human Rights, "Access to Justice and Legal Aid in East Africa: A comparison of the legal aid schemes used in the region and the level of cooperation and coordination between the various actors." *A report by the Danish Institute for Human Rights, based on a cooperation with the East Africa Law Society, 2011.* Available at http://www.humanrights.dk/files/media/billeder/udgivelser/legal_aid_east_africa_dec_2011_dihl_study_final.pdf [Accessed on 13/12/2015].

¹⁰ See Chapter 10, Constitution of Kenya 2010.

accountable.¹¹ Arguably, negotiation and mediation are capable of affording the people the much required voice for participation and natural resource-related conflicts management. Effective environmental rule of law should have the ultimate goal of achieving environmental justice for the people.

3. Natural Resource Management and Conflicts

Wherever there is extraction of natural resources, conflicts are bound to arise. Natural resources play a key role in triggering and sustaining conflicts.¹² For instance, it has been argued that, Africa's recent economic, political, environmental, and epidemiological crises have rendered livelihoods more vulnerable, reinforcing the value of land, as people seek it for security.¹³ Land and resource disputes, it is asserted, run the danger of generating more and deeper divisions, undermining the foundations of society, and reducing its ability to deal with larger-scale political and social conflicts in a peaceful manner.¹⁴

It is, therefore, necessary to have mechanisms that are efficacious to manage those conflicts. Conflicts are tensions that arise out of the various competing interests in respect of the natural resource in question. They must be managed effectively and in ways that leave the parties feeling that justice has been done to them. People evaluate both their own experience and views about the general operation of the legal system against a guide of fair procedures that involves neutrality, transparency, and respect for rights, issues that also form the basis for the rule of law.¹⁵

Procedural justice in general legal language is used to refer to the fairness of a process by which a decision is reached. In contrast, procedural justice in psychology entails the *subjective* assessments by individuals of the fairness of a decision making process.¹⁶ Justice must demonstrate *inter alia* fairness, affordability, flexibility, rule of law, equality of opportunity, even-handedness, procedural efficacy, party satisfaction, non-discrimination and human dignity. Any process used in facilitating access to justice must be able to rise above

¹¹ United Nations Development Programme, 'Access to Justice and Rule of Law.' Op cit.

¹² Maphosa, S.B., "Natural Resources and Conflict: Unlocking the economic dimension of peace-building in Africa". *Africa Institute of South Africa Policy Brief*, p.2.

¹³ Castro, A.P., 'Developing Local Capacity for Management of Natural Resource Conflicts in Africa: A Review of Key Issues, Approaches, and Outcomes,' *Paper prepared for SANREM-CRSP*, Final Draft, April 2005, P.7.

¹⁴ *Ibid*, p. 8.

¹⁵ Blumoff, R.H. & Tyler, T.R., 'Procedural Justice and the Rule of Law: Fostering Legitimacy in Alternative Dispute Resolution', *Journal of Dispute Resolution*, Vol. 2011, Issue 1 [2011], Art. 2, p. 3.

¹⁶ *Ibid*, p.3.

parties' power imbalances to ensure that the right of access to justice is enjoyed by all and not dependent on the parties' social status.

It is also noteworthy that conflicts may be culture-specific. For instance, it has been observed that although African's natural resource and land disputes are clearly economic and, increasingly, class-based conflicts, they are not solely reducible to these dimensions alone. These conflicts occur within a sociocultural context, shaping and being shaped by it.¹⁷ It therefore, follows that any approaches that are employed in dealing with such conflicts must take into account the underlying socio-cultural factors that either gave rise to the conflict or contributed in fuelling such conflict.

4. Natural Resource Management and Environmental Justice

Environmental justice is defined to refer to equity in the distribution of environmental benefits and in the prevention and reduction of environmental burdens across all communities.¹⁸ It is also defined as the fair treatment and meaningful involvement of all people regardless of race, colour, national origin, or income with respect to the development, implementation, and enforcement of environmental laws, regulations, and policies.¹⁹

According to the *1st Africa Colloquium on Environmental Rule of Law, Nairobi Statement*,²⁰ the participants were of the opinion that the realization of sustainable development in Africa and the prosperity of its people hinges on the sustainable management of its unique and rich natural resources.²¹ They opined that leveraging of these resources towards achieving food security, industrialization, energy sufficiency and socially inclusive economic growth in an environmentally sustainable manner will create equal opportunities for all and eliminate poverty for the benefit of present and future generations.²² This affirms the important role that effective management of natural resources plays to facilitate social and economic development.

In order to further advance the development and implementation of environmental rule of law in the region, the participants in the colloquium were of the opinion that it is necessary to, inter alia: emphasize that advancing environmental rule of law, including information

¹⁷ Castro, A.P., 'Developing Local Capacity for Management of Natural Resource Conflicts in Africa: A Review of Key Issues, Approaches, and Outcomes,' op cit. p.8.

¹⁸ Purifoy, D.M., 'Food Policy Councils: Integrating Food Justice and Environmental Justice,' *Duke Environmental Law & Policy Forum*, Vol. XXIV, pp. 375-398, p. 375.

¹⁹ United States Environmental Protection Agency, 'What is Environmental Justice?' Available at <http://www3.epa.gov/environmentaljustice/> [Accessed on 13/12/2015].

²⁰ *1st Africa Colloquium on Environmental Rule of Law*, Nairobi, Kenya, 16 October 2015.

²¹ *Ibid*, p. 1.

²² *Ibid*.

disclosure, public participation, implementable and enforceable laws, implementation and accountability mechanisms, including coordination of roles, and environmental auditing and criminal, civil and administrative enforcement with timely, impartial and independent dispute resolution, is critical for Africa's future.²³ According to them, it provides a predictable, dependable and solid foundation for improved environmental governance across the continent. Without environmental rule of law and the enforcement of legal rights and obligations, environmental governance may be ineffective, arbitrary, subjective and unpredictable.²⁴

Though the Statement is not a negotiated document, but rather a reflection of the views of the participants, these suggestions offer an insight on achieving environmental rule of law for the African people and what governments should do in the quest for justice for the people.

Access to justice in Kenya especially for the poor and marginalised groups of persons is still a mirage. This is due to the fact that access to justice is not just about presence of formal courts in a country but also entails the opening up of those formal systems and legal structures to the disadvantaged groups in society, removal of legal, financial and social barriers such as language, lack of knowledge of legal rights and intimidation by the law and legal institutions.²⁵ Arguably, this has not yet been achieved in our country and the result is a poor people who are often condemned to a life of misery without any viable recourse to alleviate the injustices. Access to justice has two dimensions to it namely: procedural access (fair hearing before an impartial tribunal) and substantive justice (fair and just remedy for a violation of one's rights).²⁶

It is difficult for Kenyans to seek redress from the formal court system. The end result is that these disadvantaged people harbour feelings of bitterness, marginalization, resentment and other negative feelings that also affect the stability and peace of the country. Such scenarios have been the causes of ethnic or clan animosity in Kenya.²⁷ This, thus, calls for legal empowerment of the people for access to environmental justice. Legal empowerment of the poor seeks to establish the rule of law and ensure equal and equitable access to justice and tackle the root causes of exclusion, vulnerability and poverty.²⁸ Strengthening the rule of law is also seen as an important contributor to the legal empowerment of the poor.²⁹

²³ Ibid.

²⁴ Ibid.

²⁵ Global Alliance against Traffic in Women (GAATW), Available at <http://www.gaatw.org/atj/> (Accessed on 09/03/ 2015).

²⁶ Global Alliance against Traffic in Women (GAATW), op. cit.

²⁷ See the *Report of the Judicial Commission Appointed to Inquire into Tribal Clashes in Kenya*, (the 'Akiwumi Commission'), (Government Printer, Nairobi, 1999).

²⁸ UN General Assembly, *Legal empowerment of the poor and eradication of poverty: resolution / adopted by the General Assembly*, 5 March 2009, A/RES/63/142, para. 5.

²⁹ Ibid, para. 3.

