

# Realizing Environmental Justice through Litigation

---

**Kariuki Muigua**

## **Table of Contents**

Abstract.....	3
1.0 Introduction .....	4
2.0 Case Law on Environmental Justice in Kenya.....	10
3.0 Realizing Environmental Justice through Litigation: Prospects and Challenges .....	19
4.0 Conclusion .....	22
References .....	23

## Realizing Environmental Justice through Litigation

Kariuki Muigua\*

### Abstract

*The paper critically appraises the role of litigation in realizing Environmental Justice in Kenya. It examines relevant case law on Environmental Justice and the jurisprudence that has emanated from courts on the same. The paper highlights and discusses the principles of Environmental Justice that have been upheld by courts through litigation. The paper further explores the prospects and challenges of litigation as a tool of realizing Environmental Justice and proposes the way forward.*

---

\* PhD in Law (Nrb), FCI Arb (Chartered Arbitrator), LL. B (Hons) Nrb, LL.M (Environmental Law) Nrb; Dip. In Law (KSL); FCPS (K); Dip. in Arbitration (UK); MKIM; Mediator; Consultant: Lead expert EIA/EA NEMA; BSI ISO/IEC 27001:2005 ISMS Lead Auditor/ Implementer; ESG Consultant; Advocate of the High Court of Kenya; Senior Lecturer at the University of Nairobi, Faculty of Law; Member of the Permanent Court of Arbitration (PCA) [July, 2023].

## 1.0 Introduction

Environmental Justice means the right to have access to natural resources; not to suffer disproportionately from environmental policies, laws and regulations; and the right to environmental information, participation and involvement in decision-making<sup>1</sup>. It has also been defined as the fair treatment and meaningful involvement of all people regardless of race, color, national origin, or income with respect to the development, implementation, and enforcement of environmental laws, regulations, and policies<sup>2</sup>. Environmental Justice is attained when every person enjoys the same degree of protection from environmental and health hazards and has access to the decision-making process to have a healthy environment<sup>3</sup>. Environmental Justice thus seeks to address distributive inequity, lack of recognition, disenfranchisement and exclusion in environmental matters<sup>4</sup>.

Environmental Justice raises several concerns regarding equality, equity and fairness in environmental matters<sup>5</sup>. These include intra and intergenerational equity in the environmental context, including the realization that degradation of environmental conditions has been mostly led by industrialized countries, and its impacts more acutely experienced by developing countries which contributed the least to such degradation;<sup>6</sup> Distributive environmental justice which is the notion that environmental benefits and burdens should be distributed fairly and in a way that does not contribute toward further marginalization of vulnerable groups, from both intra and intergenerational

---

<sup>1</sup> Ako. R., 'Resource Exploitation and Environmental Justice: the Nigerian Experience' Available at <https://www.elgaronline.com/display/edcoll/9781848446793/9781848446793.00011.xml> (Accessed on 24/07/2023)

<sup>2</sup> United States Environmental Protection Agency; 'Environmental Justice.' Available at <https://www.epa.gov/environmentaljustice> (Accessed on 24/07/2023)

<sup>3</sup> Ibid

<sup>4</sup> Schlosberg. D & Collins. L., 'From Environmental to Climate Justice: Climate Change and the Discourse of Environmental Justice.' WIREs Clim Change 2014

<sup>5</sup> Ibid

<sup>6</sup> United Nations Development Programme., 'Environmental Justice: Securing Our Right to a Clean, Healthy and Sustainable Environment.' Available at <https://www.undp.org/publications/environmental-justice-securing-our-right-clean-healthy-and-sustainable-environment> (Accessed on 24/07/2023)

perspectives, within and among nations; corrective justice for environmental harm, including compensation mechanisms, access to justice and effective remedy, and legal empowerment;<sup>7</sup> procedural fairness in environmental issues, requiring open, transparent and inclusive decision making, and access to information at national and international levels; the idea of justice for the environment, as something to be protected in its own right;<sup>8</sup> and the consideration of sustainability as a condition for justice, an idea that presupposes that although justice is primarily a human-centric concept, it must be viewed in a context of ecological sustainability given the interdependence between man and nature<sup>9</sup>. Environmental Justice seeks to achieve the ideal of access, participation and procedural justice in environmental decision making<sup>10</sup>. Environmental Justice is a key pillar of Sustainable Development<sup>11</sup>. It highlights the plight of vulnerable people and communities who bear the most burden when it comes to environmental damage and seeks to give them a voice through access to environmental information and participation in environmental decision making in order to ensure sustainable and equitable development<sup>12</sup>.

The United Nations 2030 Agenda for Sustainable Development and its Sustainable Development Goals recognize the environment as an essential pillar of sustainability and sets out several measures towards its protection and conservation<sup>13</sup>. It further envisages both anthropocentric and ecocentric<sup>14</sup> approaches towards Environmental Justice by

---

<sup>7</sup> Ibid

<sup>8</sup> Ibid

<sup>9</sup> United Nations Development Programme., 'Environmental Justice: Securing Our Right to a Clean, Healthy and Sustainable Environment.' Op Cit

<sup>10</sup> Schlosberg. D & Collins. L., 'From Environmental to Climate Justice: Climate Change and the Discourse of Environmental Justice.' Op Cit

<sup>11</sup> United States Environmental Protection Agency; 'Environmental Justice.' Op Cit

<sup>12</sup> Muigua. K., Wamukoya. D., & Kariuki. F., 'Natural Resources and Environmental Justice in Kenya.' Glenwood Publishers Limited, 2015

<sup>13</sup> United Nations., 'Transforming Our World: The 2030 Agenda for Sustainable Development.' Available at

