

# **The Role of Courts in Safeguarding Environmental Rights in Kenya: A Critical Appraisal**

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### **Abstract**

*National courts play an important role in promoting and upholding human rights. They are the arm of the government that ensures that all the constitutionally guaranteed rights are enforced and safeguarded against any potential violation by state officials or any other person. This paper critically discusses the place of courts in enforcing and safeguarding environmental rights in Kenya for realisation of environmental justice and sustainable development.*

### **1. Introduction**

The preamble to the Constitution of Kenya recognises the importance of the environment and therefore calls for its respect, being the heritage of the Kenyan people, and also requires its sustenance for the benefit of future generations.<sup>1</sup> In addition, it also spells out and guarantees the right of every person to a clean and healthy environment and the need to have the same respected and protected.<sup>2</sup>

Notably, scholars have pointed out that there is ‘considerable evidence that national courts are increasingly willing to apply international environmental obligations’<sup>3</sup>. It is in light of this that this paper discusses the place of national courts in the pursuit of environmental justice and protection of environmental rights in Kenya.

This paper first examines the status of environmental rights as envisaged under the laws of Kenya. The author then focuses on the role that courts can play in protecting and promoting environmental rights in Kenya. However, throughout the paper, there is a reference to some of the challenges that still hinder the full enjoyment of these rights by the Kenyan citizenry and how courts can help in overcoming them.

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<sup>1</sup> Preamble, Constitution of Kenya, (Government Printer, 2010).

<sup>2</sup> Art. 42, Constitution of Kenya 2010.

<sup>3</sup> Sands, P. and Peel, J., *Principles of international environmental law*, Cambridge University Press, 2012, p.47.

## **2. Legal Recognition and Protection of Environmental Rights in Kenya: Where are we?**

The Preamble to the Constitution of Kenya places a duty on every person to conserve and sustainably manage the environment.<sup>4</sup> Thus, every person has a constitutional duty to cooperate with State organs and other persons to protect and conserve the environment and ensure ecologically sustainable development and use of natural resources.<sup>5</sup> The citizenry should not only cooperate but also actively participate in sustainable environmental and natural resources matters through seeking court's intervention.

Article 22(1) of the Constitution of Kenya guarantees the right of every person 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. Citizenry have a right of ensuring that their rights in relation to the environment are not violated, by way of litigation.<sup>6</sup> This is also captured in the various statutes such as the *Environmental Management and Co-ordination Act*<sup>7</sup>. The Constitution also recognises the right of every person to a clean and healthy environment.<sup>8</sup>

The Constitution 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

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<sup>4</sup> We, the people of Kenya—.....Respectful of the environment, which is our heritage, and determined to sustain it for the benefit of future generations...Committed to nurturing and protecting the well-being of the individual, the family, communities and the nation:....

<sup>5</sup> Constitution of Kenya, Art. 69(2).

<sup>6</sup> Art. 22(1) provides that every person has the right to institute court proceedings claiming that a right or fundamental freedom in the Bill of Rights has been denied, violated or infringed, or is threatened; Art. 70(1) provides that if a person alleges that a right to a clean and healthy environment recognised and protected under Art. 42 has been, is being or is likely to be, denied, violated, infringed or threatened, the person may apply to a court for redress in addition to any other legal remedies that are available in respect to the same matter. Furthermore, on application under clause (1), the court may make any order, or give any directions, it considers appropriate— to prevent, stop or discontinue any act or omission that is harmful to the environment; to compel any public officer to take measures to prevent or discontinue any act or omission that is harmful to the environment; or to provide compensation for any victim of a violation of the right to a clean and healthy environment (Art. 70(2)). For the purposes of this Art., an applicant does not have to demonstrate that any person has incurred loss or suffered injury (Art. 70(3)). The right to seek legal redress is also guaranteed under s. 3(3) of the Environmental Management and Co-ordination Act, No. 8 of 1999.

<sup>7</sup> No. 8 of 1999, Laws of Kenya, s. 3(3); See also *Environmental Management and Co-ordination (Amendment) Act, 2015* which expands the provisions to include the right to clean and healthy environment and also the right of a person to file suit on his behalf or on behalf of a group or class of persons, members of an association or in the public interest (s. 3).

<sup>8</sup> Art. 42. This right includes the right— to have the environment protected for the benefit of present and future generations through legislative and other measures, particularly those contemplated in Art. 69; and to have obligations relating to the environment fulfilled under Art. 70

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to any other legal remedies that are available in respect to the same matter.<sup>9</sup> The Constitution goes further to provide that on such an application, the court may make any order, or give any directions, it considers appropriate--to prevent, stop or discontinue any act or omission that is harmful to the environment; to compel any public officer to take measures to prevent or discontinue any act or omission that is harmful to the environment; or to provide compensation for any victim of a violation of the right to a clean and healthy environment.<sup>10</sup>

