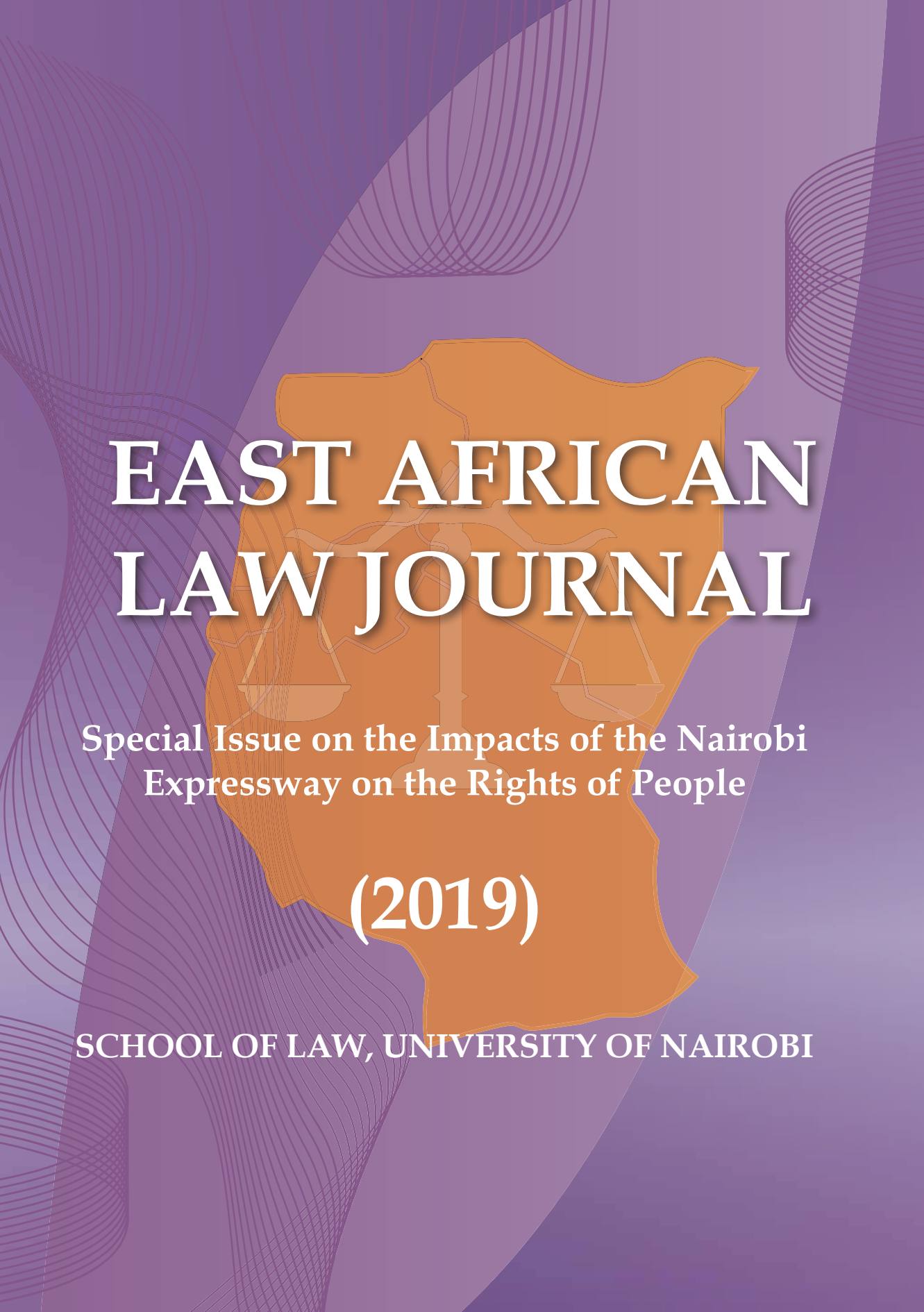

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Special Issue on the Impacts of the Nairobi Expressway on the Rights of People

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SAVING UHURU PARK: THE IMPERATIVES OF MAINTAINING OPEN PUBLIC SPACES IN THE WAKE OF MEGA-INFRASTRUCTURAL PROJECTS

Patricia Kameri-Mbote, Hadijah Yahyah** & Muriuki Muriungi****

Open public spaces are under threat as land values escalate amid the pressure of ever-increasing demand for housing and transport by urban populations. Critically important open public spaces such as Uhuru Park and the Nairobi National Park are in constant danger of being converted to other uses, including infrastructural development. The papers in this Special Issue of the East Africa Law Journal discuss key issues for consideration in the planning of mega-projects such as the Nairobi Expressway that threaten open public spaces. While the project may be/has been justified on the basis of easing traffic congestion within the city of Nairobi given the heavy traffic experienced on Uhuru Highway and on Mombasa Road all the way to Mlolongo, Uhuru Park is equally important to the vast majority of Nairobi residents. The environmental and health benefits of the Park, which are not directly quantifiable in monetary terms, must be secured for posterity. The different uses of the Park include: meetings for social, political and religious purposes as well as for recreation and relaxation. These practices are critical to the enjoyment of fundamental rights and freedoms; easing stress and improving mental health. From an eco-centric viewpoint, open spaces facilitate ecosystem functions such as air purification that cannot be quantified in monetary terms.

Uhuru Park's value to Kenyans is traceable through history; as the venue for the signing of the country's independence document and ensuing celebrations; the space where political dissent is expressed and where major rallies for presidential election campaigns are held. While these are important, the haven of tranquility and peace that the Park provides for Nairobi residents and other Kenyans, is also critical. On weekends and public holidays, families from within and outside Nairobi, spend time enjoying the recreation services provided at the Park.

The 2010 Kenyan Constitution places a premium on sustainable development; substantive and procedural human rights; public participation and stakeholder engagement. With the inclusion of international law as part of Kenya's law, international environmental governance principles are applicable in Kenya. These principles, together with statutory provisions as well as indicators set in the Sustainable Development Goals (SDGs), demand that a balance between the social, economic and environmental spheres be maintained from project conceptualisation to completion. The processes and procedures followed in mega-infrastructural projects either enable the realisation of a balanced perspective or hinder the process. Transparency and accountability are required to facilitate the desired balance and for effective environmental governance.

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It is within this context that a public discourse was held by scholars, civil society, public officers and other stakeholders to discuss the value of public open spaces.

The discussions centred around whether or not it was proper for the Government of Kenya to hive off a portion of Uhuru Park to form part of the proposed Nairobi Expressway. Although the plans to hive off the Park were abandoned, the outstanding contributions emanating from the discourse provide critical perspectives on the governance of the environment in general, and specifically about open public spaces. The discussions were held at a public forum organized at Parklands Campus, University of Nairobi by the Centre for Advanced Studies in Environmental law and Policy(CASELAP) in collaboration with the School of Law, under the theme *The Public Voice and Public Open Spaces: Uhuru Park & the Nairobi Expressway*. Supported by the Food and Agriculture Organization (FAO) and the Norwegian Partnership for Higher Education (NORHED), the forum was in response to attempts by the Government to excise part of Uhuru Park for construction of the Nairobi Expressway.

To kick the conversion off, the critical considerations informing decisions on mega-infrastructural projects are canvassed with an emphasis on making the public voice count. Prior to commencement of projects, environmental assessments are critical in the identification of potential negative impacts on the environment. In the case of the Nairobi Expressway, it is proposed that strategic environmental assessments (SEAs) could mitigate such negative impacts. The proposal to subject the Transport Sector Master Plan to an ex-post type SEA identifies areas for sustainable implementation and greening it, that is illustrative of the role that environmental assessments play.

The protection of open public spaces through the public trust doctrine (PTD) is highlighted in the second paper. The dual need to insulate public land from conversion to private land as well as securing open public spaces for enjoyment by the citizenry is emphasised. Also imperative is securing public spaces from conversion to public use that is incompatible with their status. This brings the role of bodies charged with the management of public land to the fore. As argued in the third paper, the National Land Commission (NLC) must jealously guard open public spaces. While illegal and irregular allocations of public land pose a great threat to the existence of open public spaces, the processes involved in the conversion of public land from one use to another also pose a significant threat to these spaces. Therefore, it is critical that the bodies occupying public land are held accountable by the NLC to protect the public interest in open spaces.

The fourth paper is about the clash between environmental considerations and the need for the expansion of road networks in cities like Nairobi. It would seem therefore, that the value of open public spaces transcends tangible economic returns. While mega-infrastructure development is important for the growth of an economy, it should not be at the expense of ambient environmental quality. Open public spaces have non-monetary value that is likely to be discounted in the face of perceived benefits from mega-infrastructure projects. The value of these spaces should be documented to ensure that they are not wantonly converted into built-up areas and roads.

The EIA for the Nairobi Expressway identified the potential impacts of the proposed road encroaching on the Uhuru Park and advised on an alternative that avoided the park among other benefits. However, as argued in the fifth paper, EIA is limited in addressing the cumulative impacts and a comparison of alternatives. This raises the need for a SEA to identify impacts at the policy, planning or programme level when more options are open. It still plays a role in ensuring sustainable development. This explains the proposal that the Government of Kenya should subject the Transport Sector Master Plan to an ex-post type SEA to add value to the EIA for the Nairobi Expressway and any other planned road infrastructure in the country. The involvement of the public in environmental assessments broadens the ownership of the decisions taken in development projects. Additionally, public participation during decision-making for public programmes and projects brings consultation and access to information to the fore. The value of public open spaces in urban areas, their governance and the need to balance economic, social, cultural and political considerations can also be canvassed during public participation.

While the 2010 Constitution has relaxed *locus standi* requirements, and any person can go to court in instances of threats to the environment, the protection of public spaces requires a vibrant public interest litigation (PIL) context. Individuals and communities in Kenya have used PIL in the past to ensure the protection of the environment and the promotion of environmental justice. Building on the momentum created so far, PIL has great potential to secure public open spaces from alienation and use conversion. PIL can also be used to challenge developments that do not conform to requirements for environmental assessments discussed above. EIA and SEA can be used to balance economic, social and environmental considerations in infrastructure development and thus secure open public spaces.

The case reviewed in the Special Issue highlights the challenges that plague PIL. Matters of broad conceptualisation of issues and the preparedness of public interest litigants are flagged as critical determinants of outcomes. The two concise book reviews are also crucial towards assisting the reader appreciate current environmental governance challenges that have implications for sustainable management of public open spaces.

Ultimately, this Special Issue generates insightful recommendations on compliance with the law and best practices to enhance the public voice during public policy decision-making; sustainability considerations; discussion and the adoption of recommendations on the management of public open spaces in a manner that safeguards their future in light of the pressure on land. This is a particularly important guide for policy and decision-makers, legislators, civil society, as well as academics working on environment and natural resources management.

CRITICAL CONSIDERATIONS IN MEGA DEVELOPMENT PROJECTS IN AFRICA: MAKING THE PUBLIC VOICE COUNT

Eva Maria Okoth, Gino Cocchiaro** & Mark Odaga****

I. INTRODUCTION

Mega infrastructure and development projects take different forms that can be broadly classified into social and economic infrastructure.[1] Economic infrastructure includes projects such as the construction of transportation networks, energy infrastructure, as well as Information and Communications Technology (ICT). Social infrastructure, on the other hand, includes projects such as water, sanitation, sewerage and housing, among others. Whatever form it takes, infrastructure is important because of its contribution to the process of growth and development in all parts of the world.[2] At the same time, if not implemented sustainably, development projects may occasion extensive environmental damage as a result of land use change and the exacerbation of climate change impacts.

Investment in mega infrastructure projects is at the top of the development agenda of most countries around the world. The logic and timing of this trend can be attributed to several factors. Whereas some scholars link the rising demand for infrastructure to the emergence and growth of a consumer middle class, others see it as a "fix" for resolving spatial constraints that threaten conditions of capitalist production.[3]

Generally, however, there is a growing belief among countries, and especially among emerging economies, that socio-economic growth and prosperity are dependent on increased investment in infrastructure.[4] As a consequence, countries in Africa have rushed to adopt and approve ambitious investment programmes costing billions of dollars. The Programme of Infrastructure Development for Africa (PIDA)[5] is an example of a development programme that was adopted by members of the African Union in partnership with the United Nations Economic Commission for Africa and the African Development Bank in 2012. The key priority areas of this programme include energy, transport, water, and ICT, which the implementers believe will "interconnect, integrate

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*** Mark Odaga is a senior program officer at Natural Justice and advocate of the High Court of Kenya.

1 UN, 'Infrastructure Development Within the Context of Africa's Cooperation With New and Emerging Development Partners' < https://www.un.org/en/africa/osaa/pdf/pubs/2015infrastructureanddev.pdf> (accessed on 10 August 2020).

2 *ibid.*

3 E Charis and B Bersaglio, 'On the Coloniality of "New" Mega-Infrastructure Projects in East Africa' (2020): *Antiode* 52.1 <https://onlinelibrary.wiley.com/doi/full/10.1111/anti.12582> (accessed on 11 June 2020), p. 3.

4 E John Ward and P Skayannis, 'Mega transport projects and sustainable development: lessons from a multi case study evaluation of international practice' *Journal of Mega Infrastructure & Sustainable Development* 1, no. 1 (2019): 27-53 <https://www.tandfonline.com/doi/full/10.1080/24724718.2019.1623646> (accessed 12 June 2020), p. 27.

5 < https://www.au-pida.org/> (accessed on 10 August 2020).

and contribute to the structural transformation of Africa's geographic and economic regions by 2020".[6]

African economies, which had previously been greatly influenced by European colonial powers, are presently dominated by a range of New and Emerging Partners (NEPs).[7] Countries from the Asian continent, such as China, are among the new actors whose growing economic power and political influence has led African countries on a disruptive development pathway that is profit-driven and unregulated by strict development standards and guidelines similar to those of the World Bank.[8] China has had a great impact on African economies since 2009, when it became a leading trading partner with many African countries.[9] The 21st Century has seen African countries forge close ties with China for a host of reasons, including foreign direct investment through loans.[10] This trend has been amplified under the auspices of the Belt and Road Initiative (BRI), which trails through several African territories.[11] China's Belt and Road Initiative aims to connect China with Europe, East Africa, and Latin America.[12] East Africa's Lamu Port South - Sudan Ethiopian Transport Corridor (LAPSSET) project is another grand plan which seeks to build a network of roads, international airports, resorts, increase energy supply and construct oil pipelines with the promise that it will open up the region and enhance trade.[13]

Notwithstanding the levels of financial investment that go into these projects and the fact that this infrastructure may be necessary, there is a need to acknowledge and address the potential for diverse outcomes and impacts that go beyond the physical asset that is being delivered.[14] It is equally critical to address and acknowledge the fact that securing the intended outcomes of infrastructure development is contingent on the manner in which their development is pursued and the dominant imperative. In the case of Africa, it will be suggested that the dominant imperative has largely been "extractivist", often at the expense of sustainability considerations, and therefore, the human development outcomes stated to lie at the heart of the push for infrastructure development.

This paper identifies critical considerations in mega development projects with a focus on Africa's development challenges. The article also highlights the need for a paradigm shift towards greater inclusion of the public voice in development projects. It will be

6 World Rainforest Movement, 'Infrastructure in Africa for Extractive Industries and Corporate Profits: What about Community Needs?' Bulletin 244 < https://wrm.org.uy/articles-from-the-wrm-bulletin/section1/infrastructure-in-africa-for-extractive-industries-and-corporate-profits-what-about-community-needs/>, Published 15 July 2020, (accessed 11 June 2020).

7 UN, 'Infrastructure Development Within the Context of Africa's Cooperation With New and Emerging Development Partners' Op. Cit., Pg. 1.

8 *ibid*.

9 DH Shinn, 'China's Economic Impact on Africa' (2019) International Political Economy, World Politics <https://oxfordre.com/politics/view/10.1093/acrefore/9780190228637.001.0001/acrefore-9780190228637-e- 831>. (accessed on 13 June 2020).

10 *ibid*.

11 World Rainforest Movement, 'Infrastructure in Africa for Extractive Industries and Corporate Profits: What about Community Needs?' Op. Cit.

12 *ibid*.

13 *ibid*.

14 EJ Ward and P Skayannis, 'Mega transport projects and sustainable development: lessons from a multi case study evaluation of international practice' Op. Cit., p. 28.

argued in this article that if tangible human development outcomes are to be achieved, development must be democratised or become more people-centred. Not only would this address the challenges of project implementation seen on the continent, it would also result in sustainable development decisions. It will be suggested that in order to secure the intended outcomes of infrastructure development, African countries should make infrastructure development more people-centred by decentralising and democratising decision-making processes.

II. OVERVIEW OF APPLICABLE INTERNATIONAL AND REGIONAL ENVIRONMENTAL STANDARDS

Overlooking the environmental, economic, and social consequences of large development projects is extremely costly. Consequently, attempts have been made to establish environmental protection standards and frameworks at the international, regional, and national levels.

The World Bank's Environmental and Social Standards and the International Finance Corporation's (IFC) Performance Standards on Environment and Social Sustainability are among the most widely endorsed standards internationally. In both instances, the significance of open and transparent engagement between project proponents and stakeholders is identified as the single most essential element for the successful management of the environmental and social impacts of development projects. These standards emphasise the importance of an inclusive and effective public participation process throughout the project lifecycle. Most importantly, flexibility in the stakeholder engagement process and approaches is highlighted as a requirement to align with the project's degree of risk and adverse impacts as well as its development phase.

Different regional blocs within the African continent have also developed and signed treaties outlining certain requirements for development projects. For instance, the East African Community (EAC) Protocol on Environment and Natural Resource Management was adopted under Chapters 19 and 20 of the EAC Treaty.[15] The Protocol provides for cooperation in environment and natural resource management among member States. The preamble to the Protocol acknowledges that the protection of the right to a clean and healthy environment is a prerequisite for development projects that is threatened by the adverse effects of development activities on the environment and natural resources. Some of the key provisions of the Protocol on Infrastructure Development include Article 31, which addresses environmental impact assessment for trans-boundary projects. Under this provision, Partner States are required to adopt common approaches and laws requiring the conduct of environmental impact assessment for planned activities and projects that are likely to have significant adverse impacts in the Community (EAC). The provision also requires Partner States to adopt common guidelines on environmental impact assessment in shared ecosystems including the criteria and procedures for conducting environmental assessments for planned activities and projects that

15 EAC, Protocol on Environment and Natural Resources Management (2018) <http://www.environment.go.ke/wp-content/uploads/2018/11/Revised_PROTOCOL-on-Environment-and- Natural-Resources-24-August-2018.pdf> (accessed on 12 June 2020).

are likely to have significant adverse environmental impacts. Partner States are further required to adopt harmonised guidelines and procedures for periodic environmental inspections and audits of the activities or projects implemented in the Community to assess their environmental compliance. Article 32 requires Partner States to develop and harmonise common environmental standards and laws for the control of atmospheric, terrestrial and water pollution arising from urban, agricultural, and industrial development activities.

While more stringent environmental and social protection standards could go a long way towards enhancing the level of accountability among project proponents, there are still several challenges in their implementation. The fragmentation of environmental protection standards has resulted in inconsistency in the bodies of environmental laws at all levels. Questions concerning the effective participation of all States in the development of these standards based on their unique circumstances have also been raised. Given that most of these discussions take place within the international spaces, communities at the grassroot levels have little knowledge of the existence of these frameworks and how they affect them.

III. WHAT ARE THE RESULTS? WHERE HAS IT BEEN PROBLEMATIC?

The development of adequate infrastructure has the undoubted potential to spur economic growth and reduce inequalities. On the flip side, infrastructure development also carries with it the potential for significant economic, social, and environmental costs, which may negate any intended industrialisation and sustainable growth objectives in the long-term.[16] There is a strong case to be made that the kind of infrastructure development that African countries have prioritized, and the manner in which these projects are being implemented, is widening the infrastructure gap and is often unsustainable.[17] The kind of infrastructure being developed does not address the basic needs of the most vulnerable population, such as access to clean water and sanitation. The potential for these projects to further exacerbate climate change impacts on the African continent is also not adequately considered or addressed.[18] As a consequence, infrastructure development on this track is likely to create more inequality and poverty given the imperative to first meet the needs of extractivist global capitalist interests.

As an example, investment in fossil fuel energy projects is usually justified on the basis of meeting growing energy needs.[19] While lip service is paid to the potential to meet the

16 S Schindler and JM Kanai, 'How Mega Infrastructure Projects in Africa, Asia and Latin America are Reshaping Development' The Conversation (2019) <https://theconversation.com/how-mega-infrastructure-projects-in-africa-asia-and-latin-america-are-reshaping-development-125449> (Accessed 12 Jun 2020).

17 A Bhattacharya, J Oppenheim and Nicholas Stern, 'Driving sustainable development through better infrastructure: Key elements of a transformation program' *Brookings Global Working Paper Series* (2015) <https://www.brookings.edu/wp-content/uploads/2016/07/07-sustainable-development-infrastructure-v2.pdf> p. 2

18 S Cox, K Nawaz & D Sandor, 'Development Impact Assessment (Dia) Case Study: South Africa' (2015) EC-LEDS < https://www.climatelinks.org/sites/default/files/asset/document/2015_EC-LEDS_Development-Impact-Assessment-Case-Study-South-Africa.pdf> (accessed 10 August 2020) p. 2.

19 D Ahuja and M Tatsutani, 'Sustainable Energy for Developing Countries' S.A.P.I.EN.S [Online], 2.1 |

energy needs of local and indigenous communities, the focus is usually on industrial energy needs. This can arguably be discerned from the inadequate consideration given to renewable and off-grid systems which might meet energy needs more sustainably and affordably. The impacts of the coal mining industry in Nigeria paints a clear picture of how problematic a carbon-intensive economy can be. Although Nigeria's coal mining industry boasts of wealth and job creation, it has been the leading cause of extensive environmental degradation, posing a threat to both animal and plant species as well as human health.[20]

At a time when most countries in the Global North are committing to decommissioning existing coal plants and proscribing the development of new fossil fuel plants, the rhetoric of clean fossil fuel technologies is worth interrogating.[21] Are these but veiled attempts to find new destinations for projects which will no longer be countenanced in the Global North?

Similarly, the proposition of carbon-intensive infrastructure on the African continent is counterproductive to the global efforts to achieve the 2^0C climate target, yet climate change is already impacting the lives and livelihoods of people, especially the most vulnerable and marginalised in society. [22]

Should the continent continue down this development track, there is every likelihood that the continent will lock itself into the future with increased climate change impacts, financial burdens, social impacts, and environmental degradation. All of which would be the inevitable consequence of an unsustainable trajectory.

IV. WHAT IS THE NEW PARADIGM SHIFT WE WANT AND WHAT WOULD THAT LOOK LIKE?

A. A People-centred Approach to Decision-Making

The lifecycle of a project begins with its identification and conception and ends at the closure and decommissioning stage.[23] In each of these phases, different stakeholders including the government, investors, and experts play significant roles aimed at ensuring the successful implementation of projects to completion.[24]

From a practical and legal perspective, communities whose interests such development projects ought to serve, must be engaged and offered spaces for effective and meaningful participation in the planning, implementation, and monitoring stages. Most impor-

2009, Online since 27 November 2009, connection on 01 May 2019. URL : http:// journals.openedition.org/sapiens/823. (accessed 10 August 2020)

20 PC Ogbonna, EC Nzegbule & PE Okorie, 'Environmental Impact Assessment of Coal Mining at Enugu, Nigeria' Impact Assessment and Project Appraisal (2015) 33:1, 73-79, DOI: 10.1080/14615517.2014.941711.

21 *ibid*.

22 Amar Bhattacharya, Jeremy Oppenheim and Nicholas Stern, "Driving sustainable development through better infrastructure: Key elements of a transformation program." Op, Cit.

23 FAO, "Unit Three: Project Identification, Formulation and Design" Project Planning and Management <http://www.fao.org/3/a-au766e.pdf>. (accessed 10 June 2020).

24 *ibid*.

tantly, decision-makers have a legal obligation to take deliberate steps towards investing in infrastructure that meets the basic needs of the society and considers the social and environmental concerns of the intended beneficiaries, particularly those who are marginalised and likely to bear the brunt of adverse impacts.

B. The Rights to Public Participation in Decision-Making Processes

Every individual, especially those that are likely to be impacted by a development project, has a right to participate throughout the decision-making process. This right is enshrined in many constitutional and statutory provisions of a growing number of African countries. Public participation is also recognised as a fundamental principle of good environmental governance in various international instruments.

According to the 1992 Rio Declaration on Environment and Development, 'environmental issues are best handled with the participation of all concerned citizens.'[25] The Aarhus Convention[26] also outlines the tenets of good environmental governance to include the provision on the right to information held by public authorities; public participation in environmental decision-making and the right to seek remedies for redress of any grievances arising from decisions made by administrative institutions.

At the regional level, African countries have also signed treaties and protocols to foster cooperation in the management of natural resources. For instance, Kenya, Uganda and Tanzania signed the EAC Protocol on Environment and Natural Resource Management whose objective is to promote the conservation and sustainable exploitation of natural resources within their jurisdictions including trans-boundary ecosystems and resources. Article 4 of this Protocol lists the guiding principles for the management of natural resources. Specifically, Article 4 (2) (e) provides for the principle of public participation in the development of policies, plans, processes, and activities. It further recognises environmental impact assessments, environmental audits, and monitoring as overarching guidelines in ensuring sustainable development.

For shared ecosystems in East Africa, member States have developed the Trans-boundary Environmental Assessment Guidelines to harmonise policies, laws, and environmental standards that will promote cooperation in the conservation and sustainable use of shared ecosystems. The guidelines underscore the need for stakeholder engagement of trans-boundary communities throughout the ESIA process.

It is important to note from the onset that public participation is not a one-time event but a continuous process. While there is no obligation on decision-makers to agree with every view that is presented to them, they must demonstrate that every person was allowed to present their views at every stage of the process and that those views were considered.

25 Principle 10 of the Rio Declaration on Environment and Development, 1992.
26 United Nations Economic Commission for Europe (UNECE), Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters, 1998.

Beyond the fulfilment of the laid down procedures for conducting public participation, the degree to which the public has fed into the final decisions taken is critical, and a good marker of effective public participation. In the subsequent section, we will consider the different stages of a project's development cycle where the public should be afforded every opportunity to participate.

