

ENVIRONMENTAL CONFLICT MANAGEMENT IN THE KENYAN CONTEXT - ENHANCING THE USE OF ALTERNATIVE DISPUTE RESOLUTION MECHANISMS¹

1.0 ABSTRACT.

In this paper, the author grapples with the issue of how to effectively manage or resolve environmental conflicts through the use of Alternative Dispute Resolution in Kenya.

“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 Acts², The National Environmental Management Authority³, Public Complaints Committee, Environmental Tribunal and other various informal community based resource governance bodies.⁴

The laws include the numerous statutes that deal with the environment. Notable among them is the framework law, the Environmental Management and Coordination Act (EMCA)⁵, the Public Health Act⁶, the Forest Act⁷, the Water Act⁸ and the various statutes dealing with land⁹. Despite the

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² They include the Land Disputes Tribunal established under the Land Disputes Tribunal Act 1990, the Provincial Land Appeals Board and Central Land Appeals Board under the Land Control Act (Cap 302) etcetera.

³ Established under S.7 of the EMCA (Cap 8 of 1999)

⁴ Some communities like the Meru, Maasai, Giriama etcetera still have councils of elders who sit and resolve disputes that erupt within their respective communities.

⁵ Cap. 8 of 1999.

⁶ Cap. 242 laws of Kenya.

⁷ Cap 7 of 2005.

⁸ Cap. 8 of 2002.

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.¹⁰

Resolving environmental conflicts has mainly been attempted under the institutional and legal framework described hereinabove. Alternative Dispute Resolution has not been adequately utilized in the arena of the environment. 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.

The paper seeks to explore and critically examine the question whether the existing legal and institutional framework for the resolution of environmental conflicts is sufficient to effectively deal with the conflicts aforesaid.

ADR methods have the advantages of being cost effective, expeditious, informal and participatory. Parties retain a degree of control and relationships can be preserved. What opportunities can these ADR methods offer in the area of conflict resolution within the environmental field? The paper also critically looks at the challenges faced by the legal and institutional framework for the resolution of environmental conflicts. To what extent can the challenges be addressed through the use of ADR?

The paper looks at Environmental Conflicts in Kenya generally and explores how these can be resolved through the use of ADR. Environmental conflicts are unique and require being resolved expeditiously. The resources of the environment occur within the space where people live. Their livelihoods depend on environmental resources. Left unchecked, environmental conflicts can degenerate into violence, loss of livelihoods, displacements and even loss of life.

⁹ Government Lands Act (Cap 280), Registration of Titles Act (Cap 281), Land Titles Act (Cap 282), Land Consolidation Act (Cap 283), Land Adjudication Act (Cap 284), Land Acquisition Act (Cap 295), Registered Land Act (Cap 300) and the Land Control Act (Cap 302).

¹⁰ 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.”

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.

The paper is an attempt to link environmental conflicts with ADR and see what opportunities emerge to aid in dispute resolution and sound environmental governance. The paper is premised on the hypothesis that Kenya lacks an effective legal and institutional framework for the resolution of environmental conflicts. Further, ADR which is expeditious, cost effective, participatory and all inclusive can be used to manage environmental conflicts and ensure that Kenyans achieve sustainable development.

The paper contains suggestions for reform of the dispute resolution mechanisms in Kenya. It is hoped then that contents thereof will be used to enrich, albeit to a small extent, the vision 2030 strategy for Kenya.

2.0 Background

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 mechanism for resolving environmental conflicts include the courts of law both under civil and criminal law¹¹, the National Environmental Tribunal (NET)¹², Public Complaints Committee (PCC)¹³, Arbitral tribunals¹⁴, Statutory tribunals set up under various laws (such as the Land Adjudication Boards)¹⁵ and customary law systems of dispute resolution¹⁶

¹¹ Environmental Management and Co-ordination Act, Act. No. 8 of 1999, Part XIII Section 137-146

¹² *Ibid*, Part. XII sections 125-136

¹³ *Ibid.*, section 31

¹⁴ These are mainly established under Arbitration Act, Act. No. 4 of 1995

¹⁵ Established under Land Adjudication Act, Cap. 284, Laws of Kenya

Some of these dispute resolution mechanisms have not been very effective in resolving or managing environmental conflicts. Courts, for instance, are formal, inflexible, bureaucratic and expensive to access. They address strict legal rights rather than the interest of the parties. 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.¹⁷

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.¹⁸

There is on the other hand what is commonly referred to as Alternative Dispute Resolution (ADR) methods. They include mediation, conciliation, negotiation and traditional/community based dispute resolution mechanisms. These are yet to be fully utilised to realise the elusive tranquillity that comes with equitable resource sharing between communities, which is much sought after.

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 ADR mechanisms present in realising the goal of resolving or managing environmental conflicts in Kenya.

¹⁶ Patricia Kameri-Mbote, Towards greater Access to Justice in Environmental Disputes in Kenya: Opportunities for Intervention, IELRC Working 2005-1, available at <http://www.ielrc.org/content/w0501.pdf> <last accessed on 01/08/2008>

¹⁷ For instance, the Registered Land Act (Cap. 300) provides for sanctity of title under Sections 27 & 28. The provisions therein are to the effect that when a person is registered as the proprietor of land, absolute ownership is vested in him and that title shall not be defeated except as by law provided. Thus, when a person acquires title to land that was occupied by other persons without title, this breeds conflict between the two interested persons or group of persons as they fight to control or access the resource.

¹⁸ See generally, Dr Susan Hazen, Environmental Democracy, (<<http://www.ourplanet.com>>). Accessed on 16th 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 18th February 2009.

3.0 CONCEPTUAL CLARIFICATIONS

3.1 Conflicts.

The word conflict has been defined as a struggle, fight, serious disagreement, argument or controversy.¹⁹ “Conflict is part of dynamic capitalism and an integral part of commercialism...”²⁰

3.2 Environmental Conflicts

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.²¹

3.2 Disputes.

It has been defined as argument, debate, quarrel or controversy.²² Fenn²³ differentiates between conflict and dispute by arguing that disputes develop when conflict is not (or cannot be) managed; dispute, he says, is the unnecessary and dysfunctional element.

