

# **Environmental Conflict Management Institutions and Approaches**

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**Kariuki Muigua**

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### **Abstract**

*This paper argues that conflict management can only be as effective as the institutions and the approaches employed. The author thus highlights some of the most effective institutional arrangements and approaches that can be employed in addressing environmental conflicts in Kenya and across the world as a step towards achieving sustainable development agenda. The discourse herein recommends the exploration of both formal and informal mechanisms in management of environmental conflicts.*

### **1. Introduction**

This paper seeks to explore the various institutional and methodological approaches to environmental conflicts management and answer the question whether the existing legal and institutional frameworks in Kenya for the resolution of environmental conflicts is sufficient to effectively deal with these conflicts.

The nexus between the environmental conflicts and the state of the existing dispute resolution mechanisms for resolving environmental conflicts has not been adequately explored. The institutional and legal mechanisms for resolving environmental conflicts now in place in Kenya apparently have not eliminated environmental conflicts. The issue then is: Why have the existing institutional and legal mechanisms been ineffective in the face of the ever increasing conflicts? Therefore, the author herein seeks to explore the possibilities and opportunities that both formal and informal mechanisms, including ADR mechanisms present in realising the goal of resolving or managing environmental conflicts in Kenya.

The term “environmental conflict” is not a dictionary word and hence lacks a common meaning. While few writers have grappled with the meaning of it, some have attempted to demonstrate the links between environment and conflict, various environmental dimensions, including scarcity and abundance, improvement and degradation, production and marketing, and benefits sharing that underlie the various conflicts within the different conflict systems.<sup>1</sup>

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For purposes of this paper, the author treats conflict management as an institutional approach to environmental management, where ‘institutions’ are defined as ‘the conventions, norms and formally sanctioned rules of a society, where they provide expectations, stability and meaning essential to human existence and coordination; institutions support certain values, and produce and protect certain interests’.<sup>2</sup> These institutions may be formal or informal, based on their form and what they achieve.<sup>3</sup> In the instant case, environmental conflict management approaches are geared towards securing environmental rights for the most vulnerable groups of people. It has been observed that environmental conflicts cannot always be resolved, but there are a number of ways to transform conflicts and sometimes the process of conflict transformation can be a pathway towards transition to another state of sustainability.<sup>4</sup>

This paper thus highlights some of the approaches to effective environmental conflicts management with the aim of entrenching environmental rights for all.

### **2. Environmental Conflict Management Institutions and Approaches**

“Environmental conflicts” refer to the contests that exist as a result of the various competing interests over access to and use of natural resources such as land, water, minerals and forests. Various groups, communities, developers, government and other organisations have differing ideas of how to access and utilize environmental resources. Laws and policies which have a conflict generating capacity are often pursued by the various groups leading to further friction among them.

There is a legal and institutional framework that is supposed to deal with environmental conflicts and either resolve or manage them. These institutions include the courts of law, tribunals under various Acts<sup>5</sup>, The National Environmental Management Authority<sup>6</sup>, National Environmental Complaints Committee, National Environment Tribunal, and other various informal community based resource governance bodies.<sup>4</sup> The laws include the numerous statutes that deal with the

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<sup>1</sup> Collins H. Khal, *States Scarcity and Civil Strife in the Developing World*, Princeton University Press, Princeton (New Jersey), 2006.

<sup>2</sup> Arild Vatn, *Environmental Governance: Institutions, Policies and Actions* (Paperback edition, Edward Elgar Publishing 2016) 78.

<sup>3</sup> *Ibid*, 78.

<sup>4</sup> E Gunilla Almered Olsson and Pernille Gooch, eds., *Natural resource conflicts and sustainable development*. Routledge, 2019, 5.

<sup>5</sup> Environmental (Management and Coordination) Act, No. 8 of 1999, laws of Kenya.

<sup>6</sup> Established under S.7 of the EMCA (Cap 8 of 1999).

