

PROVIDING LEGAL ADVICE ON CORPORATE ENVIRONMENTAL COMPLIANCE IN KENYA

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Abstract

This paper discusses the concept of corporate environmental compliance in Kenya and proposes solutions on how the same can be enhanced to promote sustainable development. In light of the provisions of the Constitution of Kenya, 2010 and the Environmental Management and Co-Ordination Act, the environmental regime in Kenya has been strengthened and corporations now face both civil and criminal liability for acts and omissions related to the environment. The paper delves into corporate environmental compliance challenges in Kenya and highlights how they affect the right to a clean and healthy environment in addition to other human rights before suggesting how corporations can tackle these challenges.

1. INTRODUCTION

The importance of corporations in a society can hardly be overemphasized. The vast majority of economic activities around the world are organized through corporations.¹ It has further been argued that some corporations have undergone dynamic growth and gained powers traditionally vested only upon states thus asserting influence on the global

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¹ Rauterberg. G, 'The Corporation's Place in Society' available at http://michiganlawreview.org/wp-content/uploads/2016/04/114MichLRev.913_Rauterberg.pdf (Accessed on 11th May, 2021).

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stage and affecting the lives of millions of people around the world.² In Kenya, corporations play an important role in facilitating economic growth.

Corporations have often faced the dilemma of striking a balance between economic development and environmental conservation.³ Consequently, many environmental pollution activities are perpetrated by corporations. In Kenya, it has been observed that corporate bodies are involved in acts and omissions which violate the right to a clean and healthy environment such as pollution and non-compliance to statutory obligations including undertaking environmental impact assessments and audits.⁴ The main concern of corporates engaged in such acts is their economic growth and they engage in acts of pollution to save costs through acts and omissions such as failure to treat effluent before discharging into water bodies.⁵

However, with the increased environmental challenges such as climate change, the acts and omissions of corporations can no longer go unregulated. The concept of environmental liability has emerged at both the national and global level to curb against environmental damage by corporations. Further, corporate governance principles such as corporate social responsibility require corporations to consider the social consequences of their economic actions in decision making.⁶ It has been argued that the concept of environmental governance is an important aspect of corporate social and environmental responsibility.⁷

² Monshipouri. M, 'Multinational Corporations and the Ethics of Global Responsibility: Problems and Possibilities' Human Rights Quarterly, No. 25 of 2003, p. 965-989.

³ Sozinova. A et al, 'Economic Environmental Activities of Russian Corporations' International Journal of Economics and Financial Issues, Volume 6, Issue 1, 2016, p. 52-56.

⁴ Kamweti D et al, 'Nature and Extent of Environmental Crime in Kenya' available at <https://www.files.ethz.ch/isn/111770/M166FULL.pdf> (accessed on 28/11/2019).

⁵ Ibid.

⁶ Buckley, P 'Can Corporations Contribute directly to society or only through regulated behaviour' Journal of the British Academy, 6 (sl), p. 323-374.

⁷ MSV. Prasad, 'Corporate Environmental Governance: A Perception of Indian Stakeholder', available at https://ecoinsee.org/conference/conf_papers/conf_paper_18.pdf, (accessed on 28/11/2019).

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The paper seeks to examine the concept of corporate environmental compliance in Kenya. It begins by analysing the legal framework governing corporate environmental compliance in Kenya. The paper then addresses corporate environmental compliance challenges in Kenya and liability of corporations for breach of their environmental obligations under the law. It then proposes recommendations to enhance corporate environmental compliance in Kenya.

2. LEGAL AND INSTITUTIONAL FRAMEWORK FOR CORPORATE ENVIRONMENTAL COMPLIANCE

2.1 International Legal Framework

The international framework on corporate environmental compliance is based on a number of treaties, standards and principles aimed at facilitating enforcement and compliance with environmental laws and regulations. While such treaties, principles and standards generally bind states, they are directly applicable to corporations since a state can control the activities of a corporation within its jurisdiction in compliance with its requirements under international law.

The *United Nations Framework Convention on Climate Change, Paris Agreement 2015*⁸, is an Agreement aimed at strengthening the global response to the threat of climate change in the context of sustainable development. The Agreement contains provisions aimed at holding the rise in global temperature levels and controlling green-house gas emissions.⁹

*The Montreal Protocol*¹⁰ is an international Treaty which aims to regulate the production and use of chemicals that contribute to the depletion of ozone layer. It sets limits on the

⁸ Paris Agreement, United Nations, 2015, available at https://unfccc.int/files/essential_background/convention/application/pdf/english_paris_agreement.pdf (Accessed on 01/12/2019).

⁹ Ibid, Art. 2.

¹⁰ Montreal Protocol and (London Amendment) on Substances that Deplete the Ozone layer, 1522 UNTS 3; 26 ILM 1550 (1987).

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production of chlorofluorocarbons (CFCs) and related substances that may lead to the depletion of the ozone layer.

*The 1972 Stockholm Declaration of the United Nations Conference on the Human Environment*¹¹ contains provisions on compensation for damage to victims of environmental liability and requires member states to adopt laws that provide for liability and compensation to victims of environmental damage such as pollution. This has been captured in Kenya under the Environmental Management and Co-ordination Act which imposes both civil and criminal liability for environmental damage.

*The Rio Declaration on Environment and Development*¹² captures several principles aimed at protecting the integrity of the global environment and developmental system. These include sustainable development, public participation, inter and intra generational equity, precautionary principle and the polluter pays principle.