Further, legal empowerment is also hailed as capable of promoting a participatory approach to development as well as recognizing the importance of engaging civil society and community-based organizations to ensure that the poor and the marginalized have identity and voice.³⁰ Such an approach, it is believed, can strengthen democratic governance and accountability, which, in turn, can play a critical role in the achievement of the internationally agreed development goals, including the Millennium Development Goals (MDGs).³¹ It is however, noteworthy that MDGs have been replaced by the sustainable development goals (SDGs) as developed during the United Nations Summit in New York on September 25-27, 2015.³²

5. Anchoring Environmental Justice and Environmental Rule of Law in the Legal and Institutional Framework

The *Universal Declaration of Human Rights of 1948* (UDHR)³³ provides that all are equal before the law and are entitled without any discrimination to equal protection of the law. All are entitled to equal protection against any discrimination in violation of the Declaration and against any incitement to such discrimination.³⁴ Further, it provides that everyone has the right to an effective remedy by the competent national tribunals for acts violating the fundamental rights granted him by the constitution or by law.³⁵ Also important is the provision that everyone is entitled in full equality to a fair and public hearing by an independent and impartial tribunal, in the determination of his rights and obligations and of any criminal charge against him.³⁶ These provisions are meant to promote the right of all persons to access justice.

The objective of Millennium Development Goal 7 is concerned with ensuring environmental sustainability. It requires adherence to the rule of law and a strong legal and institutional framework. The Rule of law is also one of the goals as enumerated in the Sustainable Development Goals (SDGs).³⁷ The SDGs build on the Millennium Development Goals (MDGs), eight anti-poverty targets that the world committed to achieving by 2015. Goal 16 thereof, provides for promotion of just, peaceful and inclusive societies. It states that peace, stability, human rights and effective governance based on the rule of law are important conduits

³⁰ Ibid, Para. 4.

³¹ Ibid, para. 4.

³² Transforming our world: the 2030 Agenda for Sustainable Development, adopted by the United Nations General Assembly at the UN Summit on September 25-27, 2015 in New York, A/RES/70/1.

³³ UN General Assembly, *Universal Declaration of Human Rights*, 10 December 1948, 217 A (III).

³⁴ Art. 7.

³⁵ Art. 8.

³⁶ Art. 10.

³⁷ Transforming our world: the 2030 Agenda for Sustainable Development.

for sustainable development. It further states that high levels of armed violence and insecurity have a destructive impact on a country's development, affecting economic growth and often resulting in long standing grievances among communities that can last for generations. Sexual violence, crime, exploitation and torture are also prevalent where there is conflict or no rule of law, and countries must take measures to protect those who are most at risk. The Sustainable Development Goals (SDGs) aim to significantly reduce all forms of violence, and work with governments and communities to find lasting solutions to conflict and insecurity. Strengthening the rule of law and promoting human rights is key to this process, as is reducing the flow of illicit arms and strengthening the participation of developing countries in the institutions of global governance.³⁸

The *African (Banjul) Charter on Human and Peoples' Rights*³⁹ provides in its preamble that it was adopted in consideration of the Charter of the Organization of African Unity, stipulation that "freedom, equality, justice and dignity are essential objectives for the achievement of the legitimate aspirations of the African peoples".

According to the UNEP, environmental rule of law integrates the critical environmental needs with the essential elements of the rule of law, and provides the basis for reforming environmental governance.⁴⁰ It prioritizes environmental sustainability by connecting it with fundamental rights and obligations. It implicitly reflects universal moral values and ethical norms of behaviour, and it provides a foundation for environmental rights and obligations. Without environmental rule of law and the enforcement of legal rights and obligations, environmental governance may be arbitrary, that is, discretionary, subjective, and unpredictable.⁴¹ It is therefore important that the environmental rule of law be entrenched in the environmental governance framework in the country so as to create a conducive environment for the realisation of access to environmental justice for all.

Under the East African Community Treaty – 1999, the objectives of the Community are to develop policies and programmes aimed at widening and deepening cooperation among the Partner States in political, economic, social and cultural fields, research and technology, defence, security and legal and judicial affairs, for their mutual benefit.⁴² For these purposes,

³⁸ Goal 16.

³⁹ Adopted June 27, 1981, OAU Doc. CAB/LEG/67/3 rev. 5, 21 I.L.M. 58 (1982), entered into force Oct. 21, 1986.

⁴⁰ Unep, 'Environmental Rule of Law: Critical to Sustainable Development,' *Issue Brief*, May 2015, available at <http://www.unep.org/delc/Portals/24151/Documents/issue-brief-environmental-justice-sdgs.pdf> [Accessed on 12/12/2015].

⁴¹ Ibid.

⁴² Article 5.

and as subsequently provided in particular provisions of this Treaty, the Community is to ensure *inter alia*: the attainment of sustainable growth and development of the Partner States by the promotion of a more balanced and harmonious development of the Partner States; and the promotion of peace, security, and stability within, and good neighbourliness among, the Partner States.⁴³

The fundamental principles that are to govern the achievement of the objectives of the Community by the Partner States include *inter alia*: mutual trust, political will and sovereign equality; peaceful co-existence and good neighbourliness; and peaceful settlement of disputes.⁴⁴

The Treaty confers the East Africa Court of Justice (EACJ)⁴⁵ jurisdiction to hear and determine any matter *inter alia*: arising from an arbitration clause contained in a contract or agreement which confers such jurisdiction to which the Community or any of its institutions is a party; or arising from a dispute between the Partner States regarding this Treaty if the dispute is submitted to it under a special agreement between the Partner States concerned. The EACJ acts as the main institutional instrument for settling disputes among members of the East African Community, namely Kenya, Tanzania, Uganda, Rwanda, and Burundi. EACJ thus demonstrates concerted efforts towards averting natural resource based conflicts in East African community.

The Protocol on Environment and Natural Resources Management provides for the cooperation in Environment and natural resources management.⁴⁶ More specifically, under article 13 related to the management of water resources, the protocol has these provisions: The partner States are to develop, harmonize and adopt common national policies, laws and programmes relating to the management and sustainable use of water resources and are to utilize water resources, including shared water resources, in an equitable and rational manner. From these provisions, it is clear that ADR mechanisms may play an important role in resolving any disagreements that arise from the exploitation of the resources.

⁴³Article 5.3.

⁴⁴Article 6.

⁴⁵A legal case was filed in EACJ in December 2010 by the Africa Network for Animal Welfare (ANAW), a Kenya non-profit organization, challenging the Tanzanian government's decision to build a commercial highway across the Serengeti National Park. On June 20, 2014, the court ruled that the government of Tanzania could not build a paved (bitumen) road across the northern section of the Serengeti, as it had planned. It issued permanent injunction restraining the Tanzanian government from operationalising its initial proposal or proposed action of constructing or maintaining a road of bitumen standard across the Serengeti National Park subject to its right to undertake such other programmes or initiate policies in the future which would not have a negative impact on the environment and ecosystem in the Serengeti National Park. See Serengeti Legal Defense Fund, available at <http://www.savetheserengeti.org/serengeti-legal-defense-fund/>

⁴⁶Chapter Three.

6. Environmental Justice and the role of the Judiciary

The *Rio+20 Declaration on Justice, Governance and Law for Environmental Sustainability*, declares that an independent judiciary and judicial process are vital for the implementation, development and enforcement of environmental law, and members of the judiciary, as well as those contributing to the judicial process at the national, regional and global levels, are crucial partners for promoting compliance with, and the implementation and enforcement of, international and national environmental law.⁴⁷ It affirms that judges, public prosecutors and auditors have the responsibility to emphasize the necessity of law to achieve sustainable development and can help make institutions effective.⁴⁸

The Declaration further calls on States to cooperate to build and support the capacity of courts and tribunals as well as prosecutors, auditors and other related stakeholders at the national, sub-regional and regional levels to implement environmental law and to facilitate exchanges of best practices in order to achieve environmental sustainability by encouraging relevant institutions, such as judicial institutes, to provide continuing education.⁴⁹

This demonstrates that Courts and the judicial system as a whole do still have an important role to play in the realisation of environmental justice for all, through enforcement of environmental law. Environmental law is deemed essential for the protection of natural resources and ecosystems and reflects the humankind's best hope for the future of the planet.⁵⁰

Under the constitution of Kenya, the State is obligated to ensure access to justice for all persons and, if any fee is required, it shall be reasonable and it should not impede access to justice.⁵¹ Courts are the State machinery for access to justice and must therefore be bound by this constitutional requirement. Effective national environmental governance complements efforts to improve international mechanisms for environmental protection.⁵²

The content and scope of this right has been said to be far reaching, infinite and encompasses *inter alia*, the recognition of rights, public awareness, understanding and knowledge of the law, protection of those rights, the equal access by all to judicial mechanisms for such protection; the respectful, fair, impartial and expeditious adjudication of claims within

⁴⁷ Ibid, Declaration No. I.