The protection and promotion of environmental rights in Kenya is further reinforced by the constitutionally recognised Environment and Land Court established under the *Environment and Land Court Act, 2011*<sup>11</sup>, enacted to give effect to Article 162(2)(b) of the Constitution; to establish a superior court to hear and determine disputes relating to the environment and the use and occupation of, and title to, land, and to make provision for its jurisdiction functions and powers, and for connected purposes.<sup>12</sup> The overriding objective this Act is to enable the Court to facilitate the just, expeditious, proportionate and accessible resolution of disputes governed by this Act.<sup>13</sup>

The Court has original and appellate jurisdiction to hear and determine all disputes in accordance with Article 162(2) (b) of the Constitution and with the provisions of this Act or any other law applicable in Kenya relating to environment and land.<sup>14</sup> Further, in exercise of its jurisdiction under Article 162(2) (b) of the Constitution, the Court has power to hear and determine disputes, relating to environmental planning and protection, climate issues, land use planning, title, tenure, boundaries, rates, rents, valuations, mining, minerals and other natural resources; relating to compulsory acquisition of land; relating to land administration and management; relating to public, private and community land and contracts, choses in action or other instruments granting any enforceable interests inland; and any other dispute relating to environment and land.<sup>15</sup>

The 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

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<sup>9</sup>Art. 70 (1).

<sup>10</sup> Art. 70(2).

<sup>11</sup> No. 19 of 2011, Laws of Kenya. See S. 4 thereof.

<sup>12</sup> *Ibid*, Preamble.

<sup>13</sup> *Ibid*, S. 3(1).

<sup>14</sup> *Ibid*, S. 13(1).

<sup>15</sup> *Ibid*, S. 13(2).

healthy environment under Articles 42, 69 and 70 of the Constitution.<sup>16</sup> The Court may make any order and grant any relief as the Court deems fit and just, including, interim or permanent preservation orders including injunctions; prerogative orders; award of damages; compensation; specific performance; restitution; declaration; or costs.<sup>17</sup> 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.<sup>18</sup>

It is therefore clear that environmental rights in Kenya are well entrenched under the Constitution and statutes on environmental law. All that remains is taking measures geared towards ensuring that all persons get to enjoy these rights as envisaged under the law.

### **3. The Role of Courts in Safeguarding Environmental Rights in Kenya: prospects and Challenges**

#### **3.1 Pre-Constitution 2010 Era**

*Environmental Management and Co-Ordination Act*<sup>19</sup> (EMCA) was enacted to provide for the establishment of an appropriate legal and institutional framework for the management of the environment and related matters.<sup>20</sup> The Act provides that in exercising the jurisdiction conferred upon it under the Act, the High Court is to be guided by the principles of sustainable development, *inter alia*; the principle of international co-operation in the management of environmental resources shared by two or more states<sup>21</sup>; the principles of intergenerational and intragenerational equity; the polluter-pays principle; and the pre-cautionary principle.<sup>22</sup>

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<sup>16</sup> *Ibid*, S. 13(3).

<sup>17</sup> *Ibid*, S. 13(7).

<sup>18</sup> *Ibid*, S. 20.

<sup>19</sup> Act No 8 of 1999.

<sup>20</sup> *Ibid*, Preamble.

<sup>21</sup> The case of *Friends of Lake Turkana v Attorney General and 2 others*, ELC Suit 825 of 2012.

<sup>22</sup> EMCA, S. 3(5).

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Part XII,<sup>23</sup> section 125 of EMCA establishes the National Environment Tribunal (NET) which is charged with settling disputes that arises in matters provided for under the Act.<sup>24</sup> NET is charged with hearing appeals arising from administrative decisions of committees mandated to enforce environmental standards.<sup>25</sup> However, its decision is not final and any dissatisfied party may appeal to superior courts. This tribunal is an arbitral tribunal hence offering a much formalized approach to settlement of a dispute. The dispute resolution process is also free of legal and procedural technicalities which bed evils courts.

The Tribunal has over time resolved numerous disputes relating to the environment and it has greatly contributed to the conservation of the environment. One such instance is seen in the case of *Peter Mugoya and another v Director General, National Environment Management Authority (NEMA) and 2 others*,<sup>26</sup> which concerned a dispute relating to the construction of a Church building on a community forest land. In this case, the Tribunal cancelled the EIA Licence that had been granted to the Church and also revoked NEMA's letter of development approval that had been issued to the Church. The Church was further directed to restore the land to the condition it was in before their entry. This is just one of the many instances that the Tribunal has positively contributed to environmental conservation and protection of environmental rights for particular groups and the public in general.

Notably, dispute management procedures under EMCA require the active participation of NEMA, being the implementing agency, with any grievances being addressed by NET as an appeal which can however be heard by the Environment and Land Court as the final port of call. The role of NEMA in the safeguarding environment as established under EMCA was well summarized in the case of *Martin Osano Rabera & another v Municipal Council of Nakuru & 2 others [2018] eKLR*<sup>27</sup> in the following words:

72. Nevertheless, NEMA is not just an investigator and a prosecutor. Its success cannot be measured in terms of successful investigations and prosecutions. It has a bigger mandate: to be the principal instrument of government and the people of Kenya in the implementation of all policies relating to the environment. In deed under **section 9 (2)**,

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<sup>23</sup> SS. 125-136, No. 8 of 1999.

