

Implementing environmental rights in Kenya's new constitutional order: Prospects and potential challenges

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Summary

Since independence, the process of implementing environmental rights in Kenya has encountered a myriad of challenges. For example, until about a decade ago, the country never had any law or policy specifically designed to address violations of environmental rights. Litigants had to resort generally to the law of contract and tort to redress environmental breaches. Environmental matters were strictly private law affairs that were of less concern to the main branches of public law. Worse still, Kenya's environmental law regime was characterised by the existence of a variety of sectoral laws dealing with specific issues related to environmental conservation, improvement and protection. The promulgation of a new Constitution in August 2010 signifies a paradigm shift in so far as the implementation of environmental rights is concerned. In contrast to its predecessor, the 2010 Constitution of Kenya strengthens the implementation of environmental rights. In particular, it significantly expands the scope of fundamental rights as well as their enforcement mechanisms. The article evaluates how the new Constitution deals with the question of the implementation of environmental rights in Kenya. It reviews the efficacy of both the normative and institutional mechanisms put in place to implement environmental rights. It also highlights the potential challenges to the enforcement of these rights in the country. As a way forward, the article suggests approaches to enhance the effective implementation of these rights.

Key words: *environmental rights; Kenya; 2010 Constitution of Kenya; implementation*

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1 Introduction

On 27 August 2010, Kenya promulgated a new Constitution after a successful national referendum that witnessed overwhelming support for a new constitutional dispensation in the country.¹ Credit can be given to the important step it has taken in elevating environmental protection to significant levels. In contrast to its repealed predecessor, the Constitution dedicates a number of its provisions specifically to environmental rights and their protection.² Most notably, it entrenches environmental protection in the Bill of Rights, something that did not exist in the previous constitutional dispensation.³

Until about a decade ago, the country never had any law or policy specifically designed to address violations of environmental rights. Litigants had to resort generally to the law of contract and tort to redress environmental breaches.⁴ Environmental matters were strictly private law affairs that were of less concern to the main branches of public law.⁵ These were compounded by the fact that the country's environmental law regime was characterised by the existence of a variety of sectoral laws dealing with specific issues of environmental conservation, improvement and protection.⁶ Such a fragmented legal framework made the implementation of environmental rights elusive.⁷ This called for the consolidation of the existing environmental laws with a view to producing a comprehensive legal framework for environmental management and governance that would in turn enhance the enforcement of environmental rights in the country.

The desperate search for a sustainable framework for the effective management of the environment culminated in the enactment of the Environmental Management and Co-ordination Act (EMCA) in 1999.⁸ Although it was largely expected that the enactment of the EMCA would facilitate the realisation of environmental rights in Kenya, this did not happen. Rather unfortunately, the Act turned out to be too weak for such an expectation. The repealed Constitution did not make

1 Kenya National Commission on Human Rights *Making the Bill of Rights operational: Policy, legal and administrative priorities and considerations* (2011) 1.

2 See, eg, chs 4 & 5 of the Constitution. See the Preamble; arts 2(5) & (6) on international law and its relevance; arts 10, 42, 60 & 69-72.

3 B Sang 'Tending towards greater eco-protection in Kenya: Public interest environmental litigation and its prospects within the new constitutional order' (2013) 57 *Journal of African Law* 29-30; art 43 Kenyan Constitution.

4 See JB Ojwang *Environmental law and political change in Kenya* (1992); BD Ogolla 'Environmental management policy and law' (1992) 22 *Environmental Policy and Law* 176.

5 Ogolla (n 4 above) 176.

6 Ogolla (n 4 above). EG Kenya Wildlife Services Act 1989, Water Act 2007 & Forest Act 2005.

7 CO Okidi *Review of the policy framework and legal and institutional arrangement for the management of environment and natural resources in Kenya* (1994) 6-13.

8 Act 8 of 1999.

matters any better as it failed to expressly give credence to environmental rights and their implementation.

Environmental rights were not among the rights listed in chapter V of the repealed Constitution. The said chapter contained a catalogue of human rights. It is worth noting that the enforcement of environmental rights under the previous constitutional dispensation was a herculean task. This was due mainly to the rigidity of the laws that restricted the institution of legal proceedings against violations of rights. The courts also relied heavily on administrative law principles of *locus standi* to stifle the enforcement of environmental rights. This explains why, in several instances, the courts relied overly on common law principles to determine environmental issues. For example, in *Wangari Maathai v Kenya Times Media Trust Ltd*,⁹ the High Court ruled that only the Attorney-General could sue on behalf of the public and, therefore, the plaintiff had no right of action against the defendant. In this case, the High Court relied on administrative law to determine the question of *locus standi*. The enforcement of environmental rights in Kenya, during the existence of the repealed Constitution, was to a large extent based on the common law principles established in the case of *Gouriet v the National Union of Post Office Workers*,¹⁰ where the Court had held:

It was a fundamental principle of English law that public rights could only be asserted in a civil action by the Attorney-General as an officer of the Crown representing the public. Except where statute otherwise provided, a private person could only bring an action to restrain a threatened breach of the law if his claim was based on an allegation that the threatened breach would constitute an infringement of his private rights or would inflict special damage on him.