3.3 Conflict management.

Fenn says that when it comes to conflict management, the emphasis is on the adage that it must be in all parties interests to avoid disputes by managing conflict in such a way that disputes do not arise; this sometimes is described as dispute avoidance.²⁴

3.4 Dispute resolution.

According to Fenn,²⁵ there must be occasions where the parties have legitimate disputes, the emphasis on the desire to avoid dispute notwithstanding and the techniques of dispute resolution are employed to bring about the conclusion or resolution of the dispute.

¹⁹ Oxford Advanced Learner’s Dictionary, Oxford University Press, 4th edn.

²⁰ Peter Fenn, “Introduction to Civil and Commercial Mediation”, Chartered Institute of Arbitrators Workbook on Mediation, CIARB London, 2002, pg. 8

²¹ Collins H. Khal, States Scarcity and Civil Strife in the Developing World, Princeton University Press, Princeton (New Jersey), 2006.

²² Supra, footnote 20.

²³ Peter Fenn Supra, at page 8.

²⁴ Ibid, pg. 9.

3.5 Environment

The Environmental Management and Coordination Act (EMCA) defines “environment” thus:

“Environment” includes the physical factors of the surroundings of human beings including land, water, atmosphere, climate sound, odour, taste, the biological factors of animals and plants and the social factor of aesthetics and includes both the natural and built environment.²⁶

Dictionaries define “environment” as, ‘the objects or the region surrounding anything’.²⁷

Environment has also been defined as:

The whole complex of climatic, adaptic and biotic factors that act upon an organism or an ecological community and ultimately determine its form or survival; the aggregate of social and cultural conditions that influence the life of an individual or a community.²⁸

Accordingly, the term would seem to encompass both the features and the products of the natural world and human civilization. As such, the environment is broader than but includes ‘nature’ which is concerned only with features of the world itself.²⁹ The parameters of the term “environment” as defined in the Kenyan law are wide and include both the natural and built environment.

3.6 Environmental Management

The term “environmental management” in this paper refers to and includes the protection, conservation and sustainable use of the various elements or components of the environment.³⁰

3.7 Environmental and Natural Resources

“Environmental resources” would therefore include ‘resources of the air, land, flora, fauna and water together with their aesthetical qualities.’³¹ “Natural resources” refers to a subset of

²⁵ Ibid.

²⁶ Act. No. 8 of 1999 Section 2; See also Regulation 2 of the Environmental (Impact Assessment and Audit) Regulations 2003.

²⁷ Compact Oxford Dictionary, 2nd Ed (Oxford University Press, London, 1991), p 523

²⁸ Webster’s New world Dictionary 3rd ed (Cleveland College, Cleveland, 1998) p.454; See P.W. Birnie and A.E Boyle, International Law and The Environment, 2nd Ed, (Oxford, Oxford University Press, 2002) p.3

²⁹ Philippe Sands, Principles of International Environmental Law, 2nd Ed. (Cambridge University Press, Cambridge 2003), p.15

³⁰ EMCA., Section 2

³¹ *Ibid*

environmental resources and include resources of the air, land, water, animals and plants including their aesthetic qualities.³²

4.0 WHY RESOLVE ENVIRONMENTAL CONFLICTS?

Today, environmental conflicts mainly have to do with the interaction between the use of and access to natural resources and factors of human development factors such as population growth and socio-economic advancement.³³ This means that environmental conflicts now, more than ever, impact on use of and access to, and by extension management of natural resources. Environmental conflicts also, indirectly and directly, are connected to and/or impact human development factors and especially the quest for social-economic development. For instance, most environmental conflicts are the as a result of unsustainable use of natural resources in social-economic development activities of the human populations.³⁴

Given the imperative nature of social-economic development and its dependency on use and access of natural resources, environmental conflicts resulting from unsustainable use and inequitable access of environmental resources need to be resolved, if not for anything else, in the interest of attaining sustainable development.

Resolution of environmental conflicts is an important component of the environmental security approach to fostering peace and security among communities and states. Environmental security approach generally advocates adaptation of traditional notions of security (which emphasize countering military threats with military power) to include threats posed by population growth and diminishing quantity and quality of environmental goods and services.³⁵ In essence, this approach makes resolution of environmental conflicts more than just a matter between the parties involved given the likelihood of resolution thereof being a key to national or international peace and security.

³² *Ibid*

³³ Klaus Toepfer, "Forward", in Daniel Schwartz & Ashbindu Singh Environmental conditions, resources and conflicts: An introductory overview and data collection (UNEP, New York, 1999). p.4

³⁴ Examples here include conflicts over extraction of mineral resources which meet opposition because the investors have no adequate mitigation plan in place to reclaim the mined land or a good compensation package for the inhabitants of the subject land. A further example is conflict over human settlement where due to increase in population, human settlement encroaches on vital environmental resources.

³⁵ Daniel Schwartz & Ashbindu Singh, Environmental conditions, resources and conflicts: An introductory overview and data collection (UNEP, New York, 1999).

Environmental conflicts if left unchecked have the potential of tearing the world apart. People have been forced into war over access to water, oil, food crops and minerals. Indeed, maintenance of good environmental conditions including proper resolution of environmental conflicts may hold one of the keys to future peace. In a foreword to a report on Environmental Conditions, Resources and Conflicts, Klaus Toepfer emphasizes this point. According to him, "it is clear that the opportunity for the humankind to combat international and intra-national conflict must be seen in the light of the connection between environmental conditions and resources".³⁶

The mechanisms for resolution of environmental conflicts are the key avenues for access of environmental justice. There is no question that access to environmental justice is one of the main planks of environmental democracy which is crucial for attainment of sustainable development in any country. Environmental democracy is a reflection of the 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.³⁷ In other words, environmental democracy captures the principle of equal rights for all including the public, community groups, advocates, industrial leaders, workers, governments, academics and other professionals to be involved in environmental governance.³⁸ It connotes the right of all whose daily lives are affected by the quality of the environment to participate in environmental decision-making as freely as they do in other public interest matters such as education, health care, finance and government.³⁹

The process of resolving environmental conflicts is an off-shoot of the right to access to environmental justice and by extension, environmental democracy. The right of access to justice is inevitable as it avails the means by which the public challenge application of and implementation of environmental laws and policies.⁴⁰ Access to justice is also the most potent remedy when access to environmental information or public participation have been wrongly denied or are incomplete in

³⁶ *Ibid.*

³⁷ Albert Mumma, Environmental Law in Kenya, A paper presented at the ICJ (K) members conference on "New Frontiers in the Law", held at Nyali Beach Hotel, March 11th to 14th, 1999 p. 6

³⁸ Dr. Susan Hazen (1998), Environmental Democracy, <<http://www.ourplanet.com>> accessed on 25/1/2007 (Susan Hazen is a Director of the Environmental Assistance Divisions, Environmental Protection Agency, Washington DC.).