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environment. Notable among them is the framework law, the Environmental Management and Coordination Act (EMCA)<sup>5</sup>, the Public Health Act<sup>7</sup>, the Forest Conservation and Management Act 2016<sup>8</sup>, the Water Act 2016<sup>9</sup> and the various statutes dealing with land administration.<sup>10</sup> Despite the existence of the aforesaid laws and institutions, environmental conflicts continue to manifest themselves in Kenya. There have been for instance violent conflicts over access to and use of land in Kenya, which conflicts are well documented.<sup>11</sup>

Over the years, Kenya has been faced with conflicts over natural resources such as water, forests, minerals and land among others. The existing legal and institutional mechanisms that are in place to deal with environmental conflicts have not offered much in stemming the prevalence of environmental conflicts. Environmental conflicts in Kenya are still present and a cause of much concern.

The existing legal mechanisms for resolving environmental conflicts include the courts of law both under civil and criminal law<sup>12</sup>, the National Environment Tribunal (NET)<sup>13</sup>, National Environmental Complaints Committee<sup>14</sup>, Arbitral tribunals<sup>15</sup>, Statutory tribunals set up under various laws (such as the Land Adjudication Boards)<sup>16</sup> and customary law systems of dispute settlement.<sup>17</sup>

Resolving environmental conflicts has mainly been attempted under the institutional and legal framework described hereinabove. However, Alternative Dispute Resolution has not been

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<sup>7</sup> Cap. 242 laws of Kenya.

<sup>8</sup> Forest Conservation and Management Act, No 34 of 2016, Laws of Kenya.

<sup>9</sup> Water Act, No. 43 of 2016, Laws of Kenya.

<sup>10</sup> National Land Commission Act, No. 5 of 2012; Land Registration Act (No. 3 of 2012); Land Act (No. 6 of 2012); Community Land Act, No. 27 of 2016; Environment and Land Court (No. 19 Of 2011); Land Adjudication (CAP. 284); Land Consolidation (CAP. 283); Land Control Act (CAP. 302); Physical and Land Use Planning (No. 13 of 2019).

<sup>11</sup> The Akiwumi Report of the Judicial Commission Appointed to Inquire into Tribal Clashes in Kenya (31st July, 1999) notes the contribution of the issue of land to violent conflicts in Kenya due to the way it is treated with fervent sentimentality and sensitivity and in many ways, considered explosive. The report at pg. 53 notes that "Whereas, the constitution guarantees the right of ownership of property anywhere in the country, the peaceful co-existence of the forty-two tribes that live within our national borders, appears to have been profoundly undermined by diverse man-made problems that are either directly or indirectly connected to land."

<sup>12</sup> Environmental Management and Co-ordination Act, Act. No. 8 of 1999, Part XIII Section 137-146.

<sup>13</sup> Ibid, Part. XII sections 125-136.

<sup>14</sup> Ibid, section 31; see also Environmental Management and Coordination (Amendment) Act, 2015.

<sup>15</sup> See Land Adjudication (CAP. 284); Arbitration Act, No. 8 of 1995.

<sup>16</sup> Land Adjudication (CAP. 284).

<sup>17</sup> Community Land Act, No. 27 of 2016; National Land Commission Act, No. 5 of 2012; Constitution of Kenya 2010, Article 67(2)(f); Ajayi, A.T. and Buhari, L.O., "Methods of conflict resolution in African traditional society." *African research review* 8, no. 2 (2014): 138-157.

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adequately utilized in the arena of addressing environmental conflicts. Alternative Dispute Resolution refers to those Dispute Resolution Mechanisms that are “alternative” to the court system. These include negotiation, mediation, conciliation, ‘med-arb’ and ‘arb-med’. Sometimes, arbitration is also included in the definition of ADR.

Environmental issues are special and need to be settled quickly. The area where humans reside is where the environment's resources are located. Environmental resources are essential to their way of life. Environmental conflicts may escalate into violence, loss of livelihoods, evictions, and even fatalities if left uncontrolled..<sup>18</sup> ADR may not provide a full solution to the problem. It can however be used in tandem with other existing dispute resolution mechanisms and with certain reform measures in place, the nightmare of ugly environmental conflicts in Kenya may be avoided.