ISO 14000 entails a number of standards developed by the International Organization for Standardization to help organizations take a proactive approach to managing environmental issues.¹³ The standards challenge organizations to undertake a number of activities related to environmental governance which include taking stock of their impacts on the environment, establishing objectives and targets towards environmental management, committing to effective and reliable solutions such as prevention pollution and taking personal responsibility for conduct related to the environment.¹⁴ The existence

¹¹Declaration of the United Nations Conference on the Human Environment Stockholm, 16 June 1972, available at <https://legal.un.org/avl/ha/dunche/dunche.html> (Accessed on 30/11/2019).

¹² The United Nations Conference on Environment and Development, Rio Declaration 1992, Available http://www.unesco.org/education/pdf/RIO_E.PDF (Accessed on 01/12/2019).

¹³ Environmental Management: The ISO 14000 family of International Standards, available at https://www.iso.org/files/live/sites/isoorg/files/archive/pdf/en/theiso14000family_2009.pdf (Accessed on 30/11/2019).

¹⁴ Ibid.

of such standards is important since it allows organisations to gauge their environmental efforts against the generally accepted international criteria.

2.2 National Legal Framework

2.2.1 Constitution of Kenya, 2010

The Constitution of Kenya accords every person the right to a clean and healthy environment,¹⁵ which includes the right to have the environment protected for the benefit of present and future generations through measures contemplated in article 69¹⁶; and to have obligations relating to the environment fulfilled under Article 70.¹⁷ These Constitutional provisions bind both the state and every person. Corporations thus have environmental obligations under the Constitution since they are artificial persons. Breach of these obligations could result in enforcement of environmental rights against the

¹⁵ Art. 42, Constitution of Kenya 2010, Government Printer, Nairobi.

¹⁶ Article 69 sets out the state and individual obligations in respect of the environment Clause (1) provides that the State shall – (a) ensure sustainable exploitation, utilisation, management and conservation of the environment and natural resources, and ensure the equitable sharing of the accruing benefits; (b) work to achieve and maintain a tree cover of at least ten per cent of the land area of Kenya; (c) protect and enhance intellectual property in, and indigenous knowledge of, biodiversity and the genetic resources of the communities; (d) encourage public participation in the management, protection and conservation of the environment; (e) protect genetic resources and biological diversity; (f) establish systems of environmental impact assessment, environmental audit and monitoring of the environment; (g) eliminate processes and activities that are likely to endanger the environment; and (h) utilise the environment and natural resources for the benefit of the people of Kenya.

¹⁷ Art. 70(1) provides that if a person alleges that a right to a clean and healthy environment recognised and protected under Article 42 has been, is being or is likely to be, denied, violated, infringed or threatened, the person may apply to a court for redress in addition to any other legal remedies that are available in respect to the same matter. Clause (2) thereof provides that on application under clause (1), the court may make any order, or give any directions, it considers appropriate--(a) to prevent, stop or discontinue any act or omission that is harmful to the environment; (b) to compel any public officer to take measures to prevent or discontinue any act or omission that is harmful to the environment; or (c) to provide compensation for any victim of a violation of the right to a clean and healthy environment.

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corporation and sanctions such as compensation for any victim of a violation of the right to a clean and healthy environment under Article 70 (2) (c).

2.2.2 Environmental Management and Co-ordination Act (EMCA), 1999

It is an Act of Parliament to provide for the establishment of an appropriate legal and institutional framework for the management of the environment.¹⁸ The Act entitles every person to a clean and healthy environment and requires every person to cooperate with state organs to protect and conserve the environment and to ensure the ecological sustainable development and use of natural resources.¹⁹ EMCA also stipulates several measures for protection and conservation of the environmental subsectors including rivers, lakes, seas, wetlands, mountain areas, forests, biological resource and the ozone layer.²⁰

These provisions bind both the state and individuals and their violation could result in commission of environmental offences set out under the Act. When these offences are committed *by a body corporate, the body corporate and every director or officer of the body corporate who had knowledge of the commission of the offence and who did not exercise due diligence, efficiency and economy to ensure compliance with this Act, shall be guilty of an offence (emphasis added).*²¹

To aid in environmental protection and conservation, the Act lists several environmental management tools such as *Environmental Impact Assessment (EIA), Strategic Environmental Assessment (SEA), Strategic Environmental and Social Assessment (SESA), Environmental Audits and Monitoring (emphasis added).*

¹⁸ Environmental Management and Co-Ordination Act (EMCA), No. 8 of 1999, Government Printer, Nairobi.

¹⁹ Ibid, s. 3 (2A).

²⁰ Ibid, Part V.

²¹ Ibid, s. 135.

2.2.3 Companies Act, 2015

The Act calls upon directors while discharging the duty to promote the success of a company to have regard to the impact of the operations of the company on the community and the environment.²² The Act further mandates directors while preparing their reports to include information about environmental matters and take into account the impact of the business of the company on the environment.²³

2.2.4 Climate Change Act, 2016

The Act provides a regulatory framework for enhanced response to climate change and measures and mechanisms aimed at achieving low carbon climate development.²⁴ The Act applies in all sectors of the economy and requires measures to be taken towards mainstreaming climate change responses in development planning, providing incentives and obligations for private sector contribution in achieving low carbon climate development and promotion of low carbon technologies.²⁵ *It also imposes climate change duties upon private entities which may also be required to prepare reports on the status of performance of such obligations (emphasis added).*²⁶ The Act empowers the National Environmental Management Authority (NEMA) to monitor, investigate and report whether public and private entities are in compliance with their duties under the Act.²⁷

Corporates need to bear in mind the provisions of the Climate Change Act in carrying out their activities since it is relevant to corporate environmental compliance.

2.2.5 Water Act, 2016

²² Companies Act, No. 17 of 2015, s. 143 (1) (d), Government Printer, Nairobi.