⁴⁸ Ibid.

⁴⁹ Ibid.

⁵⁰ Ibid.

⁵¹ Article 48 of the Constitution of Kenya 2010.

⁵² Fulton, S., & Benjamin, A., 'Effective National Environmental Governance – A Key to Sustainable Development,' p.2. Available at http://inece.org/conference/9/papers/Fulton-Benjamin_US-Brazil_Final.pdf [Accessed on 13/12/2015].

the judicial mechanism; easy availability of information pertinent to one's rights; equal right to the protection of one's rights by the legal enforcement agencies; easy entry into the judicial justice system; easy availability of physical legal infrastructure; affordability of the adjudication engagement; cultural appropriateness and conducive environment within the judicial system; timely processing of claims; and timely enforcement of judicial decisions.⁵³ Access to justice has further been enhanced by the recognition of public interest litigation in environmental matters which overcomes the limitations on showing *locus standi*.

With regard to environmental and natural resource management, courts have restated their important role in the quest for sustainable development. For instance, in the cases of *Waweru v Republic* (2007)⁵⁴ and *Friends of Lake Turkana Trust v Attorney General & 2 others* [2014] eKLR⁵⁵ courts have taken the active role of promoting environmental protection and averting potential natural resource based conflicts.⁵⁶ In the case of *Waweru v Republic*, the Court reiterated the position of Section 3 of Environment (Management and Conservation) Act 1999 (EMCA) which requires that courts take into account certain universal principles when determining environment cases. It also went further to state that apart from the EMCA it was of the view that the principles set out in section 3 do constitute part of international customary law and the courts ought to take cognisance of them in all the relevant situations. It therefore had a role in promoting sustainable development. Further, Article 22(1) of the constitution 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.

In the Ugandan case of *Greenwatch Vs Attorney General and Another Misc. Cause N. 140/2002*, where an action was taken against the Attorney General and NEMA under Article 50 of the Constitution for *inter alia* failing or neglecting their duties towards the promotion or preservation of the environment. It was held that the state owes that duty to all Ugandans and any concerned Ugandan has right of action against the Government of the Republic of Uganda and against NEMA for failing in its statutory duty.

⁵³ <http://kenyanjurist.blogspot.com/2011/07/kituo-cha-sheria-and-access-to-justice.html>.

⁵⁴ AHRLR 149 (KeHC 2006), High Court of Kenya at Nairobi, misc. civ application No. 118 Of 2004, 2 March 2006.

⁵⁵ ELC Suit No. 825 of 2012.

⁵⁶ The Court directed that the Government of Kenya, the Kenya Power and Lighting Company Limited, and the Kenya Electricity Transmission Company Limited should forthwith take the necessary steps and measures to ensure that the natural resources of Lake Turkana are sustainably managed, utilized and conserved in any engagement with, and in any agreements entered into or made with the Government of Ethiopia (including its parastatals) relating to the purchase of electricity.

All over the world, the Judiciary remains a crucial partner for promoting environmental law enforcement and compliance, as well as for shaping the content of legal principles and norms.⁵⁷ For instance, where the other proposed approaches to public participation do not fully satisfy the valid interests and genuine needs of a certain group or stakeholders, these people have the opportunity to challenge both the decision-making process and its outcomes through administrative appeals and litigation.⁵⁸ The Kenyan Environment and Land Court is empowered to hear and determine applications for redress of a denial, violation or infringement of, or threat to, rights or fundamental freedom relating to a clean and healthy environment under Articles 42, 69 and 70 of the Constitution.⁵⁹ Where applicable, the Court is empowered to adopt and implement, 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. Indeed, where alternative dispute resolution mechanism is a condition precedent to any proceedings before the Court, the Court must stay proceedings until such condition is fulfilled.⁶⁰

The foregoing demonstrate that courts play an important role and must therefore be actively involved in the promotion and protection of the right to environmental justice. The first way is through supporting and enforcing the outcome of ADR mechanisms and secondly, by way of safeguarding the rights of persons where they are called upon to do so, for instance under Article 70 of the Constitution.

7. Alternative Dispute Resolution Mechanisms: Overview

The phrase alternative dispute resolution refers to all those decision-making processes other than litigation including but not limited to negotiation, enquiry, mediation, conciliation, expert determination, arbitration and others. To some writers however the term, '*alternative dispute resolution*' is a misnomer as it may be understood to imply that these mechanisms are second-best to litigation which is not true.⁶¹ Article 33 of the *Charter of the United Nations*

⁵⁷ 3rd South Asia Judicial Roundtable On Environmental Justice For Sustainable Green Development 8th & 9th August 2014, Colombo, Sri Lanka, Background Paper, p. 4. Available at <http://www.asianjudges.org/wp-content/uploads/2014/08/Background-Paper-3rd-RT-Sri-Lanka-FINAL.pdf> [Accessed on 13/12/2015].

⁵⁸ Harder J., 'Environmental Mediation: The Promise and the Challenge,' *Environs*, Vol.19, No. I, December 1995, p. 30.

⁵⁹ Environment and Land Court Act, 2011, S. 13(3).

⁶⁰ *Ibid*, S. 20.

⁶¹ P. Fenn, P., "Introduction to Civil and Commercial Mediation", in Chartered Institute of Arbitrators, *Workbook on Mediation*, (CI Arb, London, 2002), pp. 50-52.

which outlines these conflict management mechanisms in clear terms and is the legal basis for the application of alternative dispute resolution mechanisms in disputes between parties be they States or individuals. It outlines the various conflict management mechanisms that parties to a conflict or dispute may resort to. It provides that the parties to any dispute shall, first of all seek a solution by negotiation, enquiry, mediation, conciliation, arbitration, judicial settlement, resort to regional agencies or arrangements, or other peaceful means of their own choice.⁶²

Some conflict management mechanisms are resolution mechanisms while others are settlement mechanisms. Litigation and arbitration are coercive and thus lead to a settlement. They are formal and inflexible. Settlement is an agreement over the issues(s) of the conflict which often involves a compromise.⁶³ Parties have to come to accommodations which they are forced to live with due to the anarchical nature of society and the role of power in the relationship. Basically, power is the defining factor for both the process and the outcome.⁶⁴ Settlement may be an effective immediate solution to a violent situation but will not thereof address the factors that instigated the conflict. The unaddressed underlying issues can later flare up when new issues or renewed dissatisfaction over old issues or the third party's guarantee runs out.⁶⁵ Settlement mechanisms may not be very effective in facilitating satisfactory access to justice (which relies more on people's perceptions, personal satisfaction and emotions).

Mediation, negotiation and the traditional dispute resolution mechanisms, on the other hand, are resolution mechanisms which mean they are informal, voluntary, allow party autonomy, expeditious and their outcomes are mutually satisfying. Conflict resolution refers to a process where the outcome is based on mutual problem-sharing with the conflicting parties cooperating in order to redefine their conflict and their relationship.⁶⁶

Alternative dispute resolution mechanisms such as mediation, negotiation and conciliation allow maximum party autonomy and are flexible, informal and leave room for parties to find their own lasting solutions to their problems.⁶⁷ These advantages make resolution potentially superior to settlement. Conflict resolution mechanisms include negotiation, mediation in the political process and problem solving facilitation.

⁶² United Nations, *Charter of the United Nations*, 24 October 1945, 1 UNTS XVI.

⁶³ Bloomfield, D., "Towards Complementarity in Conflict Management: Resolution and Settlement in Northern Ireland", *Journal of Peace Research*, Vol. 32, No. 2(May, 1995), P.152.

⁶⁴ Baylis, C., and Carroll, R., "Power Issues in Mediation", *ADR Bulletin*, Vol. 1, No.8 [2005], Art.1, p.135.