Some of these conflict management mechanisms have not been very effective in resolving or managing environmental conflicts. For instance, courts are formal, rigid, expensive to reach, and bureaucratic. Instead of the parties' interests, they deal with precise legal rights.<sup>19</sup> The court system is adversarial in nature with limited room for negotiation and agreement on issues of interest to the parties. Law itself has at times been a source of conflict rather than a conflict solver.<sup>20</sup> Of concern is the way environmental governance is carried out, without adequate participation by the people. Environmental democracy, which involves giving people access to information on environmental rights, easing access to justice in environmental matters and enabling public participation in environmental decision making, *inter alia*, is at its minimum in Kenya.<sup>21</sup>

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<sup>18</sup> Bob, U. and Bronkhorst, S., "Environmental conflicts: Key issues and management implications." *African Journal on Conflict Resolution* 10, no. 2 (2010): 9-30.

<sup>19</sup> Bingham, L., "The challenges of environmental conflict resolution." In *Promise and Performance of Environmental Conflict Resolution*, pp. 33-56. RFF Press, 2003; Heikkila, T. and Schlager, E.C., "Addressing the issues: The choice of environmental conflict-resolution venues in the United States." *American Journal of Political Science* 56, no. 4 (2012): 774-786.

<sup>20</sup> Spangler, B., "Settlement, Resolution, Management, and Transformation: An Explanation of Terms." Beyond Intractability. Eds. Guy Burgess and Heidi Burgess. Conflict Information Consortium, University of Colorado, Boulder. Posted: September 2003 <<http://www.beyondintractability.org/essay/meaning-resolution>> accessed 19 August 2022.

<sup>21</sup> See generally, Dr Susan Hazen, Environmental Democracy, (<<http://www.ourplanet.com>>). Accessed on 16<sup>th</sup> January 2009. Susan Hazen is a director of the Environmental Assistance Division, Environmental protection Agency, Washington DC; Csaba Kiss and Michael Ewing (eds), “Environmental Democracy: An Assessment of Access to Information, Participation in Decision-making and Access to Justice in Environmental Matters in Selected European Countries.” European Regional Report (published by The Access Initiative Europe.) available at <http://www.accessinitiative.org> accessed on 18 August 2022.

Then there are the procedures of what are known as alternative dispute resolution (ADR). They include of community-based and conventional conflict resolution methods including negotiation, mediation, and conciliation. To achieve the illusive tranquilly that comes with equitable resource sharing amongst communities, which is much desired, these still need to be properly used.

### **3. Methods of Managing Environmental Conflicts**

The different approaches that may be utilized to settle or at least manage environmental conflicts when they occur have typically been offered by authors in the environmental discourse. These techniques include: Party to Party Conflict Management: Negotiation; Fighting It Out; Yielding; Avoidance; Compromise; Involving a Third Party-Mediation. One may add litigation, arbitration, and hybrid dispute resolution methods to the list of conflict management initiatives involving third parties.<sup>22</sup> Conflict can be resolved by employing force when one party has the resources and motivation to win regardless of whether the other side loses and regardless of whether or not the winning process harms interpersonal ties. It is significant to highlight that not all sides will be able to employ force; rather, how it is employed will mainly rely on how much power one party has in relation to the other.<sup>23</sup>

The parties that want to avoid conflict more than they want to achieve their goals are best suited for a withdrawal-based conflict management technique. Not least because it may be used as a threat to convince hesitant and occasionally more powerful parties to engage in more cooperative discussions, it is crucial to recognise the power of withdrawal (whether it be positive or negative).<sup>24</sup>

There are instances when one party in a dispute scenario prioritizes preserving a positive relationship with one or more of the other parties over accomplishing its own particular goals

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<sup>22</sup> Fisher, R., "Sources of conflict and methods of conflict resolution." *International Peace and Conflict Resolution, School of International Service, The American University* (2000); Tyler, S.R., "Policy implications of natural resource conflict management." *Cultivating peace: Conflict and collaboration in natural resource management* (1999).

<sup>23</sup> Warner, M., "Conflict management in community-based natural resource projects: experiences from Fiji and Papua New Guinea." (2000), p.18.