³⁹ *Ibid.*

⁴⁰ *Ibid.*

that it guarantees citizens the right to seek judicial review to remedy such denial and/or deprivation.⁴¹ The Rio Declaration in principle 10 emphasizes the importance of public participation in environmental management through access to justice thus:

“Environmental issues are best handled with the participation of all concerned citizens, at the relevant level.... Effective access to judicial and administrative proceedings, including redress and remedy, shall be provided.”⁴²

Under Principle 10 of the Rio Declaration the member states are obligated to facilitate the rights of access to information, public participation in decision making and access to justice in environmental matters. The provision of effective avenues for resolution of environmental conflicts is thus far the most practical way of ensuring access to justice, and by extension adhering to public participation principle.

Environmental conflicts have attendant costs and often erupt into disputes, violence, war, and destruction. Firstly, environmental conflicts occasion human costs epitomized by loss of life as a result of violent conflicts, displacements and reduction of individuals' abilities to earn a living among others. Secondly, conflicts have economic costs both as direct consequences of violence and as foregone choices in order to fund the conflict. Conflicts also reduce tourism including eco-tourism which is one of the main sources of capital for environmental conservation projects. Also, conflicts often produce significant environmental degradation and depletion.

It is not easy to justify environmental protection when other immediate concerns exist as a result of the conflict. As a result, environmental damage from accelerated resource extraction may assume severity. The munitions and chemical or biological weapons used in conflicts also lead to long-term damage and pollution of natural resources including land and water. The reduction and/or elimination of these costs is the key justification for resolution of environmental conflicts.

The winner in every instance of successful resolution of environmental conflicts is to a large extent the environment itself. Not infrequently, environmental conflicts have to do with ensuring that

⁴¹ See Migai Akech, “Land, the environment and the courts in Kenya,” A background paper for The Environment and Land Law Reports, February 2006, 1 KLR (E&L) xiv-xxxiv. Also available at <http://www.kenyalaw.org> <last accessed on 01/11/07>

⁴² United Nations Conference on Environment and development, *Rio Declaration on Environment and Development*, Rio de Janeiro, Brazil, 1992. Available at: <http://www.unep.org/Documents.Multilingual/Default.asp?DocumentID=78&ArticleID=1163&l=en> <accessed on 26/07/2008>

environmental resources are used in a sustainable way and not as to result in environmental degradation. As a result, one of the main benefits of resolution of environmental conflicts is that the same implies that the challenged use or access to natural resources is assessed on the scale of sustainability. Effective resolution of conflicts thus impacts on attainment of sustainable use of and access to environmental resources and fosters equitable exploitation of environmental resources is thus guaranteed both for the present and future generations. In other words, resolution of environmental conflicts yields intergenerational and intra-generational equity in exploitation of environmental resources in socio-economic development activities.

Environmental conflicts are delicate as they relate to people's livelihoods. Communities depend heavily on natural resources for their livelihoods. A lot of environmental conflicts relate to the provision of basic needs such as food, water and shelter. For instance, an unresolved wildlife/human conflict may mean that human beings continue to be killed and their crops spoilt by animals leading to misery and human suffering. Similarly, the question of whether a person or community will live to see the next week may well depend on whether they can have access to clean water, pasture for their animals and food for themselves. Resolution of environmental conflicts is thus critical for the survival of the parties as restores and preserves the relationships between the diverse users of environmental resources inter se and/or between environmental resources and the user. Resolution of environmental conflicts also ensures security in terms of a guarantee of continued access to and use of the environmental resources necessary for to survival from generation to generation.

There is a need to enhance the conflict resolution mechanisms already existing for the sake of better environmental governance and sustainable development. The challenges facing the current mechanism and the opportunities for positive change should be examined. It is therefore vital that we look at the existing mechanisms bearing in mind the necessity of resolving environmental conflicts expeditiously.

The resolution of environmental conflicts is important as that it involves the development and interpretation of environmental laws, regulations and policies which is otherwise a very resource-intensive area.⁴³ The input of the conflict resolution fora is hardy in that it helps "declare the complete the scenario of law on the question" at hand. This is necessary as the mere fact that

⁴³ Carl Bruch, Regional Opportunities for improving Environmental Governance Through access Information, Public Participation, and Access to Justice, A paper presented at the 8th Session of the African Ministerial Conference on Environment (AMCEN), Held at Abuja, Nigeria, April 3rd - 6th April, 2000.

Parliament has not specifically made a law on a given question or there is no regulation or policy directly addressing it does not mean that the same should be outside the purview of environmental law and regulation.⁴⁴ It falls on the forum resolving a conflict on the question to interpret the incomplete law, regulation or policy and help clarify or redefine its application and import. Thus resolution of environmental conflicts is justified in that it ensures growth, development, interpretation and improvement of environmental laws, regulations, guidelines and policies in line with the obtaining environmental situations.

Lastly, the process of resolution of environmental conflicts helps in early identification and confrontation of environmental problems.⁴⁵ The environmental disputes finding their way into the conflict resolution framework are critical pointers of the areas that need attention in environmental management and coordination hence the need for their adequate documentation and statistical analysis. The monitoring of the disputes engaging environmental conflicts bodies in the country is an important tool in environmental planning which helps in reducing the reaction time to environmental problems by the relevant authorities.⁴⁶

5.0 CONFLICTS AND CONFLICT MANAGEMENT.

5.1 Definition of Conflicts

Loosely speaking, conflict is present when two or more parties perceive that their interests are incompatible, express hostile attitudes, or take pursue their interests through actions that damage the other parties. In other words, conflict is an expressed struggle between at least two interdependent parties who perceive incompatible goals, scarce resources, and interference from others in achieving their goals.⁴⁷ These parties may be individuals, small or large groups of individual, organizations and even countries.