²³ Ibid, s. 655 (4) (b).

²⁴ Climate Change Act, No. 11 of 2016, Government Printer, Nairobi.

²⁵ Ibid, s. 3.

²⁶ Ibid, s. 16.

²⁷ Ibid, s. 17.

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It is an Act of Parliament to provide for the regulation, management and development of water resources.²⁸ It enshrines the right to clean and healthy water and contains provisions that seek to curb contamination and pollution of water sources and establishes institutions to enforce the Act. Despite enactment of the Act, there are still many cases of pollution of water bodies some which are perpetrated by corporations through discharge of untreated wastes. Enforcement and compliance with the Act is necessary in attainment of the right to clean and healthy water.

2.2.6 Sectoral Regulations

In addition to these legal instruments, there are several sectoral regulations which govern environmental compliance in Kenya. *The Environmental (Impact Assessment and Audit) Regulations, 2003*²⁹ provide for a system governing the Environmental Impact Assessment process and environmental audits. *The Air Quality Regulations 2014*³⁰ provide for prevention, control and abatement of air pollution to ensure clean and healthy ambient air. The regulations further provide for establishment of *emission standards* for various sources *including industries* as outlined in the Environmental Management and Coordination Act, 1999 (emphasis added). *The Water Quality Regulations 2006*³¹ provides for the right to clean and healthy water and obligates every person to refrain *from acts and omission that may cause water pollution (emphasis added)*. The *Waste Management*

²⁸ Water Act, No. 43 of 2016, Government Printer, Nairobi.

²⁹ Legal Notice No. 101 (June 13, 2003), The Environmental (Impact Assessment and Audit) Regulations, 2003.

³⁰ The Environment Management And Co-ordination (Air Quality) Regulations, available at http://www.nema.go.ke/index.php?option=com_content&view=article&id=31&Itemid=171 (Accessed on 30/11/2019).

³¹ Legal Notice No. 120 (September 4, 2006), Environment Management and Co-ordination Water Quality Regulations, 2006.

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*Regulations 2006*³² provide a system to govern management of wastes including industrial and hazardous wastes.

3. ENVIRONMENTAL COMPLIANCE REQUIREMENTS UNDER EMCA

Environmental compliance *entails adherence to environmental laws, standards, regulations and other requirements. The need for environmental compliance is important among corporations due to the potential of environmental liability as a result of non-compliance (emphasis added)*.³³ Corporations thus have to adhere to the various environmental laws, regulations and standards set out under EMCA and other environmental sectoral laws. EMCA sets out various environmental management tools such as Environmental Impact Assessment (EIA), Environmental Audits, Strategic Environmental Assessment (SEA) and Strategic Environmental and Social Assessment (SESA).

3.1 Environmental Impact Assessment

Environmental Impact Assessment (EIA) refers to a systematic examination conducted to determine whether or not a programme, activity or project will have any adverse impacts on the environment.³⁴ It has been described as an important tool in environmental conservation and management since it makes it possible to identify environmental problems and provide solutions to prevent or mitigate these problems to the acceptable levels and contribute to achieving sustainable development.³⁵ Since most development activities and projects in Kenya are undertaken by companies, EIA becomes an important aspect of the corporate governance discourse. It has been argued that EIA *can be a powerful*

³² Legal Notice, No. 121 (September 4, 2006), Environmental Management and Co-Ordination (Waste Management) Regulations, 2006.

³³ Muigwa K, 'Strengthening the Environmental Liability Regime in Kenya for Sustainable Development' available at <https://www.google.com/search?client=firefox-b-d&q=environmental+compliance> (Accessed on 30/11/2019).

³⁴ EMCA, s. 2, Government Printer, Nairobi

³⁵ Al Ouran, N.M., 'Analysis of Environmental Health linkages in the EIA process in Jordan,' International Journal of Current Microbiology and Applied Sciences, Vol. 4, No. 7, 2015, pp. 862-871, p. 862.

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*tool for keeping the corporates including Multinational Corporations (MNCs) operating in the country in check (emphasis added).*³⁶

The need for EIA is so important that the Environmental (Impact Assessment and Audit) Regulations, 2003 makes it mandatory to conduct an EIA study and have it approved before undertaking a project likely to have environmental effects.³⁷ The Regulations require a proponent to prepare a Project Report that covers *inter alia*; the nature of the project, activities to be undertaken during construction of the project and the potential environmental impacts of the project and the mitigation measures to be taken during and after implementation of the project.³⁸ In addition, the regulations require a proponent to submit to NEMA an Environmental Impact Assessment Study Report that deals with among other things the environmental effects of the project and an Environmental Management Plan (EMP) proposing the measures for eliminating, minimizing or mitigating adverse impacts on the environment.³⁹

Failure to comply with EIA requirements under EMCA has seen instances where projects have been halted. In *Cortec Mining Kenya Limited v Cabinet Secretary Ministry of Mining & 9 others* [2015] eKLR, the Applicant was issued with a mining license without complying with the EIA requirements under EMCA. In cancelling the license, the Environment and Land Court decided that:

'To the extent that the Commissioner for mines was not furnished with a NEMA Licence as required under the EMCA Act and the Regulations made thereunder my view is he

³⁶ Muigua K, 'Strengthening the Environmental Liability Regime in Kenya for Sustainable Development' Op Cit.

³⁷ The Environmental (Impact Assessment and Audit) Regulations, 2003, Legal Notice No.101 (June 13, 2003), available at <http://www.nema.go.ke/images/Docs/Regulations/Revised%20EIA%20Regulations-1.pdf> (Accessed on 29/11/2019), Government Printer, Nairobi.

³⁸ Ibid, Regulation 7.