Available at <https://citeseerx.ist.psu.edu/viewdoc/download?doi=10.1.1.168.4002&rep=rep1&type=pdf>

<sup>24</sup> Ibid, p. 18; Author removed at request of original Publisher, '6.2 Conflict and Interpersonal Communication' <<https://open.lib.umn.edu/communication/chapter/6-2-conflict-and-interpersonal-communication/>> accessed 2 September 2022.

when accommodation is used as a conflict management technique. While such outcomes may appear to be the result of force, the difference is that instead of losing outright, the accommodating party perceives itself to have gained by securing good relations, possibly along with an element of good will and the opportunity to accomplish some greater goal at a later time.<sup>25</sup> Sometimes people mix up compromise with consensus. Although coming to a compromise during a negotiation may seem advantageous, it really means that at least one side feels forced to make a concession.<sup>26</sup> Consensus-building tactics can result in compromises in the final agreement, but there are several key differences between the two approaches. In particular, consensus-building tries to prevent trade-offs and instead generate a "win-win" outcome. On the other side, a compromise approach seeks to minimize what are seen to be unavoidable trade-offs.<sup>27</sup>

Conflicting parties must avoid the following in order to come to an agreement: compromising on their immediate demands and aggressive stances in order to address the underlying needs that each side believes are really motivating the conflict; focusing on a single solution instead of considering the broadest and most creative variety of solutions to satisfy the underlying needs of the parties; and individualized, frequently inflated requests in favour of being clear and precise.<sup>28</sup>

### **3.1. Environmental Conflicts and ADR**

Natural resources including water, pasture, land, and forests are among the natural resources that are the subject of environmental conflicts because of access to and usage of these resources. People's means of support are involved. Conflicts may become violent, harm the environment,

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<sup>25</sup> Ibid, p.18; 'Session 5. Conflict Management' <<https://www.fao.org/3/w7504e/w7504e07.htm>> accessed 2 September 2022; Katz, N & McNulty, K., Conflict Resolution. [Online publication], 1994 <[https://www.maxwell.syr.edu/docs/default-source/ektron-files/conflict-resolution-nk.pdf?sfvrsn=4de5d71e\\_5](https://www.maxwell.syr.edu/docs/default-source/ektron-files/conflict-resolution-nk.pdf?sfvrsn=4de5d71e_5)> accessed 2 September 2022.

<sup>26</sup> Ibid, p. 18; 'Negotiation and Mediation Techniques for Natural Resource Management' <<https://www.fao.org/3/a0032e/a0032e0a.htm>> accessed 2 September 2022; United Nations, 'The Process of Negotiation' (United Nations) <<https://www.un.org/en/model-united-nations/process-negotiation>> accessed 2 September 2022; Wertheim, E., "Negotiations and resolving conflicts: An overview." *College of Business Administration, Northeastern University*, [available at: <http://web.cba.neu.edu/~ewertheim/interper/negot3.htm>] (2002).

<sup>27</sup> Ibid, p. 18.

<sup>28</sup> Ibid, p. 18.

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and threaten livelihoods if they are not resolved..<sup>29</sup>

Natural resources may lead to conflict whether they are renewable or not. Cropland land, clean water, firewood, and fish are examples of renewable resources. Petroleum and minerals are non-renewable resources.<sup>30</sup>

The most significant causes of violence, according to some studies, are shortages of forested areas, fresh water, fish, and agricultural land. This is in part due to the absence of respected, efficient conflict resolution procedures among those responsible for managing the aforementioned resources. The environmental disputes in Kenya are not uncommon. Land is "handled with fervent sentimentality and sensitivity and in many respects considered combustible," according to the Akiwumi Report on tribal confrontations in Kenya. This contributes to the problem of land being a factor in violent conflicts in Kenya.<sup>31</sup> The Report also mentions how many communities viewed the rise of multi-party politics as an attempt to isolate and evict them from their property. Tribal concerns with economic foundations also affected multi-party politics, making it simpler to inspire tribal conflict motivated by politics.<sup>32</sup> That situation offered the perfect opportunity for ethnic cleansing to be used for political gain.

According to the Akiwumi Report, the 1992 and 1997 land conflicts in Kenya were caused by the unequal distribution of land resources and by subpar government policies and programmes that were seen as favouring some factions over others.