According to Nicholson, a conflict exists when two people wish to carry out acts which are mutually inconsistent. They may both want to do the same thing, such as eat the same apple, or they may want

⁴⁴ Jackton. B. Ojwang, "The Role of the Judiciary in Promoting Environmental Compliance and Sustainable Development," 1 Kenya Law Review Journal 19 (2007)

⁴⁵ Carl Bruch *Supra*.

⁴⁶ *Ibid*.

⁴⁷ Wilmot & Hocker (2007), Interpersonal Conflict, p.9

to do different things where the different things are mutually incompatible, such as when they both want to stay together but one wants to go to the cinema and the other to stay at home. A conflict is resolved when some mutually compatible set of actions is worked out. The definition of conflict can be extended from individuals to groups (such as states or nations), and more than two parties can be involved in the conflict. The principles remain the same.⁴⁸

Costantino and Merchant⁴⁹ define conflict as the fundamental disagreement between two parties, of which a dispute is one possible outcome. On his part, Douglas Yarn's observes that conflict is a state, rather than a process. According to him, people who have opposing interests, values, or needs are in a state of conflict. However, the conflict may not be acted upon (latent) or manifest, in which case it is brought forward in the form of a dispute or disputing process. In that sense, the author observes that "a conflict can exist without a dispute, but a dispute cannot exist without a conflict."⁵⁰

5.2 Causes of Conflicts

The clash of interests can take many forms. For instance, it could be over resources such as land, food, territory, water, energy sources, and natural resources. Such conflicts range from, to whom the resources should be distributed to, to whether the resources should be distributed and how the distribution should be undertaken. Conflict could also arise over power and control of the resources. There are also conflicts over *identity*. These concern the cultural, social and political communities to which people feel tied. Conflicts over *status* may arise and have to do with whether people believe they are treated with respect and dignity and whether their traditions and social position are respected. In addition, the conflicts could be caused by differences of values, particularly those embodied in systems of government, religion, or ideology.

Scholars have stressed that human needs are among the major causes of Conflicts. John Burton⁵¹ and Herbert Kelman⁵² argue that deep-rooted conflicts are caused by the absence of the fundamental needs of security, identity, respect, safety, and control which many find non-negotiable. As such, if

⁴⁸ M.Nicholson: Rationality and the Analysis of International Conflict. 1992:11

⁴⁹ Costantino, C.A. and Merchant C.S. *Designing Conflict Management Systems: A Guide to Creating Productive and Healthy Organizations*. San Francisco: Jossey-Bass, 1996, pp 4-5

⁵⁰ Douglas H. Yarn, ed. "Conflict" in *Dictionary of Conflict Resolution*, San Francisco: Jossey-Bass 1999, p. 115.

⁵¹ John Burton, *Conflict: Human Needs Theory* (New York: St. Martin's Press), 1990.

⁵² Herbert Kelman, *International Behavior: A Social Psychological Analysis* (New York: Holt, Rinehart and Winston), 1965.

they are absent, the resulting conflict will remain intractable until the structure of society is changed to provide such needs to all.

For instance, the need for identity has been described as a fundamental driver of intractable conflict.⁵³ Threats to identities often invite very negative responses from people who see the same as a way of protecting their essence. Identity conflicts in particular are not negotiable interest-based conflicts, so if they are approached with interest-based negotiation, the settlements are likely to be temporary, at best.

Conflicts may be classified variously. They could either Latent conflict or manifest, peaceful or manifest, sometimes an observer may believe that parties' interests are incompatible but the respective parties are not aware of these incompatibilities. This may be caused by self-delusion, rationalization, lack of knowledge, or suppressed information. We call such unacknowledged or barely recognized conflicts of interests *latent*. Conflicts become *manifest* when these unacknowledged contrary interests become conscious and voiced.

5.3 Stages of conflict.

Conflicts are considered to occur in cycles or episodes, each of which may be quite short, e.g., a few seconds or minutes. Each episode is influenced by the outcomes of previous episodes and also influences future episodes. The model of a conflict episode has six components or stages. For simplicity, the description below deals with only two individuals in conflict, although the model extension to multiple individuals is direct.

The potential for conflict exists whenever people have different needs, values, or interests; this is the "latent" conflict stage. The conflict may not become apparent until a "triggering event" leads to the emergence (or beginning) of the obvious conflict. Emergence may be followed quickly by settlement or resolution, or it may be followed by escalation, which can become very destructive.

Escalation, however, cannot continue indefinitely. De-escalation can be temporary or can be part of a broader trend toward settlement or resolution. Or escalation may lead to a stalemate, a situation in which neither side can win. If the pain of continuing the conflict exceeds that of maintaining the confrontation, the parties are in what Zartman calls a "hurting stalemate," which often presents an ideal opportunity for negotiation and a potential settlement. Finally, if and when an agreement is

⁵³ Jay Rothman, *Resolving Identity-Based Conflicts* (San Francisco: Jossey Bass), 1997. See also John Paul Lederach, *Building Peace: Sustainable Reconciliation in Divided Societies* (United States Institute of Peace), 1998.

reached, peace building efforts work to repair damaged relationships with the long-term goal of reconciling former opponents.⁵⁴

Some scholars add other phases to this list. For intractable conflict, in particular, Kriesberg adds failed peacemaking efforts after escalation and institutionalization of destructive conflict. This latter stage is closely linked with the hurting stalemate.⁵⁵

5.4 Costs of Conflicts

It goes without saying that conflicts have attendant costs. When conflict cannot be contained in a functional way, it can erupt in violence, war, and destruction. The media reports are replete with examples of costs of conflicts.

Firstly, there are human costs which are epitomized by loss of life and which is the most obvious cost of violent intractable conflict. Other less obvious human costs include displacements; long-term injuries victims suffer from combat, rape, torture and reduced individuals' ability to earn a living. There are also psychological effects as a result of trauma suffered especially in case of violent conflicts. Deep fear, distrust, depression, and sense of hopelessness are also among resultant human costs.

Secondly, conflict has a variety of economic costs both as direct consequence of violence and as foregone choices in order to fund the conflict. There is direct costs e.g. for mounting and sustaining attacks. Then there are also collateral costs such as resultant loss from displaced work force, costs as a result of wasted production time and damaged production units.

Conflict also often produces significant environmental degradation. It is difficult to justify environmental protection when other more immediate concerns exist as a result of the conflict. Therefore, environmental damage from accelerated resource extraction may be severe. Munitions and chemical or biological weapons do long-term damage to the land and well. Conflict also reduces tourism, some of which may have supported eco-tourism efforts.

