

Natural Resources and Conflict Management in East Africa

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Abstract

This paper seeks to critically discuss the issue of natural resource-based conflicts management in the East African Region. It is worth noting that the wider East African region is well endowed with natural resources such as forests, land, lakes and minerals with the latest development being the discovery of crude oil and gas in Kenya and Uganda. Natural resources are conflict generators with the various stakeholders pursuing different interests which end up clashing. It need not be emphasized that the fight for access, use and management of natural resources in the region have resulted in the most violent conflicts amongst communities and even tension between states, and often resulting in loss of human and animal lives as well as property. This is bound to become more severe with the entry of oil and gas exploration and mining in the region if the concerned states do not act on time to put in place more effective mechanisms to manage these conflicts. Conflicts impact negatively on development. Conflicts occurring as a result of contests over natural resources should be dealt with effectively and expeditiously, and there is therefore a need to have in place on effective conflict management mechanisms to deal with them.

The author critically examines the existing legal and institutional framework in place for the management of conflicts and especially natural resource-based conflicts, with a view to identifying the challenges to their effectiveness in managing these conflicts. It is argued that the current framework has not been efficacious in resolving conflicts and there is a need to develop a new approach to conflict management. The new approach should incorporate tenets of public participation, environmental democracy and the use of Alternative Dispute Resolution (ADR) mechanisms aimed at ensuring environmental democracy is achieved.

The author briefly discusses merits and demerits of litigation and Alternative Dispute Resolution (ADR) mechanisms with the aim of identifying opportunities and making a case for their tandem and effective application in the management of these resource-based conflicts so as to promote investment and economic development in the region.

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1. Introduction

This paper seeks to critically discuss the issue of natural resource-based conflicts management in the East African Region. It is worth noting that the wider East African region is well endowed with natural resources such as forests, land, lakes and minerals with the latest development being the discovery of crude oil and gas in Kenya and Uganda. Natural resources are conflict generators with the various stakeholders pursuing different interests which end up clashing. It need not be emphasized that the fight for access, use and management of natural resources in the region have resulted in the most violent conflicts amongst communities and even tension between states, and often resulting in loss of human and animal lives as well as property. This is bound to become more severe with the entry of oil and gas exploration and mining in the region if the concerned states do not act on time to put in place more effective mechanisms to manage these conflicts. Conflicts impact negatively on development. Conflicts occurring as a result of contests over natural resources should be dealt with effectively and expeditiously, and there is therefore a need to have in place on effective conflict management mechanisms to deal with them.

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The author briefly discusses merits and demerits of litigation and Alternative Dispute Resolution (ADR) mechanisms with the aim of identifying opportunities and making a case for their tandem and effective application in the management of these resource-based conflicts so as to promote investment and economic development in the region.

2. Conflicts and Disputes

Conflicts arise due to issues about values which are non-negotiable.¹ They arise due to non-fulfillment of needs and values that are shared by the parties and are inherent in all human beings.² It is arguable that most of the conflicts arise out of feelings of injustice being perpetrated. It has been posited that the desire for justice, and in this context, environmental justice, is one that people tend to be unwilling to compromise with assertions of injustice often leading to intractable conflicts as well, with an individual's sense of justice being connected to the norms, rights, and entitlements that are thought to underlie decent human treatment.³ If not well addressed, such feelings of dissatisfaction may result in conflicts.

On the other hand, a dispute refers to issues or interests that are finite and divisible can therefore be negotiated. A dispute can be interest-based, rights-based or power-based. Interest-based disputes are best addressed through negotiation and mediation, rights-based disputes through litigation while power-based disputes are addressed through *inter alia*, use of force, threats and violence.⁴

3. Settlement and Resolution Mechanisms

Settlement is an agreement over the issues(s) of the conflict which often involves a compromise.⁵ Settlement is considered to be power-based in that the outcome majorly relies on the power that is possessed by the parties to the conflict. Settlement may be an effective immediate solution to a violent situation but will not thereof address the factors that instigated

¹Mwagiru, M., *Conflict in Africa; Theory, Processes and Institutions of Management*, (Centre for Conflict Research, Nairobi, 2006), p. 42.

²Ibid. See also Bloomfield, D., "Towards Complementarity in Conflict Management: Resolution and Settlement in Northern Ireland", *Journal of Peace Research*, Vol. 32, No. 2(May, 1995), P.152-153; Kariuki Muigua, *Resolving Conflicts Through Mediation in Kenya* (Glenwood Publishers Ltd, Nairobi, 2012), Chapter Four, pp56-65.

³Maiese, Michelle. "Causes of Disputes and Conflicts."Beyond Intractability.Eds.Guy Burgess and Heidi Burgess. Conflict Research Consortium, University of Colorado, Boulder; See also generally Okidi C.O. et al. (eds), *Environmental Governance in Kenya*, East African Educational Publishers Ltd., (Nairobi, 2008).

Posted: October 2003 <<http://www.beyondintractability.org/essay/underlying-causes>>.[Accessed on 09/08/2014].

⁴ Mwagiru, M., *Conflict in Africa; Theory, Processes and Institutions of Management*, (Centre for Conflict Research, Nairobi, 2006), op. cit. pp. 109-110; See also generally Mwagiru, M., *The Water's Edge: Mediation of Violent Electoral Conflict in Kenya*, (Institute of Diplomacy and International Studies, Nairobi, 2008), chapter Four.

⁵ Bloomfield, D., "Towards Complementarity in Conflict Management: Resolution and Settlement in Northern Ireland", op. cit. P.152.

the conflict. Settlement practices fail to address needs that are inherent in all human beings, parties' relationships, emotions, perceptions and attitudes. Thus, the real causes of conflict remain unaddressed with possibilities of erupting in future.⁶ Dispute settlement mechanisms remain highly coercive allowing parties limited or no autonomy. To this end, settlement mechanisms may not therefore be very effective in facilitating satisfactory management of natural resource based conflicts. The main dispute settlement mechanisms are litigation or judicial settlement and arbitration.⁷

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.⁸ Resolution is non-power based and non-coercive thus enabling it achieve mutual satisfaction of needs without relying on the parties' power.⁹ A resolution digs deeper in ascertaining the root causes of the conflict between the parties by aiming at a post-conflict relationship not founded on power.¹⁰

This outcome is enduring, non-coercive, mutually satisfying, addresses the root cause of the conflict and it is also not zero-sum since gain by one party does not mean loss by the other; each party's needs are fulfilled.¹¹ Such needs cannot be bargained or fulfilled through coercion and power. These advantages make resolution potentially superior to settlement. Conflict resolution mechanisms include negotiation, mediation in the political process and problem solving facilitation.

It is therefore arguable that resolution mechanisms have better chances of achieving parties' satisfaction when compared to settlement mechanisms. However, each of the two approaches has their own distinct advantages thus making them complementary of each other. For realisation of environmental justice and democracy, there is need to ensure that the two are engaged effectively where applicable.

⁶Fetherston, A.B., "From Conflict Resolution to Transformative Peace building: Reflections from Croatia", *Centre for Conflict Resolution-Department of Peace Studies: Working Paper 4* (April, 2000), pp. 6-8; See also generally Muigua, K., "Resolving Environmental Conflicts Through Mediation in Kenya" Ph.D. Thesis, 2011, *Unpublished*, University of Nairobi

⁷ See generally Mwagiru, M., *Conflict in Africa: Theory, Processes and Institutions of Management*, op. cit.

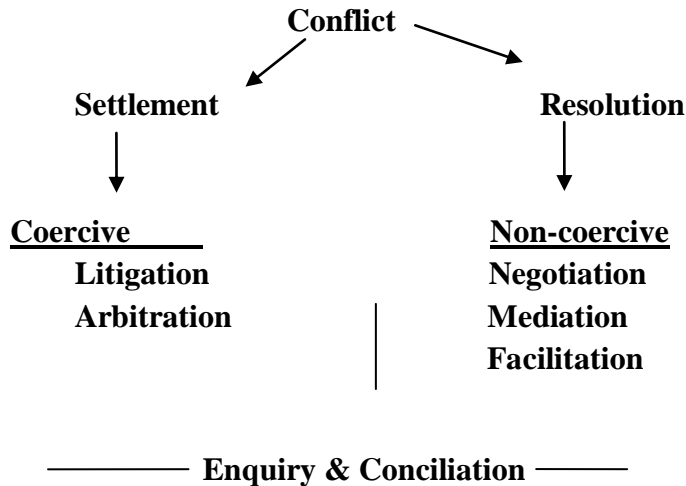
⁸ Bloomfield, D., "Towards Complementarity in Conflict Management: Resolution and Settlement in Northern Ireland", op.cit. p. 153

⁹ Cloke, K., "The Culture of Mediation: Settlement vs. Resolution", *The Conflict Resolution Information Source*, Version IV, December 2005, Available at <http://www.beyondintractability.org/bi-essay/culture-of-mediation> [Accessed on 08th March, 2014];

¹⁰ Mwagiru, M., *Conflict in Africa; Theory, Processes and Institutions of Management*, op. cit. p. 42.

¹¹Ibid.

Fig. 1 Methods of Conflict Management



*Source: Kariuki Muigua, *Resolving Conflicts Through Mediation in Kenya* (Glenwood Publishers Ltd, Nairobi, 2012), p. 64.

4. Natural Resource-Based Conflicts

Natural resources form an integral part of society the world all over, as sources of income, industry, and identity. Developing countries tend to be more dependent on natural resources as their primary source of income, and many individuals depend on these resources for their livelihoods. It is estimated that half of the world's population remains directly tied to local natural resources; many rural communities depend upon agriculture, fisheries, minerals, and timber as their main sources of income.¹²

Some natural resources play a central role in the well-being of the local community and some are used for trade purposes. Not only do natural resources serve as a commodity in the local or global economic structure but they also play a prominent cultural role for many local communities and may even be a point of pride for the nation as a whole, a part of the country's patrimony (one of the reasons many developing nations want to control their natural resources). Resources such as land, water, and timber (forests) usually have historical and cultural

¹²United States of Institute of Peace, 'Natural Resources, Conflict, and Conflict Resolution', *A Study Guide Series on Peace and Conflict For Independent Learners and Classroom Instructors*. Washington D.C. P. 6. Available at <http://www.usip.org/sites/default/files/file/08sg.pdf>[Accessed on 10/08/2014].

significance, serving as the home of ancient civilizations, historical artifacts, and cultural practices. These resources are part of the identity of a community or people. People hold a powerful sense of attachment to resources in which they have invested labor and sweat, in some cases for generations.