The High Court of Kenya entrenched this position in many cases involving violations of environmental rights.¹¹ Simply put, a weak constitutional and legal framework was a major drawback to the realisation of environmental rights in the country. With the coming into force of the 2010 Constitution, however, a paradigm shift occurred in the implementation of environmental rights in the country. In contrast to its predecessor, the current Constitution strengthens the implementation of environmental rights as it significantly expands the scope of fundamental rights as well as their enforcement mechanisms.

It is against this background that the article evaluates how the new Constitution deals with the question of the implementation of

9 (1989) 1 KLR (E&L).

10 (1977) 3 All ER 71-72.

11 See, eg, *Wangari Maathai & 2 Others v City Council of Nairobi & 2 Others* (1994) 1 KLR (E&L); *Nairobi Golf Hotels (Kenya) Ltd v Pelican Engineering and Construction Co Ltd* HCCC 706 of 1997; *Rodgers Muema Nzioka & 2 Others v Tiomin Kenya Limited* HCCC 97 of 2001; *Mbole Nzomo Anthony & 3 Others v Shreejii Enterprises Ltd & 4 Others* HC, Civil Suit 265 of 2010; and *Kenya Bus Service Ltd & 2 Others v The Attorney-General & 2 Others* (2005) eKLR.

environmental rights. The second part of the article compares and contrasts the former and current legal frameworks for the implementation of environmental rights in the country, with the aim of indicating how the new Constitution has improved the protection of these rights. In part three, a review of the mechanisms put in place by the 2010 Constitution to implement environmental rights in Kenya is analysed. The fourth part of the article evaluates the potential challenges to the enforcement of these rights. As a way forward, the article suggests approaches to enhance the implementation of environmental rights under the new constitutional order.

2 Environmental rights in Kenya: A review of the legal framework

2.1 Kenya's environmental rights regime prior to the 2010 Constitution

Kenya's current environmental rights regime is a product of prolonged growth over a long period of time. During this period, the regime has experienced not only normative, but also institutional transformation that had a negative and positive impact in an almost equal proportion.

At the end of the twentieth century, the country had approximately 77 statutes dealing with environmental issues.¹² In a way, this was similar to what obtained in the colonial era: Kenya's post-colonial environmental law regime was somewhat obscure and largely scattered in a patchwork of sectoral legislation. Upon attaining independence in 1963, Kenya inherited sectoral laws and institutions established by the British colonial government. These covered a number of sectors, such as forest conservation, wildlife conservation, geology and mining, agriculture, livestock husbandry, water conservation and waste disposal. The country's post-colonial environmental law regime was to be understood from fragmented sectoral laws that purported to deal with environmental conservation, improvement and protection.¹³ These laws were ill-structured to deal with the systemic environmental concerns that faced post-independence Kenya.¹⁴ Notwithstanding this fact, the post-independence state adopted and continued to propagate the sectoral approach inherited from the colonial state. The desire to have a more co-ordinated approach towards the protection and promotion of environmental rights led to an unyielding search for a sustainable

12 C Okidi 'Background to Kenya's framework environmental law' in Okidi (n 7 above) 126.

13 A Angwenyi 'An overview of the Environmental Management and Co-ordination Act' in CO Okidi *et al* (eds) *Environmental governance in Kenya: Implementing the framework law* (2008) 143.

14 P Kameri-Mbote & H Ouedraogo *Partnership for the development of environmental law and institutions in Africa (PADELIA): Evaluation report* (2006) 21.

environmental rights framework. This quest led to the enactment of the EMCA in 1999.¹⁵

For many reasons, there was great anticipation that the enactment of the EMCA would better facilitate the promotion and protection of environmental rights in the country than was the case with the sectoral laws. First, EMCA consolidated power and responsibility for environmental management.¹⁶ Previously, such power and responsibility had been diffused to various government departments, making it difficult to co-ordinate the promotion and protection of environmental rights. Secondly, unlike the sectoral approach, EMCA provided for the sound management and utilisation of natural resources.¹⁷ Thirdly, EMCA provided a focal point from which the policies and activities of the various sectoral bodies dealing with the environment would be regulated and co-ordinated for the harmonised protection of environmental rights.

Kenyan courts almost entirely relied on the rules established in *Gouriet v the National Union of Post Office Workers*¹⁸ to decide environmental cases. This precedent was not accommodative as it barred private persons from bringing to court actions for environmental breaches. In essence, this precedent disenfranchised private persons from instituting proceedings to enforce their rights against real or perceived environmental breaches, because such breaches were perceived as 'public', as opposed to 'private' affairs. It is rather unfortunate that Kenyan courts adopted this skewed position whenever they were called upon to deliberate on environmental concerns. In *Wangari Maathai v Kenya Times Media Trust Ltd*,¹⁹ for example, the court turned a blind eye to the fact that the preservation of a public park is in itself a right of individuals who constitute the entire public. The court should have appreciated the fact that all public rights are also individual or private rights. The plaintiff in this case had applied for orders to restrain the defendant from constructing a multi-storey building in Uhuru Park, Nairobi. It was the plaintiff's case that the proposed construction would adversely affect the city's environment. The court ruled that the plaintiff had no *locus standi* in a public interest matter. Similarly, in *Nairobi Golf Hotels (Kenya) Ltd v Pelican Engineering and Construction Co Ltd*,²⁰ where the applicant had sought a permanent injunction to restrain the defendant from constructing a dam on or across Gathani River, the court ruled that the plaintiff had no *locus standi* since the river belonged to the government.

15 This Act attempted to co-ordinate the management of environmental matters in the country and incorporated international environmental principles such as sustainable development, polluter pays and precautionary principles.