<https://sustainabledevelopment.un.org/content/documents/21252030%20Agenda%20for%20Sustainable%20Development%20web.pdf> (Accessed on 24/07/2023)

<sup>14</sup> Muigua. K., 'Nurturing Our Environment for Sustainable Development.' Glenwood Publishers Limited, 2016

seeking to achieve goals such as ensuring availability and sustainable management of water and sanitation for all; ensuring access to affordable, reliable, sustainable and modern energy for all; taking urgent action to combat climate change and its impacts; ensuring the conservation and sustainable use of the oceans, seas and marine resources; protecting, restoring and promoting sustainable use of terrestrial ecosystems, sustainably manage forests, combat desertification, and halting and reversing land degradation biodiversity loss and promoting access to justice<sup>15</sup>. The Sustainable Development Goals thus envisage attainment of human rights and environmental conservation which are key concerns in the Environmental Justice debate<sup>16</sup>.

Further, the *Rio Declaration on Environment and Development*<sup>17</sup> succinctly captures the key elements of Environmental Justice. It stipulates as follows:

*'Environmental issues are best handled with the participation of all concerned citizens, at the relevant level. At the national level, each individual shall have appropriate access to information concerning the environment that is held by public authorities, including information on hazardous materials and activities in their communities, and the opportunity to participate in decision-making processes. States shall facilitate and encourage public awareness and participation by making information widely available. Effective access to judicial and administrative proceedings, including redress and remedy, shall be provided (emphasis added)<sup>18</sup>.'*

The Declaration thus contains the critical components that are germane in promoting Environmental Justice which are access to information, public participation and access to justice in environmental matters<sup>19</sup>.

---

<sup>15</sup> Ibid

<sup>16</sup> Menton. M et al., 'Environmental Justice and the SDGs: From Synergies to Gaps and Contradictions.' *Sustainability Science*, No. 15 of 2020

<sup>17</sup> United Nations General Assembly., 'Report of the United Nations Conference on Environment and Development: Rio Declaration on Environment and Development.' A/CONF. 151/26 (Vol.1)

<sup>18</sup> Ibid, Principle 10

<sup>19</sup> Muigua. K., Wamukoya. D., & Kariuki. F., 'Natural Resources and Environmental Justice in Kenya.' Op Cit

Environmental Justice has also been captured under the legal framework in Kenya. The Constitution of Kenya enshrines Sustainable Development as among the national values and principles of governance<sup>20</sup>. Fostering Sustainable Development is one of the ways of achieving Environmental Justice<sup>21</sup>. The Constitution further sets out the right to a clean and healthy environment<sup>22</sup>. It has been argued that this right entails procedural elements such as access to information, public participation, and access to justice or effective remedies which are vital components in the Environmental Justice discourse<sup>23</sup>. Further, the Constitution sets out several obligations of the state in respect of the environment including ensuring sustainable exploitation, utilization, management and conservation of the environment and natural resources, and ensure the equitable sharing of the accruing benefits; the need encourage public participation in the management, protection and conservation of the environment; establishing systems of environmental impact assessment, environmental audit and monitoring of the environment and eliminating processes and activities that are likely to endanger the environment<sup>24</sup>.

It has been asserted that courts through litigation can play a fundamental role in safeguarding environmental rights in Kenya and fostering Environmental Justice<sup>25</sup>. The Constitution of Kenya also recognizes the role of litigation in enforcement of environmental rights. It allows a person alleging the denial, infringement or violation or of the right to a clean and healthy environment to apply to a court for redress in addition to any other legal remedies that are available<sup>26</sup>. The *Environmental Management and Co-*

---

<sup>20</sup> Constitution of Kenya, 2010., Article 10 (2) (d), Government Printer, Nairobi

<sup>21</sup> United Nations Development Programme., 'Environmental Justice: Securing Our Right to a Clean, Healthy and Sustainable Environment.' Op Cit

<sup>22</sup> Constitution of Kenya, 2010., Article 42

<sup>23</sup> Muigua. K., 'Recognising a Human Right to Safe, Healthy and Sustainable Environment.' Available at <http://kmco.co.ke/wp-content/uploads/2021/04/Recognising-a-Human-Right-to-Safe-Healthy-andSustainable-Environment-Kariuki-Muigua-1st-April-2021.pdf> (Accessed on 24/07/2023)

<sup>24</sup> Constitution of Kenya, 2010., Article 69

<sup>25</sup> Muigua. K., 'The Role of Courts in Safeguarding Environmental Rights in Kenya: A Critical Appraisal.' Available at <http://kmco.co.ke/wp-content/uploads/2019/01/The-Role-of-Courts-in-Safeguarding-Environmental-Rights-in-Kenya-A-Critical-Appraisal-Kariuki-Muigua-17th-January-2019-1.pdf> (Accessed on 24/07/2023)

<sup>26</sup> Ibid, Article 70

*ordination Act (EMCA)*<sup>27</sup> further upholds the role of litigation in fostering Environmental Justice. The Act stipulates that if a person alleges that the right to a clean and healthy environment has been, is being or is likely to be denied, violated, infringed or threatened, that person may on his behalf or on behalf of a group or class of persons, members of an association or in the public interest may apply to the Environment and Land Court for redress<sup>28</sup>. The Act empowers the Environment and Land Court to make certain orders towards realizing Environmental Justice including an order to prevent, stop or discontinue any act or omission deleterious to the environment; an order to compel the persons responsible for the environmental degradation to restore the degraded environment as far as practicable to its immediate condition prior to the damage and an order of compensation<sup>29</sup>. While exercising its jurisdiction to foster Environmental Justice, the Act also mandates the Environment and Land Court to be guided by the principles of Sustainable Development including the principle of public participation in the development of policies, plans and processes for the management of the environment; the principles of intergenerational and intragenerational equity; the polluter-pays principle; and the pre-cautionary principle<sup>30</sup>. EMCA further establishes the National Environment Tribunal which is a key body in promoting Environmental Justice in Kenya<sup>31</sup>. The Tribunal is vested with jurisdiction to hear and determine appeals concerning certain matters including the grant or refusal of grant of a licence or permit under EMCA; imposition of any condition, limitation or restriction on a licence; revocation, suspension or variation of a licence and appeals from the decisions of the Director-General, the Authority or Committees of the Authority or its agents<sup>32</sup>. EMCA empowers the National Environment Tribunal to make certain orders towards realizing