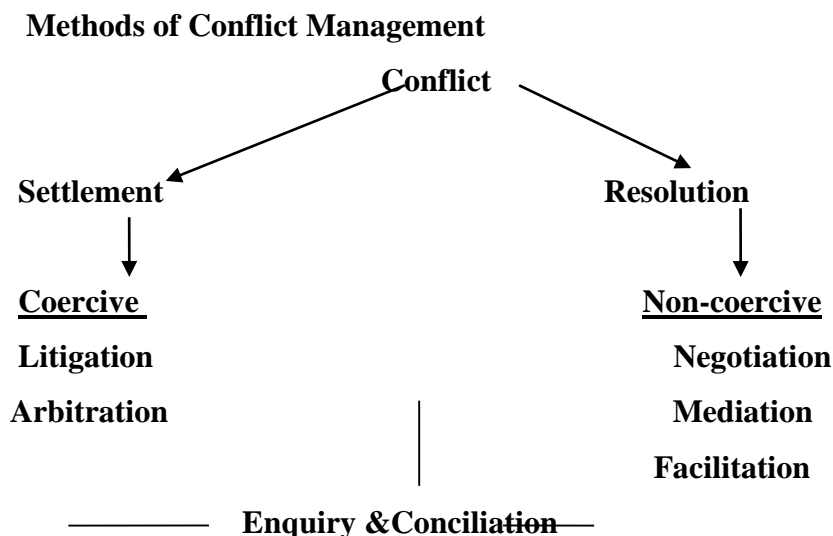
⁶⁵ Bloomfield, D., "Towards Complementarity in Conflict Management: Resolution and Settlement in Northern Ireland", op. cit. p. 153.

⁶⁶ Ibid, p. 153.

⁶⁷ Fenn, P., "Introduction to Civil and Commercial Mediation", op. cit, p.10.

It is, therefore, arguable that resolution mechanisms have better chances of achieving parties' satisfaction when compared to settlement mechanisms. However, it is important to point out that these mechanisms should not exclusively be used but instead there should be synergetic application of the two approaches. Each of them has success stories where they have been effectively applied to achieve the desired outcome. For realisation of justice, there is need to ensure that the two are engaged effectively where applicable.

Fig.1.1



*Source: The author

Figure 1.1 shows that there are certain methods of conflict management that can only lead to a settlement. Those that lead to a settlement fall into the category of coercive methods where parties have little or no autonomy over the forum, choice of the judges and the outcome. The coercive methods are litigation or judicial settlement and arbitration. It also shows the non-coercive methods (negotiation, mediation and facilitation) which lead to resolution. In the non-coercive conflict management methods the parties enjoy autonomy over the choice of the mediator or third party, the process and the outcome. Conciliation and enquiry can be classified as coercive (when the reports emanating from them are enforced) and non-coercive, for example, when the reports are used as the basis for negotiation between the parties.

8. Natural Resource Management and Alternative Dispute Resolution Mechanisms

The *Rio+20 Declaration on Justice, Governance and Law for Environmental Sustainability* declares that environmental sustainability can only be achieved in the context of fair, effective and transparent national governance arrangements and the rule of law predicated on, inter alia: Fair, clear and implementable environmental laws; public participation in decision-making and access to justice and information in accordance with

Principle 10 of the Rio Declaration including exploring the potential value of borrowing provisions from the Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters (Aarhus Convention) in this regard; accountability and integrity of institutions and decision makers, including through the active engagement of environmental auditing and enforcement institutions; and accessible, fair, impartial, timely and responsive dispute resolution mechanisms, including developing specialized expertise in environmental adjudication and innovative environmental procedures and remedies.⁶⁸

Also noteworthy, from the Declaration, is the affirmation that justice, including participatory decision-making and the protection of vulnerable groups from disproportionate negative environmental impacts must be seen as an intrinsic element of environmental sustainability.⁶⁹ It is therefore clear that access to justice through effective conflict management mechanisms must be part of effective natural resource management for sustainable development.⁷⁰

The criteria for determining procedural fairness has been identified as: First, people are more likely to judge a process as fair if they are given a meaningful opportunity to tell their story (i.e., an opportunity for voice); second, people care about the consideration that they receive from the decision maker, that is, they receive assurance that the decision maker has listened to them and understood and cared about what they had to say; Third, people watch for signs that the decision maker is trying to treat them in an even-handed and fair manner; and finally, people value a process that accords them dignity and respect.⁷¹

In environmental conflicts, ADR mechanisms such as, mediation, encourage public participation and “environmental democracy” in the management of environmental resources. Conflict management mechanisms such as mediation encourage “win-win” situations, parties find their own solutions, they pursue interests rather than strict legal rights, are informal, flexible and attempt to bring all parties on board.⁷² Mediation is democratic and ensures public

⁶⁸ Declaration No. II.

⁶⁹ Ibid.

⁷⁰ United Nations Environment Programme, ‘Rule of Environmental Law Essential for Sustainable Development, Inter-American Congress Concludes’ (UNEP News Centre, Thu, Apr 2, 2015). Available at <http://www.unep.org/newscentre/Default.aspx?DocumentID=26802&ArticleID=34886&l=en>

⁷¹ Welsh, N.A., ‘Perceptions of Fairness in Negotiation’ *Marquette Law Review*, Vol. 84, 2004, p. 753 at pp.763-764.; See also generally, Rottman, D. B., ‘How to Enhance Public Perceptions of the Courts and Increase Community Collaboration’ *NACM’S 2010-2015 National Agenda Priorities*, Available at http://www.proceduralfairness.org/Resources/~/_/media/Microsites/Files/proceduralfairness/Rottman%20from%20Fall%202011%20CourtExpress.ashx [Accessed on 13/12/2015]

⁷² Fenn, P., “Introduction to Civil and Commercial Mediation”, op. cit, p.10.

participation in decision making, especially in matters relating to natural resources management. Public participation is a tenet of sound environmental governance and is envisaged in the Constitution. Mediation in the informal context leads to a resolution (court-annexed mediation as envisaged under the Civil Procedure Act, Cap. 21 is a settlement process) and in environmental management it involves parties' participation in development planning, decision making and project implementation. The parties must be well informed so as to make sound judgements on environmental issues.

As such ADR mechanisms allow public participation in enhancing access to justice as they bring in an element of efficiency, effectiveness, flexibility, cost-effectiveness, autonomy, speed and voluntariness in conflict management. Some like mediation and negotiation are informal and not subject to procedural technicalities as does the court process. They are thus effective to the extent that they will be expeditious and cost-effective compared to litigation.⁷³ Traditional dispute resolution mechanisms are flexible, cost-effective, expeditious, foster relationships, are non-coercive and result to mutually satisfying outcomes. They are thus arguably 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. Traditional dispute resolution mechanisms include informal mediation, negotiation, problem-solving workshop, council of elders, consensus approaches among others. In light of Article 159 (2) (c) and in relevant cases, the ADR mechanisms should be used in resolving certain community disputes such as those involving use and access to natural resources among the communities in Kenya, for enhanced access to environmental justice.

9. Opportunities for ADR in Natural Resource Related Conflict management

For the constitutional right of access to justice to be realized, there has to be a framework based on the principles of: *expedition; proportionality; equality of opportunity; fairness of process; party autonomy; cost-effectiveness; party satisfaction and effectiveness of remedies* (emphasis added).⁷⁴ The United Nations observes that measures to improve access to justice should focus on developing low-cost justice delivery models, taking into account the cost of legal services and legal remedies, capacity and willingness of the poor to pay for such services, congestions in the court system, the incentives of the judiciary and law enforcement

⁷³ Article 159 (2) (d) provides that justice shall be administered without undue regard to procedural technicalities.

⁷⁴ See Maiese, M., "Principles of Justice and Fairness," in Burgess, G. and Heidi Burgess, H. (Eds.) "Conflict Information Consortium", *Beyond Intractability*, (University of Colorado, Boulder, July 2003).

agencies and the efficacy of informal and alternative dispute resolution mechanisms.⁷⁵ ADR mechanisms offer a promise in resolving natural resource related conflicts and communities' empowerment for environmental justice in Kenya.

Recognition of ADR and traditional dispute resolution mechanisms is thus predicated on these cardinal principles since they have advantages that would guarantee that everyone has access to justice (whether in courts or in other informal fora) and conflicts are to be resolved expeditiously and without undue regard to procedural hurdles that encumber the court system. Conflict management through litigation can take years before the parties can get justice in their matters due to the formality and resource limitations placed on the legal system by competing fiscal constraints and public demands for justice. It is also borne out of the recognition of the diverse cultures of the various communities in Kenya as the foundation of the nation and cumulative civilization of the Kenyan people and nation. Most of these mechanisms are entwined within the cultures of most Kenyan communities which are also protected by the Constitution.⁷⁶ In Africa, there is the problem of the imposed Eurocentric law. The definition of the rule of law must be expanded to include those notions of justice that are held dear and respected by communities in Africa and Kenya. It must include the tenets of customary law and traditional justice systems.