16 Kimeri-Mbote & Ouedraogo (n 14 above).

17 As above.

18 n 10 above.

19 n 9 above.

20 HCCC 706 of 1997.

In *Kenya Bus Service Ltd & 2 Others v The Attorney-General & 2 Others*,²¹ the court held that private individuals could enforce the fundamental rights and freedoms set out in the Bill of Rights of the repealed Constitution only against the state and state organs, but not against another private individual. Thus, it was absolutely untenable for private individuals to enforce their environmental rights during this period.

With the coming into force of the EMCA, however, decisions of courts began to take a slightly different turn as the Act provided for the right to a clean environment.²² Thus, in *Rodgers Muema Nzioka & 2 Others v Tiomin Kenya Limited*,²³ the court granted the applicants an injunction against the mining of titanium in Kwale. The applicants brought the petition on behalf of 'mere ordinary rural farming inhabitants'.²⁴ In granting the injunction, the court held:²⁵

Environmental degradation is not necessarily individual concern or loss but public loss so in a matter of this kind the convenience not only of the parties to the suit, but also of the public at large is to be considered so that if the injunction is not issued it means that any form of feared degradation, danger to health and pollution will be caused to the detriment of the population.

The rulings opened a new frontier for the protection and promotion of environmental rights in Kenya, which frontier was cemented with the coming into force of the new Constitution in 2010.

2.2 Kenya's environmental rights regime in the 2010 Constitution

Kenya's 2010 Constitution, in a marked departure from its predecessor, has deliberately dedicated a number of its provisions to the promotion and protection of environmental rights. Such provisions can be found in chapter IV,²⁶ chapter V,²⁷ chapter X,²⁸ the Fourth Schedule²⁹ and the Fifth Schedule.³⁰ As stated above, the enactment of this Constitution, for various reasons, signals a new dawn to the realisation of environmental rights in the country. First, the Constitution imposes obligations in respect of the environment and outlaws processes and activities likely to endanger the environment.³¹ Secondly, it seeks to protect and promote substantive

21 (2005) eKLR.

22 Environment Management and Control Act of 1999, sec 3.

23 HCCC 97 of 2001.

24 As above.

25 As above.

26 See Constitution of Kenya, ch 4, 'Rights and Fundamental Freedoms'.

27 See Constitution of Kenya, ch 5, 'Environment and Natural Resources'.

28 See Constitution of Kenya, ch 10, 'Judicial Authority and Legal System'.

29 See Constitution of Kenya, Fourth Schedule, 'Distribution of Functions between National and County Governments'.

30 See Constitution of Kenya, Fifth Schedule, 'Legislation to be enacted by Parliament'.

31 Art 69.

environmental rights.³² Thirdly, it provides an avenue for redress of environmental rights breaches.³³ Fourthly, it encourages greater public participation in the enforcement of environmental rights.³⁴ These issues are discussed in detail below.

2.2.1 Obligations in respect of the environment

The 2010 Constitution prescribes obligations that can, to a great extent, facilitate the realisation of environmental rights in the country. Specifically, article 69 sets out certain obligations of both the state and persons in respect of the environment. Obligations accruing to the state include ensuring the sustainable exploitation, utilisation, management and conservation of the environment and natural resources;³⁵ achieving and maintaining a tree cover of at least 10 per cent of Kenyan land;³⁶ protecting and enhancing intellectual property in, and indigenous knowledge of, biodiversity and the genetic resources of the communities;³⁷ encouraging public participation in the management, protection and conservation of the environment;³⁸ protecting genetic resources and biological diversity;³⁹ establishing systems of environmental impact assessment, environmental audit and monitoring of the environment;⁴⁰ eliminating processes and activities that are likely to endanger the environment;⁴¹ and utilising the environment and natural resources for the benefit of the people of Kenya.⁴²

With regard to persons, the Constitution imposes a 'duty to cooperate with the state organs and other persons to protect and conserve the environment and ensure ecologically sustainable development and use of natural resources'.⁴³ It is worth noting that the Constitution defines a 'person' to include 'a company, association or other body of persons, whether incorporated or unincorporated'.⁴⁴ A constructive reading of article 69(2) of the Constitution could, therefore, provide the basis to compel companies to comply with environmental standards as well as to enforce environmental rights.

An in-depth reading of article 69 of the Constitution reveals the deliberate attempt by the drafters of the Constitution to strike a balance between the right to utilise environmental resources, on the

32 Art 42.

33 Art 70.

34 Through devolution. See Fourth Schedule to the Constitution.

35 Art 69(1)(a).

36 Art 69(1)(b).

37 Art 69(1)(c).

38 Art 69(1)(d).

39 Art 69(1)(e).

40 Art 69(1)(f).

41 Art 69(1)(g).

42 Art 69(1)(h).

43 Art 69(2).

44 Art 260.

one hand, and the duty to ensure sustainability of the environment, on the other. Thus, by providing that '[t]he state shall ensure sustainable exploitation, utilisation, management and conservation of the environment and natural resources', article 69(1)(a) seeks to promote the right to utilise environmental resources, while at the same time ensuring environmental sustainability.