As a result of the foregoing, conflicts related to the exploitation of natural resources are bound to arise. Natural resource based conflicts have been defined as disagreements or disputes that arise with regard to the use, access and management of natural resources.¹³ Natural resource conflicts have also been defined as situations where the allocation, management, or use of natural resources results in: violence; human rights abuses; or denial of access to natural resources to an extent that significantly diminishes human welfare.¹⁴ This definition offers a wider scope and understanding of the effects of conflicts especially in relation to environmental justice. It is worth noting that these conflicts arise either directly or indirectly from the use of natural resources.¹⁵

These conflicts often arise from the different uses for such resources such as forests, water, pastures and land, or the desire to manage them in different ways. It has been observed that environmental factors are rarely, if ever, the sole cause of violent conflict. However, the exploitation of natural resources and related environmental stresses can be implicated in all phases of the conflict cycle, from contributing to the outbreak and perpetuation of violence to undermining prospects for peace.¹⁶ Disagreements also arise when these interests and needs are incompatible, or when the priorities of some user groups are not considered in policies, programmes and projects. Such conflicts of interest are often inevitable feature in most societies. It has been posited that four important conditions influence how access to resources could become contested. These are: the scarcity of a natural resource; the extent to which two or more

¹³ Food and Agricultural Organisation, 'Conflict and Natural Resource Management', p.1. Available at <http://www.fao.org/forestry/21572-0d9d4b43a56ac49880557f4ebaa3534e3.pdf> [Accessed on 09/08/2014].

¹⁴ United States Agency for International Development (USAID), 'Conflict Over Natural Resources At The Community Level in Nepal Including Its Relation to Armed Conflict', May 2006, p.1. Available at pdf.usaid.gov/pdf_docs/PNADF990.pdf [Accessed on 28/08/2014].

¹⁵ In a United Nations report titled 'Linking Environment and Conflict Prevention: The Role of United Nations', three types of environmental related conflicts are identifiable. These are: indirect use 'resource curse' type; direct use 'local and regional resource' type; and complex conflict 'hot spots'.

¹⁶ United Nations Environment Programme, 'From Conflict to Peacebuilding: The Role of Natural Resources and the Environment', p. 5. Available at http://www.unep.org/Themes/Freshwater/PDF/FromConflict_to_Peacbuilding.pdf [Accessed on 10/08/2014].

groups share the supply; the relative power of those groups; the degree of dependence on this particular resource, or the ease of access to alternative sources.¹⁷

In the *Report of the World Commission on Environment and Development: Our Common Future*¹⁸, the World Commission on Environment and Development observed that environmental scarcity is a possible cause of conflicts. Natural resource abundance however is also a known catalyst for conflicts. Elsewhere, it has been found that oil-based activities have brought with them the politics of oil and that this has ignited and exacerbated oil based conflicts in the oil-bearing areas. These conflicts are multi-dimensional, with the communal conflicts taking the form of conflict within a community, conflict between communities, and conflict between host communities and the oil companies.¹⁹

5. Natural resource conflict Management

Disputes and conflicts, if not well addressed or resolved early, dispute between two individuals at times degenerate to pose a threat to national security, peace and stability, which are the basic parameters to measure the development of a nation. Indeed, it has been observed that environmental conflicts have emerged as key issues challenging local, regional, national and global security.²⁰ As already noted conflicts and disputes are inevitable in the use, access and management of natural resources due to the differing needs and values of various persons and/or groups of persons in society in the wake of dwindling resources. The extraction of natural resources has in some instances triggered or fuelled violent conflict in some of the East African regions such as Kenya. In fact, inter-country disputes may also arise with regard to shared natural resources in terms of who has access and control over the transboundary natural

¹⁷ Antonia Engel and Benedikt Korf, 'Negotiation and mediation techniques for natural resource management' Food And Agriculture Organization Of The United Nations, Rome, 2005, p. 22

¹⁸ Our Common Future, Chapter 2: Towards Sustainable Development, From A/42/427. Our Common Future: Report of the World Commission on Environment and Development, 1987.

¹⁹ Abosede Babatunde, 'Environmental Conflict and the Politics of Oil in the Oil-Bearing Areas of Nigeria's Niger Delta', University of Peace, *The Peace and Conflict Review*, Volume 5, Issue 1, 2010. Available at <http://www.review.upeace.org/pdf.cfm?articulo=107&ejemplar=20> [Accessed on 27/08/2014].

²⁰ Urmilla, B. and Bronkhorst, S., 'Environmental conflicts: Key issues and management implications', P. 9. Available at <http://www.google.com/url?sa=t&rct=j&q=&esrc=s&source=web&cd=1&ved=0CCIQFjAA&url=http%3A%2F%2Fwww.ajol.info%2Findex.php%2Fajcr%2Farticle%2Fdownload%2F63307%2F51191&ei=9YcRVI3uIunb7AbR4YG4AQ&usq=AFQjCNEWjblnBwuGHLq6XCbsO2szJ1duGA&sig2=DcXHP1WMrHHCIWqtie5QeQ&bvm=bv.74894050,d.ZGU>

resources, for instance, the Migingo Island dispute between Kenya and Uganda. The conflicts, if unaddressed, can spiral into violence, cause environmental degradation, disrupt development projects and undermine livelihoods.²¹ Conflict, and more so the resource-based one, has caused tremendous harm to civilians in Kenya particularly women and children and increased the numbers of internally displaced persons in the country.²² In areas where the conflicts prevail, development programmes have been interrupted. Deterioration in the quality of life and the weakening of political and economic institutions are also likely outcomes.²³

As already pointed out, some of these conflicts can become very complex and polarizing in some cases. For instance, there have been complaints from some communities regarding the land issue as well as mineral resources, especially in the current era of devolved governments with communities wishing to get an equitable share of the resources found in their counties. It has been persuasively argued that in environmental conflicts where there is high level emotional intensity, several of the early casualties in verbal and non-verbal skirmishes are tolerance and communication with people stopping to listen to those espousing contrary views and begin associating exclusively with like-minded supporters.²⁴ Such emotions thus need to be managed effectively to avert full blown conflicts. People cannot meaningfully benefit from the exploitation of the natural resources in an atmosphere of unmanaged conflicts.

6. Natural Resource Based Conflicts in the East African Region

Although the East African region is made up of Republics of Burundi, Kenya, Rwanda, the United Republic of Tanzania, and the Republic of Uganda, this paper focuses on the environmental laws of Kenya, Uganda and Tanzania.

It is arguable that most of the conflicts arise out of feelings of injustice being perpetrated. When people believe that they have been treated unfairly, they may try to "get even" or challenge

²¹ 'Tana River District: a showcase of conflict over natural resources' *Practical Action-EA Peace Bulletin* - September 2004, Available at http://practicalaction.org/energy/east-africa/peace5_tana Accessed on 16th August, 2013. See also 'Tana River Delta clashes caused by conflict over resources, inquiry commission says' Available at http://sabahionline.com/en_GB/articles/hoa/articles/newsbriefs/2013/05/23/newsbrief-03 [Accessed on 16/08/2014].

²² Mohamud Adan and Ruto Pkalya, Elizabeth Muli (ed.) 'Conflict Management in Kenya Towards Policy and Strategy Formulation' (July 2006) p. 5, *Practical Action*, Available at http://practicalaction.org/region_east_africa_publications Accessed on 15th August, 2013

²³ Ibid.

²⁴ Emmett P. Fiske, 'Reconceptualising Environmental Conflict Resolution: The Developmental Facilitation Approach', p. 1. 2001. Available at file://A:\Reconceptualisingenvironmentalconflictrresolution.htm

those who have treated them unjustly. Individuals may come to view violence as the only way to address the injustice they have suffered and ensure that their fundamental needs are met. This is especially likely if there are ineffective or no procedures in place to correct the oppressive social structures or bring about retributive or restorative justice.

Natural resource conflict are divided into two broad types: Type I conflict encompasses situations where armed conflict is financed or sustained through the sale or extra-legal taxation of natural resources, and Type II conflict results from competition over resources among various groups.²⁵ The main interest of this paper is the Type II conflict and although natural resource based conflicts have been reported in relation to exploitation of almost all types of conflicts, this paper narrows down to exploring conflicts related to water, biological diversity, forests, minerals oil and gas and land due to the important role these play not only in the lives of people but also in the economic development agenda of a country. To this extent, the discussion focuses on the East African regional legal regime on these select natural resources.

6.1 Water-Based Conflicts

Fresh water is deemed to be an essential resource, central to all ecological and societal activities, including food and energy production, transportation, waste disposal, industrial development and human health.²⁶ However, those fresh water resources are unevenly and irregularly distributed, and some regions of the world are extremely water-short.²⁷ Countries are classified as water-scarce if they have less than 1000 cubic meters per person of renewable water resources.²⁸

²⁵ United States Agency for International Development (USAID), 'Conflict Over Natural Resources At The Community Level in Nepal Including Its Relation to Armed Conflict', op.cit. p. v.

²⁶ Gleick, P.H., 'Water and Conflict: Fresh Water Resources and International Security', *International Security*, Vol. 18, No. 1 (Summer, 1993), pp. 79-112, at p. 79, Available at <http://www.jstor.org/stable/2539033> Accessed on 11th November, 2013

²⁷ Ibid

²⁸ Population Action International, 'Why Population Matters to Water Resources', available at <http://populationaction.org/wp-content/uploads/2012/04/PAI-1293-WATER-4PG.pdf> [Accessed on 28/08/2014].

It has been rightly asserted that water scarcity will not only affect people's livelihoods but may also increase the potential for local and international conflict.²⁹ Water scarcity and resultant competition for limited supplies can lead nations to treat access to water as a matter of national security.³⁰

In Kenya, the *Water Act*, 2002³¹ was enacted to provide for the management, conservation, use and control of water resources and for the acquisition and regulation of rights to use water; to provide for the regulation and management of water supply and sewerage services; to repeal the Water Act (Cap. 372) and certain provisions of the Local Government Act; and for related purposes.³² The Act vests every water resource in the State subject to any rights of user granted by under this Act or any other written law.³³

The Act established the Water Resources Management Authority, whose functions include *inter alia*: to develop principles, guidelines and procedures for the allocation of water resources; and to receive and determine applications for permits for water use. Further, the Authority may, with the consent of the Attorney-General given under the *Criminal Procedure Code*, undertake the prosecution of any offences arising under this Act or in connection with the performance of its functions.³⁴

The Act also provides for the Water Appeal Board which hears appeals from any person who is dissatisfied with the preliminary allocation of permit for water use. The Water Appeal Board also determines the amount of compensation to be paid to a permit holder whose permit is cancelled or varied under the Act where there is default of agreement of such amount between the permit holder and the Authority.³⁵

The Integrated Water Resource Management (IWRM) approach which approach is a process which promotes the coordinated development and management of water, land and related resources in order to maximize economic and social welfare in an equitable manner without

²⁹ Christina Leb (2012) The right to water in a transboundary context: emergence of seminal trends, *Water International*, 37:6, pp. 640-653 at p. 640, DOI: 10.1080/02508060.2012.710950 [Accessed on 28/08/2014].