These mechanisms aim at maintaining a harmonious society. They aim at resolution rather than settlement. The mechanisms that are acceptable to these communities must be utilised fully so as to achieve the rule of law. The use of ADR mechanisms are part of the rule of law envisaged in the Constitution of Kenya 2010. Indeed, customary law is recognised as part of the law of Kenya.⁷⁷

Litigation may however come in handy, for instance, where an expeditious remedy in the form of an injunction is necessary. Where violent conflicts abound, the use of sanctions may help bring parties to the table, for possible negotiation. Litigation is also associated with the following advantages: the process is open, transparent and public; it is based on the strict, uniform compliance with the law of the land; determination is final and binding (subject possibly to appeal to a higher court).⁷⁸

⁷⁵ UN General Assembly, *Legal empowerment of the poor and eradication of poverty: report of the Secretary-General*, 13 July 2009, A/64/133, Report of the Secretary-General.

⁷⁶ Muigua, K., 'Empowering the Kenyan People through Alternative Dispute Resolution Mechanisms,' Available at <http://www.kmco.co.ke/attachments/article/149/Empowering%20the%20Kenyan%20People%20through%20Alternative%20Dispute%20Resolution%20Mechanisms.pdfv>

⁷⁷ See Art. 2(4); Art. 60; Art. 159(2)(c);

⁷⁸ Chartered Institute of Arbitrators, *Litigation: Dispute Resolution*, Available at <http://www.ciarb.org/dispute-resolution/resolving-a-dispute/litigation> [Accessed on 13/12/2015].

Thus, there are instances where a settlement mechanism may be applied in tandem with the conflict resolution mechanisms for the best results.

9.1 Access to Justice through Negotiation

Negotiation is a process that involves parties meeting to identify and discuss the issues at hand so as to arrive at a mutually acceptable solution without the help of a third party. It is as a process involving two or more people of either equal or unequal power meeting to discuss shared and/or opposed interests in relation to a particular area of mutual concern.⁷⁹ The parties themselves attempt to settle their differences using a range of techniques from concession and compromise to coercion and confrontation. Negotiation thus allows party autonomy in the process and over the outcome. It is non-coercive thus allowing parties the room to come up with creative solutions.

9.2 Mediation

Mediation is defined as the intervention in a standard negotiation or conflict of an acceptable third party who has limited or no authoritative decision-making power but who assists the involved parties in voluntarily reaching a mutually acceptable settlement of issues in dispute.¹³⁹ Within this definition mediators may play a number of different roles, and may enter conflicts at different levels of development or intensity.⁸⁰ Mediation can be classified into two forms namely: Mediation in the political process and mediation in the legal process.

(a) Mediation in the political process

Mediation in the political process is informed by resolution as against settlement. It allows parties to have autonomy over the choice of the mediator, the process and the outcome. The process is also associated with voluntariness, cost effectiveness, informality, focus on interests and not rights, creative solutions, personal empowerment, enhanced party control, addressing root causes of the conflict, non-coerciveness and enduring outcomes. With these

⁷⁹ Negotiations in Debt and Financial Management ‘Theoretical Introduction to Negotiation: What Is Negotiation?’, Document No.4, December 1994, Available at http://www2.unitar.org/dfm/Resource_Center/Document_Series/Document4/3Theoretical.htm [Accessed on 13/12/2015].

⁸⁰ Moore, C., *The Mediation Process: Practical Strategies for Resolving Conflict*, 3rd, (San Francisco: Jossey-Bass Publishers, 2004).

perceived advantages, the process is more likely to meet each party's expectations as to achievement of justice through a procedurally and substantively fair process of justice.⁸¹

(b) Mediation in the legal process

Mediation in the legal process is a process where the conflicting parties come into arrangements which they have been coerced to live or work with while exercising little or no autonomy over the choice of the mediator, the process and the outcome of the process. This makes it more of a settlement mechanism that is attached to the court as opposed to a resolution process and defeats the advantages that are associated with mediation in the political process.⁸²

The central quality of mediation is its capacity to reorient the parties towards each other, not by imposing rules on them, but by helping them to achieve a new and shared perception of their relationship.⁸³ In conflict resolution processes like mediation, the goal, then, is not to get parties to accept formal rules to govern their relationship, but to help them to free themselves from the encumbrance of rules and to accept a relationship of mutual respect, trust, and understanding that will enable them to meet shared contingencies without the aid of formal prescriptions laid down in advance.⁸⁴

The salient features of mediation (in the political process) are that it emphasizes on interests rather than (legal) rights and it can be cost - effective, informal, private, flexible and easily accessible to parties to conflicts. These features are useful in upholding the acceptable principles of justice: *expedition; proportionality; equality of opportunity; fairness of process; party autonomy; cost-effectiveness; party satisfaction and effectiveness of remedies* (emphasis ours), thus making mediation a viable process for the actualization of the right of access to justice.

One criticism however is that in mediation, power imbalances in the process may cause one party to have an upper hand in the process thus causing the outcome to unfavourably address his or her concerns or interests at the expense of the other.⁸⁵ Nevertheless, in any type of conflict, it is a fact that power imbalances disproportionately benefit the powerful party.

⁸¹ See generally Muigua, K., "Resolving Environmental Conflicts through Mediation in Kenya" Ph.D. Thesis, 2011, *Unpublished*, University of Nairobi.

⁸² *Ibid*, Chapter 4; See also sec. 59A, B, C & D of the Civil Procedure Act on Court annexed mediation in Kenya; See also Mediation (Pilot Project) Rules, 2015.

⁸³ Lon L. Fuller, *Mediation—Its Forms and Functions*, 44 S. CAL. L. REV. 305 (1971) [Quoted in Ray, B., 'Extending The Shadow Of The Law: Using Hybrid Mechanisms To Develop Constitutional Norms In Socioeconomic Rights Cases' *Utah Law Review*, (2009) [NO. 3] op. cit. PP. 802-803].

⁸⁴ *Ibid*.

⁸⁵ See generally, Fiss, O., "Against Settlement" 93 *Yale Law Journal*, 1073 (1984).

However, it may be claimed that inequality in the relationship does not necessarily lead to an exercise of that power to the other party's disadvantage.⁸⁶ Another weakness of mediation is that it is non-binding. It is thus possible for a party to go into mediation to buy time or to fish for more information.

9.3 Conflict Management via Conciliation

This process is similar to mediation except for the fact that the third party can propose a solution. Its advantages are similar to those of negotiation. It has all the advantages and disadvantages of negotiation except that the conciliator can propose solutions making parties lose some control over the process. Conciliation works best in trade disputes. Conciliation is recognised by a number of international legal instruments as a means to management of natural resource based conflicts.

Conciliation is different from mediation in that the third party takes a more interventionist role in bringing the two parties together. In the event of the parties are unable to reach a mutually acceptable settlement, the conciliator issues a recommendation which is binding on the parties unless it is rejected by one of them. While the conciliator may have an advisory role on the content of the dispute or the outcome of its resolution, it is not a determinative role. A conciliator does not have the power to impose a settlement.⁸⁷ This is a reflection of the Model Law on International Commercial Conciliation of the United Nations Commission on International Trade Law.⁸⁸

A conciliator who is more knowledgeable than the parties can help parties achieve their interests by proposing solutions, based on his technical knowledge that the parties may be lacking in. This may actually make the process cheaper by saving the cost of calling any other experts to guide them.

⁸⁶ Abadi, S.H., The role of dispute resolution mechanisms in redressing power imbalances - a comparison between negotiation, litigation and arbitration, page 3, *Effectius Newsletter*, Issue 13, (2011)

⁸⁷ Law Reform Commission, *Consultation Paper on Alternative Dispute Resolution*, July 2008, Op cit. p. 49

⁸⁸ Article 6 (4) of the Model law states that —The conciliator may, at any stage of the conciliation proceedings, make proposals for a settlement of the dispute, UNCITRAL Model Law on International Commercial Conciliation with Guide to Enactment and Use 2002 (United Nations 2002).

Available at http://www.uncitral.org/uncitral/en/uncitral_texts/arbitration/2002Model_conciliation.html [Accessed on 15/12/2015]

9.4 Conflict Management through Arbitration

Arbitration is a dispute settlement mechanism. Arbitration arises where a third party neutral (known as an arbitrator) is appointed by the parties or an appointing authority to determine the dispute and give a final and binding award.