---

<sup>27</sup> Environmental Management and Co-ordination Act, No. 8 of 1999, Government Printer, Nairobi

<sup>28</sup> Ibid, S 3 (3)

<sup>29</sup> Ibid

<sup>30</sup> Ibid, S 3 (5)

<sup>31</sup> Ibid, S 125

<sup>32</sup> Ibid, S 129 (1) & (2)



Environmental Justice including confirming, setting aside or varying the order or decision in question and orders to enhance the principles of Sustainable Development<sup>33</sup>.

In addition, the *Environment and Land Court Act* establishes the Environment and Land Court 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 among other matters<sup>34</sup>. While exercising its jurisdiction, the Act mandates the Environment and Land Court to be guided by several tenets that are key in realizing Environmental Justice including the principles of Sustainable Development such as the principle of public participation; the polluter-pays principle and the pre-cautionary principle<sup>35</sup>.

Litigation is thus key in realizing Environmental Justice in Kenya. Through litigation, the jurisdiction of courts and tribunals such as the Environment and Land Court and the National Environment Tribunal can be used to enhance Environmental Justice in Kenya. The paper critically appraises the role of litigation in realizing Environmental Justice in Kenya. It examines relevant case law on Environmental Justice and the jurisprudence that has emanated from courts on the same. The paper highlights and discusses the principles of Environmental Justice that have been upheld by courts through litigation. The discourse further covers the prospects and challenges of litigation as a tool of realizing Environmental Justice and proposes the way forward.

---

<sup>33</sup> Ibid, S 129 (3)

<sup>34</sup> Environment and Land Court Act, No. 19 of 2011, S 13 (2) (a)

<sup>35</sup> Ibid, S 18 (a)

## 2.0 Case Law on Environmental Justice in Kenya

Courts in Kenya have on several occasions had to adjudicate upon matters concerning Environmental Justice as a result of litigation. In *Peter K. Waweru -vs- Republic*<sup>36</sup>, the applicants and the interested parties were charged with the offence of discharging raw sewage into a public water source and the environment contrary to Section 118 (e) of the Public Health Act, Chapter 242, Laws of Kenya. The court had to consider several issues including whether the applicants were properly charged in the criminal proceedings and whether courts had a role in fostering Sustainable Development. The court reiterated the sacrosanct nature of the right to a clean environment and decided that the right is primary to all creatures including man, and is inherent from the act of creation, the recent restatement in the statutes and the Constitutions of the world notwithstanding<sup>37</sup>. The Court further reiterated the position of Section 3 of EMCA which requires that courts take into account certain universal principles when determining environment cases<sup>38</sup>. 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<sup>39</sup>. It therefore reiterated that courts had and still have a role in promoting Sustainable Development. In this case, the Court considered certain principles of Sustainable development including the precautionary principle; the polluter pays principle; and the public trust principle<sup>40</sup>. The court thus decided that a development that threatens life is not sustainable and ought to be halted<sup>41</sup>.

The Court also stated that environmental crimes under the Water Act<sup>42</sup>, Public Health Act<sup>43</sup> 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

---

<sup>36</sup> Peter K. Waweru -vs- Republic, Miscellaneous Civil Application, 118 of 2004, (2006) eKLR

<sup>37</sup> Ibid

<sup>38</sup> Ibid

<sup>39</sup> Ibid

<sup>40</sup> Ibid

<sup>41</sup> Ibid

<sup>42</sup> Water Act, No. 8 of 2002 Laws of Kenya (Repealed)

<sup>43</sup> Public Health Act, Cap 242 Laws of Kenya

environment has to be tackled from all sides and by every person<sup>44</sup>. The decision is key in realizing Environmental Justice in Kenya by upholding the role of courts in promoting the Sustainable Development; recognizing the nexus between the right to life and the right to a clean environment and the need to punish environmental crimes.

Environmental Justice matters were also considered by the Environment and Land Court in the case of *Friends of Lake Turkana Trust vs Attorney General & 2 others*<sup>45</sup>. The case emanated from a Memorandum of Understanding entered into by the Government of Kenya and Government of Ethiopia in the year 2006 for the purchase of 500 MW of electricity from Gibe III as well as an \$800 million grid connection between Ethiopia and Kenya. The petitioner argued that the Government of Kenya failed to conduct a full, proper and thorough Impact Assessment on the potential environmental effects of the construction and operation of Gibe III dam<sup>46</sup>. The petitioner also contended that the project will have severe environmental impacts on Lake Turkana hence the communities will be adversely affected<sup>47</sup>. The petitioner sought several orders including an order of mandamus compelling the Government of Kenya and the Kenya Power and Lighting Company Limited to make full and complete disclosures of each and every agreement or arrangement entered into or made with the Government of Ethiopia and an order of prohibition strictly enjoining and prohibiting the Government of Kenya and the Kenya Power and Lighting Company Limited from entering into further agreements and/or making further arrangements with the Government of Ethiopia in relation to the project<sup>48</sup>.