<sup>24</sup> S. 125, No. 8 of 1999.

<sup>25</sup> S. 126, No. 8 of 1999.

<sup>26</sup> Tribunal Appeal No. 99 of 2012.

<sup>27</sup> *Martin Osano Rabera & another v Municipal Council of Nakuru & 2 others [2018] eKLR*, Petition No. 53 of 2012.

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NEMA has mandatory obligations to among others co-ordinate with lead agencies to ensure the proper management and rational utilization of environmental resources on a sustainable yield basis for the improvement of the quality of human life in Kenya and to render advice and technical support, where possible, to entities engaged in natural resources management and environmental protection.

### **3.2 Post-Constitution 2010 Era**

The constitutionalisation of the role of courts in promotion and protection of environmental rights is a step that seeks to ensure that these rights are treated as any other human rights that are justiciable under the laws of Kenya.

It is however worth pointing out that even before the current Constitution of Kenya, Courts in Kenya still successfully handled environmental matters. For instance, in the case of *Waweru v Republic*,<sup>28</sup> the Court reiterated the position of Section 3 of Environment (Management and Conservation) Act 1999 (EMCA) which requires that courts take into account certain universal principles when determining environment cases. It also went further to state that apart from the EMCA it was of the view that the principles set out in section 3 do constitute part of international customary law and the courts ought to take cognisance of them in all the relevant situations. It therefore reiterated that courts had and still have a role in promoting sustainable development. In this case, the Court was to deal with four principles which it considered directly relevant to the matter at hand which were: Sustainable development; Precautionary principle; Polluter pays; and Public trust (not spelt out in EMCA).<sup>29</sup>

The Court also stated that environmental crimes under the *Water Act*, *Public Health Act* and *EMCA* cover the entire range of liability including strict liability and absolute liability and ought to be severely punished because the challenge of the restoration of the environment has to be tackled from all sides and by every man and woman. Courts thus play an important and indispensable role in achieving sustainable development which means conflicts must be dealt with effectively.

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<sup>28</sup> (2007) AHRLR 149 (KeHC 2006).

<sup>29</sup> *Ibid*, para. 25.

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The *Environment and Land Court Act*, 2011 provides that in exercise of its jurisdiction under the Act, the Court should be guided by the principles of sustainable development.<sup>30</sup>

Access to courts is an important pillar in promoting environmental justice in Kenya. Courts have, however, been faced by a number of challenges that hinder people particularly local communities from vindicating their environmental rights. Although the Constitution of Kenya guarantees the right of every person to institute proceedings claiming that a right or fundamental freedom in the Bill of Rights has been denied, violated or infringed, or is threatened with no need to prove *locus standi* to institute the suit, there still lies other challenges hindering access to courts such as the geographical location, complexity of rules and procedure and the use of legalese.<sup>31</sup> There is also lack of information amongst the citizenry and ignorance of their rights as far as environmental rights are concerned. Uninformed people cannot make use of courts in fighting for their rights and thus, despite their recognition under the Constitution and other laws of Kenya, a lot still need to be done to achieve this full enjoyment of these rights for all. There are however a number of ways through which this can be addressed. It must however be pointed out that this cannot only be achieved by courts but they need the support of all stakeholders.

### **3.3 Enhancing the Role of Courts in Safeguarding Environmental Rights in Kenya**

#### **3.3.1 Judicial Activism**

There is no clear definition of some of the rights guaranteed in the Constitution regarding the environment and thus it is up to the courts to give guidance in certain matters. This would not be new as noted by some scholars. For instance, some scholars have argued that the role of courts in recognition of environmental rights around the world has been so fundamental that some scholars have argued that, whereas the right to a clean and healthy environment has rapidly gained constitutional protection around the world, in some countries, recognition of the right first

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<sup>30</sup> S. 18.

<sup>31</sup> *Strengthening Judicial Reform in Kenya: Public Perceptions and Proposals on the Judiciary in the new Constitution*, ICJ Kenya, Vol. III, May, 2002; See also Muigua, K., *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 8<sup>th</sup> & 9<sup>th</sup> March, 2012. Available at <http://www.chuitech.com/kmco/attachments/Art./101/Avoiding.pdf>



occurred through court decisions determining that it is implicit in other constitutional provisions, primarily the right to life.<sup>32</sup>

There is, therefore, a need for judicial activism so that jurisprudence in this area can be improved. For instance, there is no explanation of what, for example, amounts to a ‘clean and healthy environment.’ As noted by one author,<sup>33</sup> it took the court’s active role to delineate this right in *Uganda Electricity Transmission Co. Ltd v De Samaline Incorporation Ltd*,<sup>34</sup> where the court expanded the meaning of a clean and healthy environment as follows:

*‘I must begin by stating that the right to a clean and healthy environment must not only be regarded as a purely medical matter. It should be regarded as a holistic social-cultural phenomenon because it is concerned with physical and mental well-being of human beings... a clean and healthy environment is measured in both ethical and medical context. It is about linkages in human well-being. These may include social injustice, poverty, diminishing self-esteem, and poor access to health services. That right is not restricted to a clinical model...’* (Emphasis added)

Notably, the *Environment and Land Court Act* gives the court *suo moto* jurisdiction.<sup>35</sup> It is arguable that the section allows judges to engage in judicial activism to safeguard environmental rights by ensuring sustainable development using the devices envisaged in Article 159 of the Constitution to ease access to justice. Courts may therefore act without necessarily waiting for filing of any cases on public interest litigation so as to promote environmental justice.