V. PUBLIC PARTICIPATION IN DIFFERENT STAGES OF A PROJECT'S DEVELOPMENT CYCLE

A. Planning Phase

This is the most important stage of a project's life cycle in which both environmental and social considerations are mainstreamed into policies, plans, and programmes at the highest level of decision-making through a Strategic Environmental Assessment (SEA).[27] This process takes place long before a specific project is conceived. It presents an opportunity for decision-makers to not only conduct an in-depth assessment of the needs of communities, but to also consider the cumulative impacts of plans, policies, and programmes as well as think through the most environmentally friendly and cost-effective alternatives.

SEAs are now founded on and recognised as an essential tool for sustainable development in both international and domestic legislation in many African countries such as Kenya and South Africa.[28] A thorough and effective SEA increases the transparency and credibility of the decision-making process by ensuring that the public's opinions are considered within planning or programme development processes.

An illustration from the United States of America might offer an example of how alternative and cost benefit analyses at the planning level might be applied. In a non-binding decision issued in the State of Minnesota, the Energy Authority stated that the Public Utilities Commission (PUC) is required to quantify and establish a range of environmental costs associated with each method of electricity generation. Utility companies are required to use those costs when evaluating and selecting resource options in all proceedings before the PUC, including resource planning and certificate of need proceedings.[29]

Besides the legal justification, it is important to create an enabling environment for effective community participation at the strategic level since this is the point at which their vision for development and needs can be reflected. With greater and effective participation, project proponents, investors, and implementers can earn the public's support and

27 M Kariuki, "Legal Aspects of Strategic Environmental Assessment and Environmental Management" (2016) <http://kmco.co.ke/wp-content/uploads/2018/08/Legal-Aspects-of-SEA-and-Environmental-Management-3RD-December-2016.pdf> (accessed 10 June 2020). p. 3.

28 The World Bank, "Strategic Environmental Assessment," (2013) <http://www.worldbank.org/en/topic/environment/brief/strategic-environmental-assessment> (accessed on 12 June 2020).

29 In the Matter of Further Investigation into Environmental and Socioeconomic Costs (MN) available at <https://elaw.org/MN.ALJ.external.cost.recommendation.2016> accessed 11 June 2020.

trust.[30] From a practical perspective, involving the public in the planning stage ensures that planned developments are geared towards improving the quality of life of communities, responding to their needs and concerns in a manner that increases their sense of ownership and agency, promotes a coordinated and integrated approach to independent plans and guarantees the achievement of environmental justice through compliance with good environmental practices and procedures.[31]

Contrary to good environmental governance practices, most mega development plans, policies, and programmes in African countries do not comply with the requirement to conduct a SEA. Through recent decisions, courts in Africa have affirmed the importance of inclusive SEA processes when planning mega extractive and infrastructural projects.

Court judgments on the Lamu Coal Plant and Lamu Port South Sudan Ethiopian Transport (LAPSSET) Corridor projects are landmark decisions in which the National Environmental Tribunal (NET) [32] and the High Court[33], respectively addressed these issues and provided guidance on the legal implications of a SEA.

Despite being the subject of appeal at the time of writing, the High Court's decision in the case of *Mohamed Ali Baadi & Others v. The Hon. Attorney General And 7 Others*[34] is recognised in Kenya and other African countries as providing detailed guidance on the rationale for and sustainable development imperatives underlying the need for SEAs. In this case, the court found that there was an obligation on the LAPSSET Corridor Development Authority (LCDA) to conduct a SEA in respect of the entire LAPSSET project and the impact of its various components of the plan assessed at a strategic level.

In the case of *Save Lamu v. National Environmental Management Authority (NEMA) and Another,*[35]community members from Lamu lodged an appeal against NEMA's decision to issue an Environmental Impact Assessment (EIA) licence authorising the construction of a coal-fired power plant close to an ecologically sensitive area. The appellants challenged the legality of the entire EIA process including the project proponent's failure to conduct a proper analysis of project alternatives in contravention of *Regulation 16(b) and 18 of the Environmental (Impact Assessment and Audit) Regulations, 2003 (the EIA Regulations)*. Drawing from the High Court's decision in the *Mohamed Ali Baadi* case,[36,] the NET emphasised the importance of a SEA in analysing project alternatives. The Tribunal found that since the coal plant was a component of the LAPSSET project, there was a requirement to conduct a SEA. In this instance, both the desired project, that is, a coal

30 UNECE, "Good Practice Recommendations on Public Participation in Strategic Environmental Assessment" United Nations Publication <https://www.unece.org/fileadmin/DAM/env/eia/Publications/2016/Good_Practice_Recommendations_on_Public_Participation_in_Strategic_Environmental_Assessment/1514364_E_Espoo_web.pdf> (accessed on 13 August 2020).

31 RL Clark, Victor Ehikhamenor, Kalpana Hanumanthu, Lee Muth, Clinett Short, and Mark Zietlow. "From Community Involvement to the Final Product." (2004) <http://citeseerx.ist.psu.edu/viewdoc/download?doi=10.1.1.466 1430&rep=rep1&type=pdf> (accessed 12 June 2020), p. 44.

32 *Save Lamu & 5 others v National Environmental Management Authority (NEMA) & another [2019] eKLR*.

33 *Mohamed Ali Baadi and others v Attorney General & 11 others[2018] eKLR*.

34 Nairobi HCCC Petition No. 22 OF 2012, http://kenyalaw.org/caselaw/cases/view/156405. (accessed on 13 August 2020).

35 Tribunal Appeal Net 196 of 2016, http://kenyalaw.org/caselaw/cases/view/176697/. (Accessed on 13 August 2020).

36 *ibid.*

plant and the desired site had already been pre-determined even before the SEA for the whole LAPSSET project was completed.

Although these high-level decision-making stages are essential, it is equally important to address the barriers to participation that the complexities at this level of planning might pose for communities. There is every possibility therefore that even when opportunities for participation are provided, they may not be able to effectively engage. Since the strategic planning phase is the point at which the vision of the people should be incorporated, the spaces for participation at that level should be facilitated through synthesis and provision of adequate information to ensure meaningful engagement in decision-making by communities. The provision of adequate information is a necessary component that must be read into any process of meaningful environmental governance and decision-making

B. Environmental Decision-Making Stage

There is a wide range of tools for environmental management that seek to ensure good environmental governance practices are adopted in decision-making processes. Just like SEAs, Environmental Impact Assessments (EIAs) are recognised internationally as being essential for achieving sustainable development by ensuring that environmental, social, and economic impacts of proposed development projects are evaluated and where possible, avoided or adequately mitigated to minimise any potential negative environmental impacts.[37] The information gathered during an EIA study is vital for decision-makers, particularly the environmental regulators, when considering applications for licences to authorise the construction and implementation of proposed developments.[38]

In the case of *M.P. Patil v. Union of India*[39], the court stated that while permitting industrial development, caution had to be taken that such development did not disturb the ecology and environment of the area in question. Further, the infrastructural development must not adversely affect the economic and other livelihood activities of the affected community to hamper their livelihood and render them incapable of resettlement.

The following rubrics have been posited as essential requirements for an effective EIA process: [40]

1. It must create opportunities for public participa tion and engagement in the decision-making process.
2. The process must be independent and impartial.
3. It must lead to better and informed outcomes that strike a balance

37 JK Eslamian S., Ostad-Ali-Askari K., Nekooei M., Talebmorad H., Hasantabar-Amiri A. (2019) Environmental Impact Assessment as a Tool for Sustainable Development. In: Leal Filho W. (eds) Encyclopedia of Sustainability in Higher Education. Springer, Cham. https://doi.org/10.1007/978-3-030-11352-0_170. (accessed on 10 August 2020).

38 P Birnie & A Boyle, "International Law and the Environment", 2nd edn, (Oxford University Press, 2002), p.131-132.

39 Appeal No. 12/2012, https://elaw.org/in.patil.14. (accessed on 10 August 2020).

40 P Sands, "Principles of International Environmental Law,"2nd edn, (Cambridge University Press, 2003), 799- 800.

between the development needs of communities and environmental safety.

4. It should reveal to governments any potential for the occurrence of trans-boundary harm.
5. Facilitate the sustainable implementation of policies and plans at the national level in compliance with the precautionary principle

Although ESIAs are firmly embedded in the environmental frameworks of most African countries, there is a tendency for project proponents to conduct EIAs as a formality. The most common concerns in ESIA processes revolve around the adequacy of the ESIA study report itself and non-compliance with the procedural requirements for conducting an EIA including the need to effectively engage the public meaningfully. These will be considered in turn.

1. Adequacy of the ESIA Study Report

An ESIA study report contains information that is meant to inform development decision-making.[41] The scope of its content is determined by the Terms of Reference developed through a scoping exercise, which ideally ought to be participatory.[42] Having said so, a comprehensive ESIA study report should contain as much detailed information as possible on three main components that include: Environmental Baseline Study; Environmental Assessment, and Environmental Impact Statement.[43]

The environmental baseline study provides information on the quality of different aspects of the environment within the proposed project site before the implementation of the project.[44] This includes data on different components of the physical, biological and socio-economic aspects of the environment. The data collected at this stage forms a basis for conducting an environmental assessment and predicting as well as quantifying any potential impacts.[45] It also forms the basis for assessing the changes that occur in the environment over time as a consequence of project activities. The need for public engagement at this stage can be highlighted by illustrating the fact that local and indigenous communities are often repositories of knowledge about the environments within which developments are planned. Their contributions can provide insights critical to eventual baseline studies.

The environmental assessment should outline the potential impacts of a project and propose alternatives.[46] A project proponent should also consider mitigation measures to prevent or minimise the identified negative impacts. These should be set out in a com-

41 African Development Bank Group, "Environmental and Social Assessment Procedures (ESAP)", Safeguards and Sustainability Series, Volume 1 – Issue 4 (November 2015) < https://www.afdb.org/fileadmin/uploads/afdb/Documents/Publications/SSS_%E2%80%93vol1_%E2%80%93_Issue4_-_EN_-_Environmental_and_Social_Assessment_Procedures__ESAP_.pdf>.

42 *ibid*.

43 Environmental Impact Assessment Guidelines, <https://elaw.org/es/system/files/Volume3Mining.20EIA.20guidelines.2.pdf>, (accessed on 13 August 2020). p. 4

44 *ibid*.

45 *ibid*.

46 *ibid*.

prehensive environmental management plan whose aim is to facilitate the implementation of the procedures, actions, and measures incorporated in the report.

At the end of the report, a summary of the findings from the two initial stages discussed and an environmental impact statement should be set out.[47] Based on these findings, the decision-makers and the public would be able to conclude a project's suitability.[48] This section provides the most crucial information that stands between the decision to either grant or deny an EIA licence.

One of the biggest mistakes that project proponents make is that they fail to incorporate adequate and sufficient information that would assist both the decision-makers and the public to make informed decisions. Natural Justices' assessment of different EIA study reports including the Lamu Coal Plant EIA study report; the Nairobi Expressway Project; the Lamu-Crude Oil Pipeline; and the Al Sherman Project[49] show for instance, that most project proponents overlook and fail to include a comprehensive climate risk assessment as required by the law.[50]

In the South African case, *Earthlife Africa Johannesburg v. Minister of Environmental Affairs and Others*[51,] the court stated that "the absence of express provision in the statute requiring a climate change impact assessment did not imply that there was no legal duty to consider climate change as a relevant consideration…the climate change impacts are undoubtedly a relevant consideration as contemplated in the National Environmental Management Act."

In reading a requirement for climate impact assessments, the court captured an essential aspect likely to be missing in many African environmental laws and regulations – the requirement for adequate consideration for climate risk and vulnerability assessments.

2. Inadequate Public Participation

Effective participation throughout the EIA study process is key to its success.[52] The widely accepted minimum standards for effective participatory decision-making are laid down in the Aarhus Convention. These include: access to relevant information; early and ongoing engagement of the public in decision-making; a wider participation scope; transparent and user-friendly processes; an obligation on authorities to take due account of public input, a supportive infrastructure, and effective means of enforcement or appeal.[53]

In the *Save Lamu* case, the environment tribunal observed that the preparation of a com-

47 *ibid.*

48 *ibid.*

49 A proposed salt producing operation in Kilifi County of Kenya.

50 See the Climate Change Act of 2016.

51 (65662/16) [2017] ZAGPPHC 58; [2017] 2 All SA 519 (GP) (8 March 2017) <http://www1.saflii.org/za/cases/ZAGPPHC/2017/58.html>. (accessed on 13 August 2020).

52 United Nations Economic Commission for Europe (UNECE), Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters, 1998.

53 UNECE, "The Role of the AARHUS Convention in Promoting Good Governance and Human Rights", September 2012 <https://www.ohchr.org/Documents/Issues/Development/GoodGovernance/Corruption/ECONOMIC_COMMI SSION_FOR_EUROPE.pdf>. (accessed on 13 July 2020).

prehensive EIA study report without the participation of the persons most affected was contemptuous and contrary to the rule of law.[54] The tribunal went on to state that effective public participation could only be realised by providing relevant stakeholders with access to information in a meaningful and timely manner.

The procedural and formalistic approach to assessing the adequacy of the public participation process has largely contributed to this challenge. Public participation should be both quantitatively and qualitatively satisfactory and the feedback received from these processes must be addressed through proposed mitigation measures or incorporated into the EIA licence conditions in a way that allows both the regulators and the public to monitor compliance. Above all, the effectiveness of the public consultation process should be measured based on the extent to which the feedback from the stakeholders influences the final decision.

C. Project Implementation and Operational Stage

Public participation in the monitoring and auditing of projects can increase compliance with environmental laws and licence conditions. For this to happen, however, communities and the public at large must have access to justice and remedies from administrative institutions. Access to justice is important because it provides a mechanism through which both private and public entities can be held accountable for non-compliance with environmental laws. The major impediment with most environmental regulators is a lack of responsiveness to environmental complaints. Often, incidents reported are neither investigated nor are the perpetrators held accountable. The protracted periods for seeking redress in courts as well as political interference make it close to impossible for communities to access justice.

As frustrating as these experiences are for communities, there is a need for perseverance in the efforts to hold project proponents and the liable State authorities to account. It is only through these processes that lessons can be learnt and built into the system to ensure sound environmental management.

VI. ECONOMIC CONSIDERATIONS: SECURING HUMAN DEVELOPMENT OBJECTIVES AND INVESTMENT IN SUSTAINABLE ALTERNATIVES

As highlighted at the outset, economic development is the stated driver of mega-infrastructure development in Africa. Kenya's Vision 2030, within which the LAPPSET Corridor Project is embedded, for example, aims to transform Kenya into a "newly-industrialising, middle-income country" by 2030. Yet this push for infrastructure development in Africa is not new as has been observed:

> 'Europeans built infrastructure in Africa at the turn of the century, purportedly also for local economic development, but in essence, the projects were used for natural resource extraction'.[55]

54 *Save Lamu & 5 others v National Environmental Management Authority (NEMA) & another [2019] eKLR.*

55 X Su, The Diplomat, W*hy Chinese Infrastructure Loans in Africa Represent a Brand-New Type of Neocolonialism*

Extractivism, therefore, lies at the heart of these mega-infrastructure projects. In the context of East Africa, it has been noted that this extractivist imperative tracks and overlays with colonial strategies to make Africa "accessible, useful, and visible within global production and trade networks."[56]

The push to open up Africa for extraction is perhaps best illustrated by the fact that transport projects accounted for 38.6% of construction projects on the continent, according to a 2018 report.[57] An extractivist imperative is therefore, the more immediate driver of infrastructure development, with the promise of trickle-down effects to spur further economic development and other human development outcomes contemplated further down track.[58]

In the rush for this infrastructure-induced economic growth, many countries have turned to China as a financing and construction partner. The reasons are varied, and range from the relative ease of loans from China to a desire to emulate China's political and economic success.[59] China and Chinese State-Owned Enterprises (SOEs) have ardently answered that call. China funds close to one in every five projects on the continent (the bulk of these falling within the transport sector). China is also the most prolific single country builder of projects, constructing approximately 33.2% of projects on the continent.[60]

China's role in African infrastructure development has in many ways helped plug an infrastructure deficit. However, there is much to be said about the financing models and agreements on which this partnership has been built. Part of the challenge is the nature of Environmental and Social Standards applied to Chinese Funded projects. It has been noted, for example, that environmental concerns were not a significant part of early discussions within the Forum on China-Africa Co-operation.[61] While financing institutions like the Export-Import Bank of China have encouraged the inclusion of environmental impact assessments and encouraged compliance with host environmental laws, these efforts have not been as demanding of Chinese companies. Where the Chinese government has imposed standards, they have been voluntary and the Chinese government does not require their implementation on the basis that they are not laws, but guidelines.[62]

available at: <https://thediplomat.com/2017/06/why-chinese-infrastructural-loans-in-africa-represent-a-brand-new-type-of-neocolonialism/> (accessed on 13 June 2020).

56 E Charis and B Bersaglio, "On the Coloniality of "New" Mega-Infrastructure Projects in East Africa" (2020): Antipode 52.1 <https://onlinelibrary.wiley.com/doi/full/10.1111/anti.12582> (Accessed 11 June 2020), p.15

57 Deloitte Africa Construction Trends, 2018, p. 11

58 E Charis and B Bersaglio, "On the Coloniality of "New" Mega-Infrastructure Projects in East Africa" (2020): Antipode 52.1 <https://onlinelibrary.wiley.com/doi/full/10.1111/anti.12582> (Accessed 11 June 2020), p. 11

59 DH Shinn, "China's Economic Impact on Africa" (2019) International Political Economy, World Politics <https://oxfordre.com/politics/view/10.1093/acrefore/9780190228637.001.0001/acrefore-9780190228637-e-831> (accessed on 13 August 2020).

60 Deloitte Africa Construction Trends 2018.

61 DH Shinn, "China's Economic Impact on Africa" (2019) International Political Economy, World Politics, p. 30 <https://oxfordre.com/politics/view/10.1093/acrefore/9780190228637.001.0001/acrefore-9780190228637-e-831>. (accessed on 13 August 2020).

62 P Garzon, "Handbook on Chinese Environmental and Social Guidelines for Foreign Loans and Investments: A Guide for Local Communities" p. 17 < https://www.followingthemoney.org/wp-content/

This is in huge contrast to the standards applied by the EU and European Bank which have more 'bite' as evidenced by the EU's recent decision to scrap funding for the protection of water towers in the Mau due to the unlawful evictions and other human rights abuses against the Ogiek by the State.[63]

The state of Environmental and Safety Standards is only one side of the coin. It is equally important to address how domestic environmental laws have been implemented. As Shinn notes, the sad reality is that "[p]rotection of the environment has never been a particularly high priority for African governments."[64] Left unchecked, the dominant extractivist imperative behind these engagements is likely to snuff out any trickle-down human development outcomes – the stated objectives of infrastructure development.

In recent years, concerns have been raised about infrastructure-induced debt from exceedingly costly projects. Kenya's Standard Gauge Railway, which is 80% Chinese financed, still cost Kenya nearly 6% of its GDP having exceeded its budget four times. Similarly, the Addis Ababa-Djibouti Railway line cost Ethiopia close to a quarter of its 2016 national budget.[65]

The utility of some of these projects and the terms of the agreements on which they are based is also questionable. The 75% Chinese financed 1,050MW coal-fired power plant to be built in Lamu is a prime example. The main justification for the project was the need to rationalise Kenya's energy mix and secure steady availability of energy to meet an increased demand for energy. Other than the deeply problematic ecological concerns, a recent report by the Institute for Energy Economics and Financial Analysis (IEEFA) noted that the project would lead to "excess generating capacity in Kenya and sharply increase electricity rates for consumers."[66] Rather disturbingly the IEEFA report also highlights that the Power Purchase Agreement entered into by the Kenyan government would force Kenya to pay at least 360 million US Dollars in annual capacity charges, even if no power is generated by the proposed coal plant.[67]

In Tanzania, the construction of the Bagamoyo Port has been halted as the government seeks to renegotiate several contractual terms. These include a reduction in the number of years the China Merchant Holdings International (CMHI) would run the port facili-

uploads/2019/02/2018_CLASII_Legal-Manual-on-Chinese-Environmental-and-Social-Guidelines-for-Foreign-Loans-and-Investments_E.pdf> (accessed on 15 August 2020).

63 K Gilbert, "EU quashes Shs 3.6 Billion Funding Over Ogiek Eviction" The Star 28 September, 2020 < https://www.the-star.co.ke/news/2020-09-27-eu-quashes-sh36-billion-funding-over-ogiek-eviction/> (accessed on 13 June 2020).

64 DH Shinn, "China's Economic Impact on Africa" (2019) International Political Economy, World Politics, p. 29 <https://oxfordre.com/politics/view/10.1093/acrefore/9780190228637.001.0001/acrefore-9780190228637-e-831>.

65 Wade, Forbes, What China Is Really Up to in Africa, available at <https://www.forbes.com/sites/wadeshepard/2019/10/03/what-china-is-really-up-to-in-africa/>. (accessed on 10 August 2020).

66 IEEFA Report, available at <https://ieefa.org/wp-content/uploads/2019/05/The-Proposed-Lamu-Coal-Project_June-2019.pdf>(accessed on 13 August 2020).

67 IEEFA Report, <https://ieefa.org/wp-content/uploads/2019/05/The-Proposed-Lamu-Coal-Project_June-2019.pdf> (accessed on 10 August 2020).

ties from 99 years to 33 years, scrapping any preferential taxation treatment for CMHI, and any clauses precluding Tanzania from developing any port which might compete with the Bagamoyo port.[68]

What these examples highlight is a power asymmetry in the economic engagement with China as the major player in African infrastructure development. As a consequence of this asymmetry, Chinese loans are negotiated in exchange for natural resources in some cases – resource for infrastructure deals on what has come to be known as the "Angola Model"[69] Considered innovative in the early 2000s, there is consensus that these arrangements might not yield the mutual benefit initially touted.

The power asymmetry also contributes to extractivism in the form of construction contracts that create business for Chinese companies so much so that by 2016 Africa was the largest market for China's overseas construction contracts.[70] There is little evidence of any transfer of skills or technology that derives from these contracts. In fact, the projects have been plagued by complaints of poor pay, abuse, and poor safety standards.[71]

It is therefore, a fair assessment that the economic considerations for most of these projects "carry ambitions from the colonial past into the present under the guise of a modern, prosperous future."[72] Much like the logic that informed the thinking behind colonial infrastructure, the current decision-making is often shrouded in secrecy and without the inclusion of the very people these projects are intended to benefit.

The exclusion of public voices in these economic arrangements has also meant that decision-making has failed to account for sustainability in many instances. This manifests both in the manner in which projects are implemented – as in the case of the construction of Lamu Port[73] – and decisions to invest in problematic fossil fuel projects like the coal-fired power plant in Lamu. There is, therefore, need for increased public accountability and transparency in the negotiation of the economic arrangements that underpin infrastructure development. At the very least, the negotiation of infrastructure agreements desperately needs to be brought within public reach, even through representative institutions like parliamentary oversight committees and other public accountability institutions.

68 East African, Tanzania gives Chinese firm conditions for Bagamoyo port available at <https://www.theeastafrican.co.ke/business/Tanzania-gives-chinese-firm-conditions-for-bagamoyo-port-/2560-5318790-10s5do7/index.html> (accessed on 13 August 2020).

69 Zongwe, D, On the Road to Post Conflict Development by Contract.

70 H Shengli and C Xiangming, Look East, Is China Building Africa, 1 July 2016 available at <https://lookeast.in/is-china-building-africa/> (accessed on 20 August 2020).

71 S Hsu, The Diplomat, China's Model for Africa, 14 August, 2014 available at <https://thediplomat.com/2014/08/chinas-model-for-africa/> (accessed on 23 August 2020).

72 New Mega-Infrastructure Projects in East Africa, p.2

73 Petition No. 22 of 2012 - Mohammed Ali Baadi & Others v the AG & 11 Others available at <http://kenyalaw.org/caselaw/cases/view/156405> (accessed on 10 August 2020).

VII. POLITICAL CONSIDERATIONS – SAFEGUARDING DEMOCRATIC SPACES

Often, several infrastructure projects are pursued as political pet projects. That is, projects that are centred on political reasons rather than any socio-economic rationale.[74] From the standpoint of commitment of resources, the results can be devastating, with the ultimate burden of these decisions eventually being shouldered by taxpayers.

Interestingly, a key finding of the 2018 OECD Global Anti-Corruption & Integrity Forum was that the greatest risk of corruption and interference for most investors was not from any malpractice in tender processes. Rather, the real risk was in the project origination phase, which "gives leeway for corruption at later project stages."[75] Arguably, this situation is the result of a transparency and accountability deficit that leaves room for political interference.

The need for public voices, public accountability, and transparency therefore, is equally critical in order to address the political and corrupt motives (highlighted above) that plague infrastructure projects. Without these critical aspects which would allow for more public scrutiny and participation in project decision-making, infrastructure projects are likely to remain an avenue for the misappropriation of finances by the select few who make decisions about which projects get greenlighted. As a corollary, access to information becomes particularly significant. It is impossible for the public to make their views known and hold decision-makers accountable if the information regarding the origination of these projects and their negotiation is unreasonably guarded. The logic of non-disclosure is difficult to either understand or justify, considering that these decision-making processes are in the public interest. For this reason alone, there is a reasonable and legitimate expectation that the beneficiaries of those decisions should have ample scope to give their input and provide oversight to ensure accountability.

VIII. SOCIAL CONSIDERATIONS – A HUMAN RIGHTS CENTRED APPROACH TO DECISION-MAKING

Other than securing the intended economic objectives of infrastructure projects, the inclusion of public voices in decision-making would also enhance human rights and social considerations in the implementation of projects.

As has been discussed in this paper, infrastructure development on the continent is often characterised by the violation of human rights; ranging from the failure to promote, protect and defend community rights to a clean and healthy environment, to the harassment, intimidation of, and violence against human rights defenders. It is likely that these challenges stem from the failure to adequately factor in environmental, social, and

74 A Sobjak, Corruption Risks in Infrastructure Investments in Sub-Saharan Africa, 2018 OECD Global Anti-Corruptiono & Integrity Forum, February, 2018, p. 5 available at <https://www.oecd.org/corruption/integrity-forum/academic-papers/Sobjak.pdf> (accessed on 23 August 2020).