The court partly allowed the petition and pronounced itself on several principles of Environmental Justice including access to information and public participation. The court decided that the state is a custodian of the environment and natural resources and is under certain duties and obligations including ensuring that there is public participation

---

<sup>44</sup> Ibid

<sup>45</sup> *Friends of Lake Turkana Trust vs Attorney General & 2 others.*, ELC Suit No. 825 of 2012, (2014) eKLR

<sup>46</sup> Ibid

<sup>47</sup> Ibid

<sup>48</sup> Ibid

in the sustainable management, protection and conservation of the environment<sup>49</sup>. The court further decided that access to environmental information is a prerequisite to effective public participation in decision-making and to monitoring governmental and private sector activities on the environment<sup>50</sup>. It also determined that it is now an accepted principle in international law that such access to environmental information is necessary to meet the goals of Sustainable Development as envisaged by principle 10 of the Rio Declaration on Environment and Development, 1992<sup>51</sup>. The court thus directed the Respondents to make full and complete disclosure to the Petitioner of each and every agreement or arrangement entered into or made with the Government of Ethiopia (including its parastatals) relating to the proposed purchase of electricity from Ethiopia and/or the Gibe III project including, but not limited to, the Memorandum of Understanding signed in 2006 and to take the necessary steps and measures to ensure that the natural resources of Lake Turkana are sustainably managed, utilized and conserved in any engagement with, and in any agreements entered into or made with the Government of Ethiopia (including its parastatals) relating to the purchase of electricity<sup>52</sup>. The decision is important in fostering Environmental Justice in Kenya by upholding the principles of access to information and public participation.

Further, Environmental Justice principles were examined in the case of *KM & 9 others v Attorney General & 7 others*<sup>53</sup> (Owino-Uhuru case). The case involved pollution from a lead acid batteries recycling factory that produced toxic waste resulting in several concerns in the neighbouring Owino-Uhuru village including deaths, soil and water pollution. The Court found that the acts of pollution from the lead acid batteries recycling factory had resulted in violation of the Petitioner's rights to their personal life, the environment where they stayed and the water which they consumed<sup>54</sup>. It decided that Petitioners

---

<sup>49</sup> Ibid

<sup>50</sup> Ibid

<sup>51</sup> Ibid

<sup>52</sup> Ibid

<sup>53</sup> *KM & 9 others v Attorney General & 7 others*, Petition No. 1 of 2016 (2020) eKLR,

<sup>54</sup> Ibid

suffered individually through inhalation/absorption of pollutants from factory and that further the environment where they lived (Owino-Uhuru Settlement) was affected as there was evidence of soil and water pollution<sup>55</sup>. On this basis, the court decided that the Petitioners were entitled to compensation as envisaged by Principle 13 of the Rio Declaration which imposes an obligation on the state to develop law regarding liability and compensation for victims of pollution<sup>56</sup>. It proceeded to award the Petitioners damages in the sum of Kshs. 1.3 Billion. It also directed the Respondents to clean-up the soil, water and remove any wastes deposited within the settlement<sup>57</sup>. The case is essential in the Environmental Justice debate in Kenya since it gives prominence to the concepts of access to justice and access to remedies including compensation in cases of environmental pollution<sup>58</sup>. The decision of the Environment and Land Court as regards quantum has since been modified by the Court of Appeal in the case of *National Environment Management Authority -vs- Kelvin Musyoka & Others*<sup>59</sup>. The Court of Appeal however reiterated the Environment Justice principles enunciated by the Environment and Land Court and directed the National Environment Management Authority to identify the extent of contamination and pollution caused by the operations of Metal Refinery EPZ Ltd as the Owino-Uhuru Settlement, remove any contamination and pollution in the affected areas of Owino-Uhuru Settlement, restore the environment of Owino-Uhuru Settlement and its ecosystem and to periodically report every 3 months to the Environment and Land Court at Mombasa on the progress made in this regard, and for any consequent directions, until the satisfactory completion of the restoration<sup>60</sup>.

---

<sup>55</sup> Ibid

<sup>56</sup> Ibid

<sup>57</sup> Ibid

<sup>58</sup> Ibid

<sup>59</sup> *National Environment Management Authority -vs- Kelvin Musyoka & Others*<sup>59</sup>, Mombasa Civil Appeal No. E004 of 2020.

<sup>60</sup> Ibid

The case of *Mohamed Ali Baadi and others -vs- Attorney General & 11 others*<sup>61</sup> (LAPSSET projet case) also involved Environmental Justice issues in Kenya including public participation. The case involved the design and implementation of the Lamu Port-South Sudan-Ethiopia-Transport Corridor project ("the LAPSSET Project"). The Petitioners claimed that the LAPSSET Project will have far reaching environmental effects adverse to them and the marine ecosystem of the Lamu region in terms of the destruction of the mangrove forests, discharge of industrial effluents into the environment, and effects of the fish species and marine life<sup>62</sup>. The Petitioners contended that implementation of the LAPSSET project will violate statutory and constitutional principles and values among them Sustainable Development, transparency, public participation, accountability and their constitutional rights to earn a livelihood, a clean and healthy environment, cultural rights and the right to information<sup>63</sup>. The court found that the public was not adequately involved in the project as required and that further the Petitioners' rights of access to information had been violated.