Apart from the state and persons, the Constitution also imposes an obligation on parliament to 'enact legislation to give full effect' to the environment and natural resource provisions of the Constitution.⁴⁵ The timeframe for the enactment of such legislation is provided in the Fifth Schedule to the Constitution as 'within four years from the time of promulgation of the Constitution'. At the time of the enactment of the 2010 Constitution, the main environmental legislation was the EMCA.⁴⁶ It is worth noting that the Constitution compels parliament to enact new legislation on the environment. It also demands public participation in the enactment of new laws⁴⁷ that would affect their environmental rights. The 2010 Constitution requires parliament to seek the input of the public before enacting legislation. Previously, legislation in the country was enacted without the input of the public. The need and importance of public participation in the enactment of environmental legislation are discussed comprehensively below.

2.2.2 Substantive environmental rights

Chapter V of the repealed Constitution contained a number of provisions relating to the protection of fundamental rights and freedoms. These entitlements were, however, limited to the traditional civil and political rights and did not expressly encompass other fairly important genres of rights such as environmental rights. Compared to the Bill of Rights in the repealed Constitution, the new Constitution contains provisions that expressly enhance the enforcement of environmental rights.

Article 42 of the Constitution, for example, recognises the right to a clean and healthy environment. This, according to the Constitution, is a two-fold right. First, it is a right to have the environment protected

45 Art 72.

46 Subsidiary legislation enacted to support EMCA includes Environmental Management and Co-ordination (Noise and Excessive Vibration Pollution) Control Regulations of 2009; Environmental Management and Co-ordination (Wetlands, Riverbanks, Lake Shores, and Sea Shore Management) Regulations of 2009; Environmental Management and Co-ordination (Air Quality Standards) Regulations of 2007; Environmental Management and Co-ordination (Controlled Substances) Regulations of 2007; Environmental Management and Co-ordination (Waste Management) Regulations of 2006; Environmental Management and Co-ordination (Water Quality) Regulations of 2006; Environmental Management and Co-ordination, Conservation of Biological Diversity (BD) Regulations of 2006; and Environmental Management and Co-ordination (Fossil Fuel Emission Control) Regulations of 2006.

47 Art 118(b).

for the benefit of present and future generations⁴⁸ and, secondly, it is a right to have obligations relating to the environment fulfilled.⁴⁹ The approach taken by the Constitution on the right is unique in the sense that, by invoking article 70, the Constitution broadens the scope of this right to include 'the right to adequate remedy' for environmental rights breaches. Article 70, thus, provides for the enforcement of environmental rights. More importantly, article 70 does away with need to demonstrate *locus standi* for access to justice. This is because 'an applicant does not have to demonstrate that any person has incurred loss or suffered injury'.⁵⁰

The recognition of the right to a clean and healthy environment in Kenya is not novel as it was initially acknowledged in the EMCA. What is novel, however, is the elevation of this right to constitutional status. Kenya has now joined ranks with a number of other African countries with relatively new constitutions, such as South Africa and Namibia, which entrench environmental rights. This right has in the recent past become very important and relevant to Africa as a whole. The importance culminated after the toxic waste dumping of 1988 in some African countries by international corporations.⁵¹ After discovering the dumping, the former Organisation of African Unity (OAU) took quick action to forestall future occurrences. In the same year, the OAU Council of Ministers passed a resolution condemning the importation of toxic waste to Africa, and emphasised that toxic dumping was a crime against Africa.⁵² This resolution was followed by the adoption of a convention banning the importation of toxic waste into Africa.⁵³ The right was subsequently domesticated by many countries across the continent, including Kenya.

2.2.3 Procedural environmental rights

A novel feature of the new Constitution is its emphasis on public participation in every sphere of government. Specifically, chapter XI provides for a devolved system of government. Article 174(g) enumerates the main objects of this system of government to include ensuring 'equitable sharing of national and local resources throughout Kenya'. The term 'resources' here could be interpreted broadly to

48 Art 42(a).

49 Art 42(b).

50 Art 70(3).

51 See VO Nmehielle *The African human rights system: Its laws, practice and institutions* (2001) 157.

52 OAU Council of Ministers Resolution on Dumping of Nuclear and Industrial Waste in Africa, adopted at Addis Ababa, 23 May 1998. CM/Res 1153 (XLVIII) (1989) 28 *International Legal Materials* 567.

53 Bamako Convention on the Ban of Importation into Africa and the Control of Transboundary Movement and Management of Hazardous Waste Within Africa, concluded at Bamako, 29 January 1991 (1991) 30 *International Legal Materials* 775.

include 'environmental and natural resources'.⁵⁴ Seen from this context, the devolved system of government will be instrumental in the promotion and protection of environmental rights in the country.

Under the devolved system, the Kenyan government is divided into two levels: national and county.⁵⁵ The Fourth Schedule to the Constitution details the distribution of functions between the national and county governments. With regard to the environment, the national government is responsible for

[p]rotection of the environment and natural resources with a view to establishing a durable and sustainable system of development, including, in particular (a) fishing, hunting and gathering; (b) protection of animals and wildlife; (c) water protection, securing sufficient residual water, hydraulic engineering and the safety of dams; and (d) energy policy.

On the other hand, county governments are responsible for the 'implementation of specific national government policies on natural resources and environmental conservation, including (a) soil and water conservation; and (b) forestry'.

The new approach adopted by the Constitution has the potential to enhance public participation in the enforcement of environmental rights simply because the implementation of environmental policies is no longer a preserve of the national government. The approach is also in line with the Convention on Access to Information, Public Participation in Decision Making and Access to Justice in Environmental Matters⁵⁶ and the United Nations (UN) Conference on Environment and Development,⁵⁷ both of which emphasise public participation in environmental decision making.