75 A Sobjak, Corruption Risks in Infrastructure Investments in Sub-Saharan Africa, 2018 OECD Global Anti-Corruption & Integrity Forum, February, 2018, p. 1 available at <https://www.oecd.org/corruption/integrity-forum/academic-papers/Sobjak.pdf> (accessed on 23 August 2020).

governance issues in infrastructure projects. More often than not, a check-box approach is taken to addressing these issues.

In reality, the exercise and consideration of these rights is viewed as an impediment to economic progress. This frame of reference explains the tendency to label communities seeking to assert their rights or to raise concerns about projects as enemies of progress.[76] It is therefore, not uncommon to hear affected community members hasten to disclaim the fact that they are not against development when speaking about their efforts to assert their rights to a clean and healthy environment.

This speaks to the need to incorporate human rights considerations within infrastructure decision-making processes. One way would be to encourage project developers to carry out human rights impact assessments as part of the implementation of projects. These approaches would anchor the soft law principles in the United Nations Guiding Principles on Business and Human Rights that prescribe the inclusion of human rights due diligence in business operations.

Another aspect of decision-making is a better consideration for social needs when making decisions regarding development project options. According to Deloitte's report on African Construction Trends for 2018, transport infrastructure projects accounted for 38.6% of all projects on the continent. In contrast, social development, healthcare, and education infrastructure collectively accounted for only a combined 3.7% of construction projects.[77] If the recent Covid-19 pandemic has underscored anything, it is the urgent need for countries to build up the resilience of their social infrastructure.

It has been observed that debt relief packages and humanitarian support in the face of crises like Covid-19 only provide short term solutions. To build real resilience, long-term investment in social infrastructure is critical.[78] An essential aspect of getting this right requires meaningful inclusion of local and indigenous communities in the decisions regarding their infrastructure needs. Although largely understudied, there is some evidence to suggest that investment in basic and social infrastructure, particularly in rural areas, can minimise inequalities by promoting economic growth and social development.[79]

In a post-Covid-19 world, the likely impulse is to accelerate the trajectory of economic infrastructure development as governments look to address the economic impacts of lockdowns. However, such an approach risks missing the opportunity to address some of the inequalities and vulnerabilities that Covid-19 has laid bare.

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76 See for example G Koech, The Star, Enemies of Coal are enemies of progress – State, 21 June 2019 available at: https://www.theafricareport.com/27411/social-infrastructure-investment-a-development-priority-in-africa/ (accessed on 13 August 2020).

77 Deloitte Africa Construction Trends, 2018, p. 8.

78 O Onibokun, The Africa Report, Social Infrastructure investment, a development priority in Africa, 5 may 2020 available at: <https://www.theafricareport.com/27411/social-infrastructure-investment-a-development-priority-in-africa/> (accessed on 13 August 2020).

79 H Gnade, PF Blaauw and T Greyling, The Impact of basic and social infrastructure investment on South African economic growth and Development, Development Southern Africa, Vol. 34, No.3, 347 - 364

More than ever before, it is important for governments to address the gaps in social infrastructure that Covid-19 has exposed. It is equally important that governments also reconsider projects that might exacerbate the vulnerabilities of local and indigenous communities to Covid-19 and other shocks such as adverse climate impacts. For African countries, investment in pollutant fossil fuel projects like coal plants where there are viable alternatives, is one area for reconsideration. This is critical, given the indicative link between poor air quality and Covid-19[80] as well as the disturbing findings of climate apartheid on the continent if urgent action is not taken to redress the climate crisis whose consequences are likely to undermine basic rights to life, water, food, and housing.[81]

IX. CONCLUSION AND RECOMMENDATIONS

While African countries have understandably sought to close an infrastructure gap to secure economic development, the extractivist imperative and the manner in which these projects are implemented are likely to negate the intended human development outcomes. The meaningful inclusion of public voices in decision-making is not only a right with broad recognition and acceptance internationally, it is also anchored in several domestic laws. Regrettably, a check box approach has often been adopted in public participatory processes. Development decision-making has been the poorer for it.

Development decisions have largely failed to adequately account for the disproportionate burdens on communities. In the context of a planetary climate crisis whose worst impacts will be visited on the poor and vulnerable on the African continent, the failure to adequately consider public voices has meant that little has been done to account for how these infrastructure developments might exacerbate the rising climate impacts.

A focus on extractivism has also failed to adequately consider sustainable alternatives – this is predominantly apparent in the approach to fossil fuel developments on the continent even in countries with viable renewable alternatives to meet their energy needs.

Quite apart from the resulting failure to secure sustainable development outcomes, the tendency to keep decision- making beyond public reach has further enabled problematic economic engagements to underpin development contracts. It has also allowed political and corrupt influences to undermine legitimate socio-economic outcomes and obscured the need for more human rights considerations as part of the implementation of development projects.

80 See for example, World Economic Forum, The deadly link between Covid-19 and air pollution available at: <https://www.weforum.org/agenda/2020/04/the-deadly-link-between-covid-19-and-air-pollution/> (accessed on 13 July 2020).

81 OHCHR, UN expert condemns failure to address impact of climate change on poverty, 25 June 2019 available at: <https://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=24735&LangID=E> (accessed on 13 July 2020).

Arguably, infrastructure development on the continent has failed to be responsive to the immediate needs of the most vulnerable communities whose lot it is meant to improve. The extractivist focus on transport and infrastructure projects at the expense of social infrastructure has perhaps been most starkly exposed by the Covid-19 crisis. Hopefully, the vulnerabilities exposed by the pandemic will provide a moment of reflection for policy makers to rethink development priorities and in doing so, be more attuned to community needs and concerns. Hopefully, there will be increased appreciation that effective public engagement is really the oxygen that should breathe life into development decision-making.

More needs to be done by African countries to demand stronger Environmental and Social Standards as a pre-condition for the execution of contracts with foreign parties. In keeping with international best practices, these standards ought to include a component of environmental democracy, that entails public participation and access to information. Beyond being made mandatory, these standards ought to be easily enforceable and offer an avenue for meaningful redress for indigenous and local communities that raise grievances.

As infrastructure development continues to pick pace on the continent, there is equally a need for community-led civic environmentalism. On this score, is the obligation on the part of environmental regulators to ensure that sufficient environmental information is made available at a local level to enable indigenous and local communities understand the implications of proposed developments, and how to channel any concerns they may have.

PROTECTING UHURU PARK AS A PUBLIC OPEN SPACE: OPTIONS AND IMPLICATIONS

*Collins Odote**

I. CONTEXT

Although public parks play an important role as open spaces, otherwise referred to as green spaces, their treatment in Kenya's policy and practice does not demonstrate this reality. The Report of the Commission of Inquiry into the Illegal/Irregular Allocations of Public Land[1] pointed out the wanton grabbing of such public parks by politically connected individuals and other unscrupulous persons without any regard to the law, or their unique value in society. In Nairobi for example, of the public parks that exist, several of them, including City Park, Uhuru Gardens and Uhuru Park have been subject to grabbing or conversion efforts.

In October 2019, President Uhuru Kenyatta officially launched the construction of a 27-kilometre expressway from Jomo Kenyatta International Airport to James Gichuru Road.[2] The project, which was to be funded through a public-private partnership (PPP), had originally been conceptualised and approved by the National Environment Management Authority (NEMA) to be implemented by the Kenya National Highway Authority (KeNHA) in 2013.[3] However, it underwent several changes resulting in fresh feasibility studies and designs.[4] However, the redesigned project that was launched by President Uhuru Kenyatta on 16th October 2019, drew anger from the public for lack of public participation as well as the decision to have the road pass through part of Uhuru Park.[5] Although the design was later amended to exclude the Uhuru Park hive-off,[6] the project still raises fundamental questions relating to the legal protection that Uhuru Park enjoys and the procedure for its conversion to other uses.

The questions arise from the fact that the threat to convert part of Uhuru Park into other development projects has occurred several times in the past. Of these, the most notable was the attempt by the Government to have a multi-storey complex building in the Park to house, amongst other things, the headquarters of the then ruling party, the Kenya

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1 Republic of Kenya, Report of the Commission of Inquiry into the Illegal/Irregular Allocation of Public Land (Ndungu Report) (Government Printer, 2004).

2 B Ukaya, "President Uhuru Launches Construction of JKIA-Westlands Expressway," The Standard Newspaper, October, 16 2019. Available at <https://www.standardmedia.co.ke/article/2001345729/uhuru-launches-construction-of-jkia-westlands-expressway>. (accessed on 10 July 2020).

3 See background to project summarised in The Greenbelt Movement and others V National Environmental Management Authority and another NET Appeal Number of 2020.

4 Expressway, ESIA, Volume II.

5 T Sherah, "#HandsoffUHuruPark: Why Kenyans are opposing JKIA-Westlands expressway" The Standard Newspaper, <https://www.standardmedia.co.ke/entertainment/local-news/2001346509/handsoffuhurupark-why-kenyans-are-opposing-jkia-westlands- expressway>. (Accessed on 10 July 2020).

6 H Orinde, "Government Redesigns JKIA-Westlands Expressway Design" The Standard Newspaper, 31 October 2019. Available at <https://www.standardmedia.co.ke/article/2001347587/state-revises-jkia-westlands-expressway-design> (Accessed on 10 July 2019).

African National Union (KANU) party.[7] Those efforts were thwarted, but not before a lot of protests and litigation.

While there has been no comprehensive assessment of the acreage of open spaces that have been converted to other uses, an article published in 2019,[8] reported that 84% of the respondents complained of the alienation of open spaces as being a huge challenge facing Nairobi city. This is evidence of the magnitude of the problem and hence the need to rethink the current framework and efforts to protect open spaces.

Based on the foregoing, this paper argues for the enhanced protection of Uhuru Park as a historical, environmentally and socially significant open space in Kenya. Such protection requires the adoption and application of the public trust doctrine (PTD) in a comprehensive legal and policy framework on open spaces. This will provide safeguards and a guarantee that Uhuru Park and all other public open spaces are protected for current and future generations. To make that argument, this paper is structured into seven sections. Following this introduction, section II discusses the role that public spaces play in sustainable urbanisation, anchoring the discussions in the new urban agenda that seeks to ensure that cities are safe, inclusive, resilient, and sustainable.[9] Such an approach, as the Sustainable Development Goals (SDGs) demonstrate, incorporates the protection of open spaces such as Uhuru Park. Section III focuses on the history of Uhuru Park to provide the context for the ensuing discussions. It shows that the Park is intricately linked to the country's political history and developments. Despite this, the threats faced recently are not isolated but part of a consistent pattern over the years, with the most egregious happening in the 1980s. These threats justify the need for enhanced protection of the Park, using the PTD. Section IV summarises the history and essential elements of the PTD and how it has been applied in other jurisdictions. Section V surveys the existing legislative and policy provisions addressing public open spaces in Kenya and discusses the gaps therein. Section VI makes proposals for filing the regulatory gaps by incorporating elements of the PTD and Section VII concludes the paper

II. ROLE OF PUBLIC SPACES IN SUSTAINABLE URBANISATION

Discussions about city development frequently focus on the provision of housing and other essential services.[10] Consequently, planning frameworks pay a great deal of atten-

7 The Greenbelt Movement, <https://www.greenbeltmovement.org/node/456 > (accessed on 10 July 2020).

8 Mwaniki BW, Gakuya DW, Mwaura AM. & Muthama N J, 'Open space governance in Nairobi: Towards collaborative approaches and sustainable outcomes. [3(2)] Public Administration and Governance Research Journal, 47-60, (2019) 51.

9 SGD Goal Number 11 see < https://www.un.org/sustainabledevelopment/cities/ > (accessed on 10 July 2020).

10 See, for example, S Colenbrander, 'Cities as Engines of Economic Growth: The Case for Providing Basic Infrastructure and Services in Urban Areas,' IIED Working Paper (2016); Mwangi IK, 'The Nature of Rental Housing in Kenya. Environment and Urbanisation, [9(2)] (1997) 141-159; K Mbote & Odote C. 'Innovating Tenure Rights for Communities in Informal Settlements: Lessons from Mukuru' in C. Odote, & P. Kameri-Mbote, *Breaking the Mould: Lessons from Community Land Rights in Kenya* (Strathmore University Press, 2016); and Gulyani, S., Talukdar, D., & Potter, C. 'Inside Informality: Poverty, Jobs, Housing and Services in Nairobi's Slums,' Report No. 36347-KE, Africa Water and Urban Unit 1. Washington, DC: World Bank (2008).

tion to the provision of such services as part of city development. The focus is on "filling the empty space, transforming the unoccupied into the inhabited, the unproductive into the functional, the empty into the built-up."[11] When assessing the lack of development, in a conversation that normally revolves around the urban sprawl, literature deals with the built-up component.[12] Vacant spaces are viewed as a failure of modernism in this prism.[13] However, sustainable urbanisation needs to address both the built up areas and the undeveloped areas. These areas are referred to in some literature as the interstices.[14] Unfortunately, the values of such areas are largely ignored. As one writer has argued, their presence, "(i)f considered at all, they appear as conceptually ambiguous, functionally useless, or as spatial leftovers, simple political residues of uncontrolled processes of urban expansion with unknown values."[15] Several terms are used to describe such areas, the majority of them denoting negativity, except the term open spaces, whose use has largely connoted some positivity,[16] even though public perception and treatment do not always support such positivity.

Starting out from a situation where such open spaces were viewed as vacant, undeveloped, waste and waiting to be filled with one development or the other, such lands slowly turned into a useful part of urban life. In the 1970s in the UK, for example, there grew a movement of urban ecology comprising naturalists, environmentalists and wildlife conservationists who supported the existence of such vacant lands in urban areas on the argument that "people in cities needed access, and had a right, to their own piece of the countryside."[17] This initiated the journey of appreciating the value of such vacant, empty or open spaces. It became evident that "empty spaces can accommodate different types of use and are not 'blank spaces' as sometimes represented on land-use maps."[18]

Open spaces serve many purposes in society. While traditionally seen as recreation grounds, the roles they perform are many and varied beyond serving as leisure and recreation grounds. A space to recreate, relax and exercise is an important and sometimes the primary role for which open spaces exist. Urban areas are defined by the types of buildings and density of population implying that most of the spaces are built up, unlike the rural areas where there is a lot of undeveloped and underdeveloped land. Having space for relaxing and exercising is good for people's health as it gives them an opportunity to just sit and reflect, take leisurely walks or even exercise. During the COVID-19 pandemic, human beings appreciated the importance of open spaces much more. With cities in lock-down, people stayed and worked from home, and it became increasingly necessary to take occasional walks or runs to keep fit and clear the mind after being sta-

11 I. de Solà-Morales Rubio, (1995) *Terrain vague*, in Anyplace, ed. C. C. Davidson (Cambridge, Mass., 1995), pp. 118–23; K Kamvasinou and SA Milne. 'Surveying the creative use of vacant space in London, c.1945–95', in Courtney J. Campbell, A Giovine, J Keating, eds., *Empty Spaces: Perspectives on Emptiness in Modern History*, (University of London Press, Institute of Historical Research 2019) pp. 151–77 at 151.

12 C Silva, "The interstitial spaces of urban sprawl: unpacking the marginal suburban geography of Santiago de Chile" in N.H.D. Geraghty and A.L. Massidda (eds.), Creative Spaces: Urban Culture and Marginality in Latin America (London: Institute of Latin American Studies, 2019), pp. 55–84 at p. 55

13 Krystallia and Sarah (n 10), at page 153

14 Silva, (n10).

15 *ibid*, page 59.

16 *ibid*, page 61.

17 Kamvasinou and Milne (n 11), page 165.

18 Kamvasinou and Milne (n 11), page 174.

tionary in the house for long periods of time. The existence of open spaces provided the space for such activities to be undertaken while in areas where open spaces did not exist, residents' options were limited and some had to walk along the roads even in situations where no paths and walkways existed. Thus, the existence of open spaces has health benefits and they provide avenues for undertaking physical activities.[19]

Secondly, open spaces have an aesthetic appeal. The quest to convert every inch of space into one form of construction or other transforms cities into blocks of concrete and mortar. While the development is sometimes celebrated as a step in the direction of urbanisation, the absence of sufficient open spaces creates a problem for planners. The existence of open spaces helps to break monotony[20] and enhances the aesthetic appeal of the entire city, making it more liveable.

Third, open spaces serve environmental functions in cities and other urban places where they are situated. They create a better environment and prevent congestion; conserve natural resources and scenic features of the land; help to prevent soil erosion and floods.[21] They also mitigate air and water pollution.[22] Some open spaces are also environmentally sensitive, such as wetlands, forests, watersheds, shorelands, marshes, and floodplains.[23] Maintaining them as open spaces thus ensures their conservation and continued provision of the necessary environmental goods and services, which would otherwise be compromised if they were converted to other uses.

Fourth, open spaces are also avenues for free speech. People normally congregate there to exercise their constitutional right to free speech in various ways. In Kenya, for example, such places are normally used by open-air preachers to provide spiritual nourishment to those who are present in the open spaces; youth groups and other categories of people spend time having regular social and political debate. Further, they are preferred spots for political rallies and other national gatherings. During election periods, political parties and other groups scramble for access to these places. In the United States, there emerged and continues to exist the Public Forum Doctrine[24] to capture this importance of open spaces as a space for the public exercise of the right of expression. Originally captured in a US case of *Hague vs CIO*[25] the concept has taken root and is demonstrative

19 For a discussion of the health implications of public parks, See A Henderson, Christine and R. Fry, 'Better Parks Through Law and Policy:
A Legal Analysis of Authorities Governing Public Parks and Open Spaces' Journal of Physical Activity and Health, (2011) 8 (Suppl 1), S109-S115.

20 RS Volpert, 'Creation and Maintenance of Open Spaces In Subdivision: another Approach' 12(3) UCLA Law Review 830-855 (1965) at 830.

21 *ibid*, at 830-1.

22 SM Williams, 'Sustaining Urban Green Spaces: Can Public Parks be Protected under the Public Trust Doctrine' [10] South Carolina Environmental Law Journal (2002) 23-52 at 23.

23 O Olpin, 'Preserving Utah's Open Spaces' [2] Utah Law Review (1973) 164-205 at 178.

24 For a discussion of the history, development and application of the Public Forum Doctrine to, see generally, Daniel Mach, 'The Bold and the Beautiful: Art, Public Spaces and the First Amendment,' [72] New York University Law Review (1997) 383-429; JM Phillip, 'Constitutional Law -- Southeastern Promotions, Ltd. v. Conrad: A Contemporary Concept of the Public Forum' [54(3)] North Carolina Law Review (1976) 439-449; DC Nunziato, 'The Death of the Public Forum in Cyberspace' [20(2)] Berkeley Technology Law Journal (2005) 1115-1172; Robert Jr, Langway, 'The Public Forum and the First Amendment: The Puzzle of the Podium,' [19(3)] New England Law Review, (1983)619-646.

25 U.S. 496, 515 (1939).

of the critical role that open spaces play in the democratisation process of any country. In the *Hague case*[26], Justice Roberts of the US Supreme Court stated that "streets and parks ... have immemorially been held in trust for the use of the public and, time out of mind, have been used for purposes of assembly, communicating thoughts between citizens, and discussing public questions."[27]

While the rule as developed from the above case concerns itself with the regulation of the right to free speech as captured in the First Amendment of the US Constitution, its focus on what is called the "geographical approach… because results often hinge almost entirely on the speaker's location"[28] demonstrating the importance of public open spaces. Although there are criticisms of the doctrine for seeking to limit free speech[29], with some arguing that its utility is diminishing,[30] it is its affirmation of open spaces that is attractive for this article, demonstrating that:

> '[I]n an open democratic society the streets, the parks, and other public places are an important facility for public discussion and political process. They are in brief a public forum that the citizen can commandeer, the generosity and empathy with which such facilities are made available is an index of freedom'.[31]

Therefore, by guaranteeing their continued existence and use by the public, including to freely express themselves, a country would be demonstrating its commitment to democratic ideals. The concept is particularly important for asserting the relevance of open spaces for their intrinsic value too, since it emerged at a time of "widespread concern… with the disappearance of traditional public space… in the face of nationalising, urbanising, modernising forces."[32] Therefore, "(a)sserting a right to speak on the street was a statement about the continued value of public space and the importance of articulating ideas in a face-to-face context."[33]

Open spaces, consequently, serve multiple functions. They "should be preserved as natural resources because of their availability for general use by the public for numerous public purposes and consequently, because of their importance in enhancing the quality of life in cities."[34]

While urbanisation is evidenced by the levels of infrastructure, housing, and other developments, sustainable urbanisation requires that such developments be inclusive, safe, resilient and sustainable (a commitment that the international community seeks to

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26 *ibid*.

27 *ibid*.

28 DA Farber and JE Nowak, 'The Misleading Nature of Public Forum Analysis: Content and Context in First Amendment Adjudication' [70 Virginia Law Review 1219-1266 (1984) at 1220.

29 *ibid*.

30 DS Day, 'The End of the Public Forum Doctrine,' [78(1)] Iowa Law Review (1992) 143-204.

31 H Kalven Jr, 'The Concept of the Public Forum: Cox v Louisiana' The Supreme Court Review (1965) 1-32 at 11-12.

32 S Barbas, 'Creating the Public Forum,' [44(3)] Akron Law Review (2011) 809-866 at 854.

33 *ibid*.

34 SM Williams, 'Sustaining Urban Green Spaces: Can Public Parks be Protected under the Public Trust Doctrine' [10] South Carolina Environmental Law Journal (2002) 23-52 at 24.

achieve by 2030 as per Goal 11 of the Sustainable Development Goals).[35] The existence and preservation of open spaces is an important aspect of sustainable urbanisation and consequently a target for all countries, including Kenya to pursue as part of its international commitments under the SDG Agenda, with the requirement that they should "(b)y 2030, provide universal access to safe, inclusive and accessible, green and public spaces…."[36] Protecting open spaces supports the quest for sustainable urbanisation. Uhuru Park and the threats it has undergone over the years culminating in the latest attempt to hive part of it off for the construction of the Nairobi Expressway is demonstrative of the challenges faced by many African cities in the quest for sustainable urbanisation.[37]

III. UHURU PARK'S HISTORY AND THREATS

The history of Uhuru Park is intricately linked to the history of Kenya. It existed during the colonial period, as one of the Green Spaces in the city. During the colonial period, they were markers of the colonial barrier[38] depicting the racial segregation in the city. It borders Kipande House, which was "the place where Africans had to stop and have their much-loathed passbooks verified before entering the town."[39] It also borders Nairobi Hill, Valley Road, and State House Road, which were the locations of the more affluent residential neighbourhoods of Nairobi.[40] It is from this colonial legacy that "spaces held in trust for the public in trust in post-independence" evolved.[41] When the country attained independence, President Kenyatta officiated the signing ceremony transferring the leadership of the country on 12th December 1963 from the colonial powers to African leadership led by himself. Its importance though, dates to a much earlier period: "(i)t is associated with the heroes of Kenya's independence struggle, who would assemble there to plot how to attack the enemy — the white colonialists."[42]

Uhuru park has continued to host numerous significant national events. Its importance is due to the many functions that it serves as a political venue, a governance advocacy spot, to a leisure spot for families and individuals. Its central location makes it very strategic. In 1978, following the death of Jomo Kenyatta, a prayer service was held there on 1st September 1978.[43] It contains an artificial lake, several national monuments, a popular

35 United Nations, *Transforming Our World: The 2030 Agenda for Sustainable Development I*, A/RES/70/1. Available at <https://sustainabledevelopment.un.org/content/documents/21252030%20Agenda%20for%20Sustainable%20Development%20web.pdf>. (Accessed on 28 November 2020).

36 *ibid*, Goal 11.7.

37 T Förster and C Ammann; 'African Cities and the Development Conundrum: Actors and Agency in the Urban Gr Zone,' in Carole Ammann, Till Förster, eds., *African Cities and the Development Conundrum*, (Brill, 2018) 1-25.

38 L Majanja, "A Park Named Freedom" The Elephant, August 9,2019. Available at https://www.theelephant.info/culture/2019/08/09/a-park- named-freedom/#:~:text=The%2012.9%2Dhectares%20was%20designated,people%20can%20enjoy%20boat%20rides.

39 *ibid*.

40 *ibid*.

41 *ibid*.

42 'Memories of joy and sorrow at Uhuru Park' Daily Nation, Thursday, August 26, 2010. <https://www.nation.co.ke/kenya/news/memories- of-joy-and-sorrow-at-uhuru-park--734788>.