³⁰ Gleick, P.H., 'Water and Conflict: Fresh Water Resources and International Security', *op. cit.* For instance, regarding the Jordan River Disputes, it has been observed that in the 1950s and 1960s, the animosity between Israel and its neighbors was heightened by disputes over the headwaters of the Jordan River. Occasionally, the friction led to armed clashes.

³¹ No. 8 of 2002, laws of Kenya.

³² Preamble.

³³ Sec. 3.

³⁴ Sec. 8.

³⁵ Sec. 37(3).

compromising the sustainability of vital ecosystems and the environment.³⁶ The basis of IWRM is that the many different uses of finite water resources are interdependent. Such interdependence may easily generate conflict among the various groups of persons who may be using the water for various uses. For instance, two communities that live in the same area may have differing needs for water resources which may be a source of conflict. A pastoralist community may have disagreements with another one that are farmers and who may use the water for irrigation.

To avert such situations, Integrated Water Resources Management (IWRM) approach that has now been adopted internationally as the way forward for efficient, equitable and sustainable development and management of the world's limited water resources and for coping with such conflicting demands, has been incorporated under this Draft national water policy as one of the guiding principles therein.

6.2 Biodiversity Conservation and Conflict

Biological diversity refers to the variability among living organisms from all sources including, inter alia, terrestrial, marine and other aquatic ecosystems and the ecological complexes of which they are part: this includes diversity within species, between species and of ecosystems.³⁷ East Africa is well endowed with rich biological diversity ranging from wildlife to rich forests, which play very important roles in the lives and economies of the people.³⁸ One of the most important biodiversity elements in the region is the forests due to the central role they play in the lives of the communities, especially the indigenous people of East Africa. Indeed, most of the conflicts involving biodiversity and communities rotate around forests and their resources. This discussion thus focuses on forests to highlight the issues surrounding biodiversity conservation in East Africa.

It has been argued, for instance, that forest protection through avoided deforestation may have either positive or negative social impacts with possible conflicts between the protection of forested ecosystems and ancillary negative effects, restrictions on the activities of local

³⁶ 'A Water Secure World - Global Water Partnership', Available at <http://www.gwp.org/The-Challenge/What-is-IWRM/> Accessed on 15th August, 2014

³⁷ Convention on Biological Diversity (CBD), 1760 UNTS 79; 31 ILM 818 (1992), Article 2.

³⁸ United Nations Environment Programme, 'Eastern Africa and biodiversity', *Encyclopedia of Earth* (2007). Available at <http://www.eoearth.org/view/article/151884/> [Accessed on 15th August, 2014]

populations, reduced income, and/or reduced products from these forests.³⁹ Poor management of forest resources and the absence of an established set of equitable sharing principles among contending parties lead to shifts in resource access and control. Resulting tensions and grievances can lead to armed conflict and even war. Many governments have contributed to conflict by nationalizing their forests, so that traditional forest inhabitants have been disenfranchised while national governments sell trees to concessionaires to earn foreign exchange.⁴⁰ A good example in Kenya is the recent Mau Forest evictions in Rift Valley that generated major political and social impacts in the country.⁴¹ Another example is the *Endorois* case, which involved violations resulting from the displacement of the Endorois people, an indigenous community, from their ancestral lands without adequate compensation from the Government. The African Commission on Human and People's Rights (ACHPR) ruled that the government of Kenya was in violation of the rights to freedom of religion, property, health, culture, and natural resources under the African Charter on Human and Peoples' Rights. The court further recommended restitution of Endorois ancestral land, recognition of the rights of ownership to the Endorois as well as compensation for the loss suffered.

Compensation schemes as provided have failed in achieving the desired results and this has been attributed to several factors. It has been argued that this is due to *inter alia*: the continuing dominance of conservation goals over the livelihood needs of local people; and an emphasis on reducing the dependency of local people on resources of conservation value, rather than increasing their stake in sustainable resource management.⁴² Indeed, as at 2011 the Government was yet to comply with the ACHPR Ruling.⁴³

³⁹ United Nations Environment Programme, Convention On Biological Diversity, 'Interlinkages Between Biological Diversity And Climate Change And Advice On The Integration Of Biodiversity Considerations Into The Implementation Of The United Nations Framework Convention On Climate Change And Its Kyoto Protocol' *Report prepared by the Ad Hoc Technical Expert Group on Biodiversity and Climate Change established under the Convention on Biological Diversity*, Draft Executive Summary.

Available at https://unfccc.int/files/meetings/workshops/other_meetings/application/pdf/execsum.pdf [01/09/2014].

⁴⁰ Jeffrey A. McNeely, 'Overview A – Biodiversity, Conflict and Tropical Forests', 2002, p. 33. Available at http://www.iisd.org/pdf/2002/envsec_conserving_overview.pdf [Accessed on 27/07/2014].

⁴¹ Kenya National Commission on Human Rights, et. al., 'Nowhere to go: Forced Evictions in Mau Forest, Kenya', Briefing Paper, April 2007.

Available at <http://www.knchr.org/Portals/0/GroupRightsReports/Mau%20Forest%20Evictions%20Report.pdf> [01/09/2014].

⁴² Michael Warner, 'Conflict Management in Community-Based Natural Resource Projects: Experiences from Fiji and Papua New Guinea', p.10. *Overseas Development Institute, Working Paper 135, Results of ODI research presented in preliminary form for discussion and critical comment*, April 2000. Available at <http://www.odi.org/sites/odi.org.uk/files/odi-assets/publications-opinion-files/2738.pdf> [Accessed on 27/05/2014]; See also generally, Treves, A., et al., 'Co-Managing Human–Wildlife Conflicts: A Review', *Human Dimensions of*

The Convention on Biological Diversity (CBD)⁴⁴ is an international legally-binding treaty with three main goals: conservation of biodiversity; sustainable use of biodiversity; and the fair and equitable sharing of the benefits arising from the use of genetic resources.⁴⁵ Its main objective is to encourage actions which will lead to a sustainable future.⁴⁶ The Convention provides for examination, based on studies to be carried out⁴⁷, the issue of liability and redress, including restoration and compensation, for damage to biological diversity, except where such liability is a purely internal matter.⁴⁸

Article 27 thereof deals with settlement of disputes and provides that in the event of a dispute between Contracting Parties concerning the interpretation or application of this Convention, the parties concerned are to seek solution by negotiation,⁴⁹ or mediation by a third party.⁵⁰ The Act however contemplates submission of the dispute to the International Court of Justice,⁵¹ or conciliation.⁵² The Convention has been criticised on the grounds that while there is an international dispute resolution mechanism contemplated under Article 27, there is no explicit enforcement mechanism or cause of action under the Convention against a government which

Wildlife, 11:383–396, 2006. Available at http://faculty.nelson.wisc.edu/treves/pubs/Treves_etal_2006_comgmt.pdf [Accessed on 27/07/2014].

⁴³ Mbote, P.K., and Migai, a., Kenya: Justice Sector and the Rule of Law, A review by AfriMAP and the Open Society Initiative for Eastern Africa, March 2011. P. 6.

Available at http://www.opensocietyfoundations.org/sites/default/files/kenya-justice-law-discussion-20110315_0.pdf [Accessed on 27/07/2014]. See also Joseph Letuya & 21 others vs. the Attorney General & 5 others (2004) eKLR, Environment and Land Court at Nairobi, ELC Civil Suit Number 821 of 2012 (OS) on Minority and indigenous communities' legal interests in forest land accruing from pre-colonial period. The case involved an application by representatives of the Ogiek Community, who were considered to be a minority and indigenous people as they mostly inhabited parts of the Mau Forest and depended on it for their livelihood. Their claim before the court was that the Respondents herein had infringed upon some of their constitutional rights and that as a result they had been forcibly evicted from their land in the Mau Forest. In addition, they have claimed that the government did not resettle any of them in alternative pieces of land yet this was the very purpose for the excision of the said forest land. Court held *inter alia*: Applicants' livelihood is directly dependent on forest resources and ecosystem and their right to life and socio-economic rights are defined and dependent upon their continued access to the Mau Forest and should be protected to this extent; Forest land is government land that cannot be subject to prescriptive rights arising from adverse possession.

⁴⁴ 1760 UNTS 79; 31 ILM 818 (1992)

⁴⁵ Convention on Biological Diversity, 2011-2020, United Nations Decade on Biodiversity: Living in Harmony with Nature, available at <http://www.cbd.int/undb/media/factsheets/undb-factsheets-en-web.pdf> [Accessed on 27/05/2014]. In 2010, Parties to the Convention on Biological Diversity (CBD) adopted the Strategic Plan for Biodiversity 2011–2020, a ten-year framework for action by all countries and stakeholders to safeguard biodiversity and the accruing benefits.

⁴⁶ *Ibid.*

⁴⁷ By Conference of the Parties as established under Article 23 of the Convention.

⁴⁸ Article 14.2.

⁴⁹ Article 27.1.

⁵⁰ Article 27.2.

⁵¹ Article 27.3.

⁵² Article 27.4.

destroys its own (domestic) biodiversity.⁵³ It is therefore arguably fairly effective at the international level in state to state disputes but cannot be effective tool for use by local citizens for lobbying their own governments to protect community biodiversity.

6.3 Land Based Conflicts

Most of the land based conflicts often arise from tenure challenges. In Kenya, it has been noted that a number of regions, land ownership and land use rights are often in dispute resulting into land disputes whose negative effects are on the certainty of land markets, tenure and food security, economic production and reduction of poverty.⁵⁴ Further, it has been argued that most of the land disputes in Kenya arise mainly from the failure of the authorities concerned to enforce and to comply with the law as it exists.⁵⁵ It is important to note that this is perhaps one of the severest forms of natural resource based conflicts in Kenya considering agriculture plays a major role in the lives of most communities in Kenya and the national economy. According to the National Land Policy 2009, one of the contemporary manifestations and impacts of the land question in Kenya is inadequate environmental management and conflicts over land and land based resources.