⁵⁴ Brahm, Eric. "Conflict Stages." *Beyond Intractability*. Eds. Guy Burgess and Heidi Burgess. Conflict Research Consortium, University of Colorado, Boulder. Posted: September 2003
<http://www.beyondintractability.org/essay/conflict_stages/>.

⁵⁵ *Ibid.* Others scholars conceive stages of conflicts differently. Alker, Gurr, and Rupesinghe distinguish between six phases: dispute (equivalent to conflict emergence); crisis (equivalent to escalation); limited violence; massive violence; abatement (equivalent to de-escalation); and settlement. See Rosalia Rodriguez-Garcia, et al. "How Can Health Serve as a Bridge for Peace?" Available online at <http://www.certi.org/publications/policy/gwc-12-a-brief.htm>.

Third, conflict can have continuity costs namely; it can cause damage to ongoing relationships that wrecks the feeling of community in organizations. Fourth, conflict has emotional costs for those involved.⁵⁶

5.5 Benefits of Conflicts?

Conflicts are inevitable and actually have some benefits. They can motive people to needed action and break them out of complacency. Sometimes conflict is necessary to bring an awakening to dysfunctional relationships or behaviour. Conflicts often have concrete material rewards in the form of land, treasure, power, and the like. For example, as a result of the conflict between the African nationalists and the colonial establishment, self-government was achieved. Similarly, the first Gulf War gave the US strategic advantage in the Middle East and influence over the two most important oil states, namely Saudi Arabia and Kuwait.

Conflict can also initiate a process through which individuals realize they have common interests and common enemies. As a result, individuals may come to see a strong stake in their side emerging triumphant. For instance, conflicts over identity issues are seen as a way of maintaining self-esteem. Thus, the more one's identity is tied up in the group, the more likely individuals are to fight for it. The threat produced by conflict often results in stronger self-identities. This can be positive or negative depending on the nature of that identity.

Social interaction also often begins through some form of conflict. For instance, Lawyers network when they find each other at the opposite side of a suit defending the opposite side. Children often first interact when they fight over a toy; this later evolves into cooperative play. Adults too, might meet first in a conflict context and once the dispute is resolved, trust can be gained, and the parties can interact smoothly after that. For instance, employers and trade unions start out at the opposing sides of conflicts.

However, they move to resolve their conflicts which conclude upon signing of recognition agreement and soon, they are both actively involved in promoting the interests of employees. This is also workable as far as the environment is concerned. When communities fight over a resource, they learn to appreciate it and detest its continued lack. This brings them to the table to talk and find solutions to their conflict.

⁵⁶ Kenneth W. Thomas and W. H. Schmidt, "A Survey of Managerial Interests with Respect to Conflict," *Academy of Management Journal*, June 1976.

The benefits of conflicts are often outweighed by the negative effects thereof. While conflicts cannot be avoided, there is a need to effectively manage them so as to ensure harmony amongst people and to prevent violence and loss of lives.

5.6 Factors Shaping the Course of Conflict

There are many factors that determine the emergence, persistence, and even management of conflicts. The understanding of these factors is essential in developing policies that effectively limit and manage conflict. The factors range from internal to relational and contextual factors.⁵⁷

The internal factors are factors that are structural in nature and relate to how the conflicting individuals and/or groups affect the course of a conflict. They include, for example, the level of economic development, cultural patterns, individual interests in the conflicts and decision-making institutions. These factors influence self-conceptions, identities, conceptualization of the grievances, goal formulation, and the methods for attaining the goals. The internal factors affect the level of participation of the parties in conflict management.

The structure of relations between parties to the conflict and the way parties interpret the same may affect the course of the conflict and its management. The relation factors include differences in sizes (group conflicts), economic endowment (resources), coerciveness between the parties, and cultural patterns of conduct. They also include the nature and degree of integration between adversaries in economic, social, and cultural domains. So that a conflict between groups that depend on each other's produce will be easy to manage because each party is feeling the strain of the conflict resulting from scarcity of the produce from the other party.

Conflicts do not occur in vacuum. To a large extent, they are dependent on the context. Their trajectory is affected by a multitude of external factors, of varying scope and impact. A major external factor is the set of other conflicts that are superimposed or impinge upon any particular conflict. External factors also supporting social institutions e.g. conflicts within family set-up are different from those on the tribal scale. The income levels of the parties are also an important external factor to the conflict. In addition, such other matters as technological capabilities underlying communication, travel, and production are important factors to the course of conflicts. Finally, there

⁵⁷ Kriesberg, Louis. "Factors Shaping the Course of Intractable Conflict." *Beyond Intractability*. Eds. Guy Burgess and Heidi Burgess. Conflict Research Consortium, University of Colorado, Boulder. Posted: October 2003
<http://www.beyondintractability.org/essay/factors_shaping_intractable_conflict/>.

are non-social environment issues such as the climate, availability of water and mineral resources, pollution, and land quality.

6.0 ENVIRONMENTAL CONFLICT MANAGEMENT

Environmental conflict management is predicated on the need to avoid disputes. All the parties in dispute take measures, either by themselves or with help of a third party, to ensure that disputes do not arise. In other words, conflict management measures are taken to ensure that conflicts do not degenerate to disputes and may in that context be described as dispute avoidance. However, where dispute avoidance is not immediately achieved or possible, the goal of conflict management becomes to provide interventions that make the conflicts more beneficial and less damaging to the parties.

In other words, environmental conflict management involves attempts to keep a conflict from getting worse. It involves the use of skills to control the intensity of a conflict and its effects through facilitation, negotiation, and other kinds of intervention and institutional measures, as well as diplomacy. Environmental conflict management is distinguished from conflict resolution in that it usually does not address the deep-rooted sources of the conflict.

7.0 METHODS OF MANAGING ENVIRONMENTAL CONFLICTS

Authors in the environmental discourse generally have suggested the various methods that may be used to resolve or at least manage environmental conflicts when they arise. These methods include;

- **Party to party conflict management: Negotiation.**
- **Fighting it out.**
- **Yielding.**
- **Avoidance.**
- **Compromise.**
- **Involving a Third Party: Mediation.**

7.1 Other methods of conflict management

To the list of conflict management efforts involving third parties, one may include litigation and arbitration and the hybrid processes of dispute resolution.