43 *ibid*.

skateboarding spot and an assembly ground.[44] The iconic Nyayo Statue and Mau-Mau Freedom Fighters monuments are located here too.[45] In recognition of its historic and other importance, the park was designated as a recreational park, gazetted, launched and opened to the public on 23rd May 1969, by the then President Jomo Kenyatta.[46] Further on 3rd April 1995, the then Minister for Home Affairs and National Heritage, the Honourable Francis Lotodo, published a Gazette Notice declaring Uhuru Park a national monument.[47] The notice issued under the provisions of Section 4(1) of the Antiquities and Monuments Act[48] identified the park as measuring 21.43 hectares and including the "20th anniversary monument and the spot where Pope John Paul II offered the mass of '*statio orbis*' in Nairobi city."[49]

Despite its importance, the park has constantly been under threat. From its original size at independence, the park suffered several excisions "to make way for a football stadium, hotel, and a members-only golf club"[50], a road[51] and a monument to celebrate ten years of President Moi's Nyayo philosophy.[52] However, the most notorious threat to the park occurred in 1989. By this time it had been reduced in size to only thirty-four acres.[53] The government proposed the construction of a sixty-storey tower in the park to house the offices of the then ruling party, KANU and its national publication, the Kenya Times to be named the Times Media Trust Complex.[54] In addition, the complex would also have a trading centre, offices, an auditorium, galleries, shopping malls and parking spaces for two thousand cars[55] and cost around four billion Kenya shillings to construct.[56] Professor Wangari Maathai led the public opposition to the construction following a tip-off from a young law student.[57] Her action through her Green Belt movement took the form of written protest letters, engaging her Member of Parliament, seeking the support of the international community, media engagements and eventually, court action.[58]

In *Wangari Mathai v Kenya Times Media Trust,*[59] Wangari complained that the construction would deny Nairobi residents the space they had hitherto used for recreational

44 Marion Kamau, 'Hands off Uhuru Park – The green heart and Kenyan city jewel' 22/10/2019. Available at <https://www.greenbeltmovement.org/node/908> (accessible at 9 July 2020).
45 *ibid*.
46 *ibid*. see also Lutivini Majanja (n38)
47 Gazette Notice number 2017, 3 April 1995.
48 Now repealed and replaced by the National Museums and Heritage Act.
49 Supra, note (47).
50 "Hands off our Uhuru Park: Green Spaces a Matter of Life and Death" Wanjira Maathai and Mia McDonald, 31 October 2019. Available at http://www.greenbeltmovement.org/node/910. (accessed on 9 July 2019).
51 W Mathai, *Unbowed*, (William Heinneman, 2007) p 185.
52 *ibid*.
53 *ibid*.
54 *ibid*.
55 Wangari, (n51) at page 186
56 *ibid*.
57 *ibid*, page 184
58 For details on these efforts see Wangari Mathai(n49) pages 184-205.
59 (HCCC 5403 of 1989, reported in (1989) eKLR.

purposes and would therefore, interfere with their environmental rights. [60] She consequently sought the court's intervention to stop the construction through the issuance of an injunction. The court, however, did not listen to the case on its merits. Following a preliminary objection raised by lawyer George Oraro, the case was dismissed on the basis that Wangari Mathai lacked *locus standi*[61] and further, that there was no cause of action disclosed in the plaint. The judge held that the construction complained about offended no law for which a relief could be granted. In words that became synonymous with the approach of courts on matters that were public interest in nature, Judge Dugdale stated:

> "The plaintiff has strong views that it would be preferable if the building of the complex never took place in the interest of many people who had not been directly consulted. Of course, many buildings are being put up in Nairobi without many people being consulted. Professor Maathai apparently thinks this, is a special case. Her personal views are immaterial. The court finds that the Plaintiff has no right of action against the Defendant Company and hence she has no *locus standi*."[62]

Although the case was dismissed, Professor Wangari continued to lead citizen pressure against the construction of the complex in Uhuru Park. The pressure eventually paid off when the Government announced on January 29th, 1990 that it was scaling back the project from its original size and finally in February 1992 it bowed to public pressure and abandoned the project completely.[63] With this, the plan to encroach onto the Park was stopped and citizens continued to enjoy the numerous benefits that the Park offers to residents of Nairobi as well as visitors to the city.

Although Professor Wangari succeeded in galvanising citizens in "the slaying of the 'park monster'"[64] events thirty years later would demonstrate that the monster was not fully eliminated. The action to try and excise part of the Park for the construction of the Nairobi Expressway was shrouded in mystery just as in the time of the Kenya Times complex. "Again, it took public pressure to have the government change its original plans. We could argue about the importance of the highway, and the fact that the size of land to be affected was minimal. However, it shows that Uhuru Park is viewed as just a public land, which constitutionally can be converted to other uses when the circumstances demand."[65]

The history culminating in the recent threats to hive off part of the Park to construct the Expressway is evidence of a pattern of non-appreciation of the importance of the country's ecological and socio-economic development. As urbanisation endures and land becomes even more scarce, threats to convert the land on which the Park sits may

60 C Odote, 'Public Interest Litigation and Climate Change- An Example from Kenya' in Oliver C Ruppel, et al, Climate Change: *International Law and Global Governance* (Nomos, 2013) 805-830 at 817.

61 HCCC 5403 of 1989, reported in (1989) eKLR.

62 *ibid*.

63 Wangari Mathai(n51) at page 203.

64 *ibid*, page 204.

65 C Odote, "Uhuru Park Should be a protected Site" Business Daily, Sunday 8th December 2019. Available at <https://www.businessdailyafrica.com/analysis/ideas/Uhuru-Park-should-be-a-protected-site/4259414-5378026-dba9qy/index.html> (accessed on 9 July 2020).

only accelerate. It is essential that innovative mechanisms are adopted to address this existential threat to an iconic site with huge benefits to the citizens and the environment. PTD offers a tool for such protection and requires customisation to Kenya's context and application to Uhuru Park's legislative regulatory frameworks.

IV. UTILITY OF PTD IN PROTECTION OF OPEN SPACES

Despite the acknowledged importance of open spaces, they are perennially under threat either from efforts to privatise them or to convert them to other public uses, which are not always in accord with their nature. Grappling with how best to address these challenges may require applying the PTD to open spaces so that they can always be preserved for public use. There are several scholarly arguments for extending the doctrine to open spaces. Writing on Article 49 of the Constitution of Massachusetts State in the US, for example, Baker and Mariam opine that "(i)n the way it limits local governments and state agencies from changing the use of public parks without legislative authorisation, it grants a kind of protection to parks that closely parallels protections carried out under the ancient 'public trust doctrine' in other States."[66] While the Article does not expressly mention the word parks or open spaces, instead stating that "(t)he people shall have the right to clean air and water, freedom excessive and unnecessary noise, and the natural, scenic, historic, and aesthetic qualities of their environment;"[67] pointing out that "… the protection of the people in their right to the conservation, development and utilisation of the agricultural, mineral, forest, water, air and other natural resources is hereby declared to be a public purpose"[68], it has been argued to apply to parks due to the reasons for which parks are conceived.[69] Similar provisions of public trust are captured in other States in the US,[70] and across the globe.

The most seminal writing on PTD and its modern application was published in 1970 by Joseph Sax under the title, *The Public Trust Doctrine in Natural Resources Law: Effective Judicial Intervention*.[71] The article traced the origin of the doctrine, explicated its essential elements, and justified its importance as a tool for citizens to seek protection of the environmental quality by suing Government agencies in relation to their statutory responsibilities to protect the public interest.[72] One of the cases cited in the article relates to destruction of park lands.[73] There have subsequently been other writings on PTD fo-

66 KP Baker & DH Merriam, 'Indelible Public Interests in Property: The Public Trust and the Public Forum' [32] Boston College Environmental Affairs Law Review (2005) 275-300 at 278.

67 Article XLIX of the Massachusetts Constitution, recorded in Bret Adams et al., Environmental and Natural Resources Provisions in State Constitutions, [22] Journal of Land Resources and Environmental Law (2002) 73-270, at p 147.

68 *ibid*.

69 *ibid*.

70 Bret Adams(n67).

71 JL Sax, "The Public Trust Doctrine in Natural Resources Law: Effective Judicial Intervention" 68(3) Michigan Law Review 471-566 (1970).

72 *ibid*, page 566.

73 *ibid*, in the case of Robbins v. Department of Pub. Works, 244 N.E.2d.

cusing on numerous other issues, including groundwater,[74] climate change,[75] wildlife,[76] electromagnetic spectrum[77] , and also open spaces.[78]

PTD originated from Roman law, moved to the English law[79] before getting to the rest of the world.[80] Some scholars trace its origin to the early Roman Civil law[81] and to the ancient Greek doctrine, particularly the natural law philosophies of Greek Stoicism.[82] There is greater consensus on the first recorded origin of the doctrine as the 6th Century Justinian Code of the Roman Empire.[83] The Justinian Code provided that:

> 'The following things are by natural law common to all - the air, running water, the sea, and consequently the sea-shore. No one therefore is forbidden access to the seashore..., for these are not, like the sea itself, subject to the law of nations .... Again, the public use of the banks of a river, as of the river itself, is part of the law of nations; consequently, everyone is entitled to bring his vessel to the bank, and fasten cables to the trees growing there, and use it as a resting-place for the cargo, as freely as he may navigate the river itself.... But they cannot be said to belong to any one as private property, but rather are subject to the same law as the sea itself, with the soil or sand which lies beneath it'.[84]

The above Roman antecedents sowed the seed of the public good, recognising that private property rights have limits. While this public nature of natural resources found its way into English law, including some elements being incorporated into the Magna Carta,[85] since Common law was against "ownerless things", it vested the "ownership"

74 J Tuholske, 'Trusting the Public Trust: Application of the Public Trust Doctrine to Groundwater Resources' [9] Vermont Journal of Environmental Law (2008) 189.

75 J Meyer, 'Using the Public Trust Doctrine to Ensure the National Forests Protect the Public from Climate Change' [16] Hastings W-Nw J Envt'l L & Pol'y (2010) 195.

76 P Redmond, 'The Public Trust in Wildlife: Two Steps Forward, Two Steps Back' [49] Nat Resources J (2009) 249.

77 PS Ryan, 'Application of The Public-Trust Doctrine and Principles of Natural Resource Management to Electromagnetic Spectrum' [10] Michigan Telecommunications and Technology Law Review 285.

78 H Babcock, 'Is Using the Public Trust Doctrine to Protect Public Parkland from Visual Pollution Justifiable Doctrinal Creep' [42] Ecology Law Quarterly (2015) 1-36.

79 ZC Kleinsasser, "Public and Private Property Rights: Regulatory and Physical Takings and the Public Trust Doctrine" [32(2)] Boston College Environmental Affairs Law Review (2005) 421-458 at 421.

80 For a discussion of its evolution see, for example, See Guillaume, J Aime, 'Navigating the Troubled waters of the Public Forum: The Public Trust Doctrine as a Life Jacket' [50(1)] Arizona State Law Journal, (2018) 335-364 at 345-350; Allan Kanner, 'The Public Trust Doctrine, Parens Patriae, and the Attorney General as the Guardian of the State's Natural Resources' 16 Duke Environmental Law & Policy F (2005) 57-106; and E. van der Schyff, 'Unpacking the Public Trust Doctrine: A Journey into Foreign Territory,' [13(5)] Potchefstroom Electronic Law Journal (2010) 122-160.

81 SM Horner, 'Embryo, Not Fossil: Breathing Life into Public Trust in Wildlife' [35(1)] Land & Water L Rev (2000) 23-78 at p. 32.

82 See S Wise, 'The Legal Thinghood of Non-Human Animals', [23] British Columbia Environmental Affairs Law Review, (1996) 471,489-505.

83 RJ Lazarus, 'Changing Conceptions of Property and Sovereignty in Natural Resources: Questioning the Public Trust Doctrine,' [71] IOWA Law Review. (1986) 631,636; Allan Kanner, 'The Public Trust Doctrine, Parens Patriae, and the Attorney General as the Guardian of the State's Natural Resources' [16] Duke Environmental Law & Policy F (2005) 57-106; and Susan Morath Horner, 'Embryo, Not Fossil: Breathing Life into Public Trust in Wildlife' [35(1)] Land & Water L Rev (2000) 23-78.

84 J. INST. 35 § 2.1.1 (J. B. Moyle trans., 5th ed. 1913).

85 JS Stevens, 'The Public Trust: A Sovereign's Ancient Prerogative Becomes the People's Environmental Right,' [14] U.C. DAVIS L. Rev. (1980) 195, 197.

of public resources in the King.[86] Subsequently, abuse occurred in the way the commons were used, leading to their enclosure and the importance of the doctrine was again revived in the 17th Century.[87] When it moved to America as part of the colonial process, they changed its beneficiary from the monarchy to the public as a whole.[88] In parts of the Commonwealth, including Kenya, the reference to the Crown remained in land Laws during the colonial period.[89]

This is the background against which the modern doctrine as espoused by Sax must be viewed. He elaborated it to consist of three elements, "first, the property subject to the trust must not only be used for a public purpose, but must be held available for use by the general public; second, the property may not be sold, even for a fair cash equivalent; and third, the property must be maintained for particular types of uses."[90]

Simply described, PTD provides that natural resources belong to the whole public and private owners may not deprive the public of access.[91] The meaning and importance of PTD, from the foregoing explication is well-settled as it applies to the role and responsibility of the State *vis-a-vis* its citizens with regard to the protection of natural resources.[92] However, controversy arises when the question is not about transfer from one public purpose to another, but from a public to a private purpose, just as there may be debate about its potential in prescribing liability for damage for natural resources. Originally the doctrine concerned itself with ownership of certain shared resources. Its modern application is much wider to an extent where it has been argued that it "requires from the State a custodial commitment not only to guard against unlawful appropriation by private citizens, but also to protect and conserve natural resources."[93] This modern application is hailed and criticised in equal measure[94] making it complex.[95] Despite the complexity and controversy, the essential underpinnings of PTD have not changed from the traditional roots. What has happened instead is its expansion to types of property from the traditional three - air, running water and the seashore. The importance of the doctrine is captured in the following statement:

86 SM Horner (n81) at 34.

87 SC Smith, 'A Public Trust Argument for Public Access to Private Conservation Land,' [52] DUKE L.J. (2002) 629, 639; Carol M. Rose, 'Takings, Public Trust, Unhappy Truths, and Helpless Giants: A Review of Professor Joseph Sax's Defense of the Environment Through Academic Scholarship: Joseph Sax and the Idea of the Public Trust,' [25] ECOLOGY L.Q. (1998) 351, 351.

88 SC Smith, 'A Public Trust Argument for Public Access to Private Conservation Land,' [52] DUKE L.J. (2002) 629, 639; Richard J. Lazarus, 'Changing Conceptions of Property and Sovereignty in Natural Resources: Questioning the Public Trust Doctrine,' [71] IOWA L. REV. (1986) 631,636.

89 Ogendo, HWO, 'Tenants of the Crown: Evolution of Agrarian Law & Institutions in Kenya,' (Acts Press,1991); Tim O Mweseli, 'The Centrality of Land in Kenya: Historical Background and Legal Perspective' in Smokin C. Wanjala ed., Essays on Land Law: The Reform Debate in Kenya (Faculty of Law, University of Nairobi, 2000) 3-24.

90 Sax, (n71), at page 477.

91 A Kanner, 'The Public Trust Doctrine, Parens Patriae, and the Attorney General as the Guardian of the State's Natural Resources' [16] Duke Environmental Law & Policy F (2005) 57-106 at 61.

92 L Feris, "The Public Trust Doctrine and Liability for Historic Water Pollution in South Africa" [8(1)] Law, Environment Development (2012) 1-18 at 3.

93 *ibid*, page 6.

94 See E. van der Schyff, (n90) at 125.

95 *ibid*.

> By placing public trust property in a unique property regime in which it is neither susceptible to unlimited private ownership nor unrestricted State ownership, and by binding the State with the responsibility of guarding the public's interest in that specific object, a unique property interest was vested in each member of the public purported to be protected by the public trust - normally the citizens of the country.[96]

The above backdrop justifies the expansion of the doctrine to the protection of parks and other public open spaces in other jurisdictions.[97] In discussing that expansion, the warning of Susan Morath Horner is apt.[98] She argues that there is much writing and agreement on the origin and developments of the doctrine. What is now needed, she continues, is to "turn the discussion toward understanding the elements and boundaries of the doctrine with regard to wildlife. In short; what must the government do, and what is it prohibited from doing, in order to fulfil its trust responsibilities?..... Equally important is to provide a model for the meaningful enforcement of the trust".[99] The same sentence applies to the current discussions on public open spaces.

In supporting the application of the doctrine to protection of public parks, Williams[100] has argued that parks should be treated as scarce natural resources[101] requiring protection since they are difficult to replace once either depleted or converted to other uses. This difficulty is compounded by the scarcity of land, especially in urban areas. As a consequence, Williams argues that courts should be reluctant to allow the transfer of the park to a private purpose or to another public purpose.[102] The latter instance, she says that "courts should view such diversions with scepticism and allow them only in circumstances where the public purpose of the diverted use either is consistent with the park use or outweighs the park use, where a public entity maintains control over the diverted use, and where the public continues to have access under the new use."[103]

Of the two instances above, it is much easier to apply PTD to prevent conversion of parks to private uses. The first restriction of PTD as espoused by Sax[104] focuses on maintaining property subject to the doctrine for public purpose. Consequently, parks such as Uhuru Park, being important recreational areas would be restricted from conversion either in whole or in part to private uses, whatever those uses are. The argument being that in these instances the Park is no longer freely available for the public. The more difficult discussion relates to the conversion of public parks from one public use to another. For example, converting part of it to construct a school or a road. This conversion is attractive to Governments as it saves them from expending public funds to acquire private property for that purpose.[105] Professor Serena Williams, provides the circumstances when the conversion to another public purpose should be allowed, being, that "(1) the

96 Van de Schyff (n90) at page 131.
97 SM Williams (n22).
98 SM Horner(n81).
99 SM Horner (n81) at page 25.
100 SM Williams (n22).
101 *Ibid*, page 25.
102 *Ibid*.
103 *Ibid*.
104 Sax, (n71) page 477.
105 SM Williams (n22), page 46.

area would continue to be devoted to a broad public purpose which is either consistent with the public uses of the original area or is one that outweighs the public use of the area as a park; (2) a public body would retain control over the use of the area in question; and (3) the diverted use would be one open to the public."[106]

In applying the above criteria, while it should be possible in appropriate instances, to convert a park to another public purpose, one must satisfy themselves whether or not doing so is in the public interest - Will it enable the public to continue enjoying the use of the land on which the park is located freely and openly since openness is one of the critical aspects of recreational parks in urban areas? Consequently, such conversions should be frowned upon in most instances so as to allow the parks to continue being available and to be used as recreational areas and other related functions that they serve in society. As Professor Williams accurately quips, "The financial and political expediency of alienating such parks or even diverting them for other public purposes cannot always be allowed to outweigh the recreational and public purposes of park lands which have also been shown to lower crime, improve air quality, and raise property values."[107]

V. ADOPTING A PUBLIC TRUST APPROACH TO THE PROTECTION OF UHURU PARK: LIMITATION AND GAPS

A. Constitutional Anchorage

The rationale for constitutional recognition and support for the quest for sustainable development is now well settled. The argument being that the environmental crisis of the world must be accorded pride of place in the political and constitutional arrangements of any well-managed State.[108] The efforts to constitutionalise environmental management is best captured by the treatment of environment as part of the Bill of Rights in national constitutions.[109] In 2010, Kenya joined the league of countries with environment and sustainable development as part of their constitutional architecture.[110] Unlike the previous Constitution which did not expressly address itself to issues of sustainable development and was thus characterised as weak,[111] the 2010 Constitution makes sus-

106 *Ibid.*

107 SM Williams (n22), page 52.

108 JB Ojwang, 'Environmental Law and the Constitutional Order' Ecopolicy Series Number 3, African Center for Technology Studies, 1993 at page 2.

109 For a discussion of the inclusion of environment as a human right in national constitutions see generally, C. Odote, 'A Human Rights-Based Approach to Environmental Protection: Kenyan, South African and Nigerian Constitutional Architecture and Experience' in Michael Addaney and Ademola Oluborode Jegede eds., Human Rights and the Environment Under African Union Law, (Palgrave Macmillan, 2020) pages 381-414; D. R Boyd, The Environmental Rights Revolution: A Global Study of Constitutions, Human Rights, and the Environment, (UBC Press, 2012); CO OKidi, 'International Perspectives on the Environment and Constitutions,' in 3 South African Journal of Environmental Law and Policy 39-69(1996); and D. R Boyd, The Environmental Rights Revolution: A Global Study of Constitutions, Human Rights, and the Environment, (UBC Press, 2012).

110 For a brief and early review of these provisions see Odote C, 'Kenya: Constitutional Provisions on the Environment' [1] IUCN Academy of Environmental Law E-Journal, (2012) 136-145.

111 J Bosek, 'Implementing Environmental Rights in Kenya's New Constitutional Order: Prospects and Potential Challenges' [14] AHRLJ (2014) 489, 491; Brian Sang, 'Tending Towards Greater Eco-Protection in Kenya: Public Interest Environmental Litigation and Its Prospects Within the New Constitutional Order' [57] J African Law (2013) 29, 30; Caiphas B Soyapi, 'Environmental Protection in Kenya's Environment and Land Court' [31(1)] Journal of Environmental Law(2019) 151,153.

tainable development a cornerstone of its design and implementation. This is captured in Article 10 of the Constitution.[112]

In discussing the protection of public open spaces, regard must always be given to the constitutional directives on infusing sustainable development in all aspects of governance and as part of national values. This guarantees that considerations of sustainability must be read into every constitutional article and efforts to apply it. This is especially important when considering the protection and uses of Uhuru Park since land and natural resources are the basis of livelihoods in Kenya and thus foundational to the development discourse of the country. The Constitution recognises the central place that natural resources play in the country's development landscape.[113]

The first constitutional issue would be the nature of open spaces. Are they public property, private or common property? In theory, these spaces can exist in each of the tenure regimes recognised by the Constitution. In whichever tenure category it exists, the manner of its use is to be governed by land policy principles of equity, efficiency, productivity and sustainability as captured by the Constitution.[114] The focus of the current discussions are those categories of open spaces that are for the use of the public, such as Uhuru Park. The Constitution includes a category of property called public property.[115] The debate as to whether Uhuru Park is part of public land or not, requires clarity about whether or not it becomes such by virtue of being an open space or a public open space. The Report of the *Ndungu Land Commission*[116] categorised open spaces in urban areas as public land. Although the report did not use the term 'open spaces' in its body, it argues that "(i)t is immediately evident that these lands (Urban Lands) are public lands in the classical sense used in this Report."[117] The reason given is not just that they are registered as public lands but because of their importance in the development and operations of urban areas. In this vein, the report argues that:

> The entire physical development of the country depends on these lands. Thus, facilities such as public roads and highways, **recreational parks**, playgrounds, stadia, public schools, hospitals, markets, fire stations, police stations, toilets, cemeteries, theatres, monuments, historical sites, social halls, housing estates, research institutions, and many other public utilities are excised and developed out of these lands.[118] (Emphasis added).

The 2010 Constitution of Kenya, does not explicitly mention whether recreational parks like Uhuru Park are constitutionally public land as open spaces or not, despite the language in the Ndungu Report above. What qualifies as public land includes government forests, after including government game reserves, water catchment areas, national

112 Article 10(2)(d), Constitution of Kenya, 2010.
113 C. Odote, 'Environmental Jurisprudence and Sustainable Development in Kenya: A Theoretical Foundation' in P. Kameri-Mbote and C. Odote eds., *Blazing the Trail: Professor Charles Okidi's Enduring Legacy in the Development of Environmental Law*, University of Nairobi School of Law, 2019 P188.
114 Constitution of Kenya, 2010.; Article 60(1)
115 Constitution of Kenya, 2010; article 62.
116 Republic of Kenya, *Report of the Commission of Inquiry into the Illegal and Irregular Allocation of Public Land* (Government, Printer, 2004).
117 *Ibid*, page 73.
118 Ndungu report (n1), page 73.

parks, government animal sanctuaries, and special protected areas."[119] In addition, public land would be such land declared as such by any law enacted by Parliament either before or after the coming into force of the 2010 Constitution.[120] Consequently, open spaces would constitutionally fall into public land as either under the category of specially protected areas or through a law enacted, which provides for such open spaces.

In essence, therefore, while the Constitution provides a basis for protection of open spaces as public land, there is no explicit provision that makes all open spaces public land. Further legislative provisions would be necessary to ensure that Uhuru Park as an open space is protected as part of public land.

B. Proliferation of Legislative and Policy Provisions

There is no single piece of legislative or policy guidance on public open spaces, their meaning, creation, use and mechanisms for their protection in Kenya. Instead, brief mention is scattered across several statues and policies dealing with land, environment, planning, forestry, and wildlife. The consequence is legislative gaps, institutional overlaps, and policy incoherence.

The existence and protection of open spaces is significantly linked to the planning process. Planning not only guarantees that certain areas are reserved as open spaces, but also reconciles different uses in society. One of the greatest threats to the continued presence of open spaces come from non-compatible land uses. Kenya had long relied on a 1996 Physical Planning law,[121] that failed to integrate environmental considerations in the planning processes.[122] In 2019, a new law, the Physical and Land Use Planning Act, was enacted[123] to amongst other things, "make provision for the planning, use, regulation and development of land"[124] and align the country's planning processes to the constitutional dictates.

The Act explicitly mentions open spaces and empowers County Governments to "reserve and maintain all land reserved for open spaces, parks, urban forests and green belts in accordance with the approved physical and land use development plans."[125] Thus, the Act puts the responsibility of setting aside open spaces and ensuring they are protected on County Governments. In carrying out this function, County Governments comply with and rely on the powers under the Urban Areas and Cities Act[126] and the County Government Act.[127] The Urban Areas and Cities Act requires County Governors to appoint a Board[128] to manage municipalities and cities in their respective counties.

119 Article 62 of the Constitution.
120 Constitution of Kenya, 2010, Article 61(1)(n)(i) and (ii).
121 Physical Planning Act, Act Number of 8 of 1999 (since repealed).
122 R Wachira, 'Synchronising Physical Planning Law with the Framework Environmental Law' in C.O. Okidi, *Environmental Governance in Kenya: Implementing the Framework Law* (East African Educational Publishers Limited, 2008) 208-219 at 219.
123 Act Number 13 of 2019.
124 *ibid*.
125 Physical and Land Use Planning Act, Number 13 of 2019, Section 56(f).
126 Act Number 13 of 2011.
127 Act Number 17 of 2012.
128 Urban Areas and Cities Act, Section 14.

[129] Part of the management responsibilities of these boards is controlling land use, subdivision, land development and zoning.[130] These are to be done within the framework of the spatial and Master Plans of the city or municipality. The Act allows the Boards to ensure that these cater for among others, recreational areas, parks, and entertainment places.[131] Open spaces serve these purposes; hence this provision is relevant for their establishment and regulation in urban areas.

The creation and maintenance of open spaces is part of the constitutional responsibility of county planning, a function captured in the 4th Schedule of the Constitution. By undertaking this function County Governments ensure that the land within the county is used in an orderly, equitable and sustainable manner. It avoids the mushrooming of informal and unplanned settlements which result in urban sprawl. The County Government Act elaborates on the importance of county planning, and includes as one of those functions the object of "maintain(ing) a viable system of green and open spaces for a functioning eco-system."[132] Other objects of county planning that have implications for open spaces, include the objectives of ensuring that planning supports the maintenance of 10% tree cover[133] and protecting historical and cultural heritage sites.[134]

Open spaces are also sometimes recognised as monuments in Kenya. Once so recognised, they fall under the rubric of the National Museums and Heritage Act[135] which governs the "establishment, control, management and development of national museums"[136] and "identification, protection, conservation, and transmission of the cultural and natural heritage of Kenya."[137] The Act defines open spaces as areas " not built upon in any urban or peri-urban area whether in a municipality or not to which the public has access."[138] Such areas can be used for "parks, gardens, recreation grounds"[139] or other uses.