The various conflicts that have taken place in Kenya are caused by concerns over the utilisation of environmental resources. Contests over access to and use of Kenya's natural resources can be partly blamed for the post-election violence in 2007–2008.<sup>33</sup> These conflicts have been brewing since the days of colonialism, when large areas of land were taken over to build communities for

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<sup>29</sup> See generally Matiru V. (2000) Conflict & Natural Resource Management, Food & Agriculture Organisation (FAO); Buckles D and Rusnak D (1999) "Cultivating Peace: Conflict and collaboration in Natural Resource Management" IDRC/World Bank 1999 p. 3 & 4; Thayer DM (2003) "*Nature of Conflict over nature: Protected Areas, Transfrontier Conservation and the meaning of Development*" Saratunga Skidmore College-The School for International Training.

<sup>30</sup> Canadian Security Intelligence Service and Gizewski, P., Environmental scarcity and conflict. Canadian Security Intelligence Service, 1997. p. 1.

<sup>31</sup> Akiwumi, Augustus Molade, *Report of the judicial commission appointed to inquire into tribal clashes in Kenya*. The Commission, 1999.

<sup>32</sup> Ibid.

<sup>33</sup> Oucho, J., "Undercurrents of Post-Election Violence in Kenya: Issues in the long-term agenda." In *Tensions and Reversals in Democratic Transitions: The Kenya 2007 General Elections*, pp. 491-533. 2010; Nzau, M. and Guyo, M., "The Challenge of Securing Kenya: Past Experience, Present Challenges and Future Prospects." *The Journal of Social Encounters* 2, no. 1 (2018): 37-59.

European settlers and Africans were sent to live in less productive reserves.<sup>34</sup> After independence, the government embarked on mechanisms that saw Africans and not necessarily members of the displaced communities buy back the white owned farms through soft loan schemes. The effect was that rich and “connected” Kenyans took their place and most of the indigenous displaced communities remained squatters in their ancestral land.<sup>35</sup>

### **3.2. Environmental Conflicts and ADR – The Link**

Environmental conflicts are unique as they involve people’s lives. Left to escalate, suffering and death may be the undesirable result. Certain benefits of ADR processes make them suited for use in resolving environmental problems. For instance, the processes that permit the greatest degree of party autonomy, such negotiation, conciliation, and mediation, are informal, cost-effective, and give parties the freedom to come up with their own long-term solutions to issues. Therefore, they are especially well suited for resolving environmental problems.<sup>36</sup> Sometimes rigid and bureaucratic, courts and official tribunals do not encourage the upkeep of friendly connections between the parties. The parties leave the hearings before these courts and tribunals angry and dissatisfied. Does ADR have the ability to bring about “win-win” outcomes for all parties and swiftly settle environmental conflicts? This merits investigation. However, it is possible to assert that the characteristics of party autonomy, flexibility, inclusivity, informality, and acceptability by all parties may be utilized to develop solutions to environmental concerns.<sup>37</sup>

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<sup>34</sup> Youe, C., "Moving the Maasai: A Colonial Misadventure." (2008): 202  
<[https://ora.ox.ac.uk/catalog/uuid:1eee21c4-035b-4ea9-8b0a-4079690c4f7d/download\\_file?file\\_format=application%2Fpdf&safe\\_filename=604788477.pdf](https://ora.ox.ac.uk/catalog/uuid:1eee21c4-035b-4ea9-8b0a-4079690c4f7d/download_file?file_format=application%2Fpdf&safe_filename=604788477.pdf)> accessed 2 September 2022; Kanyinga, K., *Re-distribution from above: The politics of land rights and squatting in coastal Kenya*. Vol. 115. Nordic Africa Institute, 2000; Ogot, B.O., "The historical development of African societies, 1500—1800: conclusion." *GENERAL HISTORY OF AFRICA-V* (1992): 895.

<sup>35</sup> Akiwumi, *ibid*.

<sup>36</sup> Stukenborg, C., "The Proper Rule of Alternative Dispute Resolution (ADR) in Environmental Conflicts." *U. Dayton L. Rev.* 19 (1993): 1305; Weidner, H., "Alternative dispute resolution in environmental conflicts-promises, problems, practical experience." In *Alternative dispute resolution in environmental conflicts: experiences in 12 countries*, pp. 11-55. Berlin: Edition Sigma, 1998.