In the enforcement of other Constitutional rights such as economic and social rights and the right to life under the Constitution, courts should accord such provisions broad interpretations so as to address any environmental factors that impede access to the resources necessary for enjoyment of the rights in question as guaranteed under the Constitution.<sup>36</sup>

### **3.3.2 Public Interest Litigation**

Courts can support and encourage public interest litigation geared towards protection of environmental rights and enhancing environmental justice in Kenya. The Constitution provides

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<sup>32</sup> Boyd, D.R., ‘The Implicit Constitutional Right to Live in a Healthy Environment,’ *Review of European Community & International Environmental Law*, Vol. 20, No. 2, 2011, pp. 171-179 at p. 171.

<sup>33</sup> Twinomugisha, B.K., “Some Reflections on Judicial Protection of the Right to a Clean and Healthy Environment in Uganda,” *3/3 Law, Environment and Development Journal* (2007), p. 244, p. 249.

<sup>34</sup> Misc. Cause No. 181 of 2004 (High Court of Uganda).

<sup>35</sup> S. 20.

<sup>36</sup> Constitution of Kenya, Art. 43(1).

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for the enforcement of environmental rights and guarantees that any person may apply to a court for redress in addition to any other legal remedies that are available in respect to the same matter.<sup>37</sup> Further, constitutional provisions that are useful in the promotion of the right under Article 70 are to be found under Articles 22,<sup>38</sup> 23<sup>39</sup> and 48<sup>40</sup> thereof. These are important provisions that are aimed at promoting environmental justice for every person through use of public interest litigation. This was also affirmed in the case of *Joseph Leboo & 2 others v Director Kenya Forest Services & another* [2013] eKLR<sup>41</sup> where the Court stated that:

26. A reading of Articles 42 and 70 of the Constitution, above, make it clear, that one does not have to demonstrate personal loss or injury, in order to institute a cause aimed at the protection of the environment.

27. This position was in fact the applicable position, and still is the position, under the Environment Coordination and Management Act (EMCA), 1999, which preceded the Constitution of Kenya, 2010....

28. It can be seen that Section 3(4) above permits any person to institute suit relating to the protection of the environment without the necessity of demonstrating personal loss or injury. Litigation aimed at protecting the environment, cannot be shackled by the narrow application of the *locus standi* rule, both under the Constitution and statute, and indeed in principle. Any person, without the need of demonstrating personal injury, has the freedom and capacity to institute an action aimed at protecting the environment. The plaintiffs have filed this suit as representatives of the local community and also in their own capacity. The community, of course, has an interest in the preservation and sustainable use of forests. Their very livelihoods depend on the proper management of the forests. Even if they had not demonstrated such interest, that would not have been important, as any person who alleges a violation of any law touching on the environment is free to commence litigation to ensure the protection of such environment. I am therefore not in agreement with any argument that purports to state that the plaintiffs have no *locus standi* in this suit.

For instance, in December 2010, the Africa Network for Animal Welfare (ANAW), a Kenya non-profit organization, filed a case in the East Africa Court of Justice (EACJ) challenging the Tanzanian government's decision to build a commercial highway across the

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<sup>37</sup> Art. 70 (1).

<sup>38</sup> Art. 22(1) guarantee every person's 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. Such persons need not prove *locus standi* to institute the suit (Art. 22(2)).

<sup>39</sup> Art. 23 confers the High Court with jurisdiction, in accordance with Art. 165, to hear and determine applications for redress of a denial, violation or infringement of, or threat to, a right or fundamental freedom in the Bill of Rights.

<sup>40</sup> Art. 48 obligates the State to ensure access to justice for all persons and, if any fee is required, it be reasonable and not impede access to justice.

<sup>41</sup> *Joseph Leboo & 2 others v Director Kenya Forest Services & another* [2013] eKLR, Environment and Land 273 of 2013.