³⁹ Ibid, Regulation 18.

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*could not issue a valid Mining Licence and the Licence he issued to the Applicant on 7th March 2013 was null and void and of no legal effect.'*⁴⁰

It is important for corporations to comply with EIA requirements under EMCA in order to minimise the environmental impacts of their projects and promote sustainable development.

3.2 Strategic Environmental Assessment (SEA)

Strategic Environmental Assessment (SEA) is defined as a formal and systematic process to analyse and address the environmental effects of policies, plans, programmes and other strategic initiatives before their final adoption.⁴¹ EMCA requires all entities, including corporations, to undertake preparations for SEAs at their own expense and submit them to NEMA for approval.⁴² It has been observed that the object of SEA is to enhance environmental protection and promote sustainable development through contributing to the integration of environmental considerations into the preparation and adoption of specified policies, plans and programmes.⁴³

3.3 Environmental Audits and Monitoring

The requirement for environmental audits and monitoring has been enshrined under the Constitution of Kenya as part of the obligations in respect of the environment.⁴⁴ Under EMCA, environmental audit is defined as the *systematic, documented, periodic and objective*

⁴⁰ Cortec Mining Kenya Limited v Cabinet Secretary Ministry of Mining & 9 others [2015] eKLR, available at <http://kenyalaw.org/caselaw/cases/view/109485>; See also Save Lamu & 5 Others v NEMA & another, Tribunal Appeal No. NET 196 of 2016, where the license was cancelled on account of lack of public participation.

⁴¹ EMCA, s. 2.

⁴² EMCA, s. 57 A (3).

⁴³ Environmental protection Agency, 'Strategic Environmental Assessment,' Available at <http://www.epa.ie/monitoringassessment/assessment/sea/#.Vi5tmGuJ2CA> (Accessed on 29/11/2019); See also Muigua, K, 'Legal Aspects of Strategic Environmental Assessment (SEA) and Environmental Management,' available at <http://kmco.co.ke/wp-content/uploads/2018/08/Legal-Aspects-of-SEA-and-Environmental-Management-3RD-December-2016.pdf> (Accessed on 01/12/2019).

⁴⁴ Constitution of Kenya, 2010, Article 69 (1) (f), Government Printer, Nairobi.

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evaluation of how well environmental organisation, management and equipment are performing in conserving or preserving the environment (emphasis added). Environmental audits and monitoring act as follow up tools to determine the extent to which activities being undertaken conform to the environmental impact assessment study report issues in respect of the particular project. The aim of this process is to guard against deviation from the study report which could have detrimental effects on the environment. NEMA is mandated under EMCA to undertake environmental audits of all activities that are likely to have *significant effect on the environment and in consultation with lead agencies, monitor all environmental phenomena with a view to making an assessment of any possible changes in the environment and their possible impacts (emphasis added).*⁴⁵

3.4 Public Participation

The principle of Public participation has become essential under the current Constitutional dispensation in Kenya. It is enshrined under the Constitution as one of the national values and principles that binds all persons (including corporations) in the implementation of policy decisions.⁴⁶ The principle is fundamental in environmental governance and all policies, plans and processes related to the environment are to be subjected to public participation. In *Kenya Association of Manufacturers & 2 others v Cabinet Secretary - Ministry of Environment and Natural Resources & 3 others [2017] eKLR*, the court recognized the importance of this principle and observed that, 'One of the environmental governance principles emphasized by the legal framework is the principle of public

⁴⁵ EMCA, s. 68 & 69.

⁴⁶ Constitution of Kenya, 2010, Art. 10.

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participation in the development of policies, plans and processes for the management of the environment and natural resources.⁴⁷

This principle has also been captured under EMCA. The Act requires the Environment and Land Court in exercising jurisdiction conferred upon it by the Act to be guided by principles of sustainable development including participation of the people in in the development of policies, plans and processes for the management of the environment.⁴⁸ Further, under the Environmental (Impact Assessment and Audit) Regulations, 2003, a project proponent is required to seek the views of persons who may be affected by the project while conducting an environmental impact assessment study.⁴⁹

Public participation has been hailed as an important tool of environmental governance in Kenya since it guarantees social acceptance of projects thus facilitating peace and development.⁵⁰ However, this principle has on some occasions been neglected by corporations while undertaking projects. This has led to instances where EIA licenses have been revoked to lack of public participation in conducting the EIA study.⁵¹

3.5 Sustainable Development

Sustainable development has been enshrined as one of the national values and principles under the Constitution.⁵² The principle has also been captured under EMCA and includes public participation, inter and intra generational equity, polluter pays principle,

⁴⁷ Kenya Association of Manufacturers & 2 others v Cabinet Secretary - Ministry of Environment and Natural Resources & 3 others [2017] eKLR, available at <http://kenyalaw.org/caselaw/cases/view/140427> (Accessed on 29/11/2019).

⁴⁸ EMCA, s. 3 (5) (a).

⁴⁹ The Environmental (Impact Assessment and Audit) Regulations, 2003, Regulation 17.

⁵⁰ Muigua, K, 'Towards Meaningful Public Participation in Natural Resource Management in Kenya' available at <http://kmco.co.ke/wp-content/uploads/2018/08/TOWARDS-MEANINGFUL-PUBLIC-PARTICIPATION-IN-NATURAL-RESOURCE-MANAGEMENT-IN-KENYA.pdf> (Accessed on 29/11/2019).

⁵¹ See Save Lamu & 5 Others vs NEMA & another, Tribunal Appeal No. NET 196 of 2016, (2019) eKLR.