8.0 ADR – THE ATTRIBUTES

8.1 Mediation

Mediation is a voluntary collaborative process where individuals who have a conflict with one another identify issues, develop options, consider alternatives and reach a consensual agreement.⁵⁸ Trained and untrained mediators open communications to resolve differences in a non-adversarial confidential manner.

It can also refer to a private and non-binding form of dispute resolution where an independent third party (neutral) facilitates the parties reaching their own agreement to settle a dispute. It is a structured process where the settlement becomes a legally binding contract.⁵⁹

8.2 Negotiation

This refers to where parties themselves attempt to settle their differences using a range of techniques from concession and compromise to coercion and confrontation.

8.3 Conciliation.

This is a process of mediation where the neutral party proposes a solution.⁶⁰

8.4 Med – Arb.

It is a combination of mediation and arbitration where the parties agree to mediate but if that fails to achieve a settlement, the dispute is referred to arbitration. The same person may act as mediator and arbitrator in this type of arrangement.⁶¹

8.5 Arb – Med

This is the converse of Med – Arb in that parties agree to arbitration and then result to mediation if the conflict is not resolved by arbitration. Here, the same person may step into the shoe of the arbitrator as well or the services of a different person are sought.

⁵⁸ J.G. Merrills, International Dispute settlement, (Cambridge University Press, Cambridge, 1991).

⁵⁹ Peter Fenn Supra, footnote 20 at page 10.

⁶⁰ Ibid.

⁶¹ Ibid.

8.6 Arbitration.

This is a formal, private and binding process where the disputes are resolved by an award made by an independent tribunal (third party or parties, the arbitrator or arbitrators). The tribunal is either agreed by the parties or nominated by a further independent body, e.g. a court or a professional institution such as the Chartered Institute of Arbitrators.⁶²

9.0 ENVIRONMENTAL CONFLICTS AND ADR.

Environmental conflicts are disagreements over access to and use of environmental resources which include natural resources such as water, pasture, land and forests. They involve livelihoods of people. The conflicts if not addressed can escalate into violence, cause environmental degradation and undermine livelihoods.⁶³

Renewable and non renewable natural resources have conflict generating potential. Renewable resources include crop land, fresh water, firewood and fish. Non renewable resources include petroleum and minerals.⁶⁴ According to the University of Toronto's Thomas Homer Dixon, scarcities of agricultural land, forests, fresh water, and fish are those which contribute to the most violence. This can be partly attributed to lack of effective dispute resolution mechanisms that are respected by the people who are involved in the management of the resources aforesaid.

Kenya has seen its own share of environmental conflicts. The Akiwumi report on tribal clashes in Kenya notes that the contribution of the issue of land to violent conflicts in Kenya due to the way land is "treated with fervent sentimentality and sensitivity and in many ways considered explosive."⁶⁵ The report further notes that the emergence of multi-party politics was perceived by many communities as a move to marginalize and dispossess them of land. The multi party politics were thus influenced by tribal considerations with their roots in economic and considerations making it easier to incite politically based tribal violence.

⁶² Ibid, pg 12.

⁶³ 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 .

⁶⁴ Gizewski, P (1997) Environmental Scarcity and Conflict, Toronto, Canadian Security Intelligence Service P. 1.

⁶⁵ A.M. Akiwumi, et al, Report of the Judicial Commission Appointed to Inquire into Tribal Clashes in Kenya, 31st July, 1999.

It is that scenario which provided a fertile ground for exploitation of political ends through ethnic cleansing. The Akiwumi report attributes land clashes that occurred in Kenya in 1992 and 1997 to inequitable allocation of land resources and poor government policies and programmes perceived as favouring some factions at the expense of others. The issues of the use of environmental resources underlie the numerous conflicts that have occurred in Kenya. The post election violence in 2007-08 can be attributed, to a large extent, to contests over access to and use of natural resources in Kenya. These contests have been simmering during the time of colonization when vast tracts of land were alienated to create settlements for white settlers and the Africans were designated to inhabit less productive reserves.

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.⁶⁶

9.1 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. The dispute resolution mechanisms referred to herein as ADR have certain advantages that make them suitable for use in resolution of environmental conflicts. For example, the mechanisms that allow for maximum party autonomy such as negotiation, conciliation and mediation are cost effective flexible, informal and leave room for parties to find their own lasting solutions to problems. They are thus particularly suitable for the resolution of environmental conflicts.

Courts and formal tribunals are sometimes inflexible, bureaucratic and do not foster the maintenance of cordial relations between the parties. Parties come out of the proceedings before such courts and tribunals bitter and discontented. Does ADR carry with it the potential to create “win-win” situations for all parties and expeditiously resolve environmental conflicts? This stands to be tested. However it can be said that the attributes of party autonomy, flexibility, all inclusiveness, informality and acceptability by all parties can be exploited to come up with acceptable solutions to environmental problems.

⁶⁶ Akiwumi, *ibid.*

Kenya resorted to mediation through the Koffi Annan initiative⁶⁷. 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.⁶⁸

10.0 ENVIRONMENTAL CONFLICTS IN KENYA; EXAMPLES AND OPPORTUNITIES THROUGH ADR.

The following are examples of environmental conflicts occurring in Kenya today. The question is to what extent ADR can be used to manage them?

- The government of Kenya in collaboration with some development partners has purposed to establish a sugar-growing project in the fertile Tana Delta in the coast province for bio diesel production. This initiative has met stiff opposition from the residents of the area and a number of politicians as well. The genus of sugarcane that is proposed to be grown there is fast growing, disease resistant and experts project that once the project is wholly operational, the energy shortage in Kenya will be effectively addressed to a large extent.

The locals argue that they were not consulted and that even if they were, they still would not have approved the same in that it is only the government and the multinationals that stood to

⁶⁷ 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.

⁶⁸ Dr Susan Hazen (1998), Environmental Democracy, (<<http://www.ourplanet.com>) accessed on 25th January 2007; Kariuki Muigua, Paul Musyimi; Enhancing Environmental Democracy, Law Society of Kenya Journal Vol 4 2008 No. 1.

gain and not them. The tussle still persists and the country is losing a lot in form of foreign exchange that is applied to fuel imports.⁶⁹

- The Mau forest complex is a source of livelihood for millions of people, not only in Kenya but also in the larger Eastern Africa. It is the source of waters that flow in the Mara region and also feeds the Lake Victoria. It is also the source of the water that flows to the many lakes that sit in the floor of the Central Rift. On its own, the Mau forest supports an entire ecosystem and a major part of the economy of the East African people.