The most serious recent example – in the Tana River region of eastern Kenya –led to at least 100 deaths between early August and September 2012. Mombasa has also experienced growing tension between coastal Muslim communities, local political/religious groups and the state.⁵⁶

⁵³ Daniel T. Jenks, A Convention on Biological Diversity--An Efficient Framework for the Preservation of Life on Earth? 15 Nw. J. Int'l L. & Bus. 636 (1994-1995), pp. 633-667 at pp. 656-657. Available at <http://scholarlycommons.law.northwestern.edu/cgi/viewcontent.cgi?article=1414&context=njlilb> [Accessed on 27/08/2014].

⁵⁴ Kalande, W., 'Kenyan Land Disputes in the Context of Social Conflict Theories', p. 1. FIG Commission 7 Annual Meeting and Open Symposium on Environment and Land Administration 'Big Works for Defence of The Territory' Verona-ITALY 11-15 September 2008. Available at http://www.fig.net/commission7/verona_am_2008/papers/13_sept/kalande_paper.pdf [Accessed on 27/08/2014].

⁵⁵ Ibid, p.7.

⁵⁶ Somerville, K., 'Kenya: land and communal clashes increase as country gears up for elections', Posted on September 20, 2012 by African Arguments Editor. Available at <http://africanarguments.org/2012/09/20/kenya-land-and-communal-clashes-increase-as-country-gears-up-for-elections-by-keith-somerville/> [Accessed on 27/08/2014].

6.4 Minerals, Oil and Gas Conflicts

The East African region and Kenya in particular is endowed with deposits of minerals like gold, diamond, fluorspar, titanium, gemstones and iron ore. Coal, gas and oil deposits have also been recently discovered in the region and people have high expectations that they will play a major role in the region's development.⁵⁷ For example, the oil discoveries in Turkana could be a source of conflict among communities and between communities and government arising from feelings of entitlement and equitable access to the proceeds of the exploitation.

According to the United States Agency for International Development (USAID), “valuable minerals become conflict minerals when their control, exploitation, trade, taxation or protection contributes to, or benefits from, armed conflict.”⁵⁸ For instance, the Mui basin coal exploration project in Kitui Kenya has had problems in the past with the local leaders accusing the National Government of impropriety and corruption in tendering process. This slowed the whole process as even the locals are interested in knowing how they will benefit from the coal exploitation.⁵⁹

Furthermore, it has been observed that conflicts over minerals do not necessarily stay within boundaries; neighboring countries sometimes compete for resource wealth and thus exacerbate conflict or prevent peacebuilding.⁶⁰

The two primary sources of fuel are oil (petroleum)—a flammable liquid that can be refined into gasoline—and natural gas, a combustible gas used for fuel and lighting. Many of the world's largest petroleum reserves are located in areas suffering from political instability or

⁵⁷Heinrich Boll Stiftung, ‘Roadmap to prosperity through sustainable Natural resources management in the East and Horn of Africa’, *Essay of the East and Horn of African Delegates*, available at https://www.boell.de/sites/default/files/assets/boell.de/images/download_de/EHOA_HBS_Delegates_essay_final_1.pdf [Accessed on 27/08/2014].

⁵⁸USAID, ‘Minerals & Conflict: A Toolkit For Programming’, available at http://pdf.usaid.gov/pdf_docs/pnadb307.pdf [Accessed on 27/08/2014]. Oil and gas have also been discovered in Tanzania and Uganda> Tangawizi gas discovery offshore Tanzania by Statoil> See The 10 Biggest Oil And Gas Discoveries Of 2013, <http://www.forbes.com/sites/christopherhelman/2014/01/08/the-10-biggest-oil-and-gas-discoveries-of-2013/>

⁵⁹Daily Nation, Saturday, July 21, 2012, ‘Sh8.5 bn coal mining project in danger’, available at <http://www.nation.co.ke/News/Sh8+5+bn+coal+mining+project+in+danger/-/1056/1460462/-/10rhk4iz/-/index.html> [Accessed on 29/08/2014].

⁶⁰United States of Institute of Peace, ‘Natural Resources, Conflict, and Conflict Resolution’, *A Study Guide Series on Peace and Conflict For Independent Learners and Classroom Instructors*. Op.cit. p. 6.

conflict, such as Iran, Iraq, Nigeria, Venezuela, and Sudan. The developed world's increasing demand for oil, and its search for "supply security," can exacerbate existing conflicts.⁶¹

Most of East Africa's laws leave out any provisions for the management of conflicts between the contractors and communities and do not even provide for any reference to the affected communities or persons.⁶² There are even no institutions that would deal with any potential conflicts that may arise in the course of exploration.

7. Approaches to Management of Natural Resource-Based conflicts

It has been noted elsewhere in this paper that the approach adopted in the management of any conflict or dispute largely depends on the nature of the conflict. The approaches are either formal or informal in nature.

There are basically two main approaches to natural resources conflict management which are formal and informal mechanisms. Formal approaches include the judicial approaches while informal mechanisms include the non-judicial forms of conflict management such as negotiation, conciliation, mediation and diplomatic initiatives and the traditional justice systems, which are either coercive or non-coercive respectively.

At the international level, Article 33 of the Charter of the United Nations outlines the conflict management mechanisms to include *negotiation, enquiry, mediation, conciliation, arbitration, judicial settlement, resorting to regional agencies or arrangements, or other peaceful means of people's own choice*.⁶³ (Emphasis ours)

The national legal systems are usually grounded on Constitutions, legislation or policy statements which may include judicial and regulatory frameworks. This approach majorly uses the adjudication and arbitration processes to settle arising conflicts.

The use of alternative mechanisms of conflict management as an approach to conflict management aims to incorporate community members and all the involved parties in finding a

⁶¹ Roland Dannreuther, 'China and global oil: vulnerability and opportunity', available at http://www.chathamhouse.org/sites/files/chathamhouse/public/International%20Affairs/2011/87_6dannreuther.pdf [Accessed on 27/08/2014].

⁶²For instance, Kenya's *Petroleum (Exploration) Act*, Cap 308, Laws of Kenya, does not make any reference to the affected communities in relation to the exploration process.

⁶³ United Nations, *Charter of the United Nations*, 24 October 1945, 1 UNTS XVI, Available at: <http://www.refworld.org/docid/3ae6b3930.html>. accessed on 16 August 2013

lasting solution as well as empowering them to handle any future conflicts through community peace building. To some, this approach is seen as an alternative to the formal judicial systems and hence the name alternative.

The other approach under informal mechanisms is the use of customary systems which relies on the traditional belief systems and/or values of the particular community where the conflict arises. This approach incorporates mediation and negotiation to resolve conflicts in an attempt to find a lasting solution to the disputes and conflicts.

7.1 Need for management

The need to achieve sustainable development calls for sustainable management of natural resources in the East Africa region through engaging all the relevant stakeholders. It has been persuasively argued that in environmental conflicts where there is high level emotional intensity, several of the early casualties in verbal and non-verbal skirmishes are tolerance and communication with people stopping to listen to those espousing contrary views and begin associating exclusively with like-minded supporters.⁶⁴ Such emotions thus need to be managed effectively to avert full blown conflicts. People cannot meaningfully benefit from the exploitation of the natural resources in an atmosphere of unmanaged conflicts.

It is imperative to look at each of the approaches with an aim to identify their efficacy in managing natural resource conflicts and disputes.

7.2 Judicial mechanisms

With the objective of settling disputes in a more justifiable manner, national governments and the constitutions of most nations establish institutions; judiciary organs of the government. It is the natural mandate of courts of law to entertain disputes. Litigation has however been criticized in many forums as one that does not guarantee fair administration of justice due to a number of factors. Courts in Kenya and even elsewhere in the world have encountered a number

⁶⁴ Emmett P. Fiske, 'Reconceptualising Environmental Conflict Resolution: The Developmental Facilitation Approach', p. 1. 2001. Available at file:///A:\Reconceptualisingenvironmentalconflictresolution.htm

of problems related to access to justice. These include high court fees, geographical location, complexity of rules and procedure and the use of legalese.⁶⁵

The court's role is also 'dependent on the limitations of civil procedure, and on the litigious courses taken by the parties themselves'.⁶⁶ 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. Litigation may be very slow and too expensive and it may at times lose the practical credibility necessary in the environmental matters.⁶⁷ Litigation is not a process of solving problems; it is a process of winning arguments.⁶⁸

Litigation should however not be entirely condemned as it comes in handy for instance where an expeditious remedy in the form of an injunction is necessary. Criminal justice may also be achieved through litigation especially where the cases involved are very serious, for instance loss of lives due to natural resource based conflicts. Litigation is 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).⁶⁹ However, there are also many shortcomings associated with litigation as already highlighted, so that it should not be the only means of access to justice.

Courts in the East African countries have successfully handled environmental matters.⁷⁰ Courts thus play an important and indispensable role in achieving sustainable development

⁶⁵ *Strengthening Judicial Reform in Kenya: Public Perceptions and Proposals on the Judiciary in the new Constitution*, ICJ Kenya, Vol. III, May, 2002; See also Kariuki Muigua, *Avoiding Litigation through the Employment of Alternative Dispute Resolution*, pp 6-7, a Paper presented by the author at the In-House Legal Counsel, Marcus Evans Conference at the Tribe Village Market Hotel, Kenya on 8th & 9th March, 2012.

Available at <http://www.chuitech.com/kmco/attachments/article/101/Avoiding.pdf>

⁶⁶ Jackton B. Ojwang, "The Role of the Judiciary in Promoting Environmental Compliance and Sustainable Development," Op cit

⁶⁷ Ibid, p.7; See also Patricia Kameri Mbote et al., *Kenya: Justice Sector and the Rule of Law*, Discussion Paper, A review by AfriMAP and the Open Society Initiative for Eastern Africa, March 2011, Available at <http://www.opensocietyfoundations.org/sites/default/files/kenya-justice-law-discussion-2011> Accessed on 27th April, 2013

⁶⁸ *Advantages & Disadvantages of Traditional Adversarial Litigation*,

Available at <http://www.beckerlegalgroup.com/a-d-traditional-litigation> Accessed on 27th April, 2013

⁶⁹ Chartered Institute of Arbitrators, *Litigation: Dispute Resolution*, Available at <http://www.ciarb.org/dispute-resolution/resolving-a-dispute/litigation> Accessed on 27th April, 2013

⁷⁰ In the Kenyan case of *Waweru v Republic (2007) AHRLR 149 (KeHC 2006)*, *High Court of Kenya at Nairobi, misc. civ application No. 118 of 2004, 2 March 2006*, 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

which means conflicts must be dealt with effectively. This includes the right to clean and healthy environment as envisaged under Article 43 thereof. The Kenyan Environment and Land Court is also 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.⁷¹ 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.⁷²

The cases of *Waweru v Republic* (2007)⁷³ and *Friends of Lake Turkana Trust v Attorney General & 2 others* [2014] eKLR⁷⁴ demonstrate instances where the courts have taken the active role of promoting environmental protection and averting potential natural resource based conflicts.⁷⁵

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. The role of Courts in environmental matters is further reinforced by the constitutionally recognised the Environment and Land Court established under the Environment and Land Court Act, 2011. See also the case of *Friends of Lake Turkana Trust v Attorney General & 2 others* [2014] eKLR, ELC Suit No. 825 of 2012, where one of the issues for determination was whether the Court had jurisdiction to intervene and address issues arising from any agreement entered into between the Kenyan Government and Ethiopian Government. 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 Governance of the Republic of Uganda and against NEMA for failing in its statutory duty.