It is needless to emphasise that public participation in environmental decision making is crucial to the enforcement of environmental rights. This is because the process often involves all the stakeholders in both the formulation and enforcement of environmental policies. At every stage, consultations are usually conducted before decisions are made. During such consultations, awareness is created about the existence of environmental rights and their importance. As a result of such awareness, the enforcement of environmental rights becomes easier and quicker.

54 According to art 260, 'natural resources' means the physical non-human factors and components, whether renewable or non-renewable, including (a) sunlight; (b) surface and ground water; (c) forests, biodiversity and genetic resources; and (d) rocks, minerals, fossil fuels and other sources of energy.

55 Art 1(4) Constitution.

56 See Convention on Access to Information, Public Participation in Decision Making and Access to Justice in Environmental Matters (Aarhus Convention) of 1998, <http://www.unece.org/env/pp/documents/cep43e.pdf> (accessed 2 July 2013).

57 See United Nations Conference on Environment and Development (Rio Conference) of 1992, <http://www.un.org/documents/ga/conf151/aconf15126-1annex1.htm> (accessed 2 July 2013).

3 Mechanisms for the enforcement of environmental rights under the 2010 Constitution

The enforcement of environmental rights in Kenya can be pursued either through the courts or through an administrative action.

3.1 Enforcement through the court system

Through the courts, the enforcement of environmental rights is dealt with under article 70 of the Constitution. Accordingly:⁵⁸

If a person alleges that a right to a clean and healthy environment recognised and protected under article 42 has been, is being or is likely to be, denied, violated, infringed or threatened, the person may apply to a court for redress in addition to any other legal remedies that are available in respect to the same matter.

The Constitution permits the court to make any order or give any directions it considers appropriate.⁵⁹ This may include orders or directions to prevent, stop or discontinue any act or omission that is harmful to the environment; to compel any public officer to take measures to prevent or discontinue any act or omission that is harmful to the environment; or to provide compensation for any victim of a violation of the right to a clean and healthy environment.⁶⁰ The Constitution provides very wide jurisdiction to environmental rights litigants since 'an applicant does not have to demonstrate that any person has incurred loss or suffered injury'.⁶¹

The prioritisation of environmental rights under the new constitutional dispensation is underscored by the fact that a specialised court has been designated to deal with environmental disputes. Article 162(2)(b) of the Constitution mandates parliament to establish courts with the status of a high court 'to hear and determine disputes relating to the environment and the use and occupation of, and title to land'. Giving such a court the status of a high court in itself is significant, as it ensures that the court does not conflict with other institutions dealing with the enforcement of environmental rights, such as the Public Complaints Committee and the National Environment Tribunal.

In accordance with article 162(2)(b) of the Constitution, parliament enacted the Environment and Land Court Act⁶² which establishes the Environment and Land Court. The Court consists of a presiding judge, elected in accordance with article 165(2) of the Constitution⁶³ for a

58 Art 70(1) Constitution of Kenya.

59 Art 70(2).

60 Arts 70(2)(a)-(c).

61 Art 70(3).

62 Sec 4. This Act effectively repealed the Land Disputes Tribunal Act 18 of 1990.

63 Sec 6(1).

non-renewable term of five years,⁶⁴ and such number of judges as may be determined by the Judicial Service Commission (JSC).⁶⁵ The presiding judge has supervisory powers over the Court and reports to the Chief Justice.⁶⁶

The Environment and Land Court has jurisdiction to adjudicate disputes both originally and on appeal, as well as to review decisions of other tribunals in certain instances. Such jurisdiction includes the power to adjudicate disputes for redress of a denial, violation or infringement of, or threat to, rights or fundamental freedoms relating to a clean and healthy environment as provided for under the Constitution.⁶⁷ The Court may also exercise appellate jurisdiction over the decisions of subordinate courts or local tribunals,⁶⁸ such as the National Environmental Tribunal⁶⁹ from which appeals formerly lay with the High Court.⁷⁰ The architects of the Court reserved for alternative dispute resolution a pride of place.⁷¹ Thus, it is within the Court's power to give these mechanisms a chance, especially where these are conditions precedent in the matter before it.

The importance of an effective judiciary in the protection and advancement of environmental rights cannot be over-emphasised. The judiciary plays a vital role in enforcing human rights. It is the institution that is constitutionally designed to be objective, fair and just in applying the law when controversial issues are brought before it. Without a working, independent and competent judicial system, the attainment of the rule of law and the fair administration of justice, which is the cornerstone of protecting, promoting and advancing human rights, becomes elusive. In the area of environmental management, the judiciary has a key role to play, not only in enforcing domestic law, but also in integrating the human rights values set out in international instruments.

In environmental management, the judiciary plays a balancing role between various interests, such as in ensuring that what the present generation values, is spread to the benefit of generations to come. Judicial decisions often help to sustain such values for the benefit of many who are unable to speak for themselves, either because they are not yet born, or because of the many obstacles placed in their way by procedural legal requirements, or in view of inhibiting poverty and other socio-economic factors.

64 Sec 6(2).

65 Sec 5.

66 Sec 6(3). In the absence of the presiding judge or in the event of a vacancy in the office of the presiding judge, the judges of the Court may elect any other judge of the Court to exercise the functions of the presiding judge – sec 6(4).