The Court in its decision considered the concept of Environmental Democracy and decided that it is a term that reflects increasing recognition that environmental issues must be addressed by all, or at-least a majority of those affected by their outcome, not just by the minority comprising the governments and leading private-sector actors<sup>64</sup>. It determined that access to environmental information and justice for all those who choose to participate in such decision-making is integral to the concept of environmental democracy<sup>65</sup>. The court observed that public participation is a fundamental principle of environmental governance as espoused by Principles 10 and 22 of the Rio Declaration on Environment and Development<sup>66</sup>. In respect of access to information, the Court pronounced itself that the rights of citizens in relation to environmental matters to

---

<sup>61</sup> *Mohamed Ali Baadi and others -vs- Attorney General & 11 Others*, Petition No. 22 of 2012 (2018) eKLR

<sup>62</sup> *Ibid*

<sup>63</sup> *Ibid*

<sup>64</sup> *Ibid*

<sup>65</sup> *Ibid*

<sup>66</sup> *Ibid*

information, public participation, and access to justice are indispensable to foster Sustainable Development<sup>67</sup>. It further decided that citizens must not only have access to information but must also be entitled to participate in decision-making and have access to justice in environmental matters<sup>68</sup>.

The court further reiterated the fundamental nature of the right to a clean and healthy environment and stated that courts have a solemn duty to enforce this right in the context of environmental harms<sup>69</sup>. The court allowed the petition and delicately fashioned the reliefs to appropriately respond and remedy the specific violations of the law affecting the Petitioners as well as ensure the proper, lawful implementation of the Project. The court directed the project proponents of the LAPSSET Project to fashion an effective programme of public participation by the local community in Lamu County during the conceptualization and implementation of the LAPSSET Project and its various individual components that includes adequate notification, education and information, review and reaction and, finally, consultation, dialogue and interaction with the local population who will be affected by the Project. It also directed the project proponents to craft a demonstrably effective programme to disseminate information on the LAPSSET Project and, specifically those aspects affecting Lamu County, to the Petitioners<sup>70</sup>. It also ordered the project proponents to fully comply with the mitigation measures they had identified in the Environmental and Social Impact Assessment (ESIA) Report as approved by the National Environment Management Authority (NEMA) in order to foster the right to a clean and healthy environment. The decision thus upholds the principles of public participation, access to information and environmental democracy that are vital in promoting environmental justice.

---

<sup>67</sup> Mohamed Ali Baadi and others -vs- Attorney General & 11 Others, Op Cit

<sup>68</sup> Ibid

<sup>69</sup> Ibid

<sup>70</sup> Ibid

Environmental Justice principles were also enunciated in the case of *Mui Coal Basin Local Community & 15 others -vs- Permanent Secretary Ministry of Energy & 17 others*<sup>71</sup>. The case concerned coal exploration in the Mui Basin that covers parts of Mwingi East, Mwingi Central, Mutitu and Kitui Central sub-counties of Kitui County with the aim of establishing the existence of commercially viable coal deposits in the region<sup>72</sup>. The petitioners contended that there was contravention of articles 10 and 35 of the Constitution in the award of the tender to explore, exploit and develop the Mui Coal Basin Blocks since the process was conducted in a manner devoid of public participation as envisaged in the Constitution and that further, the Petitioners' right of access to information was infringed<sup>73</sup>. They further argued that there was a threat to the right to a clean and healthy environment stipulated under article 42 of the Constitution and the right to health set out under article 43 of the Constitution from the effects of coal mining<sup>74</sup>. The court upheld the principle of public participation and decided that it is paramount in environmental governance and ought to be taken into account in the implementation of the project<sup>75</sup>. On the right to a clean and healthy environment, the court emphasized that there is need to balance, on the one hand, exploitation of natural resources so that they spur economic development and on the other hand, sustainable use and management of natural resources so that they do not generate unsustainable levels of pollution or waste or unjustified adverse effects on the health of humans<sup>76</sup>. The court upheld the role of the precautionary principle towards this end. The court directed the Respondents to continue to engaging with the local community and provide reasonable opportunities for public participation during the process of preparing an Environmental

---

<sup>71</sup> *Mui Coal Basin Local Community & 15 others -vs- Permanent Secretary Ministry of Energy & 17 others*, Constitutional Petition No. 305 of 2012, (2015) eKLR

<sup>72</sup> Ibid

<sup>73</sup> Ibid

<sup>74</sup> Ibid

<sup>75</sup> Ibid

<sup>76</sup> Ibid



Impact Assessment and the process of Resettlement as outlined in the Benefits Sharing Agreement<sup>77</sup>.

Further, Environmental Justice matters were addressed by the National Environment Tribunal in its decision in *Save Lamu & 5 others -vs- National Environmental Management Authority (NEMA) & another*<sup>78</sup>. The case concerned the intended setting up of a 1050 MW coal fired power plant in Lamu to be built, owned and operated by Amu Power Company Limited<sup>79</sup>. Save Lamu, a community based organisation representing the interests and welfare of Lamu, challenged the project on several grounds among them being that there was insufficient scoping process that lacked proper public participation; that there would be adverse effects on the marine environment through the discharge of thermal effluent into the marine environment by using poor and outdated cooling system; that the intended project would result in climate change concerns thus inconsistent with Kenya's low carbon development commitment and that the project lacked sound mitigation measures<sup>80</sup>. It sought to have the Environmental Impact Assessment (EIA) licence in respect of the project set aside and a fresh EIA study be conducted based on specific and current information involving all stakeholders<sup>81</sup>.

The Tribunal found that the EIA licence was granted in a manner devoid of public participation<sup>82</sup>. It determined that public participation in an EIA Study process is the oxygen by which the EIA study and the report are given life<sup>83</sup>. The Tribunal further decided that access to information for the persons affected is important for meaningful participation by citizens and motivates them to participate in decision and policymaking processes in an informed manner as it seeks to take into account the community's and

---

<sup>77</sup> Mui Coal Basin Local Community & 15 others -vs- Permanent Secretary Ministry of Energy & 17 others, Op Cit

<sup>78</sup> *Save Lamu & 5 others -vs- National Environmental Management Authority (NEMA) & Another*, Tribunal Appeal No. NET 196 of 2016, (2019)eKLR\*The matter has been appealed at the ELC.