⁷¹Ibid, Sec. 13(3).

⁷²Ibid, Sec. 20.

⁷³ AHRLR 149 (KeHC 2006), High Court of Kenya at Nairobi, misc. civ application No. 118 Of 2004, 2 March 2006

⁷⁴ ELC Suit No. 825 of 2012.

⁷⁵ 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.

7.3 ADR and informal methods

(a) Alternative Dispute Resolution Mechanisms Approach

Alternative dispute resolution (ADR) mechanisms is a phrase used to refer to all those decision-making processes other than litigation including but not limited to negotiation, enquiry, mediation, conciliation, expert determination and arbitration.⁷⁶

ADR mechanisms are used in management of a wide range of natural resource based conflicts and disputes. However, the choice of mechanism to be used depends on whether it is a conflict or a dispute that is to be managed. However, it noteworthy that these techniques are not essentially mutually exclusive in any particular conflict, but can be used successively or in a modified combination with other adjudicative methods for managing disputes.⁷⁷

Conflicts are issues about values which are non-negotiable. They are needs and values that are shared by the parties, which values and needs are inherent in all human beings. The conflicts arise due to disagreement over distribution of resources that are perceived to be fundamental to the survival of each of the parties.

The choice of conflict management must therefore be informed by the desire to address the underlying psychological issues. Resolution mechanisms as against settlement mechanisms are the best placed to manage conflicts since they aim at satisfying the needs of each party through mutual construction of legitimate relationship. Conflict resolution mechanisms are interactive and participatory giving the parties a chance to come up with mutually satisfying outcomes. The best placed mechanisms to achieve this are negotiation, mediation in the political process and problem solving facilitation.

(b) Conflict Management 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 also described as a process involving two or more people of either equal or unequal power meeting to

⁷⁶ Ibid., p. 1

⁷⁷ Hamilton, G., 'Rapporteur Report: Alternative Dispute Resolution (ADR) —Definitions, Types and Feasibility' *International Investment and ADR*. Available at <http://investmentadr.wlu.edu/deptimages/Symposium%202010/Rapporteur%20Report%20-%20ADR%20DEFINITION%20-%2019%20March.pdf> [Accessed on 16/08 2014].

discuss shared and/or opposed interests in relation to a particular area of mutual concern.⁷⁸ 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.

The focus of negotiations is the common interests of the parties rather than their relative power or position. The goal is to avoid the overemphasis of how the dispute arose but to create options that satisfy both the mutual and individual interests.

It has been said that 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.⁷⁹ The argument is that if no relationship exists between negotiators, self-interest will guide their choice of the appropriate allocation principle to use in negotiation. A negotiator who does not expect future interactions with the other person will use whatever principle-need, generosity, equality, or equity-produces the better result for them.⁸⁰ Relationships apparently matter in negotiators' definitions of fair outcomes.⁸¹

It may be argued that negotiation is by far the most efficient conflict management mechanism in terms of management of time, costs and preservation of relationships and has been seen as the preferred route in most disputes.⁸² Negotiation can be interest-based, rights-based or power-based and each can result in different outcomes.⁸³ However, the most common form of negotiation depends upon successfully taking and the giving up a sequence of positions.⁸⁴

⁷⁸ 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 08th March, 2014]; See also Kariuki Muigua, *Traditional Dispute Resolution Mechanisms under Article 159 of the Constitution of Kenya 2010*, Op cit. p. 2

⁷⁹ Nancy A. Welsh, 'Perceptions of Fairness in Negotiation', *Marquette Law Review*, Vol. 87, pp. 753-767, at p. 753.

⁸⁰ Roger Fisher and Ury, W., *Getting to Yes-Negotiating Agreement Without Giving in* Op cit., p. 42; See also Ireland Law Reform Commission, *Consultation Paper on Alternative Dispute Resolution*, July 2008 p. 43

⁸¹ *Ibid*, p. 756

⁸² Attorney General's Office, Ministry of Justice, *The Dispute Resolution Commitment-Guidance For Government Departments And Agencies*, May, 2011, Available at <http://www.justice.gov.uk/downloads/courts/mediation/drc-guidance-may2011.pdf> [Accessed on 08th March, 2014]; See also Kariuki Muigua, *Avoiding Litigation through the Employment of Alternative Dispute Resolution*, p.8, Available at <http://www.chuitech.com/kmco/attachments/article/101/pdf>

⁸³ Ury, B. & Goldberg, "Getting Disputes Resolved: Designing Systems to Cut the Costs of

Interest-based negotiation shifts the focus of the discussion from positions to interests, raising a discussion based on a range of possibilities and creative options, for the parties to arrive at an agreement that will satisfy the needs and interests of the parties.⁸⁵ This way, both parties do not feel discriminated in their efforts for the realization of the right of access to justice.

Parties may generate a number of options before settling on an agreement. However, there exist obstructions to this: parties may decide to take hard-line positions without the willingness to consider alternatives; parties may be intent on narrowing their options to find the single answer; parties may define the problem in win-lose terms, assuming that the only options are for one side to win and the other to lose; or a party may decide that it is up to the other side to come up with a solution to the problem.⁸⁶ The assertion is that by focusing on criteria rather than what the parties are willing or unwilling to do, neither party needs to give in to the other; both can defer to a fair solution.⁸⁷

In conclusion, negotiation can be used in facilitating the effective management of natural resources based conflicts. What needs to be done is ensuring that from the start, parties ought identify their interests and decide on the best way to reach a consensus.⁸⁸ The advantages therein defeat the few disadvantages of power imbalance in some approaches to negotiation, as already discussed. However, where parties in a negotiation hit a deadlock in their talks, a third party can be called in to help them continue negotiating. This process now changes to what is called mediation. Mediation has been defined as a continuation of the negotiation process by other means where instead of having a two way negotiation, it now becomes a three way process: the

Conflict” *Program on Negotiation at Harvard Law School Cambridge, Massachusetts* 1993, available at www.williamury.com, [Accessed on 08th March, 2014]

⁸⁴Fisher, R. and Ury, W., *Getting to Yes-Negotiating Agreement Without Giving in*, Op cit., p. 4

⁸⁵ UNESCO-IHP, “Alternative Dispute Resolution Approaches And Their Application In Water Management: A Focus On Negotiation, Mediation And Consensus Building” Abridged version of Yona Shamir, *Alternative Dispute Resolution Approaches and their Application*, Accessible at

<http://unesdoc.unesco.org/images/0013/001332/133287e.pdf> [Accessed on 9th March, 2014]

⁸⁶Ibid, pp. 24-25

⁸⁷ See generally, Dawson, R., ‘5 Basic Principles for Better Negotiating Skills’

Available at <http://www.creonline.com/principles-for-better-negotiation-skills.html> [Accessed on 19th March, 2014]

⁸⁸ See generally, Andrew F. Amendola, ‘Combating Adversarialism In Negotiation: An Evolution Towards More Therapeutic Approaches’ *Nujs Law Review* 4 *Nujs L. Rev.* (July - September, 2011) pp. 347-370, Available at http://www.nujslawreview.org/pdf/articles/2011_3/andrew-f-amendola.pdf [Accessed on 19th March, 2014]

mediator in essence mediating the negotiations between the parties.⁸⁹ It is also a mechanism worth exploring as it has been successfully used to achieve the right of access to justice for parties.

(c) Mediation and natural Resource –Based Conflicts

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.⁹⁰ Within this definition, mediators may play a number of different roles, and may enter conflicts at different levels of development or intensity.⁹¹ Mediation can be classified into two forms namely: Mediation in the political process and mediation in the legal process.

(d) (i) 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 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.⁹²

⁸⁹ Makumi Mwangi, *Conflict in Africa: Theory, Processes and Institutions of Management*, (Centre for Conflict Research, Nairobi, 2006), pp. 115-116.

⁹⁰ Christopher Moore, *The Mediation Process: Practical Strategies for Resolving Conflict*, (Jossey-Bass Publishers, San Francisco, 1996), p. 14

⁹¹ Christopher Moore, *The Mediation Process: Practical Strategies for Resolving Conflict*, 3rd, (San Francisco: Jossey-Bass Publishers, 2004). Summary written by Tanya Glaser, Conflict Research Consortium, Available at <http://books.google.com/books/about/The_Mediation_Process.html?id=8hKfQgAACAAJ> [Accessed on 08th March, 2014]

⁹² See generally Muigua, K., "Resolving Environmental Conflicts Through Mediation in Kenya" Ph.D Thesis, 2011, *Unpublished*, op.cit.

(ii) 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.⁹³

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.⁹⁴ 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.⁹⁵

Rules have been defined as requiring, prohibiting or attaching specific consequences to acts and place them in the realm of adjudication. By contrast, mediation is seen as one concerned primarily with persons and relationships, and it deals with precepts eliciting dispositions of the person, including a willingness to respond to somewhat shifting and indefinite ‘role expectations. ‘Mediation is conceived as one that has no role to play in the interpretation and enforcement of laws; that is the role of courts and the function of adjudication. Conflict resolution processes, in their focus on people and relationships, do not require impersonal, act-prescribing rules” and therefore are particularly well-suited for dealing with the kinds of “shifting contingencies” inherent in ongoing and complex relationships.⁹⁶

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

⁹³ Ibid, Chapter4; See also sec.59A, B, C& D of the Civil Procedure Act on Court annexed mediation in Kenya.

⁹⁴ 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] pp. 802-803]

⁹⁵ Ibid.

⁹⁶ Ibid, p. 803

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.⁹⁷

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.⁹⁸ Nevertheless, in any type of conflict, it is a fact that power imbalances disproportionately benefit the powerful party. However, it may be claimed that inequality in the relationship does not necessarily lead to an exercise of that power to the other party's disadvantage.⁹⁹ 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.

Thus, mediation, especially mediation in the political process indeed broadens access to justice for parties, when effectively practised.

(e) 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.