67 Sec 13(3).

68 Sec 13(4).

69 Established by sec 125 of the Environmental Management and Co-ordination Act, ch 8, 2003.

70 Sec 130 Environmental Management and Co-ordination Act.

71 Sec 20.

Over the last two decades, there has been a dramatic increase in the number of judicial decisions on environmental issues in the country. This is as a result of growing awareness of the link between damage to human health and to the ecosystem by a range of human activities.⁷² Kenya's judiciary has responded to this trend by refashioning sometimes age-old legal tools to meet the demands of the times, with varying degrees of success. Thus, it is encouraging to note that the 2010 Constitution seeks to enhance access to justice in environmental rights litigation in two main ways. First, unlike in other forms of litigation, an environmental rights litigant need not prove that he has suffered injury to obtain relief from the courts.⁷³ In most civil litigation, the plaintiff is only granted relief once the case is proved on a balance of probabilities. In litigation relating to environmental rights, this requirement is waived. Most environmental cases are proved using scientific imperatives that require highly-trained experts to demonstrate the injury suffered.

Secondly, the requirement for *locus standi* has been relaxed.⁷⁴ Article 22(2) is clear that the person taking an action to court need not be the victim of the environmental harm or threatened harm.⁷⁵ Such a situation gives wide room to whistle-blowers and environmental activists in the non-governmental organisation (NGO) sector. Due to poverty and ignorance, most ordinary citizens do not understand their basic rights. The position initiated by the 2010 Constitution makes it possible for vigilant activists to take legal action on behalf of vulnerable groups. The new provisions grant environmental whistle-blowers and other public-spirited interest groups the opportunity to challenge any action or decision that may impact on the environment in a negative way. This change of approach is bound to significantly alter the landscape of environmental rights litigation in the country.

The new constitutional order has also dealt a blow to undue technicalities that used to frustrate environmental rights litigants in Kenya under the previous dispensation. Article 159(2)(d) of the Constitution provides that 'justice shall be administered without undue regard to technicalities'. In the past, critical environmental matters were dismissed on technicalities without consideration of their

72 The increase in the volume of court actions throughout the world is attested to by the number of cases published in the UNEP Compendium of Judicial Decisions on Matters Related to the Environment. So far, they are volume I (1998); volume II (July 2001) and volume III (October 2001).

73 Art 70(3) provides that an applicant does not need to have to demonstrate that any person has incurred loss or suffered injury.

74 Art 70(3) Constitution of Kenya.

75 Art 22(2): 'In addition to a person acting in their own interest, court proceedings under clause (1) may be instituted by (a) a person acting on behalf of another person who cannot act on their own name; (b) a person acting as a member of, or in the interest of, a group or class of persons; (c) a person acting in public interest; or (d) an association acting in the interest of one or more of its members.'

merits. A case in point is that of *Wangari Maathai*.⁷⁶ While denying the plaintiff *locus standi*, Dugdale J ruled that 'it is well established that only the Attorney-General (AG) can sue on behalf of the public'.⁷⁷

Prior to the enactment of the EMCA that expanded *locus standi*, litigation on behalf of the public was effectively blocked. This is because the AG did not generally bring actions against government departments. As a matter of law, the AG must be named as a defendant in suits against government officials and departments.⁷⁸ This renders him incapable of suing on behalf of the public in cases where a government department action is to be challenged. Other than being the principal legal advisor to the government,⁷⁹ the AG also acts as its advocate, handling legal suits on its behalf through the Department of Civil Litigation in his office.⁸⁰ The same provision of law also requires the would-be plaintiff to serve the AG with 30 days' notice prior to filing suit against the government. The law, therefore, created unnecessary hurdles and difficulties for private parties intending to bring suits against the government.

In the *Wangari Maathai* case, the court failed to take account of factors that would have allowed the plaintiff to pursue the matter on behalf of the public. This includes the fact that, as a resident of Nairobi, she was a ratepayer and as such had an interest in how the affairs of the city were carried out. She would easily have established that she had the right to oppose the development of structures that had deleterious effects on the environment. Although her case was dismissed on the basis of a lack of *locus standi*, it received widespread support from the media, hence heightening debate and increasing awareness of environmental protection.

In the case of *Maina Kamanda and Another v Nairobi City Council*, Akilano Akiwumi J was faced with similar facts on requirements for *locus standi*.⁸¹ The defendants argued that the plaintiff had no standing, since he required the permission of the AG to bring the action, which he had not obtained. In dismissing this contention, the judge quoted with approval the decision in the English case of *IRC v National Federation of Self-Employed and Small Business Limited*.⁸² He held:⁸³

I think that it is now well settled that a ratepayer, as opposed to a tax payer, has sufficient interest as such, to challenge in court the action of a public body to whose expenses he contributes.

76 *Wangari Mathai v Kenya Times Media Trust* (n 11 above).

77 UNEP's Compendium (n 74 above) 17.

78 Ch 40, Laws of Kenya. See in particular sec 13A.

79 Sec 26(2) Constitution.

80 Sec 13A of the Government Proceedings Act ch 40, Laws of Kenya.

81 Nairobi High Court Civil Case 6153 of 1992 (unreported).

82 (1982) AC 617 740.