<sup>79</sup> Ibid

<sup>80</sup> Ibid

<sup>81</sup> Ibid

<sup>82</sup> Ibid

<sup>83</sup> Ibid

different stakeholders concerns<sup>84</sup>. The Tribunal allowed the appeal and set aside the decision of NEMA to issue an EIA licence to Amu Power Company Limited<sup>85</sup>. It further directed Amu Power Company Limited to undertake a fresh EIA study that complies with the law including the requirements of public participation and access to information<sup>86</sup>. This decision promotes the principles of Environmental Justice including public participation and access to information.

Finally, Environmental Justice ideas were also upheld by the National Environment Tribunal in the case of *Greenbelt Movement & 4 others -vs- National Environmental Management Authority & another; Kenya National Highways Authority (Interested Party)*.<sup>87</sup> The appellants challenged the EIA licence issued to China Road and Bridge Corporation for the construction of the proposed Nairobi Expressway on several grounds among them being that the EIA Study Report failed to include the cumulative impacts of the project, such as the effect of increasing the vehicular capacity in the city of Nairobi, the impact of the increased vehicle capacity on the greenhouse gas emissions, the impacts on the surrounding green spaces, and the role of these and other impacts on Kenya's climate change mitigation goals<sup>88</sup>. They further contended that the process leading to the issuance of the EIA licence had failed to meet the threshold of public participation<sup>89</sup>. They sought to have the EIA licence set aside. The Tribunal found that the project adhered to the requirements of public participation, however it determined that it required an analysis of the impacts on the climate since motor vehicles are known to be emitters of greenhouse gases<sup>90</sup>. Despite not cancelling the EIA licence, the Tribunal made orders for the preservation of the environment and for Sustainable Development as empowered under

---

<sup>84</sup> Save Lamu & 5 others -vs- National Environmental Management Authority (NEMA) & Another, Op Cit

<sup>85</sup> Ibid

<sup>86</sup> Ibid

<sup>87</sup> *Greenbelt Movement & 4 others -vs- National Environmental Management Authority & another; Kenya National Highways Authority (Interested Party)*, Tribunal Appeal No. 19 of 2020, (2023) KENET (24) KLR

<sup>88</sup> Ibid

<sup>89</sup> Ibid

<sup>90</sup> Ibid

section 129(3) (c) of EMCA and directed China Road and Bridge Corporation to carry out and complete a climate change analysis for the project<sup>91</sup>. The decision thus upholds the principle of Sustainable Development through climate change mitigation which are pertinent matters in Environmental Justice.

The foregoing discussion demonstrates that litigation has aided in realizing Environmental Justice in Kenya. Through litigation, courts have pronounced themselves and upheld the principles of Environmental Justice including public participation, access to information, access to justice, access to remedies, environmental democracy and Sustainable Development. Litigation could thus be a viable tool of realizing Environmental Justice in Kenya. However, the use of litigation in realizing Environmental Justice could also raise several concerns.

### **3.0 Realizing Environmental Justice through Litigation: Prospects and Challenges**

It has been pointed out that litigation has the potential of safeguarding environmental rights in Kenya<sup>92</sup>. Indeed, the Constitution of Kenya allows the use of litigation to enforce environmental rights. To this end, it provides that a person who alleges violation, infringement or denial of the right to a clean and healthy environment may apply to a court for redress in addition to any other legal remedies that are available in respect to the same matter<sup>93</sup>. The role of litigation in realizing Environmental Justice is further enhanced by measures such as allowing every person to access to justice through public interest litigation and by assigning courts special roles in protecting environmental rights<sup>94</sup>. Litigation initiatives such as public interest litigation can foster Environmental

---

<sup>91</sup> Ibid

<sup>92</sup> Muigua. K., & Kariuki. F., 'Safeguarding Environmental Rights in Kenya.' Available at <http://kmco.co.ke/wp-content/uploads/2018/08/A-Paper-on-Safeguarding-Environmental-Rights-in-Kenya.pdf> (Accessed on 25/07/2023)

<sup>93</sup> Constitution of Kenya, 2010, Article 70 (1)

<sup>94</sup> Ibid

Justice in Kenya<sup>95</sup>. This was affirmed in the case of *Joseph Leboo & 2 others -vs- Director Kenya Forest Services & another*<sup>96</sup> where the court held as follows:

*'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 (emphasis added).'*'

Litigation can thus aid in realizing Environmental Justice through practices such as public interest litigation. However, despite the viability of litigation in promoting Environmental Justice, several challenges may hinder its efficacy towards this end. It has been argued that litigation can hinder access to justice due to many unfavourable factors such high court filing fees, bureaucracy, complex legal procedures, illiteracy, distance from formal courts, backlog of cases in courts and lack of legal knowhow<sup>97</sup>. In the context of environmental disputes, shortcomings of litigation such as high costs and delay in determination of disputes can result in Environmental Justice concerns such as the

---

<sup>95</sup> Muigua. K., 'The Role of Courts in Safeguarding Environmental Rights in Kenya: A Critical Appraisal.' Op Cit

<sup>96</sup> *Joseph Leboo & 2 others -vs- Director Kenya Forest Services & another*, ELC No. 273 of 2013, (2013) eKLR

<sup>97</sup> Ojwang. J.B , "The Role of the Judiciary in Promoting Environmental Compliance and Sustainable Development," 1 *Kenya Law Review Journal* 19 (2007), pp. 19-29: 29

inability to access remedies and prolonged instances of pollution<sup>98</sup>. There is need to address these concerns in order to enhance the viability of litigation as a tool of realizing Environmental Justice.