⁵² Constitution of Kenya, 2010, Art. 10 (2) (d).

precautionary principle *inter alia*.⁵³ The importance of sustainable development has been further enhanced through the adoption of Sustainable Development Goals (SDGs) by the United Nations member states in 2015 as a universal call of action towards targets such as ending poverty and protecting the planet.⁵⁴ The SDGs set various targets such as sustainable management of water and sanitation for all, attainment of affordable and clean energy, promotion of inclusive and sustainable industrialization and taking action to combat climate change.⁵⁵ Corporations can assist towards promoting sustainable development through compliance with the targets set out under the SDGs.

4. CHALLENGES RELATED TO CORPORATE ENVIRONMENTAL COMPLIANCE IN KENYA

4.1 Environmental Pollution

EMCA defines pollution as the direct or indirect alteration of any part of the environment through discharge, emission or deposition of wastes.⁵⁶ Environmental pollution has also been defined as 'any discharge of material or energy into water, land, or air that causes or may cause acute (short-term) or chronic (long-term) detriment to the Earth's ecological balance or that lowers the quality of life'.⁵⁷ *Environmental pollution occurs in various forms*

⁵³ EMCA, s. 3 (5).

⁵⁴ Sustainable Development Goals, available at https://www.undp.org/content/dam/undp/library/corporate/brochure/SDGs_Booklet_Web_En.pdf (Accessed on 01/12/2019).

⁵⁵ Ibid.

⁵⁶ EMCA, s. 2, Government Printer, Nairobi.

⁵⁷ Coker, A.O, "Environmental Pollution: Types, Causes, Impacts and Management for the Health and Socio-Economic Well-Being of Nigeria," p.1. Available at <https://pdfs.semanticscholar.org/8e7b/a9595bab30d7ea87715533353c53f7452811.pdf> [Accessed on 29/11/2019].

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*including water pollution, air pollution, noise pollution and land pollution (emphasis added).*⁵⁸

Environmental pollution has become a major challenge across the world due to the rapid economic development to cater for the rising human population.⁵⁹

The problem of pollution especially by manufacturing industries is well documented in Kenya. It has been pointed out that a number of manufacturing industries discharge untreated effluent into rivers resulting in high pollution levels in the Nairobi and Ngong Rivers.⁶⁰ According to the National Environment Management Authority (NEMA), many factories in the country have been contravening provisions of the Water Quality Regulations, 2006 by either discharging untreated effluent into a public sewer or discharging into the environment without an effluent discharge license.⁶¹ These incidences of pollution have recently been highlighted by the media resulting in crackdown by the National Environment Management Authority (NEMA) against the perpetrators.⁶² According to NEMA, as a result of the crackdown, it has closed down several companies including Synresins, Sameer Agriculture and Livestock Limited (Daima), Kamongo Waste Recycling, Modern Lithography, Associated Battery Manufacturers (ABM), Apex Coating East Africa, Thorlite Kenya.⁶³

⁵⁸ Ullah, S., "A sociological study of environmental pollution and its effects on the public health Faisalabad city," *International Journal of Education and Research*, Vol. 1 No. 6 June 2013.

⁵⁹ Muigua K, 'Safeguarding the Environment through Effective Pollution Control in Kenya' available at <http://kmco.co.ke/wp-content/uploads/2019/09/Safeguarding-the-Environment-through-Effective-Pollution-Control-in-Kenya-Kariuki-Muigua-28th-SEPT-2019.pdf> (Accessed on 29/11/2019).

⁶⁰ National Environment Management Authority (NEMA), 'Environment, People and Development' available at <http://www.nema.go.ke/images/Docs/Regulations/KenyaSoECh1.pdf> (Accessed on 29/11/2019).

⁶¹ National Environment Management Authority, 'Factories Closed, Owners Arrested for Polluting the Environment' available at http://www.nema.go.ke/index.php?option=com_content&view=article&id=298:factories-closed-owners-arrested-for-polluting-environment&catid=10:news-and-events&Itemid=454 (Accessed on 29/11/2019).

⁶² Onyango. L, 'Kenya Regulator Shuts Down 4 Firms for Polluting Nairobi River' *The East African*, 27th August, 2010, available at <https://www.theeastafrican.co.ke/scienceandhealth/firms-shut-down-for-polluting-Nairobi-River/3073694-5250300-xrqj6bz/index.html> (Accessed on 29/11/2019).

⁶³ NEMA, "Factories Closed, Owners Arrested for Polluting the Environment" Op Cit.

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In addition to water pollution through discharge of effluent, other forms of environmental pollution by corporations have also been reported in Kenya. There have been reports of lead poisoning in Owino Ohuru slums in Mombasa County due to the presence of a lead battery recycling factory in the area. It has been reported that leakages from the factory have significantly increased lead concentration in the slum's environment which poses environmental health risks especially to children living in the slum.⁶⁴ Further, studies have also indicated that this has contributed to soil pollution in the area.⁶⁵

Despite the existence of laws and regulations to curb against pollution such as the Water Quality Regulations, Waste Management Regulations and Air Quality Regulations, the problem of pollution has persisted in the country. This calls for concerted efforts involving both the regulatory agencies such NEMA and corporations to enhance effective environmental compliance.

4.2 Human Rights Violation

It has been noted that environmental rights are intertwined with other human rights especially the economic and social rights.⁶⁶ The Constitution enshrines these rights which include the right to health, accessible and adequate housing, right to food, clean water and the right to education.⁶⁷ Realization of the economic and social rights is largely dependent on the quality of the environment which is a basic condition of life, indispensable to the promotion of human dignity, welfare and the fulfilment of other

⁶⁴ Consumer Federation of Kenya, 'Lead Poisoning in Owino Ohuru Slums in Mombasa-Kenya' available at <https://www.cofek.co.ke/Lead%20Poisoning%20in%20Owino%20Uhuru%20Slums%20Mombasa.pdf> (Accessed on 29/11/2019).