⁹⁷ See also generally Muigua, K., "Resolving Environmental Conflicts Through Mediation in Kenya" Ph.D Thesis, 2011, *Unpublished*, op.cit

⁹⁸ See generally, Fiss, O., "Against Settlement", op.cit.; See also Kariuki Muigua, "*Court Annexed ADR in the Kenyan Context*" p.5.

Available at <http://www.chuitech.com/kmco/attachments/article/106/Court%20Annexed%20ADR.pdf> [Accessed on 8th March, 2014]

⁹⁹ Shokouh HosseinAbadi, The role of dispute resolution mechanisms in redressing power imbalances - a comparison between negotiation, litigation and arbitration, p. 3, *Effectius Newsletter*, Issue 13, (2011) Effectius: Effective Justice Solutions, Available at http://effectius.com/yahoo_site_admin/assets/docs/Effectius_Theoleofdisputeresolutionmechanisms [Accessed on 8th March, 2014]

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.¹⁰⁰ This is a reflection of the Model Law on International Commercial Conciliation of the United Nations Commission on International Trade Law.¹⁰¹

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.

(f) 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.¹⁰² 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.

¹⁰⁰ Law Reform Commission, *Consultation Paper on Alternative Dispute Resolution*, July 2008, Op cit. p. 49

¹⁰¹ 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 08th March, 2014]

¹⁰² Farooq Khan, *Alternative Dispute Resolution*, A paper presented Chartered Institute of Arbitrators-Kenya Branch Advanced Arbitration Course held on 8-9th March 2007, at Nairobi.

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.

(g) 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.

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.¹⁰³ 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.¹⁰⁴

(h) 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

¹⁰³Mediation-Arbitration (Med-Arb), Available at <http://www.constructiondisputes-cdrs.com/about%20MEDIATION-ARBITRATION.htm> [Accessed on 08th March, 2014]

¹⁰⁴ Edna Sussman, 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 08th March, 2014]

be achieved. Mediation, a resolution mechanism is better suited to achieve this as opposed to arbitration, a settlement process.

(i) Adjudication and Conflict Management

Adjudication is defined under the Chartered Institute of Arbitrators (CIArb) (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 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.¹⁰⁵ However, in future it may be possible to have a framework within which to settle environmental disputes through adjudication.

7.4 Merits of ADR Mechanisms

Negotiation, problem solving facilitation and mediation processes have been associated with several advantages including voluntariness, cost effectiveness, informality, focus on interests and not rights, allowing for creative solutions, allowing for personal empowerment, enhancing party control, addressing the root causes of the conflict, non-coerciveness and enduring outcomes.

¹⁰⁵ 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 08th March, 2014]

These attributes make the above processes lead to a resolution as against to a settlement and thus desirable to resolve natural resource conflicts. Perhaps with the exception of arbitration, most of the other ADR mechanisms empower parties to the conflict to reach resolution resulting in win-win situations instead of the winner take all which is the prevalent feature of litigation. Arbitration as one of the dispute settlement mechanisms under ADR may not be very effective in the management of natural resource conflicts since it leads to a settlement rather than a resolution and this leaves a possibility of future recurrence of the disputes which may even come in higher magnitude and be of a more serious nature.

ADR mechanisms seek to address the root cause of conflicts unlike litigation which concerns itself with reaching a settlement.¹⁰⁶

Resolution of conflicts prescribes an outcome based on mutual problem-sharing in which the conflicting parties cooperate in order to redefine their conflict and their relationship. The outcome of conflict resolution is enduring, non-coercive, mutually satisfying, addresses the root cause of the conflict and rejects power based outcomes.¹⁰⁷ In litigation the dispute settlement coupled with power struggles will usually leave broken relationships and the problem might recur in future or even worse still the dissatisfied party may seek to personally administer 'justice' in ways they think best. Resentment may cause either of the parties to seek revenge so as to address what the courts never addressed. ADR mechanisms are thus better suited to resolve conflicts where relationships matter.

7.5 Demerits of ADR Mechanisms

Although the ADR mechanisms are lauded as having all the above advantages, they have also been associated with a number of disadvantages. ADR mechanisms have been criticised on the premises that: There is imbalance of power between the parties; There is absence of authority to consent (especially when dealing with aggrieved groups of people); ADR presupposes the lack of a foundation for continuing judicial involvement; and Adjudication promotes justice rather

¹⁰⁶ Kariuki Muigua, *Resolving Conflicts Through Mediation in Kenya*, 2012, op. cit. Chapter six, pp79- 88

¹⁰⁷ Kenneth Cloke, "The Culture of Mediation: Settlement vs. Resolution", *The Conflict Resolution Information Source*, Version IV, December 2005, Available at <http://www.beyondintractability.org/bi-essay/culture-of-mediation> Accessed on 26th April, 2013.

than peace, which is a key goal in ADR.¹⁰⁸ It is thus argued that a settlement will thereby deprive a court of the occasion and, perhaps, even the ability to render an interpretation. Thus, when parties settle, society gets less than what appears and for a price it does not know; parties might settle while leaving justice undone.¹⁰⁹

Regardless of the type of conflict, it is a fact that power imbalances disproportionately benefit the powerful party. However, it is arguable that inequality in the relationship does not necessarily lead to an exercise of that power to the other party's disadvantage.¹¹⁰

There is also the demerit that most of the mechanisms under ADR that are non-binding, voluntary in nature and mostly rely on the goodwill of the parties and any withdrawal of such goodwill might result in collapse of such a process.

Contrary to ADR, adjudication through court is usually based on law, rules and regulations provided for, which results in consistent decisions based on law and precedents; Parties are bound by the decision of the court, which can be enforced; Court decisions are appealable and errors can be corrected, reviewed or reversed by the appellate courts.¹¹¹

However, going by its advantages, there is a good and positive case for ADR mechanisms as to warrant their synergetic application alongside litigation, in management of natural resource based conflicts in Kenya.

7.6 Traditional Justice Systems

It is noteworthy that there is an overlap between the forms of ADR mechanisms and traditional justice systems. The Kenyan communities and Africa in general, have engaged in informal negotiation and mediation since time immemorial in the management of conflicts. Mediation as practised by traditional African communities was informal, flexible, voluntary and expeditious and it aimed at fostering relationships and peaceful coexistence. Inter-tribal conflicts

¹⁰⁸ Owen Fiss, 'Against Settlement', 93 Yale Law Journal 1073, (1984) pp. 1073-1090. Available at <http://www.law.yale.edu/documents/pdf/againstsettlement.pdf> Accessed on 16 April 2013

¹⁰⁹ Ibid

¹¹⁰ Shokouh Hossein Abadi, The role of dispute resolution mechanisms in redressing power imbalances - a comparison between negotiation, litigation and arbitration, p.3, *Effectius Newsletter*, Issue 13, (2011) Effectius: Effective Justice Solutions, Available at http://effectius.com/yahoo_site_admin/assets/docs/Effectius_Theoleofdisputeresolutionmechanisms

¹¹¹ Surridge & Beecheno, *Arbitration/ADR versus Litigation*, Op cit

were mediated and negotiated in informal settings, where they were presided over by Council of Elders who acted as ‘mediators’ or ‘arbitrators’.¹¹²

Their inclusion in the Constitution of Kenya 2010 is a restatement of these traditional mechanisms.¹¹³ However, before their application, they need to be checked against the Bill of Rights to ensure that they are used in a way that promotes access to justice rather than defeating the same as this would render them repugnant to justice or morality.¹¹⁴ Effective application of traditional conflict resolution mechanisms in Kenya can indeed bolster access to justice for all including those communities whose areas of living poses a challenge to accessing courts of law, and whose conflicts may pose challenges to the court in addressing them. The East African region can consider the Kenyan position as the way to go in institutionalizing ADR and TDRM especially in the area of natural resource based conflicts management.¹¹⁵

Traditional justice systems employ an informal approach to managing natural resource conflicts. It seeks to incorporate mediation and negotiation to resolve conflicts in an attempt to find a lasting solution to the conflicts. This approach has been hailed as participatory as it involves representatives from the affected groups and hence wins the confidence of both sides as one capable of achieving justice for all.

This approach involves negotiation and mediation in the political process and these therefore come with all their advantages. This approach is capable of addressing some of the social, political and economic conflicts among the communities, including natural resource conflicts.¹¹⁶ For instance, the Modogashe Declaration saw communities in Garissa, Mandera and Wajir districts agree to resolve the problems of *inter alia* banditry, unauthorized grazing.¹¹⁷

The concerned parties are sometimes better placed to address the disagreements and should only be empowered to negotiate their conflicts with the government officials only providing the conducive environment for the same. The only limitation to the application of these informal mechanisms is that they must not be used in a way that contravenes the Bill of

¹¹² Kariuki Muigua, *Resolving Conflicts Through Mediation in Kenya* op. cit., Chapter two, pp. 20-37; See also generally, Kenyatta, J., *Facing Mount Kenya: The Tribal life of the Gikuyu*, (Vintage Books, New York, 1965)

¹¹³ Articles 159 (2) (3) and 189(4), Constitution of Kenya, op.cit.

¹¹⁴ Ibid.

¹¹⁵ However, the scope of application of these traditional mechanisms, especially in the area of criminal law is not yet settled. For instance, in the case of *Republic v. Mohamed Abdow Mohamed*, Criminal Case No. 86 of 2011 (May,2013), High Court at Nairobi.

¹¹⁶ Muigua K., ‘*Resolving Conflicts Through Mediation in Kenya*’ (2012) pp. 20-21

¹¹⁷ Ibid., p.22

Rights; or is repugnant to justice and morality or results in outcomes that are repugnant to justice or morality; or is inconsistent with this Constitution or any written law.¹¹⁸

8. Regional Legal and Institutional Framework on natural resource based conflicts management

8.1 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.¹¹⁹ For these purposes, 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.¹²⁰

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.¹²¹

The Treaty confers the East Africa Court of Justice (EACJ)¹²² 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

¹¹⁸ Article 159(3)

¹¹⁹ Article 5.

¹²⁰ Article 5.3.

¹²¹ Article 6.

¹²² A legal case was filed in EACJ in December 2010 by the Africa Network for Animal Welfare (ANAW), a Kenya nonprofit 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/>

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. However, it has been observed that under the Treaty, there is no mechanism in place for the enforcement of matters which are not of a pecuniary nature and like other International Courts, the EACJ has no enforcement machinery of its own. Execution of its orders relies on rules of procedure in force in a Partner State in which it is to take place, and to this extent, even the success of the environment provisions of the Treaty and the Protocol when ratified by all the Partner States, will depend on the willingness of the Partner States to comply with its provisions.¹²³

8.2 The Protocol on Environment and Natural resources Management

The Protocol on Environment and Natural Resources Management provides for the cooperation in Environment and natural resources management.¹²⁴ More specifically, on its 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 shall utilize water resources, including shared water resources, in an equitable and rational manner.