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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 a 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.<sup>42</sup>

Some of the ways through which courts can encourage aggrieved persons to make use of public litigation is being slow in awarding costs where such parties do not get favourable outcomes. This was in fact highlighted in the case of *Brian Asin & 2 others v Wafula W. Chebukati & 9 others* [2017] eKLR<sup>43</sup> where the place of public litigation in constitutional matters was summarised in the following words:

48. The rationale for refusing to award costs against unsuccessful litigants in constitutional litigation was appreciated by the South African constitutional court which observed that "an award of costs may have a chilling effect on the litigants who might wish to vindicate their constitutional rights."[27] The court was quick to add that this is not an inflexible rule[28] and that in accordance with its wide remedial powers, the Court has repeatedly deviated from the conventional principle that costs follow the result.[29]

49. The rationale for the deviation was articulated by the South African constitutional Court in *Affordable Medicines Trust vs Minister of Health* where **Ngcobo J** remarked:-

"There may be circumstances that justify departure from this rule such as where the litigation is frivolous or vexatious. There may be conduct on the part of the litigant that deserves censure by the Court which may influence the Court to order an unsuccessful litigant to pay costs. The ultimate goal is to do that which is just having regard to the facts and circumstances of the case."[30]

50. **Sachs J**, set out **three reasons** for the departure from the traditional principle:-

*"In the first place it diminishes the chilling effect that adverse costs orders would have on parties seeking to assert constitutional rights. Constitutional litigation frequently goes through many courts and the costs involved can be high. Meritorious claims might not be proceeded with because of a fear that failure could lead to financially ruinous consequences. Similarly, people might be deterred from pursuing constitutional claims because of a concern that even if they succeed they will be deprived of their costs because of some inadvertent procedural or technical lapse.*

*Secondly, constitutional litigation, whatever the outcome, might ordinarily bear not only on the interests of the particular litigants involved, but on the rights of all those in similar situations. Indeed, each constitutional case that is heard enriches the general body of constitutional jurisprudence and adds texture to what it means to be living in a constitutional democracy.*

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<sup>42</sup> *African Network for Animal Welfare (ANAW) v The Attorney General of the United Republic of Tanzania*, Reference No. 9 of 2010.

<sup>43</sup> *Brian Asin & 2 others v Wafula W. Chebukati & 9 others* [2017] eKLR, Petition 429 of 2017.

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*Thirdly, it is the state that bears primary responsibility for ensuring that both the law and state conduct are consistent with the Constitution. If there should be a genuine, non-frivolous challenge to the constitutionality of a law or of state conduct, it is appropriate that the state should bear the costs if the challenge is good, but if it is not, then the losing non-state litigant should be shielded from the costs consequences of failure. In this way responsibility for ensuring that the law and state conduct is constitutional is placed at the correct door.”*<sup>[31]</sup>

51. In addition to the above reasons, it is important to point out that costs are awarded at the unfettered discretion of the court, subject to such conditions and limitations as may be prescribed and to the provisions of any law for the time being in force, but they must follow the event unless the court has good reason to order otherwise.<sup>[32]</sup> Discussing the same point, the supreme court of Kenya in the case of *Jasbir Singh Rai & Others vs Tarlochan Rai & Others*<sup>[33]</sup> observed that:-

*“in the classic common law style, the courts have to proceed on a case by case basis, to identify “good reasons” for such a departure. An examination of evolving practices on this question shows that, as an example, matters in the domain of public interest litigation tend to be exempted from award of costs.....”*

52. The reason for the above reasoning is that in public litigation, a litigant is usually advancing public interest as opposed to personal gain.

53. The primary consideration in constitutional litigation must be the way in which a costs order would hinder or promote the advancement of constitutional justice.<sup>[34]</sup>The “nature of the issues” rather than the “characterization of the parties” is the starting point.<sup>[35]</sup>Costs should not be determined on whether the parties are financially well-endowed or indigent.<sup>[36]</sup>

54. The court in its discretion may say expressly that it makes no order as to costs and in that case each party must pay his own costs. But the court must not apply this or any other general rule in such a way as to exclude the exercise of the discretion entrusted to it and the material must exist upon which the discretion can be exercised. The discretion, like any other must be exercised judicially and the court ought not to exercise it against the successful party except for some reason connected with the case. It is not judicial exercise of the judge’s discretion to order a party who was completely successful and against whom no misconduct is even alleged to pay costs.<sup>[37]</sup>

55. It is clear from the authorities that the fundamental principle underlying the award of costs is two-fold. In the first place the award of costs is a matter in which the trial Judge is given discretion. ....But this is a judicial discretion and must be exercised upon grounds on which a reasonable man could come to the conclusion arrived at. In the second place the general rule that costs should be awarded to the successful party, a rule which should not be departed from without the **exercise of good grounds for doing so.**<sup>[38]</sup>

56. It is correct that there are exceptions to the general rule that in constitutional litigation an unsuccessful litigant in proceedings against the state ought not to be mulcted with costs as they may have a chilling effect on them. One of the exceptions, that justify a departure from the general rule, is where the litigation is frivolous or vexatious.<sup>[39]</sup>

60. The Public Interest Litigation was designed to serve the purpose of protecting rights of the public at large through vigilant action by public spirited persons and swift justice.<sup>[42]</sup> But the profound need of this tool has been plagued with misuses by persons who file Public Interest Litigations just for the publicity and those with vested political interests. <sup>[43]</sup>The courts therefore, need to keep a check on the cases being filed and ensure the *bona fide* interest of the petitioners and the nature of the cause of action, in order to avoid unnecessary litigations. Vexatious and

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mischievous litigation must be identified and struck down so that the objectives of Public Interest Litigation aren't violated. The constitution envisages the judiciary as "a bastion of rights and justice.