The National Museums and Heritage Act deals with two categories of important sites in Kenya, being either a national museum or a heritage site. The idea behind heritage sites captured by the Act derives from the Convention Concerning The Protection of The World Cultural and Natural Heritage adopted by the United Nations, Educational Scientific and Cultural Organisation (UNESCO) at the seventeenth session of the General Conference (referred to as the World Heritage Convention).[140] The World Heritage Convention focuses the international community on the concept of nature conservation and the preservation of cultural properties.[141] It establishes an "effective system of collective protection of the cultural and natural heritage of outstanding universal value,

129 Section 20, Urban Areas and Cities Act.
130 Section 20(1)(d), Urban Areas and Cities Act.
131 *ibid*.
132 Section 103(c), Act Number 17 of 2012.
133 County Government Act, Number 17 of 2012, Section 103(i).
134 County Government Act, Number 17 of 2012, Section 103(g).
135 Act Number 6 of 2006.
136 *ibid*.
137 *ibid*.
138 *ibid*.
139 *ibid*.
140 <https://whc.unesco.org/archive/convention-en.pdf> (accessed on 5th July 2020).
141 See <https://whc.unesco.org/en/convention/>. (accessed on 5th July 2020).

organised on a permanent basis and in accordance with modern scientific method."[142] Each party is responsible, under Article 3 of the Convention, for identifying and delineating its own heritage sites.[143] Once they have done so they are under a duty to protect, conserve, preserve and transmit cultural and natural heritage to future generations.[144] By so doing, States adhere to the international requirements of intergenerational equity, which calls for guaranteeing future generations the same ecosystem goods and services that the current generation enjoy. Article 2 of the World heritage Convention provides a detailed definition of cultural heritage to include monuments, groups of buildings, and sites of outstanding universal value from the point of view of, inter, alia, history, art, science, aesthetics, ethnology or anthropology.[145]

In compliance with the country's obligations under the World Heritage Convention, Part Four of the National Museums and Heritage Act sets out the procedure for declaration of areas as heritage sites. One of the areas that the Cabinet Secretary responsible for culture may declare to be a protected area under this part of the Act includes an open space as defined in the Act and captured earlier on in this paper. Once gazetted as such, the area shall come under the protective powers of the National Museums of Kenya.

The laws governing ownership, use, management, and transfer of land are also relevant for open space regulation since these spaces are land. The Land Act has two provisions that are important for open spaces. *First* are the provisions that address public purposes to which land can be put. *Secondly* are those that deal with public land. The Constitution discusses the power of the State to compulsorily acquire private or community land subject to compensation in instances where it is necessary in the public interest or for a public purpose.[146] The Land Act[147] defines public purpose to include certain open spaces. These are lands used for "public parks, playgrounds, gardens, sports facilities and cemeteries."[148] When land is required either by National or County Government for a public purpose, the National Land Commission can compulsorily acquire that land. The process of acquisition is detailed and geared towards ensuring that it is done transparently, those affected are given notice and the requisite compensation paid.[149]

The sprinkling of legislative stipulations on open spaces is further evident from the Forest Conservation and Management Act.[150] The Act requires every County Government to establish and maintain open green spaces either as green zones or recreational parks.[151] These are to provide residents of the area with areas for recreation and leisure. In establishing and maintaining such green zones, recreational parks and arboreta, County Governments are to receive technical assistance from the Kenya Forest Service.[152] This

142 1037 UNTS 151, Preamble.
143 P Sands and J Peel, with A Fabra and R Mackenzie, *Principles of International Environmental Law,* Fourth Edition (Cambridge University Press, 2018), p. 423.
144 1037 UNTS 151, Article 4.
145 Sands and Peel (n143), page 423.
146 See Article 40(1)(b), Constitution of Kenya, 2010.
147 Act Number 6 of 2012.
148 *Ibid*.
149 Section 107-133, Land Act.
150 Act Number 34 of 2016.
151 Section 37(1), Ibid.
152 Section 37(4), Forest Conservation and Management Act.

implies that the Act considers open spaces as part of or similar status to forests. While an important provision, it is not all open spaces that have trees and qualify to be either arboreta or forests. Either only open spaces that have trees and meet the definition of forests are contemplated under this Act or the Act seems to be wider than what would be under the purview of the Act, a demonstration of the dangers of the sprinkling approach to treatment of the issue of open spaces. This is further buttressed by the caveat in the Forest Conservation and Management Act that "(n)o arboretum or recreational park shall be converted to any other use unless the County Department responsible for forestry, consults the residents of the area in the jurisdiction within which such arboretum, green zones or recreational park is situated."[153]

Other relevant laws in the discussions of open spaces in Kenya include the Land Registration Act,[154] the Survey Act,[155] The Wildlife Conservation and Management Act[156] and the Environmental Management and Coordination Act.[157]

The National Land Policy[158] does not mention open spaces. However, its provisions envisage public open spaces to the extent that it refers to the commitment by Government to establish mechanisms for repossession of illegally or irregularly acquired public lands.[159] Further, the Policy speaks in detail of the need for orderly land use planning, recognising that planning is important for "efficient and sustainable utilisation and management of land …"[160] Consequently, the Government should ensure the development and implementation of "spatial frameworks for the orderly management of human activities to ensure that such activities are carried out by taking into account such considerations as economy, safety, aesthetics, harmony in land use and environmental sustainability."[161]

The National Land Use Policy[162] on the other hand, speaks to the importance of open spaces more explicitly. The Policy's development sought to address the challenge of poorly regulated land use, a use that did not invariably deliver on the constitutional requirement of equity, efficiency, productivity, and sustainability due to a myriad of reasons. Some of the problems that the Policy identified as endemic in the country as a result of the use of land include, "rapid urbanisation, inadequate land use planning; unsustainable agricultural and industrial production methods, poor environmental management, poor cultural practices, inappropriate ecosystem protection and management."[163] Some of these issues manifest themselves in the challenges relating to open spaces in the country. The call by the Policy to ensure that the challenges of open spaces are addressed within the wider context of improving urban environmental man-

153 Section 37(5), Forest Conservation and Management Act.
154 Act Number 3 of 2012.
155 Chapter 299, Laws of Kenya.
156 Act Number 47 of 2013.
157 Act Number 8 of 1999.
158 Republic of Kenya, *Sessional Paper No. 3 of 2009 on National Land Policy*, (Government Printer, 2009).
159 NLP (Ibid), para 61(e).
160 NLP, Para 103.
161 NLP, para 104(c).
162 Republic of Kenya, Sessional Paper Number 1 of 2017, on National Land Use Policy (Government Printer, 2017).
163 *ibid*, page 1.

agement, is thus welcome.[164] There is a recognition that the open spaces have been encroached on, grabbed, degraded or otherwise interfered with to the extent of preventing them from performing their functions. Consequently, the Policy commits that Government will zone the open spaces and parks and restore and reclaim them "back-to-back to public ownership to ensure that they revert to the original state,"[165]

C. Regulatory and Operational Gaps

The review of the legal and policy framework reveals that while Kenya's regulatory regime contemplates and has provisions on public open spaces, they are scattered across too many statutes to be effective. In addition, the institutions that have some responsibility over their management are numerous, opening up grounds for either turf wars, lack of coordinated and dedicated responsibility. The laws are also scanty in their substantive rules, some only providing for the creation of these spaces or even when they provide for their management it is as either an arboretum or forest and not primarily as an open space.

Unfortunately, despite its historical and contemporary importance, Uhuru Park does not have strong legislative and policy protection. The Kenyan laws and policies recognise open spaces but do not have detailed protection procedures that would ensure that their unique character is preserved. These legal, policy and practice gaps need to be resolved by categorising public open spaces like Uhuru Park as resources subject to the PTD and developing legislative provisions that give meaning to the application of that doctrine in the regulatory processes.

In addition, a systematic planning and management framework for Uhuru park and resources allocated for such management are insufficient and lacking. Open spaces need to be kept neat, habitable, and well maintained. Some are, however, dilapidated and treated as no-man's-land. The lack of effective maintenance makes them susceptible to grabbing. For example, City Park in Nairobi is embroiled in contestations between public and private interests with allegations that part of the park has been grabbed. To ensure that Uhuru Park does not fall into such a threat, it is necessary that the County Government of Nairobi allocates resources under its county planning and public amenities function. The latter includes the function of sustainable management and utilisation of County Parks.[166] Currently this is not adequately prioritised by Nairobi Cunty Government in its annual budgetary processes.

In the final analysis, the challenge moving forward must be to respond to the words written about open spaces in the city of London centuries ago,[167] by Isabella Holmes thus:

> The provision of houses for the growing population, the regulation of buildings, the widening of streets, and the making of sewers, are parts of the council's work, and the healthier the towns are made, the faster will

164 See *Ibid*, page 47.
165 *ibid*, page 47.
166 Schedule IV, Constitution of Kenya, 2010.
167 Isabella M Holmes, 'Open Spaces' (1889) 1(3) County Council Magazine 172-176.

> their populations increase. The needs of the dead also must be met, and the councils will be obliged to purchase lands for cemeteries. These facts alone show that it will be necessary that due attention be given to the question of securing and maintaining open spaces for public and healthful recreation; and as time goes on it will not be, as in the past, that the local authorities may purchase lands for this purpose, but that they must do so. It is this fact, that the provision of open spaces has not been made compulsory, which has resulted in the unsatisfactory and inadequate manner in which this work has hitherto been carried on, and has led to the need of voluntary societies stepping in to meet, in a small measure, a great want.[168]

VI. ADDRESSING THE REGULATORY GAPS FOR ENHANCED PROTECTION

It is important that Kenya's regulatory framework for Uhuru Park expressly incorporates the application of the PTD and thus make it legally enforceable. Kenya's ongoing efforts to amend the 2010 Constitution under the Building Bridges Initiative process should have considered enhancing the protection of public lands and natural resources through the incorporation of the PTD as a constitutional principle to address the challenges of land grabbing and conversion of such resources to meet infrastructural expansion needs of cities and other urban areas in the country. This would expressly ensure constitutional elevation of the argument that important open spaces like Uhuru Park and other recreational parks are important natural resources which should always be held in trust for the public by being legally secured under the PT D[169] from conversion to other uses.

Even without constitutional change, the current Constitution, by incorporating the principles of sustainable development and also those on public land, has set the basis for applying the PTD to open spaces. What is required is the development of a comprehensive policy on open spaces that clarifies the process of designation of public open spaces, the protection status, the uses to which they can be put and the rules for their management. The policy would also address the question of whether or not, and under what conditions they can be converted to other uses. Such a policy should be followed with a comprehensive law on open spaces. This will clarify the purposes for which they are established and the framework for their management. Such a law will identify the institutional responsibility, avoid the current arrangement where that task oscillates between County Governments, National Museums of Kenya and Kenya Forest Service, irrespective of the type of open space. This state of affairs defeats logic, since Kenya Forest Service cannot be responsible for managing a space where there is no forest in the first place. In the same way the mere use of the word 'Park' does not place an open space within the purview of the Kenya Wildlife Service under the Wildlife Conservation and Management Act.

168 *Ibid,* page 172.
169 Serena M Williams (n20) at 24.

Sax[170] argued that to be enforceable, the concept of the PTD needed to meet several conditions; namely: (i) contain some concept of a legal right in the general public; (ii) be enforceable against the government; and (iii) be capable of an interpretation consistent with contemporary concerns for environmental quality.[171] This concept provides a useful analytical lens and justification for crafting rules to ensure increased protection for Uhuru Park and other open spaces, since "(s)ociety is not able to exist without access to natural resources, and the PTD protects the public from private monopolies over vital resources."[172] In designing a law for public open spaces, these requirements need to be incorporated.

One of the critical concerns is the conversion of open spaces to other uses that are incompatible with their status. The law must secure public spaces from conversion. With such a law there would have been better clarity on the use of Uhuru Park. It would ensure that it is not open to Government to wake up one day and seek to convert an open space from one use to the other as it sought to do by excising part of the Uhuru Park to construct the Expressway. PTD is useful for ensuring this is achieved. Its application requires that provisions are put in place for resolving the question of conversion of a property from one type of use to another, since PTD concerns itself not just with the availability of the property for public use but also enables questioning the type of use. Drawing from its historical roots where it was limited to just three uses, the doctrine focuses on the type of public use being protected and seeks to guarantee that and related uses, and not every public use. As stated by one scholar, "…property subject to the Trust may not be used for any and every public purpose. The property must be held available for use by the public, but it must be maintained for certain types of uses, which include traditional uses or uses that are in some sense related to or compatible with the natural uses peculiar to that resource."[173] Therefore the law must ensure that it contains the provisions to ensure that should conversion be contemplated, it satisfies the test of compatibility with the traditional and primary purpose of the open space before it is approved.

To avoid the current threats that open spaces face, it is important that the procedures for conversion require that when proposed by Government, the process is not complete until there is explicit approval by the legislature. In the Kenyan context, the approval should include both the National Assembly and the Senate. In doing this, Kenya would be borrowing from the comparative experiences of the US and Britain where the conversion of property subject to the PTD is not possible by law without the involvement and special authorisation of the legislative arm of Government.

In addition to the overall legislative framework above, there is need for a dedicated law on Uhuru Park. This could either be enacted by Senate or the County Assembly of Nairobi. This would recognise and secure the unique status of the Park and guarantee the protection of its multiple values. Uhuru Park is not just any other Park or land. It is

170 Joseph Sax (n69).
171 Sax, (n69) page 474.
172 GJ Aime, 'Navigating the Troubled waters of the Public Forum: The Public Trust Doctrine as a Life Jacket' [50(1)] Arizona State Law Journal, 335-364 (2018) at p.356.
173 *Ibid*

the most important open space in the city.[174] In giving meaning to PTD, it is important that legislative enactments be put in place that secure the status of Uhuru Park. Such a law should seek to preserve not just the existence of Uhuru Park but its current public purpose. The Park should be protected, not just as public property, but its multiple uses guaranteed into the future; be they recreation, economics, religious or political. Currently, on any day you will find preachers, families relaxing, workers resting during breaks, traders selling their wares and politicians holding rallies. This is a demonstration that like other open spaces that serve important functions in any society, [175] Uhuru Park too, is useful in diverse ways to the residents and visitors to Nairobi City.

Most public open spaces are in urban areas. The legal framework gives roles for County Governments in the planning processes. In addition, the Physical and Land Use Planning Act makes provision for open spaces. It is important, that in addition, County Assemblies be involved in the process of protection of open spaces. Their authority should be a prerequisite to the conversion of open spaces to other public uses. Further, management plans should be prepared for every open space so as to capture its unique characteristic and iterate a framework for its management. Management plans are recognised as an important conservation tool and are already being used for several ecosystems. It should be made mandatory for every open space to have a management plan. The preparation of such plans should be consultative and participatory and involve County Assemblies. The Constitution empowers County Assemblies to receive and approve policies for the management and exploitation of resources within their respective counties.[176]

To ensure the effective management of Uhuru Park, there is need for resource provision from public coffers. As the County Government of Nairobi prepares its annual budget, maintenance and improvement of Uhuru Park should be a priority in its budgeting process. With the establishment of the Nairobi Metropolitan Services (NMS),[177] and its renewed focus on beautification of the city, the recovery of grabbed land and enhanced service delivery for the residents of Nairobi County, allocating resources for and ensuring that Uhuru Park is improved would be a demonstration of that commitment.

The existence of the open space is important as a demonstration of freedom and openness. The management should adhere to this fundamental reality. There is now widespread acceptance that the management of natural resources requires the involvement of citizens. This is the prerequisite of the concept of public participation. In 1992, when the international community debated the concept of sustainable development for the first time following its elucidation by the Brundtland Commission Report[178] it was agreed that environmental and natural resource management required the involvement

174 C Odote, "Uhuru Park Should be a protected Site" Business Daily, Sunday 8th December 2019. Available at https://www.businessdailyafrica.com/analysis/ideas/Uhuru-Park-should-be-a-protected-site/4259414-5378026-dba9qy/index.html. (accessed on 6 July 2020).

175 *Ibid*.

176 Article 185(4)(a), Constitution of Kenya, 2010.

177 Gazette Notice No. 1609 in Vol CXX11 – No.38.

178 World Commission on Environment Development, *Our Common Future, The Report of the World Commission on Environment and Development* (Oxford University Press, 1987).

of concerned stakeholders and should adhere to the subsidiarity principle.[179] It is important that mechanisms for public involvement are integrated in the management of Uhuru Park. There are citizens that have organised themselves into friends of several open spaces within urban areas. There should be clear frameworks set up for such engagements of the public in a similar manner as exists for forest users' association and water resources users' associations in relation to the management of forest resources and water resources respectively. This would provide structured mechanisms for the collaborative management of Uhuru park and other open spaces. In addition, any decisions relating to the use of the Park must have an elaborate, structured and objective involvement of the public.

Uhuru Park's importance is also tied to its history as a cultural heritage site. Important events linked to the country's' history have been held at the park. From celebrations of important events, like the inauguration of the 2010 Constitution on 27th August 2010, to the hunger strike by the mothers of freedom fighters, to key political rallies. The park is more than a recreation ground. Its name *Uhuru,* meaning freedom, is linked to the attainment of independence by the country from colonial rule. The articles of independence were signed by President Jomo Kenyatta in 1963 at the iconic Uhuru Park.[180] Its link to the country's struggle for independence and continued journey for over fifty years makes it an important cultural heritage. This justifies the reason for its gazettement under the National Museums and Monuments Act. It is important however, that the country strictly and fully applies the provisions of the World Heritage Convention and treat Uhuru Park as a significant national heritage under the Act and apply all the obligations that it has as a State party in order to enhance the protection of the site. As a significant national heritage, its conversion should be prohibited and its status protected both for current and future generations. The Convention requires that important cultural heritage is protected to avoid the possibility of their loss owing to the place they occupy in the country's history.

As part of the application of the PTD, courts should stop any attempts by Government to convert Uhuru Park to infrastructural development and related uses, since these should be seen as being contrary to the trustee responsibility that the state has over the park as a public open space.

VII. CONCLUSION

The case of Uhuru Park and persistent attempts to encroach on it justifies the need for elevating its protection status. The vesting of the park in the County Government of Nairobi, concurrently with the National Museums of Kenya, has not resulted in strong protection of the park. The latest attempts to excise part of it for purposes of construction of the Expressway is evident of the lack of full appreciation of the unique status of the Park and hence the need for its protection for posterity. The manner in which the

179 Principle 10, Rio Declaration on Environment and Development, The United Nations Conference on Environment and Development, 1992. Available at <https://www.cbd.int/doc/ref/rio-declaration.shtml> (accessed on 10 July 2020).

180 For a media report of the history of Kenya and signing of the agreement listen to <https://www.youtube.com/watch?v=hUPwDDfl6Tg> (accessed on 10 July 2020).

park is treated is symptomatic of the larger attitude towards open spaces in Kenya, an approach that sees these areas as 'ownerless' 'vacant' land that should quickly be taken up by private individuals or allocated to commercially profitable development projects.

When Uhuru Park was under threat from the Nairobi Expressway project, the County Government, which has primary responsibility for its protection was quiet. However, during political seasons when contestation is about which political group can use the park, their voice is heard loud. This casual manner of discharging the mandate to protect open spaces is not just evident with the Nairobi County Government or in Kenya as a whole, but afflicts local authorities worldwide.

These areas face incessant threats when the public bodies entrusted with their protection do not fully appreciate their importance. Further, there are threats from unscrupulous individuals who always view any space that has not been constructed as just one other empty plot waiting to be grabbed. It is therefore important that a legislative and policy framework dedicated to the protection of open spaces in Kenya be put in place. Such a framework should inculcate the PTD and make it the basis for the regulation of open spaces so that they are viewed as property whose use must always be preserved. Applied to Uhuru Park, it would guarantee its existence in perpetuity for the benefit of current and future residents of Nairobi. As argued elsewhere, "(t)o avoid the possibility of another attempt several years from now to convert Uhuru Park into another development, it is necessary that we deploy the PTD to elevate its status as an open green space that must be conserved for public use in perpetuity due to its historical, ecological and recreational significance."[181] As a starting point the exact size of the Park, its ownership documents and its existence in perpetuity as a public open space must be pronounced and captured within such a framework.

181 C Odote, 'Uhuru Park Should be a protected Site' Business Daily, Sunday 8 December 2019. Available at <https://www.businessdailyafrica.com/analysis/ideas/Uhuru-Park-should-be-a-protected-site/4259414-5378026-dba9qy/index.html.> (accessed on 6 July 2020).

THE PLACE OF THE NATIONAL LAND COMMISSION IN MANAGEMENT OF PUBLIC OPEN SPACES IN KENYA

*Mwenda K. Makathimo**

I. INTRODUCTION AND BACKGROUND

Public spaces have been generally classified to include all places owned or of public use accessible to all and enjoyable for free and without a profit motive such as streets, public facilities and open spaces.[1]They are not just physical places but encompass cultural systems, human behaviour around the space and the totality of the environment in which they are set.[2] This paper focuses on public open spaces within this scope.

The subject of public open spaces management has received international attention with the calls for their sustainable management being emphasised. The global community has displayed its commitment to this cause through the Sustainable Development Goal 11(6) which seeks the provision of universal access to safe, inclusive and accessible green and public open spaces.[3] The United Nations Governing Council also mandated the UN Habitat to coordinate work on the development of policies and strategies for promoting open spaces management.[4]

The New Urban Agenda further articulates the commitment by States and urban management authorities to promote the creation and maintenance of well-connected and distributed networks of open, safe and inclusive, accessible green and quality open spaces.[5] This agenda is reinforced by the African Union Agenda 2063[6] while elaborating its intentions to deliver liveable habitats with basic quality services; sustainable natural resource management and biodiversity conservation.[7]

Kenya, being party to the global and regional commitments above, has made constitutional provisions that support their realisation. The Constitution embraces and anchors the concept and principles of sustainable development. Right from the preamble, it proclaims respect for the environment as a heritage and commits people to sustain it for the benefit of future generations. It places sustainable development, participation of the people, equity, social justice, inclusiveness, equality and non-discrimination as some of the national values and principles of governance.[8]

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1 United Nations, 'Public Space; Habitat III Issue papers – II (2015).
2 M Hanzlm (2018) *Meaning of Public Spaces* (Lodz University of Technology, 2018).
3 United Nations (n 1) above.
4 UN-Habitat (2020) *CityWide Public Space Strategies: Guide book for City leaders* (UN-Habitat: Nairobi, 2020).
5 United Nations (2016) *New urban Agenda* (United Nations, 2016).
6 African Union Commission (2015) *Agenda 2063* (African Union Commission, 2015).
7 *ibid*.
8 Constitution of Kenya, 2010.

Other than the provisions on national values and principles of governance, the Constitution has secured key tenets of sustainable development under the Bill of Rights.[9] Key among these rights is the right to a clean and healthy environment which includes the protection of these rights for future generations.[10] It further enumerates principles of land policy that include equitable access, sound conservation and security of land rights.[11] Every institution or person managing or using open public spaces is therefore bound by these principles and values. Through the land use policy, the Government of Kenya clearly outlined the intention to zone, restore, reclaim open spaces and establish green areas in its efforts to enhance sustainable management of the urban environment.[12]

The Global concurrence on the need for sustainable management of public open spaces is partly informed by the realisation of the value they have. They provide ecological benefits such as reduction of urban heat and improvement of air quality.[13] Open spaces offer places for people to meet and engage in recreation activities.[14] They enhance the social interaction of various groups within an urban area[15]and provide spaces for active citizenship, thus promoting social cohesion. They have offered spaces for cultural activities, political assembly and civic empowerment.[16]The spaces have been termed as spaces for community revitalisation and participatory local democracy, and the connecting tissue between private spaces of the city.[17] They are a common place for physical activities which contribute to improvement of fitness and health of urban dwellers and a positive correlation has been established between people's mental health and the availability of open urban green spaces.[18] Green open spaces contribute to the appreciation of property values as people generally prefer a property with access to a green open space to one without.[19]

Despite the value of public open spaces, numerous challenges have been experienced in their management. There exists immense pressure on open public spaces from different human activities resulting in their deterioration especially in Africa.[20] This pressure has been pronounced by the rapid urbanisation[21]resulting in the proliferation of unplanned

9 Chapter Four of the Constitution of Kenya, 2010.
10 Article 42 of the Constitution of Kenya 2010.
11 Constitution of Kenya, 2010.
12 Republic of Kenya, *Sessional paper No. 1 National Land Use Policy* (2017).
13 M Malik, 'The role of Stakeholders Related to the Management of Ecological Function of Urban Green Open Space. Case study; City of Depot, Indonesia'10 Conference Series Earth Environmental Science (2017)
14 R Kariuki, *Re-examination of Nairobi's Urban Open Space Design. The case of Jevanjee Gardens* (MA University of Nairobi, 2010).
15 S Ivan & V Lubica, 'Public Spaces as the Reflection of Society and its Culture' 10P Conf. Ser. Mater. sci. Eng., (2017
16 UN-Habitat (n 4) above.
17 M Carmona, 'Re-theorizing contemporary public space; a new narrative and new normative' (8) Journal of urban sustainability (2015) 4.
18 S Kang, W Wang & S Cole, 'Influence of Urban Green Open Space on Residents Physical activity in China' (19) BMC Public Health (2019) 1093.
19 J Crompton, 'The impacts of parks on property values. A review of empirical evidence' (33)1 Journal of Leisure Research (2001) 1.
20 C Mensah, 'Urban Green Spaces in Africa: Nature and challenges' (4) International Journal of ecosystem (2014)1.
21 UN-Habitat (n 4) above

informal settlements that often encroach on open public spaces.[22] Increased urbanisation has resulted in the upward revision of allowed development densities thus occasioning higher concentrations of people around public open public spaces leading to congestion and declining security.[23] Lack of proper planning, outdated urban plans, weak enforcement of planning regulations and by-laws have also been cited for their contribution to the reduction of open public spaces within sub-Saharan Africa in terms of quality and size.[24]

Public open spaces in Kenya have been declining due to rampant grabbing and allocation of land reserved for public purposes to private individuals.[25] This is evidenced by the infamous attempted allocation of part of Uhuru Park (a strategic open public space in Nairobi) to Kenya Times Media Trust Limited for the construction of offices and a hotel in 1989.[26] Land conversions or changes of user from open public space use to other forms of use such as roads and railways have similarly threatened ecosystem quality and function.[27] The attempted conversion and allotment of part of Uhuru Park for Construction of an Expressway in Nairobi[28] is a recent example of threats and pressure exerted on public open spaces by expansion of urban infrastructure.