In the early 90's, communities were settled there by the leadership of the day and title deeds to the land were issued. Massive deforestation and acute shortage of water and rainfall were the end result of this invasion of the forest so to speak. The current government, various communities that rely on the Mau and environmentalists have stated categorically that the occupants of Mau forest have to leave as the survival of other communities depends on it. The inhabitants insist that they have title to the land and cannot leave without the government providing them with an alternative settlement. Communities out there insist that the inhabitants must leave and they are ready to use force as their lives depend on it. There is a standoff now and politicians are fuelling an already dire situation.⁷⁰

- The **Solio Ranch case (Gucokaniriria Kihato Traders and Farmers Company Limited v. AG [HCCS 1251 of 2002])** elucidates one long standing environmental dispute. The plaintiffs are a land buying company that was formed in 1970. In 1973, some members of the company went to Nakuru State Lodge to see the late president Kenyatta with the intention of being allotted land which they could buy. Kenyatta allocated them Land Ref. 11571/R and they paid for the same. Two days later, CID officers visited their offices and confiscated the letter of allotment and cash money. The state after several suits in court paid back the money taken from the office with interest but the letter of allotment was never found.

In the last three decades, the Plaintiffs sought the assistance of different governments and a record three heads of state, went to court severally and the dispute stands to date. In the instant civil suit, Lady Justice Aluoch declared in her judgment dated 23rd June 2006, that the Plaintiffs are entitled to obtain a new allotment from the Chief Land Registrar or the Commissioner of Lands.

⁶⁹ Environmental News Services; Sugar for bio fuel to displace Kenya's Tana Delta wildlife, Nairobi Kenya, June 26, 2008 (ENS). Sourced from www.ens-newswire.com/ens/Jun 2008 accessed on 5th March 2009.

⁷⁰ At a forum held at the KICC by the Prime Minister with the M.P's from the affected communities on 16th July 2008, Hon. William Ole Ntimama was quoted as saying that his men had "finished" 600 people and were ready to continue until the invaders left the forest. (Sourced from www.mashanda.com/forums/kenya-2008/83503 accessed on 5th March 2009.

The state subsequently Appealed from this decision and the matter now awaits hearing at the Appellate court.

- Human/wildlife conflicts today have reached levels that require intervention by the government in terms of formulation of appropriate policies to deal with the conflicts and the strengthening of the legal framework. This alone is not enough as even where policy is in place, the conflicts of the resources persist. The Maasai community has coexisted with the wildlife in the greater Mara for generations. The herders and the wild animals had an “understanding of sorts” and there was no friction at all.

In the last few decades, there has been an increase in large scale farming in the in areas around the Mara and heavy human settlement. This has reduced the grazing areas, encroached on wild animals’ habitat and also closed down animal migration corridors. This has brought with it a multifaceted conflict between the herders and the animals on one hand and between the herders and the farmers on the other. Demand for human settlement has also seen an influx on the animal-human conflicts as is the case with the Nairobi National Park and the exploding property Market in Ngong, Kiserian and Rongai areas.⁷¹

The above are just but a few examples of the many environmental conflicts that prevail in our country today. Can ADR resolve these conflicts? ADR as we have seen has the advantages of informality flexibility and speed. It would be possible for instance to get all the stakeholders involved, including communities, government agencies and developers to sit, negotiate and agree on the best way to implement a project.

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.

⁷¹ African Conservation Foundation, Kenya: Human Activity Threatens the Mara. Sourced from www.africanconservation.org accessed on 5th March 2009.

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 enumerated hereinabove. Given the many positive attributes of ADR the experiment may be worth it and may save Kenyan lives and contribute to sustainable development.

11.0 CHALLENGES FACING APPLICATION OF ADR IN ENVIRONMENTAL CONFLICTS

The current legal and institutional framework for environmental management is fragmented in that the various facets of environmental law and policy are divided across different institutions. Despite enactment of the Environmental Management and Coordination Act (EMCA), which was meant to improve management of environmental resources in Kenya, it did nothing to obviate the multiplicity of regulatory frameworks for individual environmental resources in Kenya. In addition, enactment of relevant laws and regulations to bolster the EMCA framework is far from complete.

This multiplicity gives a false sense of sufficiency of laws and institutions to handle environmental conflicts. A proper application of the law via the institutions provided for in this array of laws still leaves a lot unresolved hence the need to revise the EMCA and consolidate all the relevant laws so that it would be easier to judge the effectiveness of the law and institutions above mentioned. Further to the above and to ensure stricter enforcement of environmental standards and regulations, there is need for policy and institutional reforms on environmental governance in Kenya.⁷²

Previously there have been no provisions in the laws for use of ADR mechanisms in resolving or managing environmental conflicts. This means that whatever decisions are made using ADR mechanisms have had no legal basis under the parent Act and thus not treated with reverence like other decisions that are as a result of litigation. This is bound to change because on 4th August 2010, Kenyans ratified the new Constitution.

Under the new Constitution, various dispute resolution mechanisms are spelt out including alternative methods of dispute resolution like mediation and arbitration. Article 159 of the new Constitution provides inter alia that;

⁷² Kenya Vision 2030, p. 104.

(1) Judicial authority is derived from the people and vests in, and shall be exercised by, the courts and tribunals established by or under this constitution.

(2) In exercising judicial authority, the courts and tribunals shall be guided by the following principles-

...

c) Alternative forms of dispute resolution including reconciliation, mediation, arbitration and traditional dispute resolution mechanisms shall be promoted subject to clause 3...

As for the courts and tribunals to be established, Art. 162 (2) of the new Constitution provides inter alia that;

“Parliament shall establish courts with the status of the High Court to hear and determine disputes relating to-

(b) the environment and the use and occupation of, and title to land...”

Further, Art. 169 (1) (d) provides that the subordinate courts are;

“any other court or local tribunal as maybe established by an act of parliament, other than the courts established as required by Art. 162 (2)”

It is the above courts/tribunals and others established by law that are required to exercise their judicial power as per the provisions of Art. 159 above.