⁶⁵ Caravanos, 'Conflicting Conclusions or Competing Methodologies? Documenting Soil Lead Pollution in Owino Uhuru, Kenya' *Journal of Health & Pollution*, Vol. 9, No. 21, March 2019.

⁶⁶ Muigua. K and Kariuki. F, 'Safeguarding Environmental Rights in Kenya' available at http://erepository.uonbi.ac.ke/bitstream/handle/11295/90689/Muigua_Safeguarding%20Environment%20Rights%20in%20Kenya.pdf?sequence=1&isAllowed=y (Accessed on 30/11/2019).

⁶⁷ Constitution of Kenya, 2010, Art. 43.

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human rights.⁶⁸ Thus, acts and omissions by corporations related to the environment are likely to have impact on the realization of socio-economic rights enshrined in the Constitution. Where water sources are polluted due to effluent discharge from industries, the rights to clean water and health are likely to be compromised. Further, soil pollution is likely to affect the right to food due to its effect on agricultural activities. The right to housing may be affected in instances where people are displaced to cater for economic activities by corporations such as mining. The link between environmental rights and other human rights was succinctly captured by the High Court of Kenya in *Peter K. Waweru -v- Republic*, (2006) 1 KLR (E&L) 677 at 691 where the court observed as follows:

“We have added the dictionary meaning of life which gives life a wider meaning, including its attachment to the environment. Thus a development that threatens life is not a sustainable and ought to be halted. In Environmental law, life must have this expanded meaning.....the environment is ‘essential to the enjoyment of basic rights – even the right to life itself’⁶⁹

Corporations therefore have a role to play in the attainment of socio-economic rights in Kenya through environmental compliance.

5. ENVIRONMENTAL LIABILITY BY CORPORATIONS IN KENYA

5.1 Civil Liability

Civil liability against corporations for environmental breaches occurs in the form of compensation and damages aimed at bringing the property or person affected by such acts as far as possible to the condition they were before the breaches occurred.⁷⁰ Civil

⁶⁸ Patricia Birnie & Alan Boyle, *International Law and the Environment*, Op. Cit.; See also Philippe Sands, *Principles of International Environmental Law*, 2 ed. (Cambridge: Cambridge University Press, 2003) and Phillipe Cullet, “Definition of an Environmental Right in a Human Rights Context”.

⁶⁹ Peter K. Waweru -v- Republic, (2006) 1 KLR (E&L) 677 at 691.

⁷⁰ Krstinić, D., Bingulac, N., & Dragojlović, J., "Criminal and civil liability for environmental damage," *Economics of Agriculture* 64, no. 3 (2017): 1161-1176.

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remedies for environmental protection can be classified according to their intended function which could be preventive, compensatory, reparatory or natural restitution.⁷¹ In addition to enshrining the right to clean and healthy environment, the Constitution sets out obligations in respect of the environment.⁷² Breach of these obligations may result in enforcement of environmental rights under article 70 of the Constitution which empowers the Environment and Land Court to grant civil remedies such as compensation to the victim or orders of injunction to prevent, stop or discontinue any act or omission that is harmful to the environment. In addition to these remedies, EMCA provides for environmental restoration orders, conservation orders, and easements as part of civil remedies for environmental breaches.⁷³

Consequently, corporations in Kenya found liable for environmental breaches have been imposed with civil consequences. In *John Mutungu Waititu -vs- China Wuyi (Kenya) Co. Limited (2018)*⁷⁴, the Respondent had leased the Appellant's land for a period of one year, with the purpose of excavating murram. After excavating the murram, the Respondent had failed to push back the top soil in order to make the ground level and leave the ground the way they had found it. This in turn left the land vulnerable and prone to grave environmental degradation. The Court found the Respondent liable and imposed civil remedies including; nominal damages of Kshs. 25,000 and a Restoration order directing the Respondent move to the Appellant's land and ensure that the same is restored to sound environmental standards not harmful to the environment and to the area residents and animals.

⁷¹ Muigua, K, 'Strengthening the Environmental Liability Regime in Kenya for Sustainable Development' Op Cit.

⁷² Constitution of Kenya, 2010, Art. 42 & 69, Op Cit.

⁷³ EMCA, Part IX (Sec. 108-116).

⁷⁴ *John Mutungu Waititu -vs- China Wuyi (Kenya) Co. Ltd*, Environment and Land Court at Nyahururu, ELC Appeal No. 25 of 2017, (2018) eKLR.

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Civil liability for environmental breaches by corporations follows common law principles such as the strict liability rule. The rule was laid down in the case of *Rylands vs Fletcher*⁷⁵ which imposes strict liability on the owner of land for damage caused by the escape of substances to his or her neighbour's land.

Courts in Kenya have applied the strict liability rule and imposed civil liability on corporations for actions that have resulted in damage to the adjacent lands. In *Esther Wanjiru Mwangi & 3 Others vs Xinghui International (K) Limited*⁷⁶, the defendant dumped large quantities of lead wastes on a road adjoining the Plaintiffs' land and as a consequence, the hazardous wastes negatively affected the Plaintiff's crops and animals. The plaintiffs lost three cows due to indigestion of the poisonous waste material and argued that continued dumping and staying on site of the waste pose real danger to their health as well as to their animals and crops. The court found the Defendant liable for negligence as established in *Rylands -vs-Fletcher* and granted several civil remedies in favour of the Plaintiffs including Kshs. 270,000/= being the value of the dead cows, an order directing the defendant to remove the dumped lead contaminated soil and waste on the road between its land and the Plaintiffs' parcels and a mandatory injunction restraining the Defendant from dumping any contaminated waste from its factory to the Plaintiff's land parcels.