<sup>37</sup> Muigua, K., "Managing natural resource conflicts in Kenya through negotiation and mediation." (2016)  
<[http://erepository.uonbi.ac.ke/bitstream/handle/11295/97031/Muigua\\_Managing%20Natural%20Resource%20Conflicts%20in%20Kenya%20through%20Negotiation%20and%20Mediation.pdf?sequence=3&isAllowed=y](http://erepository.uonbi.ac.ke/bitstream/handle/11295/97031/Muigua_Managing%20Natural%20Resource%20Conflicts%20in%20Kenya%20through%20Negotiation%20and%20Mediation.pdf?sequence=3&isAllowed=y)> accessed 2 September 2022; Mugford, J., ed. *Alternative Dispute Resolution: Proceedings, 22-24 July 1986*. No. 15. Australian Institute of Criminology, 1986.

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In 2008, Kenya resorted to mediation through the Koffi Annan initiative<sup>38</sup> to resolve a political standoff. Mediation offers a dispute resolution mechanism where all parties come to the table and with the help of the mediator find their own solutions. Negotiation also played a part within the mediation process. It was ADR that saved Kenya from the brink of total anarchy. Thus, there must be something in ADR that is worth examining with a view to making use of the same to resolve environmental conflicts which have the potential to tear the country apart if left unchecked.

In the Koffi Annan initiative, ADR (specifically mediation) was used in the face of the apparent failure or impotence of the legal and institutional mechanisms for the resolution of conflict in Kenya. A critical look at ADR methods in the resolution of environmental conflicts is worthwhile considering the many positive attributes and potential for involving the public and reaching of acceptable solutions that can withstand the test of time. ADR can be used to address environmental conflicts with the long-term aim of sustaining environmental democracy, peace keeping and efficient management of environmental resources, to ensure sustainable use of the same.<sup>39</sup>

It is possible to come up with “win-win” situations. With the flexibility and informality of ADR the parties may come up with ‘tailor made’ solutions to their problems. Apart from arbitration ADR processes involve a large measure of party autonomy. The parties are free to come up with their own agreements and implement them. In the environmental arena, agreed solutions rather than those imposed on the parties are desirable. The people are able to live and abide by them and relationships are preserved. Mechanisms for sound environmental management by all stakeholders can be put in place.

ADR processes have not been given an adequate chance within the Kenyan framework of environmental disputes resolution. Maybe it is time we tried them out in the context of the real environmental conflicts. Given the many positive attributes of ADR the experiment may be worth it and may save Kenyan lives and contribute to sustainable development.

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<sup>38</sup> Koffi Annan, the former Secretary General of the United Nations mediated the all-out conflict that was labeled the ‘post-election’ violence in 2007 – 08 in Kenya. Essentially the long-term causes of the conflict were issues relating to access to and use of natural resources. The initiative resulted in the signing of the peace agreement formalized in the National Accord & Reconciliation Act.

<sup>39</sup> Susan Hazen (1998), *Environmental Democracy*, (<<http://www.ourplanet.com>) accessed on 25 August 2022; Kariuki Muigua, Paul Musyimi, ‘Enhancing Environmental Democracy’, *Law Society of Kenya Journal* Vol 4 2008 No. 1.

### **3.3. Challenges Facing Application of ADR Mechanisms in Environmental Conflicts**

The existing legal and institutional framework for environmental management is disjointed because different entities are responsible for different aspects of environmental law and policy.

The Environmental Management and Coordination Act (EMCA), which was passed with the intention of improving management of Kenya's environmental resources, did little to eliminate the variety of regulatory frameworks in place for various environmental resources.

Furthermore, the development of necessary legislation and rules to support the EMCA framework is still far from completion. This collection creates a misleading impression that there are enough institutions and regulations to resolve environmental concerns. A proper application of the law through the institutions outlined in this collection of laws still leaves many issues unresolved; therefore, it is necessary to update the EMCA and combine all pertinent laws so that it will be simpler to assess the effectiveness of the law and institutions mentioned above. In addition to the foregoing, environmental norms and laws need to be enforced more strictly, and therefore legislative and institutional changes on environmental governance in Kenya are required.<sup>40</sup>

Until recently, there were no substantial legal provisions that addressed the use of ADR techniques to handle or resolve environmental disputes. This implies that any outcomes reached utilising ADR processes lacked a legal foundation under the parent Act and were not given the same respect as those reached through litigation. This changed when Kenyans passed the new Constitution in August 2010, ushering in a new era. Numerous post-constitutional acts have been enacted to codify the different conflict resolution systems outlined in the new Constitution, including alternative dispute resolution processes like mediation and arbitration.