61. Public interest litigation is a highly effective weapon in the armory of law for reaching social justice to the common man. It is a unique phenomenon in the Constitutional Jurisprudence that has no parallel in the world and has acquired a big significance in the modern legal concerns.

62. Former Chief Justice of India A.S. Anand cautioned the over use of Public Interest Litigation and emphasized "Care has to be taken to see that Public Interest Litigation essentially remains public interest litigation and is not allowed to degenerate into becoming political interest litigation or private inquisitiveness litigation."<sup>[44]</sup>

This was also affirmed in the case of *Republic v Independent Electoral and Boundaries Commission & 2 others Ex-Parte Alinoor Derow Abdullahi & others [2017] eKLR*<sup>44</sup> where the Court observed as follows:

21. With respect to the nature of litigation as a consideration in the award of costs, it is clear that in genuinely public interests litigation, Courts are reluctant to award costs. This in my view must be so for the realisation of the spirit of Article 3(1) of the Constitution which provides that:

***Every person has an obligation to respect, uphold and defend this Constitution.***

22. One of the ways in which this obligation performed is provided for in Article 258(1) and (2) of the Constitution which states that:

***(1) Every person has the right to institute court proceedings, claiming that this Constitution has been contravened, or is threatened with contravention.***

***(2) In addition to a person acting in their own interest, court proceedings under clause (1) may be instituted by—***

***(a) a person acting on behalf of another person who cannot act in their own name;***

***(b) a person acting as a member of, or in the interest of, a group or class of persons;***

***(c) a person acting in the public interest; or***

***(d) an association acting in the interest of one or more of its members.***

23. Therefore the Constitution itself recognises that a person may commence legal proceedings not for his own interest but in the interests of the public. This was clearly appreciated by the Supreme Court in ***Jasbir Singh Rai & 3 Others vs. Tarlochan Singh Rai & 4 others [2014] eKLR*** where it was held that:

***"It is clear that there is no prescribed definition of any set of "good reasons" that will justify a Court's departure, in awarding costs, from the general rule, costs-follow-the-event. In the classic common law style, the Courts have proceeded on a case-by-case basis, to identify "good reasons" for such a departure. An examination of evolving practices on this question, shows that, as an example, matters in the domain of public-interest litigation tend to be exempted from award of costs. In *Amoni Thomas Amfry and Another v. The Minister for Lands and Another*, Nairobi High Court Petition No. 6***

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<sup>44</sup> Republic v Independent Electoral and Boundaries Commission & 2 others Ex-Parte Alinoor Derow Abdullahi & others [2017] eKLR, Miscellaneous Application 388 of 2017.

of 2013, Majanja, J concurred with the decision in *Harun Mwau and Others v. Attorney-General and Others*, Nairobi High Court Petition No. 65 of 2011, [2012] eKLR, in which it was held [para.180]:

“In matters concerning public-interest litigation, a litigant who has brought proceedings to advance a legitimate public interest and contributed to a proper understanding of the law in question without private gain should not be deterred from adopting a course that is beneficial to the public for fear of costs being imposed. Costs should therefore not be imposed on a party who has brought a case against the State but lost. Equally, there is no reason why the State should not be ordered to pay costs to a successful litigant.”

“It emerges that the award of costs would normally be guided by the principle that “costs follow the event”: the effect being that the party who calls forth the event by instituting suit, will bear the costs if the suit fails; but if this party shows legitimate occasion, by successful suit, then the defendant or respondent will bear the costs. However, the vital factor in setting the preference, is the *judiciously-exercised discretion of the Court*, accommodating the *special circumstances of the case*, while being guided by *ends of justice*. The *claims of the public interest* will be a relevant factor, in the exercise of such discretion, as will also be the *motivations and conduct of the parties*, prior-to, during, and subsequent-to the actual process of litigation.”

24. I also agree with Lenaola, J (as he then was) in *Okiya Omtatah Okiti vs. Communications Authority of Kenya & 14 Others* [2015] eKLR, where he expressed himself as hereunder:

“In my view, this Court has a duty to protect the noble motive of public interest litigation from those who file claims out of mischief and less than genuine interest in the guise of protecting a public interest. The filing of false and frivolous public interest litigation which risk diverting the Court’s attention from genuine cases will not be entertained.”

25. This position was also well captured in In *John Harun Mwau and 3 Others vs. Attorney General and 2 Others* [2012] eKLR the Court remarked at paras 179 and 180 that:

“The intent of Articles 22 and 23 of the Constitution is that persons should have free and unhindered access to this court for the enforcement of their fundamental rights and freedoms. Similarly, Article 258 allows any person to institute proceedings claiming the Constitution has been violated or is threatened. The imposition of costs would constitute a deterrent and would have a chilling effect on the enforcement of the Bill of Rights...In matters concerning public interest litigation, a litigant who has brought proceedings to advance a legitimate public interest and contributed to a proper understanding of the law in question without private gain should not be deterred from adopting a course that is beneficial to the public for fear of costs being imposed.”