It follows then that any decisions that are arrived at by utilising ADR methods will henceforth have the backing of the highest law of the land.

12.0 REFORM MEASURES AND CONCLUSION.

12.1 Reform Measures

There is a need to reform the legal framework in Kenya so as to enhance the use of ADR in the resolution of environmental conflicts. Some key statutes like the EMCA and the Civil Procedure Act need to be amended to recognise ADR and traditional dispute resolution mechanisms to be in conformity with the new Constitution. Such an attempt had been made in a Bill introduced in parliament to amend the Civil Procedure Act so as to incorporate ADR.⁷³ This proposed section was however not enacted by parliament.

⁷³ A proposed Section 59A provided that every suit may be referred to mediation unless otherwise excepted by statute, rule or court order or the suit involves constitutional issues, matters of public policy or has pending applications that seek to dispose the suit in a summary manner or where the trial court considers the case to be unsuitable for referral to mediation. Further, it is proposed to introduce Order XLVB to the Civil Procedure Rules, which provides for mediation

With the new constitutional dispensation however, it is a foregone conclusion that this provision has to be introduced to the Civil Procedure.

Kenyans need to be involved more in environmental decision making. The tenets of environmental democracy, which involve public participation in environmental matters, access to information and access to justice, ought to be enhanced.⁷⁴ The new Constitution has recognised this need and under Art. 69, it provides that the state shall encourage public participation in the management, protection and conservation of the environment.⁷⁵

Public education on environmental matters is necessary if Kenya is to manage its natural resources properly and avoid environmental conflicts. Kenyans should be educated right from the primary school level on how to manage environmental resources sustainably so as to ensure an intergenerational and intragenerational equity⁷⁶ and maintain sustainable development.⁷⁷

Conflict management methods that include ADR should be well explained within the educational context aforesaid. Their respective strengths and weaknesses should be highlighted and noted. The public should be well informed so as to enable them make a decision on the best ADR methods to apply in particular circumstances.

Where law has to be amended or promulgated, it is necessary to engage in the exercise of public consultation and education to ensure acceptability of any new laws that come into place. Law making should ideally be an all inclusive process. Environmental conflicts may not be eliminated but they

under order of a court thus: In every suit instituted in court, a first scheduling and settlement conference shall within thirty days after close of pleadings for the purpose of referring the case to mediation be held and presided over by the mediation coordinator.

⁷⁴ Dr Susan Hazen (1998), *supra*.

⁷⁵ Article 69(1) (d).

⁷⁶ 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.

⁷⁷ Dr Susan Hazen (1998), *supra*.

can be managed in such a way that Kenya avoids the violence that has been witnessed in the recent past⁷⁸ in contests involving access to and use of environmental resources.

ADR can only work in appropriate cases. There is a need to strengthen the existing legal and institutional framework for the resolution of environmental conflicts so as to make it effective in the face of the ever increasing environmental conflicts. Institutions such as the National Environmental Management Authority (NEMA), other institutions under the EMCA, the Judiciary e.t.c, can play a vital role in the management of environmental conflicts in Kenya. Such institutions need support and proper management to enable them function effectively and make a difference on the ground.

When Kenya fought in 2008,⁷⁹ the aforesaid institutions just stood by and watched. It required a mediator from outside Kenya⁸⁰ to come in and apply ADR methods to the conflict. Kenya should learn from other jurisdictions that have combined the legal and institutional frameworks with the tenets of ADR and gone on to manage environmental conflicts effectively.⁸¹ Lessons from such jurisdictions can be used to enhance our dispute resolution capabilities.

12.2 CONCLUSION.

We set out to have a closer look at the legal and institutional framework for the resolution of environmental conflicts in Kenya with a view to establish its efficacy in the resolution of environmental conflicts.

Clearly, the framework faces major challenges and environmental conflicts continue to manifest themselves through violent clashes leading to loss of lives and livelihoods. Sustainable development is not possible in the context of unchecked environmental conflicts.

⁷⁸ Some of the said conflicts include the Mau Forest complex conflict, Amboseli and Mara National Reserve cases, the Tiomin Mining company issue in Kwale among others.

⁷⁹ During the post election violence in the months of January and February 2008. This was as a result of the contested presidential elections of December 2007.

⁸⁰ Kofi Annan, *supra*.

⁸¹ For example Canada where it is provided under Rule 24.1 for Mandatory Mediation under Regulation 194 of the Revised Regulations of Ontario of 1990 made under the courts of Justice Act.

The framework for the resolution of environmental conflicts in Kenya is wanting and is in dire need for reform. Environmental conflicts continue to negatively affect Kenyans owing to the many weaknesses of the present legal and institutional framework.

ADR is not fully utilised in the Kenyan context. Therefore, the attributes of cost effectiveness, party autonomy, flexibility etcetera are hardly taken advantage of in the environmental arena. ADR with its positive attributes which include its participatory nature can be used to manage environmental conflicts and ensure that Kenyans achieve sustainable development. A link between ADR and environmental conflicts must be established so as to ensure expeditious resolution of environmental conflicts. Kenya lacks an effective framework for the resolution of environmental conflicts. It is possible to make the existing framework effective by putting in place reform measures as suggested hereinabove.

In other jurisdictions, for example Uganda, scheduling conferences are a mandatory part of proceedings and litigants cannot file a suit without attending before a magistrate or registrar of the court. At this stage the judicial officer listens to the contentions by both parties and tries to establish whether it is necessary to file a suit or the dispute is one that can be talked out by the parties. The Judicial officer here facilitates the talks and possible settlement and only allows matters or issues that cannot be settled to be filed as suits. This is ADR in operation in the realm of courts and this should be encouraged here in Kenya to ensure that disputes are resolved without necessarily resulting to litigation.

Environmental conflicts, like all other kinds of conflicts, are inevitable in human interactions and if left unmanaged, they tend to degenerate into disputes that ruin the relations between persons or communities and yield undesired costs. The use of ADR in the resolution of environmental conflicts is viable and should be exploited to its fullest. ADR is not a panacea to all the environmental problems as it has many limitations and is also faced with many challenges. However ADR is worth working with in the environmental arena. The benefits accruing from ADR processes should be fully utilised in the Kenyan context to minimise or at least manage environmental conflicts and ensure Kenya realises its goal of sustainable development.

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