### **3.4. Reform Measures**

In order to increase the use of ADR in the resolution of environmental issues, it is necessary to continuously modify the legal and institutional frameworks in Kenya. ADR and customary dispute resolution processes are recognized in several important acts, such as the EMCA and the Civil Procedure Act, in order to be in compliance with the new Constitution.

Kenyans must play a larger role in deciding how to protect the environment. It is necessary to strengthen the principles of environmental democracy, which call for public involvement in

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<sup>40</sup> Kenya Vision 2030, p. 104.

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environmental issues, access to knowledge, and access to justice.<sup>41</sup> The 2010 Constitution recognises this need and under Article 69, it provides that the state shall encourage public participation in the management, protection and conservation of the environment.<sup>42</sup>

To effectively manage its natural resources and prevent environmental conflicts, Kenya must educate the general public on environmental issues. To promote intergenerational and intragenerational justice<sup>43</sup> and preserve sustainable development, Kenyans should begin receiving instruction in natural resource management in primary schools. The aforementioned educational setting should include a thorough explanation of ADR-related conflict management techniques. It is important to draw attention to and underline each party's advantages and disadvantages. To be able to choose the appropriate ADR techniques to use in specific situations, the public should be well-informed. A public education and consultation process is required whenever a law has to be altered or issued in order to guarantee that any new laws that are enacted will be accepted by the general public. Ideally, the process of establishing laws should be open to everybody. Although environmental conflicts can't always be resolved peacefully, they can be controlled so that Kenya doesn't experience the previous spike in hostilities over disputes over who gets to access and uses whose environmental resources. Only the right situations can benefit from ADR. To make it successful in the face of the continuously growing environmental conflicts, it is necessary to enhance the current institutional and legal framework for the resolution of environmental conflicts. Institutions like the National Environmental Management Authority (NEMA), other institutions included in the Environmental Management and Coordination Act (EMCA), the Judiciary, etc., can be extremely important in Kenya's management of environmental conflicts. To be able to operate efficiently and have an impact on the ground, such institutions require support and good management. The domestic justice systems did little while Kenya witnessed post-election violence in 2008.

It was necessary to bring in a mediator from outside Kenya to resolve the disagreement using ADR techniques. Kenya could take notes from other countries that have successfully handled

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<sup>41</sup> Susan Hazen (1998), *supra*.

<sup>42</sup> Constitution of Kenya, Article 69(1) (d).

<sup>43</sup> These concepts have been defined under S. 2 of the EMCA to mean (i) that the present generation should ensure that in exercising its right to beneficial use of the environment the health, diversity and productivity of the environment is maintained or enhanced for the benefit of future generations and, ii) that all people within the present generation have the right to benefit equally from the exploitation of the environment, and that they have a equal entitlement to a clean and healthy environment.

environmental problems by integrating their institutional and legislative frameworks with ADR principles. We may improve our conflict resolution capacities by learning from such nations.

#### **4. Conclusion**

The goal of this paper was to examine the Kenyan legal and institutional framework for resolving environmental disputes in greater detail in order to determine its effectiveness. It is obvious that the framework confronts significant difficulties, and environmental issues continue to show themselves in violent confrontations that result in the loss of lives and means of subsistence. Environmental disputes that go uncontrolled make sustainable development impossible. Kenya's framework for resolving environmental conflicts is deficient and in urgent need of revision. Due to the numerous flaws in the current institutional and legal system, environmental disputes continue to have a detrimental impact on Kenyans. In the Kenyan context, ADR has not been extensively utilised. As a result, the environmental sector seldom makes use of factors like cost effectiveness, party autonomy and flexibility. With its beneficial qualities, including as its participatory aspect, ADR may be used to handle environmental problems and make sure Kenyans achieve sustainable development. To guarantee the swift resolution of environmental conflicts, a connection between ADR and those issues must be made. Kenya does not have a good system in place for resolving environmental conflicts. The above-mentioned reform actions can be implemented in order to make the current framework more effective. In certain countries, like Uganda, arranging conferences is a requirement of the legal process, and parties cannot file a lawsuit without appearing in front of a magistrate or the court's registrar. The judicial officer hears both sides' arguments at this point and attempts to determine if it is necessary to file a lawsuit or if the parties can resolve their disagreement via discussion.