83 See volume 1 UNEP Compendium, December 1998 78.

3.2 Enforcement through administrative action

Currently, Kenya does not have legislation relating purely to administrative action. Instead, the principles of common law and doctrines of equity guide the courts when adjudicating on administrative disputes. For a long time, the High Court has had jurisdiction to exercise the judicial review remedies of *certiorari*, prohibition and *mandamus*.⁸⁴ It may issue a declaratory order, an injunctive order or order payment of damages.

The 2010 Constitution compels parliament to enact legislation that gives effect to the right to expeditious, efficient, lawful, reasonable and procedurally-fair administration.⁸⁵ According to the Fifth Schedule to the Constitution, the envisaged legislation must be enacted within four years of promulgation of the Constitution.⁸⁶ The enactment of legislation on fair administration will enhance the realisation of the right to a clean and healthy environment. Article 47 of the Constitution gives the direction administrative law should take. It states:

- (1) Every person has the right to administrative action that is expeditious, efficient, lawful, reasonable and procedurally fair.
- (2) If a right or fundamental freedom of a person has been or is likely to be adversely affected by administrative action, the person has a right to be given written reasons for the action.

The requirement that administrative action be fair is strengthened by the right of access to information. Article 35 of the Constitution states:

- (1) Every citizen has the right of access to -
 - (a) information held by the state; and
 - (b) information held by another person and required for the exercise or protection of any right or fundamental freedom.
- (2) The state shall publish and publicise any important information affecting the nation.

Administrative action and access to information are important components of enforcing environmental rights. They ensure transparency and accountability in decision making. They also provide mechanisms through which litigants who have filed cases in court can access records held by both the state and private individuals that impact on the environment.

Administrative bodies are diverse. In the context of the right to a clean and healthy environment, they would include the National Environment and Management Authority (NEMA), Kenya Wildlife Services (KWS), Kenya Forestry Services (KFS) and other lead agencies that are charged with the management of sectoral environmental

84 See the Judicature Act Cap 8 section.

85 Art 47(3).

86 The new Constitution was promulgated on 27 August 2010.

law.⁸⁷ Environmental management bodies exercise public functions when they intervene or participate in a function that has a bearing on public interest. Administrators have a wide range of powers which have often been abused.

The enactment of new administrative legislation, together with the right of access to information, will therefore ensure a more accountable, responsive and transparent system of enforcing environmental rights. Administrators would be effectively checked so that their functions are confined to those that are in line with best public interest. The rationality and reasonableness of a decision would become the threshold to test administrative actions. Both procedural fairness and the merit of the decision will stand to be questioned. This is a shift from the situation where the court is concerned only with procedural requirements.

4 Possible challenges to the implementation of environmental rights under the new constitutional order

The implementation of environmental rights in Kenya's new constitutional order is a process that will most likely encounter numerous challenges. The realisation of these rights requires that institutions dealing with their implementation comply with the Constitution. However, as in the past, there is the danger that vested interests among these institutions may affect legislation, interpretation, administration and other aspects of the implementation of environmental rights. As noted by the Constitution Implementation Commission (CIC) in one of its reports:⁸⁸

... selective reading and misinterpretation of provisions of the Constitution by implementing agencies, deliberate misinformation to members of the public by some members of both the executive and the legislature, a lack of guidance from the office of the Attorney-General in the process of implementation of the Constitution, political risk, and the increasing trend by the executive and some members of the legislature to create grey areas regarding the interpretation of the Constitution. All these have the unfortunate propensity to create confusion and to delay the implementation of provisions of the Constitution.

The reality of the above observation by CIC is vivid in the process of enacting appropriate environmental legislation as contemplated in the Constitution. The Fifth Schedule to the Constitution requires legislation regarding the environment to be enacted within four years from the effective date. This task is complex and will certainly require significant technical and intellectual input from environmental

87 Lead agencies are defined in the National Environmental Co-ordination Act 1999 (EMCA).

88 See Commission for the Implementation of the Constitution *Second quarterly report on the implementation of the Constitution (CIC)* (2011) 45.

experts. However, experience has shown that Kenya's Parliament has often been reluctant to adhere to recommendations by experts, particularly in matters where the Members of Parliament have vested interests.⁸⁹ One would therefore expect that 'appropriate legislation' on the environment will take quite some time to be legislated in line with the new Constitution's requirement. What will most likely come from parliament within the four years of existence of the Constitution is legislation that will hurriedly be enacted to beat the constitutional deadline.

Even where appropriate legislation is enacted, there is the likelihood of a lack of co-operation and collaboration among stakeholders in the implementation process. The effective implementation of environmental rights will ordinarily require co-operation and collaboration among the various stakeholders. Experience has shown that meaningful and effective stakeholder participation is lacking in the country's environmental sector. A willingness to explore new participatory approaches in the sector is lacking, mainly due to an inadequate flow of information within the sector.⁹⁰ It follows, therefore, that many individuals and communities, especially those in rural areas, are unaware of their rights. Such lack of awareness has led to indifference, as a result of which the violation of environmental rights has become the general rule, with their effective implantation being the exception.

Much as the implementation of environmental rights at the two levels of government is applauded, as explained above, this may nonetheless pose a challenge. Administrative bureaucracy is likely in the process of the implementation of environmental rights as there are jurisdictional overlaps. The 2010 Constitution, in the spirit of devolution, has created two levels of government which are distinct and interdependent. Both levels of government are instrumental in the implementation of environmental rights, since they have concurrent and exclusive jurisdiction on environmental matters. Like the national government, each of the 47 county governments has its own legislative assembly with the power to enact environmental legislation. In such circumstances, jurisdictional overlaps and conflicts may arise, inhibiting the effective implementation of environmental rights, unless proper measures are put in place.