In order to foster Environmental Justice through litigation, there is need to enhance practices such as public interest litigation which have the ability to foster Environmental Justice<sup>99</sup>. In addition, it is imperative to address the issue of costs especially in public interest litigation in order to enhance access to justice in environmental matters<sup>100</sup>. Further, courts should promote expeditious management of environmental disputes in order to foster Environmental Justice. Timely administrative and judicial procedures have a major importance in ensuring proper environmental protection<sup>101</sup>. Courts should also continue fostering Environmental Justice by rendering sound decisions which promote and protect environmental rights as well as enhance the realization Sustainable Development<sup>102</sup>. Through these measures, the role of litigation in realizing Environmental Justice in Kenya will be enhanced.

---

<sup>98</sup> Dilay. A et al., 'Environmental Justice in India: A Case Study of Environmental Impact Assessment, Community Engagement and Public Interest Litigation.' Available at [https://www.researchgate.net/profile/Ariane-Dilay2/publication/332891421\\_Environmental\\_justice\\_in\\_India\\_a\\_case\\_study\\_of\\_environmental\\_impact\\_assessment\\_community\\_engagement\\_and\\_public\\_interest\\_litigation/links/5ee23be9a6fdcc73be703fcb/Environmental-justice-in-India-a-case-study-of-environmental-impact-assessment-community-engagement-and-public-interest-litigation.pdf](https://www.researchgate.net/profile/Ariane-Dilay2/publication/332891421_Environmental_justice_in_India_a_case_study_of_environmental_impact_assessment_community_engagement_and_public_interest_litigation/links/5ee23be9a6fdcc73be703fcb/Environmental-justice-in-India-a-case-study-of-environmental-impact-assessment-community-engagement-and-public-interest-litigation.pdf) (Accessed on 25/07/2023)

<sup>99</sup> Sang. B., 'Tending Towards Greater Eco-Protection in Kenya: Public Interest Environmental Litigation and its Prospects Within the New Constitutional Order.' *Journal of African Law*, Volume 57, No. 1 of 2013.

<sup>100</sup> United Nations Economic Commission for Europe., 'Access to Justice in Environmental Matters: Standing, Costs and Available Remedies.' Available at [https://unece.org/DAM/env/pp/a.to.j/AnalyticalStudies/SEE\\_Access2Justice\\_Study\\_Final\\_logos.pdf](https://unece.org/DAM/env/pp/a.to.j/AnalyticalStudies/SEE_Access2Justice_Study_Final_logos.pdf) (Accessed on 25/07/2023)

<sup>101</sup> Ibid

<sup>102</sup> Muigua. K., 'The Role of Courts in Safeguarding Environmental Rights in Kenya: A Critical Appraisal.' Op Cit

#### 4.0 Conclusion

Environmental Justice is a fundamental concept in the Sustainable Development agenda<sup>103</sup>. Environmental Justice seeks to achieve the ideal of access, participation and procedural justice in environmental decision making<sup>104</sup>. It has been observed that litigation is key in realizing Environmental Justice in Kenya<sup>105</sup>. Through litigation, the jurisdiction of courts and tribunals such as the Environment and Land Court and the National Environment Tribunal can be used to enhance Environmental Justice in Kenya. Consequently, through litigation judicial bodies have upheld Environmental Justice principles in Kenya such as public participation, access to information, access to justice, access to remedies, environmental democracy and Sustainable Development<sup>106</sup>. However, concerns in litigation such high court filing fees, bureaucracy, complex legal procedures, illiteracy, distance from formal courts, backlog of cases in courts and lack of legal knowhow can hinder its viability in enhancing Environmental Justice<sup>107</sup>. There is need to foster public interest litigation, address the issue of costs in litigation, facilitate expeditious management of environmental disputes and promote Sustainable Development<sup>108</sup>. Through these measures, the viability of litigation in promoting Environmental Justice will be enhanced. Realizing Environmental Justice through litigation is attainable.

---

<sup>103</sup> United Nations Development Programme., 'Environmental Justice: Securing Our Right to a Clean, Healthy and Sustainable Environment.' Op Cit

<sup>104</sup> Schlosberg. D & Collins. L., 'From Environmental to Climate Justice: Climate Change and the Discourse of Environmental Justice.' Op Cit

<sup>105</sup> Muigua. K., 'The Role of Courts in Safeguarding Environmental Rights in Kenya: A Critical Appraisal.' Op Cit

<sup>106</sup> See for example the cases of KM & 9 others v Attorney General & 7 others (Owino-Uhuru case); Mohamed Ali Baadi and others -vs- Attorney General & 11 others (LAPSSET projet case); Mui Coal Basin Local Community & 15 others -vs- Permanent Secretary Ministry of Energy & 17 others; and Save Lamu & 5 others -vs- National Environmental Management Authority (NEMA) & another

<sup>107</sup> Ojwang. J.B, "The Role of the Judiciary in Promoting Environmental Compliance and Sustainable Development," 1 Kenya Law Review Journal 19 (2007), pp. 19-29: 29

<sup>108</sup> United Nations Economic Commission for Europe., 'Access to Justice in Environmental Matters: Standing, Costs and Available Remedies.' Op Cit

## References

Ako. R., 'Resource Exploitation and Environmental Justice: the Nigerian Experience'

Available at

<https://www.elgaronline.com/display/edcoll/9781848446793/9781848446793.00011.xml>

Constitution of Kenya, 2010., Government Printer, Nairobi

Dilay. A et al., 'Environmental Justice in India: A Case Study of Environmental Impact Assessment, Community Engagement and Public Interest Litigation.' Available at