The judge here supports negotiations and potential resolutions, and only permits topics or situations that cannot be resolved to be filed as lawsuits. The Court-Annexed Mediation in Kenya is a step in the right direction and should be supported fully and rolled out across the country's judicial stations.<sup>44</sup>

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<sup>44</sup> Mburu, K., 2022. Kericho Law Courts Roll Out Court annexed Mediation – Kenya News Agency. [online] Kenyanews.go.ke. Available at: &lt;<https://www.kenyanews.go.ke/kericho-law-courts-roll-out-court-annexed-mediation/>&gt; [Accessed 9 September 2022]; Mauri Aluda, Maurice. “Judiciary Rolls-out Court Annexed Mediation

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In human interactions, environmental conflicts are unavoidable, just like all other types of conflicts. If they are not controlled, however, they have a tendency to turn into disputes that damage relationships between people or groups and result in unintended costs. The utmost possible use of ADR should be used to resolve environmental disputes because it is a realistic option. Given its numerous drawbacks and difficulties, ADR cannot be the solution to every environmental issue. In the environmental sector, ADR is worthwhile to use, nevertheless. In order to minimize or at least manage environmental disputes and guarantee Kenya reaches its aim of sustainable development, the advantages arising from ADR processes should be properly utilized in the Kenyan context. In order to manage a conflict, the parties involved must acknowledge that the issue at hand affects both sides, participate in dialogue with specific objectives in mind, rely on credible evidence, and be conscious of trade-offs.<sup>45</sup> Of concern is the way environmental governance is carried out, without adequate participation by the people. Environmental democracy which involves giving people access to information on environmental rights, easing access to justice in environmental matters and enabling public participation in environmental decision making, *inter alia*, is at its minimum in Kenya.<sup>46</sup>

Alternative Dispute Resolution (ADR) methods, which include mediation, conciliation, negotiation and traditional/community based dispute resolution mechanisms, are yet to be fully utilized to realise the elusive tranquility that comes with equitable resource sharing between communities, which is much sought after. Therefore, the author herein urges stakeholders to explore the possibilities and opportunities that ADR mechanisms present in realising the goal of

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<sup>45</sup> Redpath, S.M., Young, J., Evely, A., Adams, W.M., Sutherland, W.J., Whitehouse, A., Amar, A., Lambert, R.A., Linnell, J.D., Watt, A. and Gutierrez, R.J., ‘Understanding and Managing Conservation Conflicts’ (2013) 28 Trends in Ecology & Evolution 100 <<https://www.sciencedirect.com/science/article/pii/S0169534712002169>> accessed 19 August 2022.

<sup>46</sup> See generally, Susan Hazen, Environmental Democracy, (<<http://www.ourplanet.com>>). Accessed on 16 August 2022; Csaba Kiss and Michael Ewing (eds), “Environmental Democracy: An Assessment of Access to Information, Participation in Decision-making and Access to Justice in Environmental Matters in Selected European Countries.” European Regional Report (published by The Access Initiative Europe.) available at <http://www.accessinitiative.org> accessed on 16 August 2022.

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resolving or managing environmental conflicts in Kenya. While it is already acknowledged that ADR may not provide a full solution to the problem, it can however be used in tandem with other existing dispute resolution mechanisms and with certain reform measures in place, the nightmare of ugly environmental conflicts in Kenya may be avoided. Environmental conflict management institutions and approaches should be designed in a way that ensures equal access to justice and creation of peaceful societies through effective and swift elimination of conflicts. This is why this paper advocates for exploration of both formal and informal approaches in management of environmental conflicts due to their close association with people's livelihoods and the risks involved.

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