The failure to capture the full ecological and social value of public open spaces by local laws and valuation methodologies has led to low prioritisation of public spaces in local development agenda.[29] This low prioritisation has led to limited allocation of resources for management of public open spaces by urban authorities. A study of Kisumu confirmed that urban authorities set aside minimal resources for the maintenance and management of open green spaces.[30]

II. THE PROBLEM

Given the value of public open spaces to the society, it is necessary that they are managed in a manner that is sustainable. Their management must attain a balance between social, environmental and economic considerations while securing equitable benefits for the current and future generations.

While there are global, regional and national policies and laws that set the principles for achieving these aspirations, challenges in the actual implementation still persist. Ineffective planning and enforcement of regulations; public space grabbing; land use changes

22 E Mutisya & M Yarime, 'Understanding the Grassroots Dynamics of slums in Nairobi: The Dilemma of Kibera Informal Settlements' (2) International Transaction Journal of Engineering, Management &Applied Sciences and Technologies (2011) 2.

23 M Carmona et al., , 'Public Space in an age of Austerity' (24) Urban Design International (2019) 241.

24 Mensah (n 20) above.

25 Republic of Kenya, *Report of the Commission of Inquiry into the Illegal/Irregular Allocation of Public Land* (Government Printer: Nairobi, 2004).

26 National Council for Law Reporting *Kenya Law Reports 2020* (National Council for Law Reporting, 2020)

27 Mensah (n 20) above

28 H Kimuyu, 'Uhuru Park to lose 1.3 acres along Uhuru Highway for Expressway's construction' (Nairobi News, 24 October 2019) <https://nairobinews.nation.co.ke/editors-picks/uhuru-park-to-lose-1-3-acres-along-uhuru-highway-for-expressways-construction > accessed 29 January 2021.

29 H Ernston, 'The Social production of ecosystems services; A framework for studying environmental justice and ecological complexity in urbanized landscapes' (109) Landscape and Urban Planning (2013)1.

30 S Rabare, 'The Role of Urban Parks and Social Economic Development: Case Study of Kisumu Kenya' (3) Theoretical and Empirical Researches in Urban Management (2009) 12.

and conversions; increasing insecurity; environmental degradation; low prioritisation and limited financing are manifested in most urban areas.

It is within this frame that the need for reviewing how open public spaces are managed in Kenya and the roles of the National Land Commission in addressing the challenges has arisen. Locating the contextual and practical limitations that hinder sustainable management within the legal and administrative frameworks in Kenya is important in informing strategies for seeking ways to reverse the situation.

III. OBJECTIVES AND METHODOLOGY

The objectives of this paper are to;

i) Review public open spaces' management practices in Kenya before the formation of the National Land Commission.
ii) Identify the roles of the National Land Commission in the management of public open spaces
iii) Make recommendations to address gaps in management of public open spaces in Kenya.

These objectives have been addressed through a survey of relevant literature. The results of the literature review are presented and discussed in a thematic format.

IV. DISCUSSIONS

A. Management of Open Public Spaces in Kenya before the Promulgation of the Constitution of Kenya 2010

Before the promulgation of the Constitution of Kenya 2010, public open spaces were on land generally classified as Government Lands, Trust Lands, Special Lands and Territories.[31] Those classified as Government Lands, were managed under the Government Lands Act Cap 280 as the framework law. The Government lands reserved for use as open public spaces were administered through the Local Government Act Cap 265 and the Physical Planning Act Cap 286. The public spaces under the category of Trust Lands were administered under the provisions of the Trust Land Act Cap 288. The special lands and territories such as forests, national parks, historical sites and monuments were administered under the specific statutes such as the Forest Act Cap 385, Wildlife (Conservation and Management) Act Cap376, National Museums and Heritage Act of 2006.

It is therefore clear that public open spaces were not under one governance framework. The institutions, administration procedures and the policy directives were as varied as were the statutes. This multiplicity of governance frameworks is not conducive to the integrated management of public open spaces. Below is a discussion of each category and the manifestation of governance challenges that pertained to it.

31 Republic of Kenya (n 25) above

1. Government Lands

All un-alienated Government land was managed and administered by the President in line with the special powers bestowed by the Government Lands Act Cap 280.[32] These powers included powers to allocate land, dispose or make reservations among others. Some of these management and administration powers could be exercised by the Commissioner of Lands under delegation by the President.[33]Public open spaces within government lands were therefore subject to the powers exercised directly by the President or indirectly through the Commissioner of Lands or the subordinate officers under the Commissioner of Lands.

Public spaces including open spaces, gardens, parks, streets, sidewalks, thorough fares, roads were vested in the local authorities where they fell.[34] Despite this vesting, they were subject to powers of the President and the delegated powers of the Commissioner of Lands.[35] Local authorities and the Local Government Minister had powers to cause acquisition, disposition, and allocation subject to the provisions of the Government Lands Act.[36]

Other than the Local authorities and the local government Minister, the Director of Physical Planning had powers and functions of advising the Commissioner of Lands on matters concerning alienation of land; advising the local authorities on change of user, extension of user, sub-division of land and development control.[37] In addition, the Director of Physical Planning had the powers to prepare both long term and short term regional and local development plans.[38] The exercise of these powers would directly influence the establishment, management, maintenance and disposal of public open spaces.

The Local Government Act Cap 265 gave local authorities power to establish and maintain grounds and facilities for recreation on land belonging to them and on parks, squares and open spaces vested in them.[39] The Physical Planning Act also gave local authorities power to reserve and maintain all land planned for open spaces, parks, urban forests and green belts.[40] It is by virtue of these provisions that most public open spaces in Kenya were established and managed.

The local authorities were further conferred with powers to establish buildings, refreshment and dressing rooms; set apart portions of recreational facilities as areas for games clubs and exclude the public from such areas. In addition, the authorities were allowed to let out any part of recreational grounds and collect the due rent or fees.[41] Besides the executive powers, local authorities had powers to make by-laws to make further prescriptions on how the functions would be executed provided that the by-laws were not

32 Government Lands Act Cap 280 (now repealed) s. 3.
33 *ibid* s. 7.
34 Local Government Act Cap 265 (now repealed) s. 2.
35 *ibid* s.9.
36 *ibid* s. 144.
37 Physical Planning Act, Cap 286 (now repealed) s. 5.
38 *ibid*.
39 Local Government Act Cap 265 (now repealed), s. 145.
40 Physical Planning Act Cap 286 (now repealed) s. 29.
41 Local Government Act Cap 265 (now repealed), s. 145.

inconsistent with any written law or the Constitution.[42] The Physical Planning Act Cap 286 further gave local authorities powers to formulate by-laws to regulate zoning, use and density of developments.[43]The authorities would exercise the management through the directions of the committees which would be implemented through the Clerk, the Treasurer and other officers.[44]

From the above review it is clear that a framework for guiding the management of open public places on Government lands existed before the promulgation of the 2010 Constitution of Kenya. While having a legal and administrative framework is important, it is the implementation, respect and compliance with such frameworks that leads to the achievement of intended objectives. There is evidence[45] that the President, the Commissioner of Lands and the Local authorities did not exercise the powers and functions given by the statutes diligently.

The powers bestowed upon the President, those delegated to the Commissioner of Lands, functions of the Director of Physical Planning and local authorities were abused. There was a blatant disregard of the procedures, and a breach of public trust that resulted in the rampant illegal and irregular allocation of Government land set aside for public purposes. "*Officials and institutions that were supposed to be the custodians of public land became facilitators of illegal and irregular allocation of the same*"[46].Public open spaces were allocated to private individuals by the Commissioner of Lands or subordinate officers using powers delegated by the President for speculative purposes and as political reward without regard for social, environmental or any public interest. Other than the abuse of power by the statutorily authorised officials, the allocation of public land was facilitated by unauthorised Government officers such as Members of Parliament, Provincial Commissioners, District Commissioners and Chiefs.[47]

The Director of Physical Planning failed to effectively discharge the functions and powers of office in the interest of the public and as provided for by the Physical Planning Act. The regular preparation of comprehensive and participatory Regional and Local Development Plans was neglected and focus placed on short term plans referred to as Part Development Plans. These Part Development Plans (PDP) were used as tools for facilitating the quick grabbing of public land, including public open spaces.[48]

Local authorities also failed to discharge the powers of development control including zoning, change of user and development density in a manner that would result in sustainable development. At times they changed use of public open spaces and other land reserved for public use; conspired with the Director of Physical Planning, Director of Survey and the Commissioner of Lands to allocate them to private individuals for private use.[49] This resulted in the loss of many public open spaces that had been reserved from the planning and sub-division processes. Plots earmarked for public use as recre-

42 *ibid* s. 201.
43 Physical Planning Act Cap 286 (now repealed) s. 29.
44 *ibid*.
45 Republic of Kenya (n 25) above.
46 *ibid*.
47 *ibid*.
48 *ibid*.
49 *ibid*.

ational facilities were converted into private residential and commercial use. There is evidence of intense grabbing of land surrendered upon sub-division and set aside for public open recreational facilities in Nairobi.[50]

Revision of planning standards and zoning regulations resulted in an increase in development densities. This increase in densities led to the congestion and deterioration of the quality of public open spaces and recreational parks.[51]A study on Nairobi's open spaces confirmed that the Nairobi City Council had low priority for the development and maintenance of public open spaces as evidenced by poor waste management and dilapidated park facilities.[52] The abandonment of the implementation of the Nairobi Master Plan led to uncontrolled urbanisation that resulted in overcrowding, increased insecurity and encroachment of open public spaces.[53]

Local authorities faced numerous governance challenges as reflected in their inability to discharge legal mandates effectively. They operated under a weak institutional framework which was only established statutorily. They were subject to the control of the local government minister who was a political appointee of the President. There were overlaps in oversight and no central unit of command since the chief officers were appointed by the public service commission, paid by the local authorities and supervised by the ministry of local government. They had to deal with political interference due to their lack of autonomy from the ministry of local government and the manner in which councillors were appointed or elected. They witnessed political divisions and infighting amongst the councillors, thus frustrating the operation of committees and service delivery. Besides the political challenges, many local authorities had weak capacity in terms of human and financial resources.[54] Thus, these governance challenges impacted negatively on the management of public open spaces as manifested in their poor state of maintenance as highlighted earlier.

V. TRUST LAND

The Constitution of Kenya (now repealed) outlined the various types of Trust Land.[55] It vested these lands in the County Councils.[56] Trust Land could be converted to private land and individual titles issued through the processes of consolidation and adjudication provided for under the Land Consolidation Act Cap 283, and the Land Adjudication Act Cap 284.[57]Any land that went through this process and was not registered under any individual or group was registered in the name of the County Council. Such land included public open spaces, parks, community forests, schools and market centres.[58]

50 M Makworo & C Mireri, 'Public Open Spaces in Nairobi City, Kenya, Under Threat' (54)8 Journal of Environmental planning and management (2011) 1107.
51 *ibid*.
52 *ibid*.
53 *ibid*.
54 DM Muia, J Ngugi & R Gikuhi 'Evolution of Local Authorities in Kenya' In T Barasa and W Eising eds., *Reforming Local Authorities for Better Service Delivery in Developing Countries: Lessons from RPRLGSP in Kenya* (Institute of Policy Analysis and Research: Nairobi, 2010).
55 The Constitution of Kenya, 1969 (now repealed), s. 114.
56 *ibid*, s. 115.
57 *ibid* s. 116.
58 *ibid* s. 2.

Through the process of setting it apart initiated by the County Council, Trust Land could also be converted into government land for use by a public body or authority for public purposes; for prospecting and mineral extraction; for use by a private person for a purpose which the County Council considered to be beneficial to the residents of that area in terms of use or revenue.[59] Trust Land could also be converted to government land for use by government; for use by a company owned by the government; for use by a private company in which the government has shares; as well as for prospecting and extraction of mineral oils.[60]Therefore, some open public spaces came into being through the processes of setting apart Trust Land either initiated by County Councils or by the President.

The Trust Land Act Cap 288 made further provisions on the processes of administration of Trust Land, which had implications on the establishment and management of public open spaces. It is worth noting that the Act allowed County Councils to grant licences and leases over Trust Land.[61] It further provided for the Commissioner of Lands to administer Trust Land as an agent of County Councils with authority to execute grants, leases and licences on their behalf.[62]

There is evidence that the President, Commissioner of Lands and the County Councils abused the legal powers and duties assigned to them over Trust Land in Kenya. The Commissioner of Lands or the County Councils allocated land to private entities without going through the process of setting apart or adjudication. This was done through the use of allotment letters or grant of title. Councillors were found to be the main beneficiaries of these allotments passed on through the minutes of County Council meetings in which they sat.[63] Trust Lands that had been set apart for public purposes for use as public utilities, including open spaces, were allocated to private individuals or companies by the County Councils and Commissioner of Lands.[64] This abuse of office by public officials and leaders led to a substantial loss of open public spaces across the country leading to the loss of social, economic and environmental benefits that would have accrued to the citizens.

Besides the land governance related challenges discussed above, County Councils also faced general governance limitations experienced by other local authorities in Kenya. They faced institutional oversight overlaps; financial and human resource capacity constraints; political interference from State officials as well as infighting among the Councillors.[65] These governance challenges limited the ability of County Councils to sustainably manage and maintain open public spaces on Trust Land.

59 *ibid* s. 117.
60 *ibid* s. 118.
61 Trust Land Act, Cap 288 (now repealed), s. 37.
62 *ibid* s. 53.
63 Republic of Kenya (n 25) above
64 *ibid*.
65 Muia et al (n 54) above.

VI. SPECIAL LANDS AND TERRITORIES

This is the category of lands reserved for special purposes due to their ecological value, cultural relevance or strategic importance**.** They include forests, wetlands, riparian reserves, the foreshore, historical sites and monuments, museums, military and other security installations. Their reservation, management, and disposal are regulated by specific legislation.[66] It is worth observing that some and parts of these lands comprise public open spaces. The management of these spaces has therefore been subject to the application of the specific statutory framework and the administrative practices within the established statutory bodies.

Public open spaces falling in forests were managed under the provisions of the Forest Act Cap 385, which was later repealed following the enactment of the Forests Act of 2005. The minister in charge of forests had the power to declare forests, including their boundaries as well as cessation of those forests and alterations of the boundaries set. Before making the declaration for alteration of boundaries the affected area needed to be surveyed and a boundary plan approved by the Chief Conservator of Forests, after making the requisite public notices.[67] The implementation of the Forest Act Cap 385 was replete with irregularities and illegalities that led to massive loss of forest lands including public open spaces therein. The area under forests was reduced from 3% to approximately 1.7% through illegal or irregular excisions.[68] The excisions were carried out without consideration of the social, economic and ecological implications.

Following the massive loss of land under forests and the social economic implications, the need to avert the trend and institute safeguards for ensuring the sustainable management of forest resources became pronounced. Parliament enacted the Forests Act of 2005 to address this need and to close governance gaps in the Forest Act Cap 385. The Forests Act 2005 established the Kenya Forest Service, a Corporate body with a Board and a Director separate from the Ministry; established a forest management and conservation fund; introduced a requirement of Parliamentary approval for alteration of forest boundaries; provided for community participation in forest management and the creation of Community Forest Associations; and required forests to be managed in accordance with Forest Management Plans.[69] These provisions aligned well with the concept of sustainable development and gave stakeholders avenues for effective participation in the management of forests and the open spaces defined as such.

The 2005 Forest Act also required every local authority to establish and maintain arboreta, mini-forests or recreational parks; and required developers within the jurisdiction of a local authority to provide spaces for the establishment of mini-forests at the rate of at least 5% of the total land area of any housing estate planned for development.[70] The Forest Service was required to provide technical assistance to local authorities to facilitate the establishment and maintenance of mini-forests, recreational parks and arboreta.

66 Republic of Kenya (n 25) above.
67 Forests Act Cap 385 (now repealed), s. 4.
68 Republic of Kenya (n 25) above
69 Forest Act Cap 385 (now repealed) s. 70.
70 *Ibid* s. 30

This was intended to address the technical capacity gaps in the local authorities. To protect the mini-forests, arboreta and recreational parks, local authorities were required to consult and seek approval from area residents before converting such spaces to other uses.[71]

The legal changes introduced through the 2005 Forests Act helped in deterring the grabbing of public open spaces categorized under forests. The creation of Community Forest Management Associations also helped in the protection and maintenance of public spaces such as the Nairobi Arboretum. Since its enactment forest excisions have reduced due to the accountability mechanisms instituted.

Although some public open spaces fell under the management of the National Museums of Kenya, it should be noted that this land was not spared from illegal grabbing. Several parcels in Kitale, Eldoret, Kwale, Nakuru and Mombasa, among them a portion of Mama Ngina Drive, were illegally allocated to private entities.[72] To provide for the establishment, control, protection, conservation and better management of the Museums, cultural and natural heritage, the National Museums and Heritage Act of 2006 was enacted.

The Act explains the term open space to mean an open space not built upon in any urban area or peri-urban area whether in a municipality or not in which the public has access and which may be used as parks, gardens, recreational gardens or other use. It accords the National Museums of Kenya the functions of identifying, protecting, conserving and transmitting the cultural and natural heritage of Kenya.[73] Of significance to this study are the powers given to the Minister, the National Museums of Kenya and its Director General in relation to the management of public spaces. The Minister could declare open spaces and geo-parks as protected areas; while the Director General had power to make an order protecting the heritage which faces danger of serious damage or destruction[74]. The Minister was given powers to control access and authorise the National Museums to make by-laws for controlling access into a protected area[75]. The implementation of the provisions of the National Museums and Heritage Act, 2006 yielded positive results and curbed the encroachment of public spaces such as the City Park in Nairobi.[76]

The Wildlife (Conservation and Management) Act Cap 376 made provisions for the protection, conservation and management of wildlife. It established the Kenya Wildlife Service consisting of the Board of Trustees, Director and other officers. The Director was to work under the direction of the Board of Trustees and the Minister in charge of wildlife.[77] The Director had powers to appoint honorary game wardens in addition to the officers, to assist in the duties of the Service, with the approval of the Minister.[78] The

71 *ibid*.
72 Republic of Kenya (n 25) above
73 National Museums and Heritage Act 2006, s. 4.
74 *ibid* s. 25.
75 *ibid* s. 34.
76 M Mutua (2014) *Assessing Planning Policy Framework for Public Urban parks: A case of City Park* (MA University of Nairobi, 2014).
77 Wildlife (Conservation and Management) Act, Cap 376 (now repealed) s. 3.
78 *ibid* s. 4.

Director could also delegate functions to officers of the Service, officers of the Forest Department, officers of the Fisheries Department or any other public officer approved by the Minister.[79]

It is worth noting that besides the functions of wildlife management, the Service had the function of implementing international protocols, conventions and treaties regarding wildlife.[80] The Act gave the Minister power to declare an area a National Park with the approval of the National Assembly subject to setting apart, in the case of Trust Land or compulsory acquisition if the area falls under private land.[81] In addition, the Minister was allowed to amend boundaries of a National Park with the approval of the National Assembly.[82]

The Minister also had powers to declare an area a National Reserve or a Local Sanctuary.[83] In addition to these powers, the Minister was given powers to declare areas adjacent to a National Park, National Reserve or Local Sanctuary as Protected areas.[84] It is important to observe that the National Parks, National Reserves, Local Sanctuaries and Protected areas could comprise any land including those covered by sea or other water. [85]It is therefore evident that the Kenya Wildlife Service and the Minister in charge of wildlife had substantial management authority over open public spaces falling either under National Parks, National Reserves, Local Sanctuaries or Protected Areas.

In practice the management of open public spaces and other areas falling under the purview of Kenya Wildlife Service were also plagued by land grabbing and related challenges. There were illegal allocations of land around riparian reserves and sites under the management of KWS. For instance, a chain of islands off Shimoni Marine Park in Kwale district were illegally allocated to individuals.[86] Large areas falling within the riparian reserve of Lake Naivasha, a Wetland of International Importance under the Ramsar Convention, were illegally allocated to individuals and private companies.[87] Robinson Island, a protected area in Malindi, was encroached on by individuals and private companies threatening the important ecosystem around it.[88]

There were illegal allocations of land within the National Parks, National Reserves and Sanctuaries. Fortunately, the beneficiaries were not able to take possession of the land given the protection by KWS and the lack of approval by the National Assembly. KWS land outside the protected areas (Stations) was grabbed in places like Garissa, Embu, Kakamega, Kericho, Limuru, Malindi, Mandera, Mombasa, Nanyuki, Moyale and Narok.[89]

79 *ibid* s. 5.
80 *ibid* s. 3A (j).
81 *ibid* s. 6.
82 *ibid* s. 8.
83 *ibid* s. 18 & 19.
84 *ibid* s. 15.
85 *ibid* s. 2.
86 Republic of Kenya (n 25) above.
87 *ibid*.
88 KNCHR (2006) *The Malindi Inquiry Report 2006: Report of a Public Inquiry Into Allegations of Human Rights Violations in Magarini, Malindi* (KNCHR, 2006).
89 *ibid*.

From the foregoing, it is evident that open public spaces whether falling under Government Lands, Trust Lands or Special Lands and Territories faced numerous governance challenges. These challenges manifested in legal gaps and a multiplicity of frameworks; overlaps in institutional oversight; administrative weaknesses and capacity limitations; political interference and infighting; the lack of professional and leadership ethics. These challenges have had adverse effects on both the management of public open spaces and Public Land in general.

VII. NEED FOR REFORMS

Given the weaknesses in governance highlighted above, there was need to institute comprehensive reforms to put in place measures that would ensure the sustainable management of land resources in the country. The Commission of Inquiry into Illegal/Irregular Allocation of Public Land[90] made numerous recommendations in that regard. The key recommendations that relate to the management of public open spaces, were for the government to establish a Land Commission to be in charge of land matters including the allocation of Public Land and supervision of allocation of Trust Land; the repeal of laws allowing the President and Commissioner of Lands to make grants on unalienated Government Lands; preparation of an inventory of all Public Land and a register of all Trust Lands; reform the structure of management of Trust Land; establishment of a court to deal exclusively with land matters; harmonisation of legislation on land; formulation of a Land Policy to address the management of all categories of land; revocation of all illegally allocated titles; and cancellation of all illegal excision of Forests.[91] These were major recommendations that required, constitutional, statutory, policy, administrative, practice and cultural changes to effect.

The recommended reforms began with the formulation of the Sessional Paper No. 3 of 2009 on National Land Policy which was adopted by Parliament the same year. The Policy included all the recommendations made by the Commission of Inquiry into Illegal/Irregular Allocation of Public Land. It was guided by principles and values that included ensuring sustainable land use, intra and intergenerational equity; public participation and inclusive land governance. It made provision for the establishment of the National Land Commission as an independent constitutional body accountable to Parliament.[92] The Policy proposed the enactment of an Act of Parliament to operationalise the National Land Commission. The proposed Commission was to manage public land on behalf of the state; establish and maintain a register of all land in the country; exercise powers of compulsory acquisition and development control; ensure the realisation of multiple values of land including economic, social, environmental sustainability and conservation of national heritage.[93]

For the Commission to have legal authority to perform these functions it was necessary for the Constitution, the relevant Statutes and attendant regulations to be amended. Kenya undertook major constitutional reforms that culminated in the promulgation of

90 Republic of Kenya (n 25) above.
91 *ibid*.
92 Republic of Kenya (2009) *Sessional Paper No. 3 on National Land Policy*, 2009 (Government Printer: Nairobi, 2009)
93 *ibid*.

the Constitution of Kenya 2010. Since the promulgation, the Country has been engaged in an implementation process that has encompassed legislative and administrative reforms. The section below discusses these reforms and the place of the National Land Commission in the management of Public Open Spaces in Kenya.

A. Management of Public Open Spaces post the Promulgation of the Constitution of Kenya 2010

The Constitution of Kenya 2010 provides sets of values, rights and frameworks that reorient the governance of public open spaces. Its preamble commits to respect of the environment, heritage and sustaining them for future generations. It outlines national values and principles of governance that include inclusiveness, integrity, transparency, accountability and sustainable development.[94] It specifically sets land policy principles that include equity, productivity, efficiency, sustainability, sound conservation and management of ecologically sensitive areas.[95]All institutions, public officers and individual citizens are expected to uphold these values and principles. The management plans, decisions and activities of all institutions, officers and the public with regard to public open spaces also ought to reflect adherence to these values and principles.

Besides the values and principles, the Constitution has made provisions under the Bill of Rights that have significance on the governance of public open spaces. The right to property is protected save for illegally acquired property.[96] This is important because it removes protection of title for illegally acquired property. It helps in deterring the illegal allocations that were threatening public open spaces. The right to a clean and healthy environment including its protection for current and future generations is equally protected for every person.[97] The State has the obligation and responsibility to ensure that this right is respected while the people are required to co-operate with the State as it discharges this responsibility.[98] Of significant effect to securing public open spaces and their environmental integrity is the constitutional protection of this right to a clean and healthy environment. Every person whose environmental rights are threatened or violated has the right to seek enforcement and redress from court.[99]

The Constitution of Kenya 2010, classifies land into Public, Community and Private Land.[100] This has the effect of placing public open spaces into the categories of Public Land and Community Land. The institutional and legal frameworks for governing each of the two categories has a direct effect on their sustainability.

Parliament is required to enact legislation to provide for the management of Community land; revision, rationalisation and consolidation all land laws; protection, conservation, and provision of access to public land; discharge of obligations and the enforcement of

94 Constitution of Kenya, 2010, Art. 10.
95 *ibid* Art. 60.
96 *ibid* Art. 40.
97 *ibid* Art. 42.
98 *ibid* Art. 69.
99 *ibid* Art. 70.
100 *ibid* Art. 61.

environmental rights.[101]Following these provisions Parliament has passed various legislations that have the effect of either repealing or revising the previous ones that regulated the management of open public spaces. The notable legislations that have been enacted in this regard include: The Land Act, 2012; the Land Registration Act 2012; the National Land Commission Act, 2012; County Government Act 2012; Wildlife Management and Conservation Act 2013; the Community Land Act 2016; Forests Conservation and Management Act, 2016; the Physical and Land Use Planning Act, 2019. It is in the context of implementing these frameworks and the constitutional provisions that the role of the National Land Commission is located.