[https://www.researchgate.net/profile/ArianeDilay2/publication/332891421\\_Environmental\\_justice\\_in\\_India\\_a\\_case\\_study\\_of\\_environmental\\_impact\\_assessment\\_community\\_engagement\\_and\\_public\\_interest\\_litigation/links/5ee23be9a6fdcc73be703fcb/Environmental-justice-in-India-a-case-study-of-environmental-impact-assessment-community-engagement-and-public-interest-litigation.pdf](https://www.researchgate.net/profile/ArianeDilay2/publication/332891421_Environmental_justice_in_India_a_case_study_of_environmental_impact_assessment_community_engagement_and_public_interest_litigation/links/5ee23be9a6fdcc73be703fcb/Environmental-justice-in-India-a-case-study-of-environmental-impact-assessment-community-engagement-and-public-interest-litigation.pdf)

Environment and Land Court Act, No. 19 of 2011, Government Printer, Nairobi

Environmental Management and Co-ordination Act, No. 8 of 1999, Government Printer, Nairobi

Friends of Lake Turkana Trust vs Attorney General & 2 others., ELC Suit No. 825 of 2012, (2014) eKLR

Greenbelt Movement & 4 others -vs- National Environmental Management Authority & another; Kenya National Highways Authority (Interested Party), Tribunal Appeal No. 19 of 2020, (2023) KENET (24) KLR

Joseph Leboo & 2 others -vs- Director Kenya Forest Services & another, ELC No. 273 of 2013, (2013) eKLR

KM & 9 others v Attorney General & 7 others, Petition No. 1 of 2016 (2020) eKLR

Menton. M et al., 'Environmental Justice and the SDGs: From Synergies to Gaps and Contradictions.' *Sustainability Science*, No. 15 of 2020

Mohamed Ali Baadi and others -vs- Attorney General & 11 Others, Petition No. 22 of 2012 (2018) eKLR

Mui Coal Basin Local Community & 15 others -vs- Permanent Secretary Ministry of Energy & 17 others, Constitutional Petition No. 305 of 2012, (2015) eKLR

Muigua. K., & Kariuki. F., 'Safeguarding Environmental Rights in Kenya.' Available at <http://kmco.co.ke/wp-content/uploads/2018/08/A-Paper-on-Safeguarding-Environmental-Rights-in-Kenya.pdf>

Muigua. K., 'Nurturing Our Environment for Sustainable Development.' Glenwood Publishers Limited, 2016

Muigua. K., 'Recognising a Human Right to Safe, Healthy and Sustainable Environment.' Available at <http://kmco.co.ke/wpcontent/uploads/2021/04/Recognising-a-Human-Right-to-Safe-Healthy-andSustainable-Environment-Kariuki-Muigua-1st-April-2021.pdf>

Muigua. K., 'The Role of Courts in Safeguarding Environmental Rights in Kenya: A Critical Appraisal.' Available at <http://kmco.co.ke/wp-content/uploads/2019/01/The-Role-of-Courts-in-Safeguarding-Environmental-Rights-in-Kenya-A-Critical-Appraisal-Kariuki-Muigua-17th-January-2019-1.pdf>

Muigua. K., Wamukoya. D., & Kariuki. F., 'Natural Resources and Environmental Justice in Kenya.' Glenwood Publishers Limited, 2015

National Environment Management Authority -vs- Kelvin Musyoka & Others, Mombasa Civil Appeal No. E004 of 2020

Ojwang. J.B , "The Role of the Judiciary in Promoting Environmental Compliance and Sustainable Development," 1 *Kenya Law Review Journal* 19 (2007), pp. 19-29: 29

Peter K. Waweru -vs- Republic, Miscellaneous Civil Application, 118 of 2004, (2006) eKLR

Public Health Act, Cap 242 Laws of Kenya



Sang. B., 'Tending Towards Greater Eco-Protection in Kenya: Public Interest Environmental Litigation and its Prospects Within the New Constitutional Order.' *Journal of African Law*, Volume 57, No. 1 of 2013.

Save Lamu & 5 others -vs- National Environmental Management Authority (NEMA) & Another, Tribunal Appeal No. NET 196 of 2016, (2019) eKLR

Schlosberg. D & Collins. L., 'From Environmental to Climate Justice: Climate Change and the Discourse of Environmental Justice.' WIREs Clim Change 2014

United Nations Development Programme., 'Environmental Justice: Securing Our Right to a Clean, Healthy and Sustainable Environment.' Available at <https://www.undp.org/publications/environmental-justice-securing-our-right-clean-healthy-and-sustainable-environment>

United Nations Economic Commission for Europe., 'Access to Justice in Environmental Matters: Standing, Costs and Available Remedies.' Available at [https://unece.org/DAM/env/pp/a.to.j/AnalyticalStudies/SEE\\_Access2Justice\\_Study\\_Final\\_logos.pdf](https://unece.org/DAM/env/pp/a.to.j/AnalyticalStudies/SEE_Access2Justice_Study_Final_logos.pdf)

United Nations General Assembly., 'Report of the United Nations Conference on Environment and Development: Rio Declaration on Environment and Development.' A/CONF. 151/26 (Vol.1)

United Nations., 'Transforming Our World: The 2030 Agenda for Sustainable Development.' Available at <https://sustainabledevelopment.un.org/content/documents/21252030%20Agenda%20for%20Sustainable%20Development%20web.pdf>

United States Environmental Protection Agency; 'Environmental Justice.' Available at <https://www.epa.gov/environmentaljustice>

Water Act, No. 8 of 2002 Laws of Kenya (Repealed)