Corporations therefore have to guard against instances of environmental damage since their actions can give rise to civil liability.

5.2 Criminal Liability

⁷⁵ *Rylands vs Fletcher* [1861-73] ALL ER REP 1, the rule states that the person who, for his own purposes, brings on his land, and collects and keeps there anything likely to do mischief if it escapes, must keep it at his own peril, and, if he does not do so, he is prima facie answerable for all the damage which is the natural consequence of its escape. He can excuse himself by showing that the escape was owing to the Plaintiff's own default, or, perhaps that the escape was a consequence of vis major, or the act of God.

⁷⁶ *Esther Wanjiru Mwangi & 3 others v Xinghui International (K) Limited*, High Court of Kenya at Nakuru, Civil Suit No. 144 of 2009 (2016) eKLR.

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EMCA stipulates various environmental offences which including offences related to *inspection*, offences related to *Environmental Impact Assessment*, offences related to records and *standards and offences related to hazardous wastes (emphasis added)*.⁷⁷ The Act also prescribes penalties for these offences.⁷⁸ The Act also empowers environmental inspectors appointed under the Act, subject to the Constitution and section 29 of the Office of the Director of Prosecution Act, *to institute and undertake criminal proceedings against any person before a court of competent jurisdiction (other than a court martial) in respect of any offence alleged to have been committed by that person under EMCA (emphasis added)*.⁷⁹

Corporates need to be aware of the legal provisions in regard to civil and criminal liability and comply accordingly to avoid incurring liability.

6. WAY FORWARD

6.1 Enhanced Corporate Environmental Compliance

Environmental compliance is required by corporate organizations under EMCA. The foregoing discussion has demonstrated that breach of environmental compliance may result in civil and criminal sanctions upon an organization. *It has been argued that the survival of a corporate organization may depend on how environmental compliance issues are handled (emphasis added)*.⁸⁰ This relates to the sanctions that may be imposed for breach

⁷⁷ EMCA, s. 137-146.

⁷⁸ Ibid.

⁷⁹ EMCA, s. 118 (b).

⁸⁰ Muigua. K, 'Role of the Company Secretary in Environmental Compliance' available at http://kmco.co.ke/wp-content/uploads/2018/08/078_ROLE-OF-THE-C-S-IN-ENVIRONMENTAL-COMPLIANCE.pdf (Accessed on 30/11/2019).

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of environmental compliance requirements such as damages or closure of the corporation.

Officers of corporations such as directors and company secretaries have to ensure that all environmental laws, regulations and policies are adhered to. Breach of this duty may result in both civil and criminal liability under EMCA. The Act provides that, *when an offence is committed by a body corporate, the body Corporate and every director or officer who had knowledge of the commission of the offence and who did not exercise due diligence, efficiency and economy to ensure compliance with the Act shall be guilty of an offence (emphasis added).*⁸¹

Thus, where an Environmental Impact Assessment is required, a corporation should ensure that it is prepared in accordance with EMCA and the Environmental (Impact Assessment and Audit) Regulations, 2003. Where an environmental audit is required, the corporation should conduct it as provided by EMCA and the regulations. Further, corporations in the manufacturing sector should comply requirements on hazardous wastes and chemicals in handling wastes from their industries.

6.2 Adhering to Principles of Sustainable Development

Sustainable development has been defined as development that meets the needs of the present generation without compromising the ability of future generation to meet their own needs.⁸² It is enshrined as one of the national principles under the Constitution and binds all persons including corporations.⁸³ Sustainable development is also captured under EMCA and incorporates the principles of public participation, international co-

⁸¹ EMCA, s. 145 (1).

⁸² Report of the World Commission on Environment and Development: Our Common Future, available at <https://sustainabledevelopment.un.org/content/documents/5987our-common-future.pdf> (Accessed on 01/12/2019).

⁸³ Constitution of Kenya, 2010, Art. 10 (2) (d).

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operation, inter and intra generational equity, polluter pays principle and the precautionary principle.⁸⁴

The principle of public participation requires the views of those who are likely to be affected by policies, plans and processes related to the environment to be taken into account before their implementation.⁸⁵ Corporations should comply with this principle when undertaking Environmental Impact Assessment studies before implementation of projects.

The Polluter Pays Principle provides that the polluter bears the expenses of carrying out pollution prevention measures or paying for damage caused by pollution.⁸⁶ It is a principle of equity aimed at introducing environmental costs in economic decision making in order to achieve sustainable development.⁸⁷ This principle has been enforced by courts in Kenya by compelling corporations to undertake environmental restoration orders and pay damages for environmental pollution.⁸⁸ Corporations should therefore comply with such orders since they are responsible for their acts and omissions that affect the environment.

The Precautionary Principle is provided for under the Rio Declaration on Environment and Development that requires a precautionary approach to be undertaken in order to protect the environment where there are threats of serious and irreversible damage.⁸⁹ The

⁸⁴ EMCA, s. 3 (5).

⁸⁵ Muigua, K, 'Towards Meaningful Public Participation in Natural Resource Management in Kenya' Op cit.

⁸⁶ OECD, Environmental Principles and Concepts, (Organisation For Economic Co-Operation And Development, Paris, 1995).

⁸⁷ Vícha, O, The Polluter-Pays Principle In OECD Recommendations And Its Application In International And EC/EU Law, Czech Yearbook of Public & Private International Law, Vol. 2, 2011, pp. 57-67 (Accessed on 01/12/2019).