B. The Place of National Land Commission

The Constitution provides for the establishment of the National Land Commission.[102]It is significant to observe that the Commission is established as an Independent Commission thus enjoying constitutional protection.[103] The Commission has the functions of managing Public Land on behalf of National and County Governments; Monitoring and overseeing land use planning throughout the Country, including others under the Constitution or legislation passed by Parliament.[104] It is in the discharge of these functions that the National Land Commission finds a place in the management of public open spaces.

The National Land Commission has management roles over Public Spaces that fall under the realm of Public Land. This includes unalienated Government Land; Land used or held by State organs except those under private leases; Land transferred to the State by way of sale, surrender or reversion; Land not owned by individuals or communities under any law; Government forests, game reserves, national parks, government animal sanctuaries, protected areas and water catchment areas; Rivers, lakes, water bodies, territorial sea and economic zones including continental shelf; Roads and thorough fares; Any land declared to be public land by an Act of Parliament.[105]Public land is further elaborated to include the coast foreshore, dams and land reserved for public purposes such as public parks, play grounds, gardens, sports facilities and cemeteries.[106]

The Commission is also required to ensure that public land under the management of designated state agencies is sustainably managed.[107] This gives it mandate over all public land even though directly managed by State agencies operating under other statutes such as the Kenya Wildlife Service, Kenya Forest Service, National Museums of Kenya, Cities and Urban Areas, Kenya National Highways Authority, Kenya Urban Roads Authority and Kenya Rural Roads Authority.

101 *ibid* Art.63, 68 & 72.
102 *ibid* Art. 67.
103 *ibid* Art. 248(b).
104 *ibid* Art. 67.
105 *ibid* Art. 62.
106 Land Act, 2012, s. 2.
107 National Land Commission Act, 2012, s. 5(2).

In performing the function of public land management, the Commission is expected to prescribe guidelines, indicating management priorities and operational principles to be followed by all State Agencies, Statutory Bodies and State Corporations while complying with the values and governance principles outlined in the Constitution.[108]It is evident that the National Land Commission is the integration platform for all State Agencies, Corporations and the Public on matters of public land management. The Commission is therefore expected to play a pivotal role in the management of public open spaces to ensure cooperation of all stakeholders while setting the standards for sustainable management.

The National Land Commission has the duty of ensuring and preparing a data base (inventory) of all public land for purposes of management.[109] In addition to the inventory, it is expected to develop and maintain an effective land information management system for the management of public land.[110] It is in execution of this function that the Commission is expected to maintain all spatial and management information for efficient decision-making with regard to management of public open spaces. Accurate spatial, ecological, use and management records are instrumental for the protection of public open spaces from encroachment and degradation; monitoring compliance with and the outcomes of implementation of the management guidelines.

The quantum and geographical spread of public open spaces is not fixed. They may increase due to conversion of private land into public land either by way of compulsory acquisition, reservation, surrender, reversion or purchase. They may also decrease due to the process of allocation, or a variation of boundaries by statutorily authorised agencies. The Land Commission has statutory roles in the processes of conversion of public land to private land or private land to public land; Public land to Community Land or Community Land to Public land through these processes. The Commission is required to maintain a register of the conversions from one category to another.[111] It must be borne in mind that it is through these conversion processes that illegalities and irregularities had occurred before the establishment of the Commission. Therefore, the strict compliance with governance values and principles outlined in the Constitution by the Commission is mandatory.

The National Land Commission's function of monitoring and overseeing land use planning places it at a strategic position to ensure that all developments and land uses are aligned with the principle of sustainable development. The effective performance of this function is vital to the sustainable management of public open spaces controlled by County Governments and those under Community Land Management Institutions. The monitoring and oversight of County Governments would ensure that the Counties meet the planning objectives provided for under the County Governments Act of 2012. Some of these objectives include: ensuring harmony in land use planning; maintaining a viable system of green open spaces for a functioning ecosystem; protection of historical

108 Land Act, 2012, s. 10.
109 *ibid* s. 8.
110 Land Laws (Amendment) Act, 2016, s.37.
111 Land Act, 2012, s. 8 & 9.

and cultural heritage and sites; making reservations for public security, national infrastructure and utility services; as well as the achievement of at least 10% tree cover.[112] In addition, the Commission is expected to ensure that County Governments integrate economic, social and environmental considerations in land use planning.[113] In relation to community land, the commission is expected to monitor land use planning with regard to powers of the State in land use and development control.[114] In addition, the Commission should ensure Community Land Management Institutions observe laws and policies relating to the protection of wildlife and animals, forestry, environmental management.[115]

The Commission has the responsibility of preparing the land use monitoring framework and formulating oversight parameters in addition to preparing a status report.[116]This is meant to ensure accountability on the part of the Commission and the planning authorities. The Commission also plays a dispute resolution role in the physical and land use planning process. This role is played by virtue of its representation at the National and County Physical and Land Use Liaison Committees.[117]It is in playing this role that the Commission is in a position to make interventions on disputes relating to use and planning of open public spaces.

Recommending a national land policy to the National Government is another function of the National Land Commission. In discharging this mandate, the Commission has the opportunity to initiate and influence the policy for the sustainable management of public open spaces. Any gaps arising from the implementation of current legal and administrative frameworks can be addressed as the Commission discharges this duty.

The objectives of laws and policies can only be realised upon effective and efficient implementation. The section below reviews the status of implementation of the functions assigned by law to the National Land Commission with a bearing on the management of public open spaces.

C. Implementation of the National Land Commission's Mandate on Management of Public Open Spaces

The establishment of the National Land Commission and the commencement of its operations resulted in the abolition of the office of Commissioner of Lands and the removal of powers of allocation of unalienated Government Land from the President. In effect, this has resulted in deterring the rampant allocation of public land under political influence by these offices, thus, significantly curtailing the risk of illegal and irregular allocation of public open spaces by the President and other political offices.

The Commission has successfully initiated the revocation of many illegal allocations of public land to private individuals and entities following a review of grants and disposi-

112 County Government Act 2012, s. 103.
113 *ibid* s. 104.
114 National Land Commission Act, s. 3.
115 Community Land Act, 2016, s. 38.
116 Physical and Land Use Planning Act, 2019, s. 9.
117 *ibid* s. 75, 76, 77 & 78.

tions of public land.[118] It has also verified 3,685 letters of allotment with only 382 of the letters being upheld.[119] The Commission also reclaimed public utility facilities.[120] This has resulted in the recovery of some public open spaces that had been illegally allocated. The efforts of the Commission to recover public land has been subject to at least 1,820 court cases.[121]The numerous court cases against the Commission have served to slow the speed of recovery due to injunctions and orders issued against it. The cases have also compounded the legal costs borne by the Commission.

The Commission initiated the collection of data on public land from government agencies although the public land inventory is still incomplete. The Commission is also yet to establish a public land information management system; prepare and issue guidelines for the management of public land by State agencies; and establish a framework for monitoring and oversight of physical and land use planning. The lack of full implementation of these legal mandates occasions gaps that limit the effective and sustainable management of public open spaces in the country.

There is no evidence of the statutory bodies or Government agencies making reports to the Commission on public land management under their custody. The practice is for these agencies and bodies to report directly to their boards of management and the respective Cabinet Secretaries. This may be explained by the requirement by operational statutes requiring them to report to those offices and only seeking them to make consultations with the National Land Commission when making specific decisions. For instance, the Forest Management and Conservation Act 2016 does not require the Cabinet Secretary or the Kenya Forest Service to seek approval or concurrence of the National Land Commission in a matter as important as the variation of boundaries or revocation of public forests.[122] At least the Wildlife Conservation and Management Act, 2013 requires the Kenya Wildlife Service and the Cabinet Secretary to Consult the National Land Commission before a declaration of national reserves or variation of boundaries or revocation of national park or marine protected area.[123] It does not, however, require concurrence or approval of the Commission. The County Government Act 2012 does not require Counties to seek the Commission's approval or concurrence when changing use of any public open space to another public use or giving a licence over such spaces.

These statutory provisions point to claw-backs on the Constitutional provisions on the mandate of the Commission to manage public land or an attempt by the statutory bodies to resist change. These statutory incongruences may lead to government agencies making decisions that change use of land under their custody from one public use to another public use of a different nature with ease. An example of such change is the creation of

118 National Land Commission (2019) *2013–2019 First Commissioners End Term Report* (NLC: Nairobi, 2019) 60.

119 *ibid* 55.

120 *ibid* 60.

121 *ibid* 61. The 1,820 court cases have largely been challenging the functions, processes or decisions of NLC with the majority of the cases filed within Nairobi County accounting for 47% of the cases, followed by Mombasa County with 9%, Eldoret and Nakuru and Kilifi Counties tied at 6% each. The rest of the counties account for 32%.

122 Forest Management and Conservation Act, 2016, s. 34.

123 Wildlife Conservation and Management Act, 2013, s. 34 & 35.

easements at Nairobi National Park allowing for the construction of the standard gauge railway and the southern bypass through the park.[124] Similarly, no public evidence has been published regarding the concurrence or approval of the National Land Commission for the creation of an easement or change of use of part of Uhuru Park to allow for the construction of an expressway.[125] These legal, administrative and practice gaps point to threats to the sustainable management of public open spaces emanating from public agencies, National or County Governments seeking change of use for public open spaces to other public uses that do not serve the same purpose.

VIII. CONCLUSION

Public open spaces are of significant social, environmental and economic value to society. Given this importance there is global concurrence on the need for their sustainable management. While there are global, regional and national policies and laws that set the principles for achieving these aspirations, challenges in the actual implementation have been experienced. Ineffective planning and enforcement of regulations; public space grabbing; land use changes and conversions; increasing insecurity; environmental degradation; low prioritisation; multiplicity and duplication of legal and administrative frameworks; weak institutional capacity and limited financing were manifest in Kenya before the promulgation of the Constitution of Kenya 2010. These challenges resulted in the loss of public open spaces and a deterioration of their state.

As part of the reforms to address some of these challenges, the National Land Commission was established as an independent body. The functions of the Commission include managing Public Land on behalf of National and County Governments; Monitoring and overseeing land use planning throughout the Country including others under the Constitution or legislation passed by Parliament. It is in discharging these functions that the National Land Commission finds place in the management of public open spaces.

Although the Commission has registered success in deterring illegal and irregular allocation of public spaces and the reclamation of some of the grabbed spaces, it has also faced the challenge of numerous court cases brought against revocations of illegally and irregularly allocated public land. The Commission is yet to develop guidelines for the management of public land by statutory bodies and public agencies; a framework for monitoring and oversight of planning and land use; an inventory of public land; and a Public Land Information Management System.

There is evidence of statutory claw-backs with regard to management of public land under statutory bodies and Government agencies. The statutes under which these bodies operate have omitted the need for the agencies to seek concurrence or approval of the Commission on significant decisions such as change of user from one public use to another or the alteration of boundaries of public open spaces under their management. This has resulted in the loss of public open spaces to other public uses that are not complimentary or aligned with their social, environmental functions.

124 Parliament of Kenya (2020) *Report On A Petition Regarding Encroachment Into Nairobi National Park, 2020* (Parliament of Kenya, November 2020).

125 *ibid*.

To enhance the sustainable management of public open spaces in Kenya, there is need to address the statutory gaps that limit the effective integration of public land management under the National Land Commission. It is also critical for the Commission to address the lag in implementation of its functions such as developing guidelines for public land management; establishing a public land inventory; developing a framework for monitoring and land use planning oversight; and advising government on a policy for the management of public open spaces.

WHEN URBAN GREEN SPACES MEET INFRASTRUCTURE DEVELOPMENT IN KENYA: A CASE OF THE NAIROBI EXPRESSWAY

*Richard Mulwa**

I. INTRODUCTION

Modern cities are characterised by intensified human concentration accompanied by the accumulation of economic, cultural, educational and social human activities. Globally, urban expansion has increased over recent decades[1], a trend that is expected to continue as urban areas absorb most of the global population growth in the upcoming decades.[2] The cities are at different stages of development, with rising population and rapid world-wide urbanisation creating huge problems for health and environment, concerns about their sustainability, and many of them in the global South struggling with enormous growth rates and migration. These cities have grown rapidly in size and density[3] and in some developing countries, often denominated rapid urban expansion, cities have tripled in size.[4] The unprecedented pace of rapid city growth, mostly in the global South is caused by rapid population growth.[5] In sub-Saharan Africa, demographic growth has been on the rise in recent decades, with the trend appearing to continue. The continent's population is projected to double to 2 billion over the next 40 years, with about 720 million people expected to be living in urban areas by that time.[6]

The development of cities is usually coupled with the growth in transportation infrastructure which connects cities. Infrastructure networks constitute the channels between and within regions that promote the spatial transfer of production factors and mobility of goods. Additionally, the transportation network contributes to the socio-economic development and the increased quality of life through generating inter- or intra-city connections during urbanisation.[7] Transportation infrastructure such as roads, highways, railways, airports, bridges, waterways, and canals play important roles in the transmission of materials and the flow of population during urban agglomeration and

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1 B Cohen, 'Urbanisation in developing countries: current trends, future projections, and key challenges for sustainability' (28)1-2 Technol. Soc. (2006) 63.

2 UN-DESA (2012), *Challenges and way forward in the urban sector Sustainable Development in the 21st century (SD21)* (United Nations Department of Economic and Social Affairs (UN-DESA), Division of Sustainable Development, 2012).

3 T Turrini & E Knop, 'A landscape ecology approach identifies important drivers of urban biodiversity' 21(4) Global Change Biol. (2015) 1652.

4 (KC Seto, B Güneralp & LR Hutyra, 'Global forecasts of urban expansion to 2030 and direct impacts on biodiversity and carbon pools' (109)40 Proc. Natl. Acad. Sci. U.S.A. (2012) 1608.

5 S-C Hsieh, 'Analysing urbanisation data using rural–urban interaction model and logistic growth model' (45) Computers, Environment and Urban Systems (2014) 89; V Watson, 'The planned city sweeps the poor away…'. Urban planning and 21st century urbanisation' (72) Progress in Planning (2009) 151.

6 C Linard, AJ Tatem & M Gilbert, 'Modelling spatial patterns of urban growth in Africa' (44) Applied Geography (2013) 23.

7 J-P Rodrigue, C Comtois & B Slack (2016) *The Geography of Transport Systems* (Taylor & Francis; Abingdon, UK: 2016); J Liu et al, 'Systems integration for global sustainability' Science (2015) 347:1258832.

diffusion. This leads to urban aggregation and diffusion, greatly boosting the regional and national economic development.[8] However, transportation infrastructure also generates negative effects such as ecological destruction, increased traffic accidents, climate change, carbon dioxide emissions and lower transport efficiency.[9] Alongside the negative impacts is the area taken up by the infrastructure, especially roads. These effects could put huge pressure on the natural and ecological environment when meeting the need for economic development and social improvement.[10] Therefore, inasmuch as road infrastructure is important for development; it could be realised at the expense of other developments especially the expansion and development of green spaces, which play a critical role for the urban dwellers such as providing provisioning, regulatory, habitat and cultural services. One such urban area where the conflict of natural environment and expansion road infrastructure is pronounced is the city of Nairobi,[11] which has experienced considerable road construction projects in the past 15 years. This could be contrasted against limited attention to the natural environment despite its importance, and inadequate development of urban green areas which have remained largely the same size since 1948. [12] The immediate question from this road network expansion is whether sustainability arguments of the social, economic and environment have been considered in the expansion programme, and where is the place of natural environment and urban green spaces in the city of Nairobi? The doubts over environmental considerations in the expansion of road networks in Nairobi have been reinforced by the recent development of the Nairobi Expressway, which is expected to have a considerable impact on the environment now and in the future. It seems therefore the case, that where the two meet in Kenya, the environment almost always loses.

II. THE PLACE OF URBAN GREEN SPACES IN CITIES

The utility of urban green spaces for urban planners can be seen through many lenses. According to Barton,[13] urban green spaces provide environmental, economic, social, educational, health, psychological, scenic and scientific benefits. Many studies have focused on the economic aspects of open spaces, especially on values of properties[14] and

8 X Jiang et al, 'Transportation and regional economic development: Analysis of spatial spill overs in china provincial regions' (16) Netw. Spat. Econ. (2016) 769; Z Chen & KE Haynes (2017) *Socioeconomic Environmental Policies and Evaluations in Regional Science* (Springer; Berlin, Germany, 2017):

9 MW Doyle & DG Havlick, 'Infrastructure and the environment' (34) Annu. Rev. Environ. Resour. (2009) 349; I Tasic & RJ Porter, 'Modeling spatial relationships between multimodal transportation infrastructure and traffic safety outcomes in urban environments' (82) Saf. Sci. (2016) 325; J Camp et al, 'Climate change and freight-transportation infrastructure: Current challenges for adaptation' (19) Journal of Infrastruct. Syst. (2013) 363.

10 M Muller et al, 'Built infrastructure is essential' (349) Science (2015) 585.

11 P Mwaura, 'Let's Strike A Balance Between Development And Environmental Protection' (Capital News, 10 October 2020) <https://www.capitalfm.co.ke/news/2020/10/lets-strike-a-balance-between-development-and-environmental-protection/ > accessed 28 January 2021.

12 M Makworo & C Mireri, 'Public open spaces in Nairobi City, Kenya, under threat; (54(8) Journal of Environmental Planning and Management (2010) 1107.

13 J Barton, R Hine & J Petty, 'The health benefits of walking in green spaces of high natural and heritage value' (6)4 Journal of Integrative Environmental Sciences 261.

14 J Wu & AJ Plantinga, 'The influence of public open space on urban spatial structure' (46(2) Journal of Environmental Economics and Management (2003) 288.

on urban spatial structure.[15] For instance, Tajibaeva et al. [16]point out that there are at least two important effects of conserving open space in a metropolitan area. First, they increase the value of developable land and increase development density on that land. Indeed, urban greening projects have been undertaken to maintain and increase property values due to their aesthetic characteristics and functionality.[17] Secondly, open spaces generate local amenities that make nearby areas more attractive thereby changing the spatial pattern of demand for development.

Urban green spaces also fulfil a range of other different roles, such as social spaces and areas for recreation and cultural purposes. In fact, the environmental services provided by urban green spaces are part of their key values.[18] These environmental services include recreation, aesthetics and other ecosystem goods and services.[19] For example, they counteract the urban heat island effect, thereby reducing the energy costs of cooling buildings. Urban greenery also minimises air, water, and noise pollution, and may offset greenhouse gas emissions through CO_2 absorption.[20] Urban greenery also provides storm water attenuation, thereby acting as a flood mitigation measure.[21] Further ecological benefits include preservation of biodiversity and nature conservation.[22] Consequently, due to the range of environmental services provided by, urban green spaces, they can be viewed as a public good.

From a health perspective, urban green spaces allow for health-promoting activities, such as physical activity or rest and relaxation to take place. In this way, they have a direct relationship with the quality of life of urban dwellers as they encourage mental health, physical activity of the residents and the overall public health of the urban dwellers in addition to enhancing the quality of air, and rendering town ecosystems more desirable.[23] Urban green spaces may therefore help facilitate active lifestyles in the urban setting. In addition, they may be used as therapeutic spaces for rehabilitative exercise for persons with different ailments, such as coronary artery disease[24] and have been associated with lower rates of diseases such as type 2 diabetes mellitus.[25] Urban green

15 L Tajibaeva, RG Haight & S Polasky, 'A discrete-space urban model with environmental amenities' (30) Resource and Energy Economics (2008) 170.

16 *ibid*.

17 SM Haq, 'Urban green spaces and an integrative approach to sustainable environment' (2)5 Journal of Environ Protect. (2011) 601.

18 MW Strohbach, E Arnold & D Haase, 'The carbon footprint of urban green space – a life cycle approach' (104)2 Landscape Urban Plan. (2012) 220.

19 V McConnell & MA Walls (2005) *The value of open space: Evidence from studies of nonmarket benefits* (Resources for the Future: Washington, DC, USA, 2005).

20 DE Pataki, MM Carreiro & J Cherrier et al, 'Coupling biogeochemical cycles in urban environments: ecosystem services, green solutions, and misconceptions' (9)1 Front Ecol Environ. (2011) 27.

21 S Roy, J Byrne & C Pickering, 'A systematic quantitative review of urban tree benefits, costs, and assessment methods across cities in different climatic zones' (11)4 Urban For Urban Green. (2012) 351.

22 CP Durand, M Andalib & GF Duntonet al, 'A systematic review of built environment factors related to physical activity and obesity risk: implications for smart growth urban planning' (12)5 Obes Rev. (2011) e173.

23 ACK Lee & R Maheswaran, 'The health benefits of urban green spaces: a review of the evidence' (33)2 J Public Health (Oxf). (2011) 212.

24 R Grazuleviciene, J Vencloviene & R Kubilius et al., 'The effect of park and urban environments on coronary artery disease patients: a randomized trial' BioMed Res Int. (2008) 403012.

25 T Astell-Burt, X Feng & GS Kolt, 'Is neighborhood green space associated with a lower risk of type 2 dia-

spaces provide residents with opportunities for contact with the natural environment, which has positive restorative effects on mental health and wellbeing and may also help to provide a buffer against stressful life events.[26]

The benefits of green space on mental health and wellbeing may also arise from participation in activities occurring in these spaces, such as social interaction or physical exercise.[27] These benefits include alleviation of stress and anxiety, and improved mood and attention. Urban green spaces also provide opportunities for social interactions to take place. This in turn could help reduce social isolation, generate social capital, and lead to greater personal resilience and wellbeing.[28] This is particularly important for elderly population groups,[29] hence the importance of recreational areas and urban green spaces. The quality of green spaces helps to define the identity of towns and cities, which can enhance their attraction for living, working, investment and tourism.

Given the benefits of urban green spaces highlighted above, it is clear that these spaces are critical for any urban population, and governments should ensure the development of these spaces alongside transportation infrastructure. However, due to the invisible nature of the benefits of urban green spaces, and lack of a clear expression of the benefits in monetary terms, their importance is often relegated to a secondary role. Transport infrastructure, especially road construction whose value is easier to decipher, takes preeminence due to the perceived immediate economic benefits.

III. IMPORTANCE OF TRANSPORT INFRASTRUCTURE

The transportation infrastructure represents the motivator of economic growth and social welfare[30] through improving production and investment performances for the private sector.[31] More specifically, the construction of transportation infrastructure could reduce the travel cost, attract foreign investment and expand trade of shared resources.[32] In terms of the social overhead capital, transport infrastructure plays a decisive role in industrialization and has obvious spill over effects on regional innovation, factor reallocation, and manufacturing productivity[33], which promote the aggregation of industries,

betes? Evidence from 267,072 Australians' (37) Diabetes Care (2014) 197.

26 T Hartig, AE van den Berg & CM Hagerhall et al., 'Health benefits of nature experience: psychological, social and cultural processes' In: Nilsson K, Sangster M, Gallis C, et al, eds. *Forests, Trees and Human Health* (Rotterdam, The Netherlands: Springer; 2011); AE van den Berg, J Maas & RA Verheij et al., 'Green space as a buffer between stressful life events and health' (70)8 Soc Sci Med. (2010) 1203.

27 D Nutsford, AL Pearson & S Kingham, 'An ecological study investigating the association between access to urban green space and mental health' 127(11) Public Health (2013) 1005.

28 SM Haq, 'Urban green spaces and an integrative approach to sustainable environment' (2)5 Journal of Environ Protect. 601.

29 T Sugiyama & CW Thompson, 'Associations between characteristics of neighbourhood open space and older people's walking' (7)10 Urban Forestry Urban Green. (2008) 41; AL Bedimo-Rung, AJ Mowen & DA Cohen, 'The significance of parks to physical activity and public health: a conceptual model' (28)2 Amer. Journal of Prev. Med. (2005) 159.

30 H Achour & M Belloumi, 'Investigating the causal relationship between transport infrastructure, transport energy consumption and economic growth in Tunisia' (56) Renew. Sustain. Energy Rev. (2015) 988.

31 D Banister & Y Berechman, 'Transport investment and the promotion of economic growth' (9) J. Transp. Geogr. (2001) 209.

32 S Paul, 'Effects of public infrastructure on cost structure and productivity in the private sector' (79) Econ. Rec. (2003) 446.

33 Nutsford et al., 2013 (n 27) above.

population and economy. Empirical evidence from both developed and developing countries point to a positive correlation between development in the physical, social, and policy and regulation aspects of infrastructure and economic development. In Kenya for example, infrastructure development particularly investments in information communication technologies (ICTs), electricity, and transport infrastructure have been in rapid positive transition. These developments, which have been promoted by a friendly policy framework and hugely benefited from foreign assistance, have benefited many towns and cities in Kenya, including Nairobi, the country's capital.[34]

The merits of transport infrastructure development are not without problems, as urban economies are growing and the living conditions and lifestyles of the city are changing leading to high numbers of people in the upper and middle classes in the cities, which in turn increases the ownership of private vehicles and the levels of pollution. Most of these cities however, do not have any growth management plans for controlling this rapid increase in personal vehicles. This has led to severe traffic congestion, environmental problems such as air pollution, loss of personal and corporate productivity, high cost of transport, and poor quality of life. Due to its continued expansion, the transport sector in many countries has become the largest contributor to anthropogenic pollutant emissions in urban environments.[35] In the US for example, nearly 60% of total carbon monoxide emissions can be attributed to the transport sector[36], while in the UK, it accounts for approximately 24% of PM2.5, 54% of carbon monoxide, and 32% of NOx.[37] According to Fu et al.[38] motor vehicles contributed more than 80% of carbon monoxide emissions in the cities of Beijing and Guangzhou in China. The congestion in traffic and air pollution has a negative impact on the gross domestic product (GDP) as they impose significant costs in health and productivity. Therefore, the net effect of continued road network expansion may be zero or even negative if all the benefits and costs are accounted for. A paradigm shift in these cities is therefore necessary to ensure that the expansion of countries' GDP is not achieved at the expense of the environment and society.

This paradigm shift will seldom be realised, especially in developing countries, where expansion of transport infrastructure has created more demand for use of newly built roads and ends up congesting the roads after a short period of time. For most cities in developing countries, the traditional way of solving this traffic congestion is to continue increasing the capacity of the existing road network by expanding either the width or the length of the roads.[39] However, experience has shown that this only works as a temporary fix because investors, attracted by the improved road network, develop

34 D Mwaniki, 'Infrastructure Development in Nairobi: Widening the Path Towards a Smart City and Smart Economic Development' In: Vinod Kumar T. (eds) *Smart Economy in Smart Cities. Advances in 21st Century Human Settlements* (Springer, Singapore, 2017).