Article 18 of the Protocol is related to the management of mineral resources. It requires that: the Partner States develop and harmonize common policies, laws and strategies for access to exploitation of mineral resources for the socio-economic development of the Community; develop common measures for ensuring that mineral resources are exploited in an environmentally sound manner; develop strategies and programmes for restoration and rehabilitation of mines and quarries; cooperate in research and exchange of data and information

¹²³Harold R. Nsekela, J, President, East African Court of Justice, 'Environmental Enforcement from a Regional Perspective: The Role of Regional Courts', page 5. *Presented at Environmental Justice and Sustainable Development—A Global Symposium on Environmental Rule of Law held on 24 June, 2014, Nairobi, Kenya.* Available at <http://www.unep.org/unea/docs/erl/env-enforcement-regional-perspective-EAC.pdf> [Accessed on 11/09/2014].

¹²⁴Chapter Three.

related to mineral resources; develop strategies on sustainable production, value addition and marketing of minerals and their products; put in place effective measures to regulate mineral resource trading in the Community; and take appropriate measures to prevent, reduce and control pollution resulting from activities of exploration and exploitation of mineral resources.

9. National Legal and Institutional frameworks

9.1 Introduction

In this section the writer briefly examines elements of the legal and institutional frameworks of in Kenya, Uganda and Tanzania. There are various legal instruments that govern the access, use and management of environment and natural resources in Kenya ¹²⁵. Administrative conflict management mechanisms, litigation and arbitration are the main strategies for addressing conflicts over environmental resources under the Kenyan law. They often overlap resulting in different legal bodies that can be complementary, competitive or clashing. Some of the laws set up arbitral tribunals that are tasked with settling natural resource conflicts arising under the particular laws. They set up reporting mechanisms that are mandated to handle complaints against alleged violation of the rights of persons to use, access or participate in the management of natural resources as an attempt to forestall any conflicts or disputes. However, some of them hardly provide a comprehensive framework on the management of conflict arising in use and management of such resources. The country's constitution is key in enhancing access to justice including environmental justice and the East African countries' constitutions are no different. The three countries' constitutions in review herein now provisions guaranteeing environmental rights, and also spell out state duties to protect the environment and the state's natural resources. The next section highlights the relevant provisions in each of these Constitutions so as to evaluate their effectiveness.

¹²⁵ See the various laws covering forests, wildlife, water, land, minerals (Land Act 2012, National Land Commission Act 2012, Water Act 2002, Forest Act 2005, Wildlife (Conservation and Management) Act 2013, Mining Act Cap 306, etc.

9.2 Constitution of Kenya 2010

The Constitution of Kenya 2010 has provisions that relates to the management of the environment and natural resources. Indeed, The Constitution directs how the natural resources within the territory of Kenya are to be managed. The State is charged with the obligation 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; work to achieve and maintain a tree cover of at least ten per cent of the land area of Kenya; encourage public participation in the management, protection and conservation of the environment; protect genetic resources and biological diversity; establish systems of environmental impact assessment, environmental audit and monitoring of the environment; eliminate processes and activities that are likely to endanger the environment; and utilize the environment and natural resources for the benefit of the people of Kenya.¹²⁶

One of the Principles of land policy as provided for under the Constitution is encouragement of communities to settle land disputes through recognised local community initiatives consistent with this Constitution.¹²⁷

Further, some of the functions of the National Land Commission under the Constitution and the National Land Commission Act are to *inter alia*: to initiate investigations, on its own initiative or on a complaint, into present or historical land injustices, and recommend appropriate redress; and to encourage the application of traditional dispute resolution mechanisms in land conflicts.¹²⁸

The Constitution allows courts to protect the right to clean and healthy environment by allowing persons to litigate on the same. Such persons do not necessarily have to demonstrate locus standi. It provides that if a person alleges that a right to a clean and healthy environment recognised and protected under Article 42 has been, is being or is likely to be, denied, violated,

¹²⁶ Article 69(1).

¹²⁷ Article 60(1) (g).

¹²⁸ Article 67(2); See also the *National Land Commission Act*, No. 5 of 2012, which echoes the Constitutional position under section 5 thereof.

infringed or threatened, the person may apply to a court for redress in addition to any other legal remedies that are available in respect to the same matter.¹²⁹

Article 159(2) (c) of the Constitution of Kenya, 2010 provides for alternative forms of dispute resolution as one of the principles that will guide the courts and tribunals in the exercise of judicial authority. The formal recognition of ADR and traditional dispute resolution mechanisms is predicated on the cardinal principles to ensure that everyone has access to justice (whether in courts or in other informal fora), disputes are resolved expeditiously and without undue regard to procedural hurdles that in the past bedeviled the court system as they are very informal. It was 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.¹³⁰ It can therefore be argued that this is a positive step towards promoting public participation by communities in conflicts management.

Further, Article 189(4) thereof provides for cooperation between national and county governments. It requires that Government at each level, and different governments at the county level, co-operate in the performance of functions and exercise of powers and, for that purpose, may set up joint committees and joint authorities.¹³¹ Further, in any dispute between governments, the governments are to make every reasonable effort to settle the dispute, including by means of procedures provided under national legislation.¹³² The national legislation is to provide procedures for settling intergovernmental disputes by alternative dispute resolution mechanisms, including negotiation, mediation and arbitration.¹³³

¹²⁹ Article 70(1).

¹³⁰ Article 11, Constitution of Kenya 2010; See generally Muigua, K., “Alternative Dispute Resolution and Article 159 of the Constitution” P.28.

¹³¹ Article 189(2).

¹³² Article 189(3).

¹³³ Article 189(4). In this regard, the *Intergovernmental Relations Act*, No. 2 of 2012 was enacted to establish a framework for consultation and co-operation between the national and county governments and amongst county governments; to establish mechanisms for the resolution of intergovernmental disputes pursuant to Articles 6 and 189 of the Constitution, and for connected purposes. Sec.31 thereof states that the national and county governments shall take all reasonable measures to—resolve disputes amicably; and apply and exhaust the mechanisms for alternative dispute resolution provided under this Act or any other legislation before resorting to judicial proceedings as contemplated by Article 189(3) and (4) of the Constitution. Also noteworthy, is sec. 32(1) which states that any agreement between the national government and a county government or amongst county governments must— Include a dispute resolution mechanism that is appropriate to the nature of the agreement; and provide for an alternative dispute resolution mechanism with judicial proceedings as the last resort.

The Constitution of Kenya, 2010 heralds a new era of a more participatory conflict management approach as against command and control mechanisms that had previously characterized most of the legal instruments regulating the various natural resources management.

The Constitutional provisions offers hope of realising environmental justice which is the fair treatment and meaningful involvement of all people regardless of race, color, national origin, or income with respect to the development, implementation, and enforcement of environmental laws, regulations, and policies.¹³⁴

9.3 The Constitution of the Republic Of Uganda 1995

The Constitution of the Republic of Uganda¹³⁵ provides for national objectives and directive principles of state policy on various areas. The objectives and principles are to guide all organs and agencies of the State, all citizens, organisations and other bodies and persons in applying, or interpreting the Constitution or any other law and in taking and implementing any policy decisions for the establishment and promotion of a just, free and democratic society, and the President is to report to Parliament and the nation at least once a year, all steps taken to ensure the realisation of these policy objectives and principles.¹³⁶

With regard to democratic principles, the Constitution of Uganda provides that the State shall be based on democratic principles which empower and encourage the active participation of all citizens at all levels in their own governance. Further, the State is to be guided by the principle of decentralisation and devolution of governmental functions and powers to the people at appropriate levels where they can best manage and direct their own affairs. All organs of State and people of Uganda are to work towards the promotion of national unity, peace and stability. The Preamble also provides for establishment and nurturing of institutions and procedures for the resolution of conflicts fairly and peacefully. The Constitution also charges the State to protect important natural resources, including land, water, wetlands, minerals, oil, fauna and flora on behalf of the people of Uganda.

¹³⁴United States Environmental Protection Agency, 'Environmental Agency', available at <http://www.epa.gov/environmentaljustice/> [Accessed on 06/09/2014].

¹³⁵ Uganda Printing and Publishing corporation, 22 September 1995, UGA-010

¹³⁶ The Preamble

The State is also required to institute effective machinery for dealing with any hazard or disaster arising out of natural calamities or any situation resulting in general displacement of people or serious disruption of the normal life. Cultural and customary values which are consistent with fundamental rights and freedoms, human dignity, democracy, and with the Constitution may be developed and incorporated in aspects of Ugandan life.

With regard to the environment, the Constitution provides for the State's obligation *inter alia* to promote sustainable development and public awareness of the need to manage land, air, water resources in a balanced and sustainable manner for the present and future generations.¹³⁷

The foreign policy of Uganda is to be based on the principles of *inter alia*-respect for international law and treaty obligations; peaceful co-existence and non-alignment; settlement of international disputes by peaceful means; Uganda's shall active participation in international and regional organisations that stand for peace and for the well-being and progress of humanity; and the State's promotion of regional and pan-African cultural, economic and political co-operation and integration.¹³⁸

Notably, these objectives and principles which carry the spirit of Uganda's Constitution are similar to the provisions of Article 10 of the Constitution of Kenya 2010. However, unlike the Kenya's Constitution, the Uganda's Constitution does not make any direct reference as to the adoption of ADR, TDRM or litigation as the preferred mode of managing domestic conflicts whether resource based or general ones. What stands out is the foreign policy on settlement of international disputes by peaceful means. If reference is to be had to Article 33 of the UN Charter, then these peaceful means refer to such mechanisms as diplomacy and ADR.¹³⁹ However, it is apparent that the Constitution attempts to avert any conflicts through such means as public participation and devolution. The right to clean and healthy environment is guaranteed under Article 39 of the Constitution of Uganda.¹⁴⁰

¹³⁷ Preamble Clause xxvii

¹³⁸ Preamble Clause xxviii.

¹³⁹ Chapter VI of the Charter provides for Pacific Settlement of Disputes. Article 33.1 thereof provides that the parties to any dispute, the continuance of which is likely to endanger the maintenance of international peace and security, 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.* (Emphasis added).

¹⁴⁰ See similar provisions under Article 42 of the Constitution of Kenya 2010. However, the Ugandan provisions are not as detailed as the provisions in the Constitution of Kenya.