89 Eg, the current parliament has often risen to oppose the recommendation for salaries and allowances recommended by the Salaries and Remuneration Commission. This is a constitutional commission established to recommend rates of salaries to be earned by state and public officers.

90 See a similar argument in R Naome *et al* 'Challenges in implementing an integrated environmental management approach in Zimbabwe' (2012) 3 *Journal of Emerging Trends in Economics and Management Sciences* 410.

Ambivalent administrative bureaucracy is also likely to be experienced in the process of the implementation of environmental rights by both levels of government.⁹¹ As already stated, environmental legislation is currently administered by several agencies established by national legislation. With the institution of counties, it is expected that more environmental agencies will soon be created. This may lead to a duplication of efforts, the splitting of resources and unnecessary bureaucracy.

The lack of political will by the leadership in either level of government to implement the laws and policies of the other level may cause bureaucracy to be increased. For example, political representatives at the counties may be reluctant to enforce 'unpopular regulations' from the national government for fear of destroying their political base. It must be emphasised that political support is crucial for the effective implementation of environmental rights.

The realisation of environmental rights may also be hampered by a lack of capacity, both in terms of staff and resources. The effective enforcement of environmental legislation and policies is contingent upon the availability of competent staff and adequate financial resources. In the previous constitutional dispensation, the appointment of competent staff to implement environmental legislation and policies was more often than not wanting. Appointments to key positions in environmental agencies, like all others in the public sector, were motivated by political and ethnic considerations as opposed to professionalism and competence.⁹² The management of such agencies⁹³ therefore was epitomised by corruption, negative ethnicity, gross incompetence, political interference and patronage. In a country where such vices have been rife, conscious efforts should be made to reverse the trend, otherwise the effective enforcement of environmental rights will remain a myth. The new Constitution enjoins the executive at both levels of government and all state organs to recruit competent personnel through competitive processes.⁹⁴

91 B Sihanya 'Constitution implementation in Kenya 2010-2015: Challenges and prospects' *FES Occasional Paper 5* (2011) 35.

92 Sec 24 of the repealed Constitution empowered the President to create and abolish offices in the public service without parliamentary approval.

93 Agencies such as Kenya Revenue Authority, Kenya Wildlife Services, Kenya Bureau of Standards, Agricultural Finance Corporation, etc.

94 The Public Service Commission is created by ch 13 of the Constitution. Under the provisions of ch 15, it is an independent governmental organ. Art 232 enjoins it to adhere to certain values which include the following: (a) high standards of professionalism; (b) efficient, effective and economic use of resources; (c) responsive, prompt, effective, impartial and equitable provision of services; (d) involvement of people in the process of policy making; (e) accountability for administrative acts; (f) transparency and provision to the public of timely, accurate information; (g) subject to paragraph (h) and (i), *fair competition and merit as the basis of appointments and promotions* (my emphasis).

5 Conclusion

It is clear from the foregoing discussion that the 2010 Constitution has initiated a paradigm shift in the implementation of environmental rights in Kenya. In contrast to its predecessor, the Constitution strengthens the enforcement of environmental rights, as it significantly expands the scope of fundamental rights as well as their enforcement mechanisms. This notwithstanding, the process of implementing environmental rights in the country faces numerous challenges, as discussed in the previous section of the article. These challenges, however, are by no means insurmountable.

In the main, the government should formulate a comprehensive integrated environmental rights delivery strategy with sufficient institutional support and funding. Such strategy should focus on, among other things, providing environmental justice through the implementation of existing legislation and fostering public participation in the implementation of environmental rights. The strategy should also envisage continuing environmental education among stakeholders. The education programme should be co-ordinated by qualified environmental education officers at both the national and county levels of government. The programme should also focus on capacity building through the dissemination of information and the training of volunteers. Universities, colleges, high schools and primary schools can also be targeted for such education and training. Increasing awareness and education are important because it is necessary for people to know of their rights before their implementation.

Measures should be put in place to guarantee access to information and community participation in environmental decision making. This will encourage communities to support government policies and initiatives related to the environment as it will give communities the feeling of being 'partners with government'.

An integrated environmental rights delivery strategy may not be possible without the establishment of a co-ordination agency. With the existence of a devolved system of government, there is a need to have a co-ordination agency to streamline the implementation of environmental rights at both levels of government. The agency may also mediate disputes that may arise between the national and county governments in the course of the implementation of environmental rights. The agency should be empowered to create accessible claim mechanisms for environmental rights breaches at both levels of government to enable people to find redress more speedily.

Another measure the government can put in place is to increase resource allocation towards the enforcement of environmental rights. Resources for such purposes should be distributed equitably to all counties and must be made accessible to actors at the grassroots level. It is high time for budgetary allocation for environmental rights implementation to be made a priority in the same way as budgets for

other activities in the country. Experience has shown that the restraining of funds for environmental activities has been one of the major hindrances to the implementation of environmental rights.

Apart from the measures discussed above, there must be the political will to enforce environmental rights. Political leaders, both at the national and county levels of government, must work together to inculcate environmental stewardship in the country. They must show their commitment to the implementation of environmental rights by taking environmental issues more seriously. A show of commitment by the political class will automatically encourage the people they lead to follow suit.