26. It is therefore clear that where a person is genuinely advancing public interest under the Constitution as he is obliged to do under Article 3(1) of the Constitution he ought not to be penalised in costs.

27. However this right to institute such proceedings ought not to be abused in order to achieve collateral purposes such as to in effect litigate on behalf of other persons who are able to litigate on their own but for some ulterior motives do not want to be in the forefront of litigation.

28. I therefore agree with the decision of Warsame, J (as he then was) in Truth Justice and Reconciliation Commission vs. Chief Justice of the Republic of Kenya & Another [2012] KLR, that:

“Though as Courts we spare no efforts in fostering and developing liberal and broadened litigation, yet we cannot avoid but express our opinion that while genuine litigants with legitimate grievances relating to matters which are dear to them must be addressed, the meddlesome interlopers having absolutely no grievances but who file claims for personal gain or as a proxy of others or for extraneous motivation break the queue by wearing a mask of public interest litigation and get into the Court corridors filing vexatious and frivolous cases. This criminally wasted the valuable time of the Court and as a result of which genuine litigants standing outside the Court in a queue that never moves thereby creating and fomenting public anger, resentment and frustration towards the courts resulting in loss of faith in the administration of justice.”

Courts dealing with public litigation in environmental matters can therefore, while bearing in mind the safeguards set out in the case of *Brian Asin & 2 others v Wafula W. Chebukati & 9 others* and the others cited above, make orders that promote the state’s efforts towards promotion and protection of environmental rights as well as realisation of the sustainable development agenda in general.

### **3.3.3 National Courts and Sustainable Development**

Access to justice is one of the pillars of the Agenda 2030 on Sustainable Development Goals (SDGs)<sup>45</sup>. SDG Goal 16 seeks to ‘promote peaceful and inclusive societies for sustainable development, provide access to justice for all and build effective, accountable and inclusive institutions at all levels’.

It has rightly been argued that there are other regulatory approaches to achieving environmental protection and public health that are not rights-based. These include economic incentives and disincentives, criminal law, and private liability regimes which have all formed part of the framework of international and national environmental law and health law.<sup>46</sup> For instance, the *Environmental Management and Co-ordination (Amendment) Act, 2015*<sup>47</sup> seeks to ensure that any area declared to be a protected area under section 54(1), may be managed in

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<sup>46</sup> Shelton, D., ‘Human Rights, Health and Environmental Protection: Linkages in Law and Practice: A Background Paper for the WHO,’ p. 3. Available at [http://www.who.int/hhr/information/Human\\_Rights\\_Health\\_and\\_Environmental\\_Protection.pdf](http://www.who.int/hhr/information/Human_Rights_Health_and_Environmental_Protection.pdf) [Accessed on 12/1/2019].

<sup>47</sup> *Environmental Management and Co-ordination (Amendment) Act*, No. 5 of 2015, Laws of Kenya.

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cooperation with any individual, community or government with interests in the land and forests and should *provide incentives to promote community conservation* (emphasis added).<sup>48</sup> Such an approach can boost the State's efforts in sustainable development.

In *Peter K. Waweru v Republic*,<sup>49</sup> the Court observed that '...environmental crimes under the Water Act, Public Health Act and EMCA cover the entire range of liability including strict liability and absolute liability and ought to be severely punished because the challenge of the restoration of the environment has to be tackled from all sides and by every man and woman....',<sup>50</sup>

The role of the State and the national courts, and indeed the general public, in promoting sustainable development through striking a balance between environmental conservation and development needs of the country was also reiterated in the case of *Patrick Musimba –vs- National Land Commission & 4 Others* (2016) eKLR<sup>51</sup> where the Court stated as follows:-

“...the State under Article 69 of the Constitution is enjoined to ensure sustainable development. (See also the preamble to the Constitution). The State is also to ensure that every person has a right to a clean and health environment. However, physical development must also be allowed to foster to ensure that the other guaranteed rights and freedoms are also achieved. Such physical development must however be undertaken within a Constitutional and Statutory framework to ensure that the environment thrives and survives. It is for such reason that the Constitution provides for public participation in the management, protection and conservation of the environment. It is for the same reason too that the Environmental Management and Coordination Act (“the EMCA”) has laid out certain statutory safeguards to be observed when a person or the State initiates any physical development.

At the core is the Environmental Impact Assessment and Study which is undertaken under Section 58 of the EMCA and the regulations thereunder. Under Regulation 17, the Environmental Impact Assessment Study must involve the public. The inhabitants of any area affected by a physical development must be given an opportunity to air their views on the effects of any such development. After the Environmental Impact Assessment Study report is compiled, the same report must be circulated to the affected persons.”

Courts should thus closely work with the rest of the stakeholders in not only safeguarding the environment but also ensuring that the country meets its international and national

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<sup>48</sup> S. 31, *Environmental Management and Co-ordination (Amendment) Act, 2015*.