9.4 The Constitution of the United Republic of Tanzania (Cap. 2)

The Constitution of Tanzania¹⁴¹ provides for fundamental objectives and directive principles of state policy which include the Constitution's objective to facilitate the building of the United Republic as a nation of equal and free individuals enjoying freedom, justice, fraternity and concord, through the pursuit of the policy of Socialism and Self Reliance which emphasizes the application of socialist principles while taking into account the conditions prevailing in the United Republic.

The Constitution also provides for every person's duty to protect the natural resources of the United Republic, the property of the state authority, all property collectively owned by the people, and also to respect another person's property.¹⁴²

Chapter Five thereof provides for dispensation of justice in the United Republic, The High Court Of The United Republic, the Judicial Service Commission for Mainland Tanzania, the High Court of Zanzibar, the Court of Appeal of the United Republic And Special Constitutional Court of the United Republic. It provides for Judiciary as the authority with final decision in dispensation of justice in the United Republic of Tanzania.¹⁴³ However, the Court of Appeal shall not have any jurisdiction in arbitration of any matter which is to be dealt with in accordance with the provisions of Article 126¹⁴⁴ of the Constitution concerning a dispute between the Government of the United Republic and the Revolutionary Government of Zanzibar.

The reading of the Constitution of Tanzania paints a picture of the Court system being the dominant mechanism for conflict management in Tanzania especially considering that there is no mention of ADR or TDRM in the Constitution as far as domestic disputes are concerned.

¹⁴¹ Government Printer, Dar es Salaam, Tanzania.

¹⁴² Article 27.

¹⁴³ Article 107, The Constitution of the United Republic Of Tanzania (Cap. 2).

¹⁴⁴ Article 126(1) provides that the sole function of the Special Constitutional Court of the United Republic is to hear and give a conciliatory decision over a matter referred to it concerning the interpretation of this Constitution where such interpretation or its application is in dispute between the Government of the United Republic and the Revolutionary Government of Zanzibar.

10. Challenges

Conflict-sensitive natural resource management (NRM) systems are an important tool for preventing violence. A NRM system is conflict-sensitive if the power to make decisions about vital resources can be contested by different stakeholders without violence. This, in turn, requires a government that is capable, accountable, transparent and responsive to the wishes and needs of its population. In this way, natural resources have the potential to be turned from triggers for violence into a tangible commitment on the part of the government to peace and development.¹⁴⁵ It also requires a civil society that is ready and able to engage with the government to manage resources in a sustainable, profitable and non-violent manner.¹⁴⁶

Conflict becomes problematic when societal mechanisms and institutions for managing and resolving conflict break down, giving way to violence. Societies with weak institutions, fragile political systems, and diverse societal relations can be drawn into cycles of conflict and violence. Natural resource conflicts arise when parties disagree about the management, distribution and protection of natural resources and related ecosystems. These conflicts can escalate into destructive relations and violence when the parties are unable or unwilling to engage in a constructive process of dialogue and conflict resolution.

Societies lacking the institutional arrangements that facilitate constructive conflict resolution can be drawn into intractable cycles of conflict and violence, particularly where political systems are fragile, and in situations where divisions between opposing parties are extreme.

11. Way Forward

There is a need to make more use of an integrated application of litigation, alternative dispute resolution mechanisms and traditional justice systems in the management of natural resource conflicts. Litigation is desirable in that it is able to secure compliance by bringing unwilling parties to the process and also giving a binding outcome that is enforceable without

¹⁴⁵ United Nations Environment Programme, 'Strengthening Capacity for Conflict-Sensitive Natural Resource Management', *Toolkit And Guidance For Preventing And Managing Land And Natural Resources Conflict*, available at http://postconflict.unep.ch/publications/GN_Capacity_Consultation_ES.pdf [Accessed on 27/08/2014].

¹⁴⁶ Ibid.

further agreement. Such parties may have to live with such decisions making them harbour bitterness that may cause recurrence of the dispute in future with possibly worse effects as a way of seeking revenge. Litigation as a settlement process may therefore be the best placed mechanism to handle natural resource conflicts where there is the immediate need to quell warring factions or where there is an urgent need for an injunction to preserve the status quo in environmental matters.

The Constitution of Kenya, 2010 provides under Article 10(1) provides for the national values and principles of governance which include inter alia, democracy and participation of people, equity, social justice, inclusiveness, non-discrimination, protection of the marginalized, sustainable development and transparency. These values and principles should also be reflected in the processes that are chosen in the management of natural resource conflicts. Indeed, Article 10(1) of the Constitution provides that the foregoing principles should guide enactment, application or interpretation of any law as well as the making or implementation of public policy decisions.

The implication of this is that any mechanism used to resolve natural resource conflicts should be able to reflect the foregoing values and promote access to justice by persons. The national values and principles of governance should inform the application of ADR mechanisms, traditional justice systems or litigation in achieving satisfaction of the needs of the parties to a conflict thus leading to acceptance of the outcome by all as one that is just and applicable. The concept of justice is one that is abstract, its meaning varying from one person to the other and thus parties must have confidence in the whole process employed if they are to accept the outcome and feel satisfied. Any dissatisfaction is likely to lead to future disputes over the same issues. Where litigation fails to be effective in dealing with certain kinds of conflicts, other mechanisms should be explored considering that dissatisfied parties can only appeal to the highest court after which they have to deal with the outcome. In such situations, they may decide to resort to their own informal means of achieving 'justice' which 'means' may not necessarily be termed as legal. In such situations, ADR mechanisms and traditional justice systems may suffice in addressing the real issues in disputes and conflicts considering that they may give the parties a chance to participate in the process and speak their mind as they have control of the process. This essentially means that any agreement reached by parties will be a result of a consensual process and traditional justice system may come in to ensure that parties abide by the

outcome. The customs and belief systems of both parties may require them not to renege on the agreement to respect the decision. As recognition of this, Article 60(1) provides that one of the principles of land policy is the encouragement of communities to settle land disputes through recognized local community. This is a laudable constitutional move.

Article 159(2) (c) of the Constitution of Kenya, 2010 provides that employment of alternative dispute resolution mechanisms will be one of the guiding principles in the exercise of judicial authority by courts and tribunals. Courts may be required to refer some matters for ADR where it is deemed necessary. For instance, section 20(1) of the *Environment and Land Act* 2011 provides that nothing in the Act may be construed as precluding the Court from adopting and implementing, on its own motion, with the agreement of or at the request of the parties, any other appropriate means of alternative dispute resolution including conciliation, mediation and traditional dispute resolution mechanisms in accordance with Article 159(2) (c) of the Constitution. Further, it provides that where alternative dispute resolution mechanism is a condition precedent to any proceedings before the Court, the Court shall stay proceedings until such condition is fulfilled. Thus, in dealing with land the Court also ought to consider ADR to manage disputes and/or conflicts.

There is need to move from the formal justice system in managing natural resource conflicts and incorporate other informal mechanisms as these will promote the spirit of the Constitution of Kenya, 2010 which seeks to adopt a more participatory and just approaches in management of conflicts. It will also go a long way in promoting the spirit of Article 48 of the Constitution which guarantees access to justice for all persons. This is more likely to be achieved where the informal processes and the formal system reinforce each other in promoting access to justice by all. For this 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.*¹⁴⁷

¹⁴⁷ See generally, Maiese, Michelle. "Principles of Justice and Fairness," *Beyond Intractability*. Eds. Guy Burgess and Heidi Burgess. Conflict Information Consortium, University of Colorado, Boulder. (July 2003) Available at <<http://www.beyondintractability.org/bi-essay/principles-of-justice>> [Accessed on 18 April, 2013].

11.1 Community Based Natural Resources Management

Developing shared understandings of the resource and conflict context: Preventing violence over resources begins with an analysis of the role that resources can play in conflict. Ideally, the conflict analysis process should be inclusive and participatory.¹⁴⁸ The objects and purposes of the Kenya's proposed Community Lands Act are to establish a legislative framework and procedures for—recognition, protection and registration of community land rights; vesting of community land in the communities identified on the basis of ethnicity, culture or similar community of interests; management and administration of community land by organs of the communities; and holding of unregistered community land in trust by county governments.¹⁴⁹

This legislation, if passed, can go a long way in promoting effective management of natural resource based conflicts be it through organized community legal action or through ADR and traditional justice systems thus promoting the development agenda in the relevant areas.

11.2 Institutionalized Cooperation

Regarding water resources management, it has rightly been pointed out that adequate institutional structures at the transboundary, national, and regional levels can play a crucial role in balancing competing interests over water resources and enabling sustainable water cooperation. This is believed to be possible through institutionalization of cooperation which can help to build trust and provide solutions for the challenges in shared waters. This is due to the finding that where institutional capacity for dialogue and the management of disputes is present, conflict is less likely.¹⁵⁰

¹⁴⁸ For instance, the proposed *Community Lands Act*, 2013 seeks to give effect to Article 63 (5) of the Constitution; to provide for the recognition, protection, management and administration of community land; to establish and define the powers of community land Boards and management committees, to provide for the powers of county governments in relation to unregistered community land and for connected matters.

¹⁴⁹ Section 3.

¹⁵⁰ UNW-DPAC 2012, Information brief: Promoting Water Cooperation Legal frameworks and institutional arrangements, p.3. Available at http://www.un.org/waterforlifedecade/water_cooperation_2013/ [Accessed on 27/08/2014].

Conclusion

This paper has examined the natural resource conflicts and the various approaches to the management of such conflicts.

If environmental justice and democracy are to be achieved, then there is need to adopt an integrated approach to both conflict resolution and dispute settlement mechanisms in order to promote peace, coexistence, justice for all and participation by all the involved parties. Environmental justice entails promotion of equitable treatment of people of all races, incomes and cultures with respect to environmental laws, regulations, policies and decisions. One of the fundamental components of environmental justice is that it seeks to tackle social injustices and environmental problems through an integrated framework of policies. There is need for increased integration of principles of sustainable development into the national legal frameworks of the East African countries and especially the principle of public participation.

Courts have played a useful role in promoting and securing the environmental rights of persons as well as in environmental conservation and are therefore useful in achievement of peace, sustainable development and environmental justice for all.

However, Alternative Dispute Resolution mechanisms such as negotiation, fact finding facilitation and mediation have the potential to enhance environmental justice since they allow parties to enjoy autonomy over the process and outcome; they are expeditious, cost-effective, flexible and employ non-complex procedures. They greatly enhance the principle of public participation in natural resources management. They result in mutually satisfying outcomes which essentially resolves the conflict thus achieving lasting peace among the previously conflicting parties. These mechanisms are also useful in achieving environmental democracy in Kenya and East Africa as a region. There is a need to manage natural resource based conflicts for the sake of peace, prosperity and sustainable development.

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