Arbitration has also been described as a private consensual process where parties in dispute agree to present their grievances to a third party for resolution.⁸⁹ Its advantages are that parties can agree on an arbitrator to determine the matter; the arbitrator has expertise in the area of dispute; any person can represent a party in the dispute; flexibility; cost-effective; confidential; speedy and the result is binding. Proceedings in Court are open to the public, whereas proceedings in commercial arbitration are private, accordingly the parties who wish to preserve their commercial secrets may prefer commercial arbitration.

In disputes involving parties with equal bargaining power and with the need for faster settlement of disputes, especially business related, arbitration offers the best vehicle among the ADR mechanisms to facilitate access to justice.

The problem that arises with the use of arbitration in natural resource related conflicts is that due to its private nature, coupled with the provisions of the Arbitration Act, 1995,⁹⁰ there is the likelihood of ousting the jurisdiction of the court by way of enforcing the requirement of non-interference in the arbitration process.⁹¹ Arguably, arbitration is not suitable in environmental matters, since the court needs to maintain a supervisory role in the natural resource conflicts management, especially where a foreign investor is involved and the rights of the communities are likely to be violated.

9.5 Conflict Management through Med-Arb

Med-Arb is a combination of mediation and arbitration. It is a combination of mediation and arbitration where the parties agree to mediate but if that fails to achieve a settlement the dispute is referred to arbitration. It is best to have different persons mediate and arbitrate. This is because the person mediating becomes privy to confidential information during the mediation process and may be biased if he transforms himself into an arbitrator.

⁸⁹Farooq Khan, *Alternative Dispute Resolution*, A paper presented Chartered Institute of Arbitrators-Kenya Branch Advanced Arbitration Course held on 8-9th March 2007, at Nairobi.

⁹⁰ Art. 10.

⁹¹ For instance, an arbitration clause that refers matters to the International Centre for the Settlement of Investment Disputes (ICSID) ousts the jurisdiction of the national courts. ICSID awards do not require national courts for enforcement. ; S. 10 of the Arbitration Act 1995 limits court's intervention.

Med-Arb can be successfully be employed where the parties are looking for a final and binding decision but would like the opportunity to first discuss the issues involved in the dispute with the other party with the understanding that some or all of the issues may be settled prior to going into the arbitration process, with the assistance of a trained and experienced mediator.⁹² This is likely to make the process faster and cheaper for them thus facilitating access to justice.

Elsewhere, the courts have held, the success of the hybrid mediation/arbitration process depends on the efficacy of the consent to the process entered into by the parties.⁹³

9.6 Conflict Management through Arb-Med

This is where parties start with arbitration and thereafter opt to resolve the dispute through mediation. It is best to have different persons mediate and arbitrate. This is because a person arbitrating may have made up his mind who is the successful party and thus be biased during the mediation process if he transforms himself into a mediator. Arb-med can be used to achieve justice where it emerges that the relationship between the parties needs to be preserved and that there are underlying issues that need to be addressed before any acceptable outcome can be achieved. Mediation, a resolution mechanism is better suited to achieve this as opposed to arbitration, a settlement process. Arb-med can be applied in the management of natural resource conflicts for environmental justice.

9.7 Adjudication and Conflict Management

Adjudication is defined under the Chartered Institute of Arbitrators (CI Arb) (K) *Adjudication Rules* as the dispute settlement mechanism where an impartial, third-party neutral person known as adjudicator makes a fair, rapid and inexpensive decision on a given dispute arising under a construction contract. Adjudication is an informal process, operating under very tight time scales (the adjudicator is supposed to reach a decision within 28 days or the period stated in the contract), flexible and inexpensive process; which allows the power imbalance in relationships to be dealt with so that weaker sub-contractors have a clear route to deal with

⁹²Mediation-Arbitration (Med-Arb), Available at <http://www.constructiondisputes-cdrs.com/about%20MEDIATION-ARBITRATION.htm> [Accessed on 15/12/2015]

⁹³ Sussman, E., Developing an Effective Med-Arb/Arb-Med Process, *NYSBA New York Dispute Resolution Lawyer*, Spring 2009, Vol. 2, No. 1, p. 73, Available at <http://www.sussmanadr.com/docs/Med%20arb%PDF.pdf> [Accessed on 15/12/2015]

more powerful contractors. The decision of the adjudicator is binding unless the matter is referred to arbitration or litigation. Adjudication is thus effective in simple construction disputes that need to be settled within some very strict time schedules. Due to the limited time frames, adjudication can be an effective tool of actualizing access to justice for disputants who are in need of addressing the dispute in the shortest time possible and resuming business to mitigate any economic or business losses.

The demerits of adjudication are that it is not suitable to non-construction disputes; the choice of the adjudicator is also crucial as his decision is binding and that it does not enhance relationships between the parties.⁹⁴ However, in future it may be possible to have a framework within which to settle environmental disputes through adjudication.

10. Fair and Equitable Sharing of Resources for Peace and Sustainable Development

10.1 The Nagoya Protocol in the Kenyan Legal Framework

The *UN Convention on Biological Diversity (CBD)* has 3 main objectives namely: the conservation of biological diversity; the sustainable use of the components of biological diversity; and the fair and equitable sharing of the benefits arising out of the utilization of genetic resources.⁹⁵ The CBD recognises the sovereign right of states over their natural resources in areas within their jurisdiction. The *Nagoya Protocol*,⁹⁶ is a supplementary agreement to the Convention on Biological Diversity. It provides a transparent legal framework for the effective implementation of one of the three objectives of the CBD: the fair and equitable sharing of benefits arising out of the utilization of genetic resources.⁹⁷

10.2 Use of and Access to Genetic Resources and Traditional Knowledge

It is noteworthy that the Constitution of Kenya 2010 gives “natural resources” a broad definition which means the physical non-human factors and components, whether renewable or non-renewable, including, inter alia, forests, *biodiversity and genetic resources* (emphasis

⁹⁴ K. W. Chau, Insight into resolving construction disputes by mediation/adjudication in Hong Kong, *Journal Of Professional Issues In Engineering Education And Practice*, ASCE / APRIL 2007, pp 143-147 at P. 143, Available at http://www.academia.edu/240893/Insight_into_resolving_construction_disputes_by_mediation [Accessed on 15/12/2015]

⁹⁵ Art. 1, 1992 *Convention on Biological Diversity*, [1993] ATS 32 / 1760 UNTS 79 / 31 ILM 818 (1992).

⁹⁶ *Nagoya Protocol on Access to Genetic Resources and the Fair and Equitable Sharing of Benefits Arising from their Utilization (ABS) to the Convention on Biological Diversity*,

⁹⁷ CBD Secretariat, ‘About the Nagoya Protocol,’ available at <https://www.cbd.int/abs/about/> [Accessed on 13/12/2015].

added).⁹⁸ In recognition of importance of traditional knowledge, the Constitution goes further to provide that the State should: 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.⁹⁹ Indeed, the Parliament is required to enact legislation to—ensure that communities receive compensation or royalties for the use of their cultures and cultural heritage; and recognise and protect the ownership of indigenous seeds and plant varieties, their genetic and diverse characteristics.¹⁰⁰

Parliament has since developed some Bills as contemplated in the Constitution. For instance, one of the proposed laws in response to the Constitution and the Nagoya Protocol requirements is *the Protection of Traditional Knowledge and Traditional Cultural Expressions Bill, 2015*, is a Bill that is undergoing internal review & stakeholder consultations, developed in line with the foregoing.¹⁰¹ The proposed law seeks to provide a unified and comprehensive framework for the protection and promotion of traditional knowledge and traditional cultural expressions; to give effect to Article 11, 40(5) and 69 of the Constitution; and for connected purposes. The Bill's purpose is, inter alia: protect holders of traditional knowledge against any infringement of their rights; protect traditional knowledge and traditional cultural expressions against misappropriation, misuse and unlawful exploitation beyond their traditional context; promote sustainable utilization of traditional knowledge and traditional cultural expressions and ensure communities receive compensation and/or royalties for the use of their cultures and cultural heritage; and promote the fair and equitable sharing and distribution of monetary and non-monetary benefits arising from the use of traditional knowledge and traditional cultural expressions.¹⁰²

With regard to natural resource related conflict management, the proposed legislation has several provisions that recognise the importance of ADR in such disputes. The Bill provides that the National Competent Authority¹⁰³ may, in the case of a dispute where there is no agreement between the parties, refer the matter for determination through alternative dispute resolution mechanisms.¹⁰⁴ Further, an authorization to exploit traditional knowledge and

⁹⁸ Art. 260.