<sup>49</sup> [2006] eKLR, Misc. Civ. Applic. No. 118 of 2004.

<sup>50</sup> p.14.

<sup>51</sup> *Patrick Musimba –vs- National Land Commission & 4 Others* (2016) eKLR, Petition 613 of 2014.



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obligations towards realisation of the sustainable development agenda. Environmental obligations cannot be achieved by courts alone and this calls for cooperation among all stakeholders, including communities. Synergetic cooperation between the different state organs charged with different social affairs can also go a long way in achieving sustainability. This is one of the ways through which the economic and social rights and the right to life as guaranteed under the Constitution can be achieved. Some of the economic and social rights whose fulfilment largely depend on the state of the environment include *inter alia*, right to the highest attainable standard of health, which includes the right to health care services, including reproductive health care; to accessible and adequate housing, and to reasonable standards of sanitation; to be free from hunger, and to have adequate food of acceptable quality; and to clean and safe water in adequate quantities.<sup>52</sup>

It is also important to remember that the Courts are under a constitutional obligation under Article 10 to uphold the principles of sustainable development. This includes protecting the environment for the sake of future generations. Courts can take proactive measures to ensure conservation and protection of the environment for sustainable development. They can ensure that communities and other private persons enjoy environmental democracy especially where such communities approach courts seeking justice and access to environmental information, and demand enforcement of environmental laws or compensation for damage. Courts can work closely with such local bodies to adequately and peaceably address conflict or disputes. Where state decision makers or such local bodies or tribunals attempt to bypass the legal requirements on public participation in decision-making in matters that greatly affect the livelihoods of a particular group of people, courts can use its constitutional powers to enforce and uphold the law.

Courts play an important role in giving life and meaning to human rights, including environmental rights, by providing a forum of last resort for human rights violations, at the national level.<sup>53</sup> Courts should however consider adopting both anthropocentric and ecocentric approaches in protecting the environment and environmental rights as a way of overcoming any challenges that may arise from a requirement for proof by the complainant of actual or likely

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<sup>52</sup> Constitution of Kenya, Art. 43(1).

<sup>53</sup> Boyd, D.R., 'The Constitutional Right to a Healthy Environment,' *Environment: Science and Policy for Sustainable Development*, July-August 2012, available at <http://www.environmentmagazine.org/Archives/Back%20Issues/2012/JulyAugust%202012/constitutional-rights-full.html> [Accessed on 12/1/2019].

denial, violation, infringement or threat by the respondent. This can be pegged on the Courts' constitutional obligation under Article 10 to uphold the principles of sustainable development on protecting the environment for the sake of future generations. Courts ought to adopt an approach that does not emphasize on the likely denial, violation, infringement or threat to the right to clean and healthy environment but one that focuses on the protection and conservation of the environment and its resources, to ensure that all persons including those who cannot access justice through courts enjoy the above right.

## **Conclusion**

Courts are important players 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. This therefore means that we cannot dispense with the role of courts in environmental matters. The Constitution stipulates that sustainable development is one of the national values and principles of governance that must bind all State organs, State officers, public officers and all persons whenever any of them—applies or interprets the Constitution; enacts, applies or interprets any law; or makes or implements public policy decisions.<sup>54</sup>

The foregoing statutory and constitutional provisions as well as the case law cited on environmental rights in Kenya demonstrate the central role that courts can play as far as recognition, promotion and implementation of the environmental rights and sustainable development agenda are concerned. The environment should be accorded some right, independent of the human beings. The constitutional recognition of the centrality of environment as the heritage of the people of Kenya should give the law makers, courts and other stakeholders an incentive and clear authority to take strong action to protect the environment.

Courts also need to work closely with the public as a way of enhancing identification of activities that violate environmental laws as well as increasing the rate of enforcement and compliance with court decisions, by bodies and individuals. This is because Kenyans have a role to play in achieving the ideal of a clean and healthy environment. There is need to cultivate a culture of

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<sup>54</sup> Constitution of Kenya, Art. 10(2) (d).

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respect for environment by all, without necessarily relying on courts for enforcing the same. Developing environmental ethics and consciousness through such means as dissemination of information and knowledge in meaningful forms can also enhance participation in decision-making and enhance appreciation of the best ways of protecting and conserving the environment.

Courts are also under an obligation to take lead role in promoting the use of traditional knowledge in environmental conflict management. They should offer support and uphold the relevant provisions where they are faced with such situations. Courts have a great and important role to play in facilitating realisation and safeguarding of environmental security. They should be driven by not only anthropocentric arguments for environmental conservation but also ecocentric justifications. Courts must discharge their obligations towards the environment on the understanding that anthropocentrism alone cannot effectively protect the environment and thus, ecocentrism should drive them towards being more proactive towards protecting the environment through such means as judicial activism.

Courts can be at the forefront in promoting and protecting environmental rights for realisation of environmental justice and sustainable development in Kenya, as envisaged under the current Constitution of Kenya as well as environmental laws.

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