⁸⁸ See John Mutungu Waititu -vs- China Wuyi (Kenya) Co. Ltd, Environment and Land Court at Nyahururu, ELC Appeal No. 25 of 2017, (2018) eKLR and Esther Wanjiru Mwangi & 3 others v Xinghui International (K) Limited, High Court of Kenya at Nakuru, Civil Suit No. 144 of 2009 (2016) eKLR.

⁸⁹ Principle 15, 1992 Rio Declaration on Environment and Development http://www.unesco.org/education/pdf/RIO_E.PDF (Accessed on 01/12/2019).

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principle is aimed at providing guidance for governance and management decisions in responding to environmental uncertainties. Corporation should comply with this principle and *err on the side of caution when undertaking plans and policies related to the environment (emphasis ours)*. This can be through technological responses, prohibitions and other measures that can limit the impact of environmental activities.⁹⁰

The Principle of *intra and inter-generational equity* requires the right of development to be fulfilled so as to equitably meet both the developmental and environmental needs of present and future generations.⁹¹ This is essential principle of sustainable development since it safeguards against instances such as depletion of natural resources.

Under the Companies Act, a corporation while pursuing its economic activities is required to take into account the *impact of its operations on the community and the environment*.⁹² Corporations should therefore adhere to the principles of sustainable development to ensure that their economic activities meet the needs of both the present and future generations.

6.3 Corporate Social and Environmental Responsibility

Related to sustainable development is the idea of Corporate Social Responsibility (CSR). However, while sustainable development is a legal requirement, CSR is a voluntary undertaking. CSR has been defined as a transparent business practice based on ethical values, legal requirements compliance and respect for the community, people and the environment within which the business operates.⁹³ *Corporate Social Responsibility has*

⁹⁰ Sunstein, C.R., 'Beyond the Precautionary Principle,' University of Chicago Public Law and Legal Theory Working Paper No. 38, January 2003, p.11. Available at http://www.law.uchicago.edu/files/files/38.crs_.precautionary.pl-lt.pdf [Accessed on 01/12/2019].

⁹¹ Principle 3, 1992 Rio Declaration on Environment and Development http://www.unesco.org/education/pdf/RIO_E.PDF (Accessed on 01/12/2019).

⁹² Companies Act, No. 17 of 2015, s. 143 (1) (d).

⁹³ Arora, R., & Richa, G. D. (2013). 'Corporate Social Responsibility-Issues and Challenges in India.' International Journal of Research in Finance & Marketing, 3 (2).

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been defined as the behaviour and activities of a corporation that go beyond its economic interest to positively affect social and non-social stakeholders.⁹⁴ CSR has an environmental dimension (emphasis added).⁹⁵

It has been argued that CSR contributes to the economic success of an organization since it meets the needs of stakeholders who are critical to its existence.⁹⁶ According to proponents of CSR, a firm's success is dependent on how it is able to safeguard relationship with stakeholders such as employees, communities and customers since socially responsible helps it gain support from such stakeholders.⁹⁷ In Kenya, studies have shown that *corporations that have undertaken CSR initiatives such as environmental conservation programs have witnessed success in areas such as sales and market share (emphasis added).*⁹⁸ Corporations should therefore pursue corporate environmental responsibilities such as environmental conservation programmes which may include clean up exercises, restoration activities, tree planting exercises and environmental awareness campaigns. These activities have the ability to contribute to the economic growth of an organization.

6.4 Environmental Insurance

Environmental Insurance can be used as a tool for environmental management. This however is yet to be popularized in Kenya and EMCA does not have provisions on environmental insurance. It has however been suggested that environmental insurance can be popularized in the country for both medium and large corporations to shield them

⁹⁴ Agan Y et al, 'The Relationships Between Corporate Social Responsibility, Environmental Supplier Development and Firm Performance' Journal of Cleaner Production, 2014 (1-10).

⁹⁵ Ibid.

⁹⁶ Freeman. E, and Velamuri. R, 'A New Approach to CSR: Company Stakeholder Responsibility' available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1186223 (Accessed on 01/12/2019)

⁹⁷ Ibid.

⁹⁸ Mwanicha. Y, and Ouma. C, 'Effects of Social Responsibility Initiatives on Performance of Safaricom Kenya Limited' International Journal of Innovative Research & Development, Volume 6, Issue 8, August 2017.

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against environmental liability which could turn out to be too costly.⁹⁹ Some insurance providers have packages on environmental liability covering environmental damage and clean-up costs for pollution.¹⁰⁰ It is therefore important to popularize environmental insurance in the country since *some cases of environmental liability may not be foreseen by a corporation and could arise due to natural acts (emphasis added)*. However, the strict liability rule imposes liability on the corporation even where such acts could not be foreseen. Through environmental insurance, it may be possible to shield a corporation from cases of environmental liability.

7. CONCLUSION

Corporate environmental compliance remains a central theme in the environmental governance debate in Kenya. In light of the sustainable development agenda in Kenya, corporations are now required to ensure that their activities adhere to the environmental laws, rules and regulations set out under the Constitution and EMCA. In case of violation of these rules, both civil and criminal liability may be imposed upon the corporation. Corporations can therefore ensure environmental compliance by *adhering to environmental laws, rules and regulations, promoting sustainable development, engaging in Corporate Social Responsibility activities and taking up environmental liability insurance (emphasis added)*.

Corporate Environmental Compliance is thus vital in the quest for attainment of sustainable development.

⁹⁹ Muigua, K. 'Strengthening the Environmental Liability Regime in Kenya for Sustainable Development' Op Cit.

¹⁰⁰ <https://www.aig.co.ke/commercial/products/liabilities/environmental-impairment-liability> (Accessed on 30/11/2019).

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