⁹⁹ Art. 11(2).

¹⁰⁰ Art. 11(3).

¹⁰¹ Commission for the Implementation of the Constitution.

¹⁰² Clause 2, *the Protection of Traditional Knowledge and Traditional Cultural Expressions Bill, 2015*.

¹⁰³ The proposed National Competent Authority is to be established under clause

¹⁰⁴ Clause 10 (3).

traditional cultural expressions must be granted by the holders of traditional knowledge and traditional cultural expressions or where the holders so wish, from the National Competent Authority, on the request and behalf of the holders.¹⁰⁵ However, where the National Competent Authority is to grant an authorization under subsection (1)— it should not grant the authorization before undertaking appropriate consultations with the relevant communities, in accordance with their traditional processes for decision-making and public affairs management. The authorization should also comply with the scope of protection provided for the traditional knowledge or traditional cultural expressions concerned and shall provide for the equitable sharing of the benefits arising from their use; and the uncertainties or disputes relating to the determination of the communities should be involved shall be resolved, in so far as is possible, in accordance with customary laws and protocols of the communities involved.¹⁰⁶

The *Natural Resources (Benefit Sharing) Bill*, 2014, 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 Benefits Sharing Authority; and for connected purposes.¹⁰⁷ The law, is to apply with respect to the exploitation of- petroleum; natural gas; minerals; forest resources, water resources; wildlife resources; and fishery resources.¹⁰⁸ The functions of the Benefit Sharing Authority, will be, inter alia, coordinate the preparation of benefit sharing agreements between local communities and affected organizations; review, and where appropriate, determine the royalties payable by an affected organization engaged in natural resource exploitation; identify counties that require to enter into a benefit sharing agreement for the commercial exploitation of natural resources within the counties; and oversee the administration of funds set aside for community projects identified or determined under any benefit sharing agreement.¹⁰⁹

The Benefit Sharing law can go a long way in boosting the quest for environmental justice for the Kenyan, as far as natural resource management is concerned. Arguably, the first step towards preventing or eliminating natural resource-related conflicts is to promote equitable sharing of accruing benefits in natural resources exploitation. People who feel that they are fairly and meaningfully involved in decision-making and benefit sharing are more likely to coexist peacefully. Procedural justice is used to mean the perception of the fairness of the

¹⁰⁵ Clause 24(1).

¹⁰⁶ Clause 24(2).

¹⁰⁷ Preamble.

¹⁰⁸ Clause 3(1), *Natural Resources (Benefit Sharing) Bill*, 2014.

¹⁰⁹ *Ibid*, Clause 6(1).

procedure. Procedural justice is distinguished from distributive justice, which refers to the perception that there has been a fair apportionment of outcomes, or the perception of the fairness of the outcome.¹¹⁰ The *Universal Declaration of Human Rights* (UDHR 1948)¹¹¹ affirms in its Preamble that the recognition of the inherent dignity and of the equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world. Where communities feel that their livelihoods and genuine needs are taken care of, they have no need to engage in conflict in the search for resources to meet their needs, since conflict is often triggered by scarcity of resources. They feel that they are being treated fairly and justly, that is, as far as environmental justice is concerned, they have their needs taken care of in participatory processes.

Thus, it is more prudent for the State to protect the resources for the sake of meeting the needs of the people for while ensuring that the benefits that accrue thereof are fairly and equitably shared amongst the entitled communities. However, these benefits, as observed in various international and local environmental instruments, need not be in monetary terms. Article 5 of the Nagoya Protocol provides that in accordance with Article 15, paragraphs 3 and 7 of the Convention, benefits arising from the utilization of genetic resources as well as subsequent applications and commercialization must be shared in a fair and equitable way with the Party providing such resources, that is, the country of origin of such resources or a Party that has acquired the genetic resources in accordance with the Convention. Such sharing should be upon mutually agreed terms.¹¹²

Each Party to the Protocol¹¹³ must take legislative, administrative or policy measures, as appropriate, with the aim of ensuring that benefits arising from the utilization of genetic resources that are held by indigenous and local communities, in accordance with domestic legislation regarding the established rights of these indigenous and local communities over these genetic resources, are shared in a fair and equitable way with the communities concerned, based on mutually agreed terms.¹¹⁴ Noteworthy is the Nagoya Protocol provision that benefits may include monetary and non-monetary benefits, including but not limited to those listed in the Annex.¹¹⁵ Arguably, the non-monetary benefits accruing from natural resources

¹¹⁰ Howieson, J., 'Procedural justice in mediation: an empirical study and a practical example,' *ADR Bulletin*, Vol. 5, No. 7 [2002], Art. 1, p.1.

¹¹¹ UN General Assembly, *Universal Declaration of Human Rights*, 10 December 1948, 217 A (III).

¹¹² Art. 5(1).

¹¹³ Kenya signed the Protocol on 1/02/2012, ratified it on the 7/04/2014 and became a party on 12/10/2014.

¹¹⁴ Art. 5(2).

¹¹⁵ According to the Annex, Monetary benefits 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

exploitation may be more effective in improving the lives of the people as compared to the monetary gains since the former leave a lasting mark on the lives of the community and even affect future generations.

Monetary gains, on the other hand, are more prone to misappropriation or embezzlement by a small group of elite, thus leaving the community worse off. Where the concerned community is involved in benefit sharing negotiations, they are more likely to settle for non-monetary but more meaningful benefits. Negotiators rely upon their perceptions of distributive and procedural fairness in making offers and demands, reacting to the offers and demands of others, and deciding whether to reach an agreement or end negotiations.¹¹⁶

Negotiations by the elected representatives on behalf of the community may not always bear much fruit in the quest for environmental justice and benefit sharing for the community. This creates an opportunity for the ADR mechanisms to help communities address such issues and even negotiate for the best deal, as far as the types of possible benefits are concerned. They ought to be assured, at least through active participation where need be, that their resources will benefit them.

The Constitution of Kenya provides that the obligations of the State in respect of the environment include, inter alia, to: ensure sustainable exploitation, utilisation, management and conservation of the environment and natural resources, and ensure the equitable sharing of the accruing benefits; protect and enhance intellectual property in, and indigenous knowledge of, biodiversity and the genetic resources of the communities; encourage public participation in the management, protection and conservation of the environment; protect genetic resources and

biodiversity; salaries and preferential terms where mutually agreed; research funding; joint ventures; and joint ownership of relevant intellectual property rights. Non-monetary benefits, on the other hand, may include, but not be limited to: sharing of research and development results; collaboration, cooperation and contribution in scientific research and development programmes, particularly biotechnological research activities, where possible in the Party providing genetic resources; participation in product development; collaboration, cooperation and contribution in education and training; admittance to ex situ facilities of genetic resources and to databases; transfer to the provider of the genetic resources of knowledge and technology under fair and most favourable terms, including on 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; strengthening capacities for technology transfer; institutional capacity-building; human and material resources to strengthen the capacities for the administration and enforcement of access regulations; training related to genetic resources with the full participation of countries providing genetic resources, and where possible, in such countries; access to scientific information relevant to conservation and sustainable use of biological diversity, including biological inventories and taxonomic studies; contributions to the local economy; research directed towards priority needs, such as health and food security, taking into account domestic uses of genetic resources in the Party providing genetic resources; institutional and professional relationships that can arise from an access and benefit-sharing agreement and subsequent collaborative activities; food and livelihood security benefits; social recognition; and joint ownership of relevant intellectual property rights.

¹¹⁶ Welsh, N.A., 'Perceptions of Fairness in Negotiation,' op. cit. at p.753.

biological diversity; and utilise the environment and natural resources for the benefit of the people of Kenya.¹¹⁷

These provisions are in line with the Nagoya Protocol, whose main objective is the fair and equitable sharing of the benefits arising from the utilization of genetic resources, including by appropriate access to genetic resources and by appropriate transfer of relevant technologies, taking into account all rights over those resources and to technologies, and by appropriate funding, thereby contributing to the conservation of biological diversity and the sustainable use of its components.

10.3 Addressing Climate Change for peace and Sustainable Development

Competition for scarce resources, such as fresh water, land or fishing grounds, brought about by changes in climate, has the added potential to cause conflict over resources with impacts on the achievement of the Millennium Development Goals, and on human migration.¹¹⁸ For example, it has been observed that in Africa increased pressure on resources related to food and water insecurity can deepen tensions between communities and ethnic groups resulting in violence and war.¹¹⁹ This is well illustrated by the situation in the Northern parts of Kenya, where resource scarcity arising from climate change and consequent overexploitation of the available resources, has led to frequent inter-clan and ethnic natural resource conflicts.¹²⁰

The MDGs, under Goal 7 required countries to ensure environmental sustainability. Essentially, under this, they were required to deal with the alterations and possible irreversible damage in the quality and productivity of ecosystems and natural resources; address the problem of decrease in biodiversity and worsening of existing environmental degradation; and take measures to reverse the alterations in ecosystem-human interfaces and interactions which lead to loss of biodiversity and loss of basic support systems for the livelihood of many people, particularly in Africa.¹²¹ Arguably, any measures aimed at dealing with these problems requires

¹¹⁷ Art. 69(1), Constitution of Kenya.

¹¹⁸ United Nations Framework Convention on Climate Change, 'Climate Change: Impacts, Vulnerabilities and Adaptation in Developing Countries,' (Information Services of the UNFCCC secretariat, 2007), p.42. Available at <http://unfccc.int/resource/docs/publications/impacts.pdf> [Accessed on 16/12/2015].

¹¹⁹ Ibid.

¹²⁰ See Doti, T., 'Climate variability, pastoralists' vulnerability and options: The case of the Borana of Northern Kenya,' in Mwiturubani, D.A. & Wyk, JAV (eds), *Climate Change and Natural Resources Conflicts in Africa*, Monograph 170, (Institute for Security Studies) available at <https://www.issafrica.org/uploads/Mono170.pdf> [Accessed on 16/12/2015].

¹²¹ United Nations Framework Convention on Climate Change, 'Climate Change: Impacts, Vulnerabilities and Adaptation in Developing Countries,' op cit., p. 43.

the active participation of communities. This is because there are those activities by such communities that directly contribute to environmental degradation and ultimately climate change. Getting solutions to the resultant conflicts that may arise out of the fight for the scarce resources requires the communities to sit at the table together and identify their needs and interests and how the same can be satisfied without putting undue pressure on the environment.

This, therefore, calls for action on climate change to curb environmental degradation. During the 21st session of the Conference of the Parties (COP21) to the United Nations Framework Convention on Climate Change (UNFCCC), Parties acknowledged that adaptation action should follow a country-driven, gender-responsive, participatory and fully transparent approach, taking into consideration vulnerable groups, communities and ecosystems, and should be based on and guided by the best available science and, as appropriate, traditional knowledge, knowledge of indigenous peoples and local knowledge systems, with a view to integrating adaptation into relevant socioeconomic and environmental policies and actions, where appropriate.¹²² This is a firm acknowledgement of the usefulness of ADR and TDR mechanisms in not only providing a tool for conflict management but also community participation in climate change efforts.

The recently adopted document, *Transforming our world: the 2030 Agenda for Sustainable Development*,¹²³ commonly referred to as *Sustainable development Goals (SDGs)*, and which are meant to build on and advance the gains made by MDGs, seeks to strengthen universal peace in larger freedom and recognizes that eradicating poverty in all its forms and dimensions, including extreme poverty, is the greatest global challenge and an indispensable requirement for sustainable development.¹²⁴ As already noted, development cannot take place in a conflict situation. As such, this objective can only be achieved through mechanisms that incorporate effective conflict management strategies. The SDGs seeks to foster peaceful, just and inclusive societies which are free from fear and violence and also affirms that there can be no sustainable development without peace and no peace without sustainable development.¹²⁵

The participating State parties in the UN Summit resolved that they must redouble the efforts to resolve or prevent conflict and to support post-conflict countries, including through ensuring that women have a role in peacebuilding and statebuilding.¹²⁶ The use of ADR

¹²² Art. 7 (5), Conference of the Parties, *Adoption Of The Paris Agreement*, Conference of the Parties Twenty-first session Paris, 30 November to 11 December 2015, FCCC/CP/2015/L.9/Rev.1, 12 December 2015.

¹²³ *Transforming our world: the 2030 Agenda for Sustainable Development*, adopted by the United Nations General Assembly at the UN Summit on September 25-27, 2015 in New York, A/RES/70/1.

¹²⁴ *Ibid*, Preamble.

¹²⁵ *Ibid*.

¹²⁶ *Ibid*.

mechanisms hold the potential to achieve these goals in the new agenda. Through the use of ADR, such as mediation, women are afforded an opportunity to play a role in peacebuilding and helps in building peaceful, just and inclusive societies that provide equal access to justice and that are based on respect for human rights. There is need to exploit these mechanisms in the quest for environmental justice for social and economic development in the country. The mechanisms that are acceptable to these communities must be utilised fully so as to achieve the rule of law, including environmental rule of law.

11. Capacity-Building, Education and Training and Public Awareness

Sustainable development must be based on effective rule of law and governance at all levels. Under the SDGs and particularly what has been dubbed, the new agenda, it has been affirmed that sustainable development cannot be realized without peace and security; and that peace and security will be at risk without sustainable development.¹²⁷ The new Agenda recognizes the need to build peaceful, just and inclusive societies that provide equal access to justice and that are based on respect for human rights (including the right to development), on effective rule of law and good governance at all levels and on transparent, effective and accountable institutions.¹²⁸

The realisation of peaceful, just and inclusive societies that provide equal access to justice and that are based on respect for human rights requires promotion of meaningful citizen participation and/or to effectively resolve conflicts. There is need for capacity building through education, training and even creating awareness amongst the communities so as to give them the required capacity to contribute. Collaboration between educational, training and research institutions would greatly help in building such capacity in a way that puts into consideration the genuine needs and interests of the affected community or group of people. They ought to be empowered to enable them participate effectively in ADR. The ADR institutions should also be promoted and supported to improve their capacity in addressing the arising conflicts. Effective and meaningful participation in governance matters, as required under Article 10 of the constitution, calls for empowerment of the people. Such empowerment will be useful for enhancing accountability, fairness and responsibilities amongst leaders since people will be aware of their rights and thus demand them through the various available channels, including the court system.

¹²⁷ Ibid, New Agenda No. 35.

¹²⁸ Ibid.

Capacity building should also be in the form of financial resources. Putting up the relevant structures for the use of ADR may require funds and the Government, through the relevant arm, may be required to assist in sourcing such funds. Capacity-building may also necessitate an overhaul of the current institutions as established under Environment (Conservation and Management) Act, 1999. There may require support to build and strengthen environmental and sectoral institutions that have the capacity to incorporate and make use of ADR mechanisms so that they can address the complexities of addressing and coordinating the planning and implementation of action with the participation of communities and other locally set up initiatives for effective management of natural resource conflicts.

12. Conclusion

ADR and Traditional dispute resolution mechanisms have been effective in managing conflicts where they have been used. Their relevance in the conflict discourse has been recognized in the constitution.¹²⁹ They are mechanisms that enhance access to justice. Some like mediation and negotiation bring about inclusiveness and public participation of all members of the community in decision-making. Their effective implementation as suggested herein and in line with the constitution will be a paradigm shift in the policy on resolution of conflicts towards enhancing access to justice and the expeditious resolution of disputes without undue regard to procedural technicalities.

A comprehensive policy and legal framework to operationalise ADR mechanisms in the context of natural resource management, is needed. It should be realized that most of the disputes reaching the courts can be resolved without resort to court if members of the public are involved in decision-making and resolution of their own disputes using ADR and traditional conflict resolution mechanisms. This is especially so where natural resource-related conflicts are involved, unless the same are intractable and violent conflicts, where the coercive mechanisms, such as court system, may come in handy. These mechanisms should thus be applied and linked up well with courts and tribunals to promote access to justice and public participation.

Effective management of natural resource conflicts in Kenya is a necessary ingredient in the quest for Environmental Justice.

¹²⁹ Article 159(2) (c) of the Constitution of Kenya 2010 provides that in the exercise of judicial authority, the Courts and tribunals must be guided by the principle of *inter alia* promotion of alternative forms of dispute resolution (ADR) including reconciliation, mediation, arbitration and traditional dispute resolution mechanisms shall be promoted, subject to clause (3).

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