35 RN Colvile, et al, 'The Transport Sector as A Source of Air Pollution' (35(9) Atmospheric Environment (2001) 1537;

36 EPA (2012), Our Nation's Air: Status and Trends Through 2010 <https://www.epa.gov/ air-trends> accessed 27 January 2021.

37 NAEI (2010), Emissions of Air Quality Pollutants 1970–2008. <http://naei.defra.gov.uk/ > accessed 27 January 2021.

38 L Fu et al., 'Assessment of Vehicular Pollution in China' (51)5 Journal of the Air & Waste Management Association (2001) 658.

39 V Jain, A Sharma & L Subramanian, 'Road traffic congestion in the developing world' Proceedings of the 2nd ACM Symposium on Computing for Development (2012).

new commercial and residential developments where new lanes are added to an existing road network or where new roads are built. Consequently, after a few years, these roads become congested again.[40] The probable explanation is that citizens are encouraged to buy more cars to drive on the new roads, leading to increased congestion. Due to land scarcity, horizontal expansion of road networks gives way to vertical expansion as adding lanes or building new roads becomes untenable. The preferred alternative has been to build expressways on top of and parallel to the existing ones like the proposed Nairobi expressway in Kenya.

IV. THE NAIROBI EXPRESSWAY: ECONOMIC AND ENVIRONMENTAL IMPACTS

Kenya aspires to become a middle-income country by 2030 through its economic blueprint - Kenya Vision 2030.[41] Included in Vision 2030 is the roads expansion programme aimed at enhancing domestic and regional trade through upgrading national and county road networks. The target is to construct and rehabilitate approximately 5,500 km of roads comprising of 3,825 km national trunk roads and 1,675 km county roads. About 1,700 km for Non-Motorized Transport (NMT) including paths and walkways are also planned. About 800 km of roads will be designed and 4,257 km and 1,735 km of national trunk roads and county roads will be periodically maintained respectively. In addition, approximately 200,000 km will be routinely maintained.[42] This is to be achieved through public-private partnership (PPP) arrangements such as concessioning, Build Operate Transfer (BOT), and Design Build Operate (DBO).

In the recent past, the Kenyan Government has been dedicated to improving the infrastructure in the country, especially transport, as part of its efforts to elevate the country to upper middle-class status by 2030. For instance, according to the 2018 Economic Survey[43], the development expenditure on roads grew by 19.2% to Ksh. 134.9 billion in 2017/18 from Ksh. 109 billion 2016/17. Additionally, the Kenya Roads Board (KRB) increased disbursements to the various road agencies and County Governments by 5.0% to Ksh. 63.5 billion in 2017/18, from Ksh. 60.5 billion in 2016/17. Roads are the most common mode of transport in Kenya accounting for 62.9% of the total value of output from the transport sector as at 2018.[44]

In 2011, it was estimated that with the exception of Nairobi county, 9.6% of roads in the Nairobi Metropolitan Region[45] were paved compared to a national average of 13.7%. Between 2012 and 2018, Nairobi County received the largest share (61%) of funds allocated to road projects in the region, and a total of 111.6 km were constructed in the country. A number of factors have influenced the growth of infrastructure in Nairobi County. These include: a) the changing demographics of the county with a population density

40 *ibid*.
41 <https://vision2030.go.ke/ > accessed 28 January 2021.
42 *ibid*.
43 Kenya National Bureau of Statistics (2018) *Economic Survey 2018* (KNBS, 2018) <https://www.theelephant.info/documents/kenya-national-bureau-of-statistics-economic-survey-2018/ > accessed 28 January 2021.
44 *ibid*.
45 The region comprises of Nairobi county and parts of surrounding counties i.e. Kiambu, Muranga, Machakos, and Kajiado.

at 6,474 people per sq. km and growing at 4.1% per annum; b) government initiatives such as establishment of a road annuity fund, an infrastructure bond, and increased budgetary allocation to improve infrastructure in the county; c) increased private sector investment; and d) raising foreign direct investment for infrastructure.

The expansion of transportation infrastructure in the city of Nairobi has also incorporated the PPP. An example is the *Nairobi Expressway* which extends from the Jomo Kenyatta International Airport (JKIA) in the south-eastern part of the city, to Westlands area running alongside the current Uhuru highway. The Expressway is a privately initiated project and will be the first of the new toll roads in Nairobi, and the first of its kind in Africa with unique design features that combine underpasses, overpasses, exits as well as a Bus Rapid Transit (BRT) component covering the entire stretch.[46] Once completed, it will be 27 km long, forming part of the Mombasa-Nairobi highway (A8) and will comprise a 15.7 km grade section and an 11 km elevated section.

According to the Kenya National Highways Authority (KeNHA), the estimated cost is between Ksh. 59.9 billion and Ksh. 62.2 billion, an amount that was approved by the Cabinet in 2019. Part of the cost, Ksh. 8 billion, is set aside for the compensation of the private land and property owners who will be affected by the project, while an additional Ksh. 7.7 billion is expected to be used in the relocation of water and sewerage infrastructure to pave the way for the road. It will be financed through a PPP of BOT model by the African Development Bank and the World Bank, but the construction is being undertaken by the China Road and Bridge Corporation (CRBC). The project is a 30-year concession, with three years designated for the construction phase and the remaining 27 years for the operation, then handover to the KeNHA. The construction company will recoup its cost by charging motorists an estimated KSh.11.24 per kilometre, which amounts to at least a total of Ksh. 300 for the entire section for a sedan, but the costs may be higher for sport utility vehicles (SUVs). This will be actualised under the PPP model of BOT and the pay-as-you-use payment method.

The purpose of the road is to ease congestion caused by the heavy traffic entering and exiting the Nairobi central business district (CBD) that normally causes snarl-ups during morning and evening rush hours. This is expected to save time and cost in terms of fuel consumption, and to reduce accidents among others. The city is currently characterised by chronic traffic jams, with the situation worsening over time.[47] This could be attributed to the expansion of middle income earners, but also the unreliability of the existing public transport system, making Nairobi the fourth most congested city in the world.[48] As a consequence, it is estimated that Kenya loses over US$ 1 billion annually in traffic jams, wasted fuel and lost productivity.[49] In addition, the marked and dedicated emergency

46 <https://www.president.go.ke/2019/04/26/kenya-secures-shs-226-billion-in-project-financing-as-the-belt-and-road-summit-kicks-off-in-beijing/ > accessed 28 January 2021.

47 MN Ndatho, *Socio-Economic Effects Of Traffic Congestion On Urban Mobility Along Jogoo Road, Nairobi City County – Kenya* (Master of Environmental Planning and Management Thesis: Kenyatta University, 2018)

48 *ibid*.

49 E Ombok, 'Traffic Jams in Kenya's Capital Bleed $1 Billion From Economy' (Bloomberg, 24 September 2019) <https://www.bloomberg.com/news/articles/2019-09-24/traffic-jams-in-kenya-s-capital-bleed-1-billion-from-economy > accessed 28 January 2021.

lanes will help in reducing emergency response time and travel time for motorists moving beyond the city.

In most developing countries like Kenya, new road construction is often seen as a yardstick of modernisation. Governments have therefore often allocated public expenditure in favour of new road construction at the expense of other urban transport investments and the maintenance of existing infrastructure.[50] Is should therefore be noted that easing congestion, which is the main objective in constructing the express road, may only be realised in the short-run. This is because expanding the capacity of transport infrastructure by increasing the size and number of roads (including flyovers and tunnels) can lead to greater demand as a result of "induced travel" (also referred to as latent demand or generated traffic). This is because improved facilities attract more traffic on the road. The argument is further strengthened by growing incomes and car ownership especially from the increasing middle-income earners. As a consequence, congestion levels are soon restored to almost pre-expansion levels and little travel time savings are realised after the construction of new roads.[51] A case in point was the expansion of Thika super highway to ease traffic congestion, which only worked for a few years before the situation reverted to what it was before the expansion. The one factor that may reduce accelerated congestion on this road is the fact that the investors will charge a toll levy for its use, thus limiting the number of users. In terms of road investment, evidence suggests that developing cities need to focus their resources on existing road maintenance rather than new road construction.[52] In addition, it has also been shown that in developing cities, maintenance expenditures have a positive effect on economic output whereas the construction of new highly-visible road infrastructure is less beneficial for economic development.[53]

Other economic benefits of the Expressway within the country include[54]: opening up the city suburbs for business, industrial, and residential investment via reduced travel time and cost from the CBD; increasing international visibility for Kenya as the destination for Foreign Direct Investment, especially in road infrastructure; generating revenues for the government through income taxes and corporate taxes on expenditures, operational and corporate revenues, and incomes of employees. Operational revenues will be generated primarily through toll fees on the expressway, while corporate tax is estimated at to

50 D Pojani & D Stead, 'Sustainable Urban Transport in the Developing World: Beyond Megacities' (7) Sustainability (2015) 7784.

51 T Litman, 'Generated Traffic and Induced Travel: Implications for Transport Planning' (71) ITE Journal (2001) 38; R Cervero, 'Induced Travel Demand: Research Design, Empirical Evidence, and Normative Policies' (17) Journal of Plan. Lit. (2002) 3.

52 *ibid*.

53 S Devarajan, V Swaroop & H Zou, 'The Composition of Public Expenditure and Economic Growth' (37) Journal of Monet. Econom. (1996) 313; F Rioja, 'Filling Potholes: Macroeconomic Effects of Maintenance vs. New Investments in Public Infrastructure' (87) Journal of Public Econom. (2003) 2281.

54 CT Wekesa, NH Wawire & G Kosimbei, 'Effects of Infrastructure Development on Foreign Direct Investment in Kenya' (8)2 Journal of Infrastructure Development (2016) 1; G Wachira, 'Why Nairobi Expressway project deserves support' (Business Daily, 06 November 2019) <https://www.businessdailyafrica.com/bd/opinion-analysis/ideas-debate/why-nairobi-expressway-project-deserves-support-2269710> accessed 28 January 2021.

increase to US$ 371 million. Other benefits are: help in realisation of Big Four Agenda[55] as neighbouring areas, counties and towns are further enabled to develop industrial and business hubs including locations for affordable housing, while improvement of the road network within the country will contribute to the objectives of Kenya Vision 2030. Finally, JKIA is expanding its Terminal 2 to increase its handling capacity from 9 million to 20 million passengers per year and the road will ease the increased traffic and accommodate the increased air passengers through the airport into the city and other areas; and during its construction and beyond, the project will create employment for over 2000 residents who will directly and indirectly work on the project. The Expressway also has trans-boundary multiplier effects that will spill over to the neighbouring states. These include:[56] i) providing better connectivity for the movement of goods, services and people between Nairobi and the entire northern corridor, and thus open up the economic potential of the region; and, ii) enhancing Kenya's economic competitiveness within the East African region and beyond and bolstering her position as the business hub of choice through enhanced logistics efficiency at SGR Terminus, JKIA, Inland Container Depots (ICDs), and the Industrial Area.

Assuming the road was to meet its economic objective, an important indicator that is not getting its due attention is the impact on the environment. This is true for this and other infrastructure projects in towns and cities in the country. According NEMA, the Expressway will use 60% of public land and 40% of private land totalling to 35 acres. Initially, the road was designed to hive 1.3 acres from the historic Uhuru park open green space, the University of Nairobi land, land for people living with disability, part of St. Paul's Chapel land, and land used as a military base in Westlands. However, due to pressure from environmental conservationists and human rights activists, the design was changed to elevate the road above the ground, ensuring no land would not be hived from Uhuru Park. KeNHA also reiterated that no buildings would be affected, except perimeter walls which take up minimal parcels of land. There would however be clearance of vegetation along the entire project area including mature tree species; interference with green cover areas along the construction path; moderate and intermittent loss in plant richness diversity especially in stretches rich in plant species.[57]

Clearance of vegetation causes modification of habitat, as a substantial part of the proposed area will be converted from green spaces to roads and paved areas. The project also involves significant loss of bird habitat associated with vegetation clearance of mature trees. Some of the trees along the expressway right of way (RoW) such as *Acacia spp* and *Jacaranda mimosifolia* serve as habitats for Marabou stork.[58] Vegetation clearance and disturbance of plant communities will also create room for alien species and weeds such as *Lantana Camara*, *Parthenium hysterophorus*, and *Tagetes minuta,* which have the

55 The Big Four Action Plan/Agenda is the current administration's priority projects of Enhancing Manufacturing; Food Security and Nutrition; Universal Health Coverage; and Affordable Housing <https://www.president.go.ke/ > accessed 28 January 2021.

56 Wachira (n 54) above.

57 H Kimuyu, 'Uhuru Park to lose 1.3 acres along Uhuru Highway for Expressway's construction' (Nairobi News, 24 October 2019) <https://nairobinews.nation.co.ke/editors-picks/uhuru-park-to-lose-1-3-acres-along-uhuru-highway-for-expressways-construction > accessed 28 January 2021.

58 <https://naturaljustice.org/wp-content/uploads/2020/02/Nairobi-Expressway-NEMA-Submission-for-printing_centric_Jan-15-2020-FINAL-2.pdf > accessed 28 January 2021.

potential to invade the disturbed areas.[59] Further, the removal of plant species without replacement in the project area may result in gene dilution. [60]

The project is also expected to generate an assortment of wastes with some being clearly hazardous such as bitumen, oils, paints, and requiring specialized handling and treatment. [61] Poor waste management is already a challenge where the road project will be located. There will also be risks and impacts of traffic noise and vibration resulting from the construction on people and property. Potential sources of noise and vibration during construction will include clearing and grubbing of the highway corridor, earth-moving, erection of bridges, construction traffic and blasting in quarries. The main sensitive receptors to the noise impact will be the residential areas, commercial entities, and institutions including places of worship, schools and hospitals along the road project. Gaseous and dust emissions will also be produced in excavations and earth moving activities, haulage of fill material, operation of diesel-powered machinery and ignited vehicle engines. Human exposure to these emissions is associated with airborne disease such as respiratory infections. Finally, the quality of groundwater is likely to be compromised result of contaminated operational road runoff infiltration entering the groundwater environment via proposed filter drains. Runoff from the road pavement is likely to contain some degree of silt/dust and pollutants from atmospheric deposition, vehicle emissions, litter and general road maintenance, as well as from possible accidental road spillage incidents. Any surface water runoff has the potential to infiltrate the subsoil and migrate into the groundwater. The permanent environmental damage during and after the construction of the expressway are indeterminate and can only be captured after the road is commissioned for use.

The initial plans of hiving off a part of Uhuru Park and the continued expansion of road infrastructure in Nairobi and other cities, without a similar enthusiasm for expansion of urban green spaces is an indicator that green spaces are not a priority in the urban plans of the city. A tour around the city and other cities and towns in the country show that development of urban green spaces has suffered at the expense of road infrastructure expansion. [62] It has also been shown that urbanisation devoid of urban green spaces can cause many social and physical impacts on its residents,[63] and urban green infrastructure[64] (UGI) is an indispensable part of urban planning, and its significance is understood exceptionally for keeping up the natural quality and sustainability of the city environment (Gee et al., 2009). Uncontrolled expansion of many developing cities

59 RT Shackleton et al., 'Distribution of the invasive alien weed, *Lantana camara*, and its ecological and livelihood impacts in eastern Africa' (34)1 African Journal of Range & Forage Science (2017) 1.

60 WRM Meilink et al., 'Genetic pollution of a threatened native crested newt species through hybridization with an invasive congener in the Netherlands' (184) Biological Conservation (2015) 145.

61 <https://naturaljustice.org/wp-content/uploads/2020/02/Nairobi-Expressway-NEMA-Submission-for-printing_centric_Jan-15-2020-FINAL-2.pdf > accessed 28 January 2021.

62 RS Khanani et al., 'The Impact of Road Infrastructure Development Projects on Local Communities in Peri-Urban Areas: the Case of Kisumu, Kenya and Accra, Ghana' International Journal of Community Well-Being (2020) 2108.

63 R Anguluri & P Narayanan, 'Role of green space in urban planning: Outlook towards smart cities' (25) Urban Forestry & Urban Greening (2015) 58.

64 Urban Green Infrastructure is an inter-linked network of green spaces that together renders ecosystem befits to the society.See, R Lafortezza et al, 'Green Infrastructure as a Tool to Support Spatial Planning in European Urban Regions' (6) J. Biogeosci. For. (2013) 102.

like Nairobi and their infrastructure have made green spaces vulnerable to the need of space (Gomes & Moretto, 2011). This is due to competition for space in the urban region, which makes urban forests and urban green areas vulnerable to encroachments for the growth of the city. Land allocation to urban green cover is usually neglected or readily negotiated in these countries. For instance, in Nairobi, the area under urban green spaces has remained constant even with the expansion of the city and its population from 119,000 in 1948 to over 4 million in 2020.[65]

V. SUSTAINABLE CITIES

Cities, especially in sub-Saharan Africa are urbanised with little or no economic growth.[66] This has resulted in increased slums and informal settlements, which are difficult to provide with services and access to facilities.[67] Cities in sub-Saharan Africa are growing unmonitored and without due care for urban planning.[68] This trend outpaces infrastructure development leaving planners with the role of playing catch-up with past developments instead of planning for the future.[69] This growth has brought about both positive impacts, such as trade growth and negative impacts, among them increased housing demand, shortage of services, a decline in living standards, land speculation, absence of urban waste management, and overcrowding.[70] The growth has also contributed to a rise in demand for social services and transportation.[71] As a consequence, urban green spaces have come under increasing pressure during the urbanisation process and this negatively affects ecosystem services, cultural associations, psychological wellbeing and the health of urban dwellers.[72] The concept of green cities should therefore be promoted as one that strikes a balance between economic development, environmental conservation, and social wellbeing.

Since the 1990s, the introduction of sustainable practices into urban development seems to have progressed step-wise from light to deeper shades of green and to more colours

65 <https://www.smartcitiesdive.com/ex/sustainablecitiescollective/will-nairobi-maintain-its-status-green-city-sun/211676/ > accessed 27 January 2021.

66 Hsieh 2014 (n 5) above

67 E-W Augustijn-Beckers, J Flacke & B Retsios, 'Simulating informal settlement growth in Dar es Salaam, Tanzania: An agent-based housing model' (31) Cities (2011) 57; K Vermeiren et al, 'Urban growth of Kampala, Uganda: Pattern analysis and scenario development' (106) Landscape and Urban Planning (2012) 199.

68 WJ Kombe, 'Land use dynamics in peri-urban areas and their implications on the urban growth and form: The case of Dar es Salaam, Tanzania' (29) Habitat International (2005) 113; JM Lupala, Urban types in rapidly urbanizing cities (PhD Thesis). Department of Infrastructure and Planning (Tryck hos Universitets service, Stockholm, 2002) pp. 280; L Diaz Olvera, D Plat & P Pochet, 'The puzzle of mobility and access to the city in Sub-Saharan Africa.' (32) Journal of Transport Geography (2013) 56.

69 KC Seto, 'Exploring the dynamics of migration to mega-delta cities in Asia and Africa: Contemporary drivers and future scenarios' (21) Global Environmental Change (2011) S94.

70 JML Kironde, 'Understanding land markets in African urban areas' (24) Habitat International (1997) 151; B Mbiba, 'Urban solid waste characteristics and household appetite for separation at source in Eastern and Southern Africa' (43) Habitat International (2014) 152; A Rizzo, 'Rapid urban development and national master planning in Arab Gulf countries. Qatar as a case study' (39) Cities (2014) 50; M Wubneh, 'Addis Ababa, Ethiopia – Africa's diplomatic capital' (35) Cities (2013) 255.

71 S Gulyani, EM Bassett & D Talukdar, 'A tale of two cities: A multi-dimensional portrait of poverty and living conditions in the slums of Dakar and Nairobi' (43) Habitat International (2014) 98.

72 Y Tian et al, 'Landscape ecological assessment of green space fragmentation in Hong Kong' (10)2 Urban Forestry Urban Green. (2011) 79.

of the rainbow.[73] These developments include the promotion of urban green spaces such as parks, forests, green roofs, streams, and community gardens which are ecosystems of vital importance in enhancing the quality of life in an urban environment and supply important ecosystem services such as biodiversity, and climate regulation. It should be appreciated however, that urban centres are quickly changing to accommodate growing populations and with the increase in living densities, urban green spaces and the environment services associated with them have been adversely affected, largely because of the inadequacy of space to establish the urban green spaces. Urbanisation will therefore cause the transformation of semi-natural and natural ecosystems in urban and peri-urban areas into impervious surfaces. This will, and has led to the ecosystems' loss and decreasing provision by urban ecosystem services.

The continuous increase in the number and size of cities, and the ensuing transformation of virgin landscapes on different scales pose significant challenges for aims to reduce the rate of biodiversity loss. This has implications for ecosystem functionality and human welfare.[74] In fact, the conversion of green spaces into built-up areas has become one of the major reasons for habitat destruction worldwide.[75] Urban areas with higher population densities often report fewer green spaces and a lesser amount of green spaces per capita.[76] The changing urban dynamics, planned or unplanned, cause changes to the structure, shape and functions of built up and non-built up areas.[77] These will be more pronounced if there are uncoordinated master planning strategies and will lack information on the past, present, and future changes to the urban and green space structure. There is, therefore a growing need for new sites for recreational activities to fulfil this looming need for urban green spaces.[78] This is because they offer several important ecological and social advantages leading to a better quality of life of the urban inhabitants.[79] In addition to helping reduce the risk of urban floods[80], urban green spaces help in environmental conservation by reducing the impacts of surface runoff from rainwater.[81]

Given the importance of urban green spaces for urban dwellers, city planners should not just perceive development issues from an anthropocentric perspective where only economic development dominates the debate, but should also look at GDP growth and economic development from a broader perspective that includes economic growth, en-

73 UNDESA 2012(n 2) above.
74 D Haase et al, 'A Quantitative Review of Urban Ecosystem Service Assessments: Concepts, Models, and Implementation' (43)4 Ambio (2014) 413.
75 Turrini and Knop 2015 (n 3) above.
76 KK Peschardt & UK Stigsdotter, 'Associations between park characteristics and perceived restorativeness of small public urban green spaces' (112) Landscape and Urban Planning (2013) 26.
77 H Madureira, T Andresen & A Monteiro, 'Green structure and planning evolution in Porto' (10)2 Urban Forestry Urban Green. (2011) 141.
78 L Lategan & EJ Cilliers, 'The value of public green spaces and the effects of South Africa's informal backyard rental sector' (191) WIT Transactions on the Built Environment 427.
79 N Kabisch & D Haase, 'Green justice or just green? Provision of urban green spaces in Berlin, Germany' (122) Landscape and Urban Planning (2014) 129.
80 J-H Kim et al, 'Neighborhood landscape spatial patterns and land surface temperature: an empirical study on single-family residential areas in Austin' (13) Texas. Int. J. Environ. Res. Public Health (2016) 880.
81 B Zhang et al., 'The economic benefits of rainwater-runoff reduction by urban green spaces: a case study in Beijing, China' (100) J. Environ Manage. (2012) 65.

vironmental protection, and social wellbeing. This is important for cities in developing countries such as Nairobi, which started off as the 'green city in the sun' where urban green spaces had been included in the initial Master Plans for the city, but this legacy was lost after some time. Nairobi, like many other cities in the global South has been expanding rapidly. However, Nairobi County's global administrative boundary has remained the same since Kenya's independence in 1963. The first Master Plan for Nairobi was done in 1927, and the second was developed by South African experts in 1948. It was based on a neighbourhood concept.[82] In the second Nairobi City Plan, the component of open spaces received a lot of emphasis. Whilst the 1948 Nairobi plan called for 28.7% of total pre-1964 city area to be preserved as open spaces, this did not materialise.[83] The open space set aside in Kenya is based on the premise that a certain minimal size of open space is necessary per person. Even with the expansion of the city, this initial area assigned in 1948 has remained largely unchanged after more than 50 years of post-colonial rule.[84] This could be attributed to either poor planning; intentional planning to suit the affluent; or lack of planning in itself.

At the time of the second Master Plan, the population of Nairobi was 119,000; and at independence, the population had grown to 267,000.[85] This population has been rising from independence to a population of 3.2 million residents in 2010, estimated at 4.4 million residents in 2019. This means that the spaces reserved before independence are shared by a population that is several times larger, within the same geographical space. This raises the question on the quality of life of the current residents, and especially the adequacy of space reserved for recreational use as indicated by Makworo and Mireri.[86]

VI. INTRODUCING ENVIRONMENTAL VALUATION INTO THE DEBATE

The government has been keen to expand other infrastructure at the expense of the environment. Other than the August 7th Memorial Park and the John Michuki Park, hardly any other urban green space has been developed in the recent past. The advantages of these green spaces have been highlighted, but despite literature showing their importance, conventional goods and services continue to dominate the monetary debate as their benefits are readily visible. Perhaps the key reason why urban green spaces and the environment in general have not been included in the development debates of Kenyan cities and towns is because no monetary value has been attached to them. They neither invite the same monetary slate nor compare favourably with other economic goods and services that have tangible values such as roads.

82 LW Thornton-White et al., (1948) *Nairobi, Master Plan for a colonial capital; a report prepared for the Municipal Council of Nairobi* (London: HM Stationery, 1948)

83 DB Freeman (1991) *A City of Farmers: Informal Urban Agriculture in the Open Spaces of Nairobi, Kenya* (Montreal, Canada: McGill-Queen's University Press, 1991).

84 M Makworo & C Mireri, 'Public open spaces in Nairobi City, Kenya, under threat' (54)8 Journal of Environmental Planning and Management (2011) 1107.

85 J Lonsdale, 'Townlife in Colonial Kenya' In H Charton-Bigot & D Rodriguez Torres, *Nairobi Today: The Paradox of a Fragmented City* (Mkuki Na Nyota Publishers, 2010).

86 Makworo & Mireri (n 84) above.

The importance of including economic valuation is that it provides a way of comparing the benefits of public investment in the regulation or delivery of ecosystem services with the benefits of other policy programmes such as in infrastructure development. For instance, if the economic value of green spaces could be provided prior to implementing a road project, it would offer trade-offs between ecosystem services and the development project where a course of action that increases one service but diminishes another could be properly evaluated. It also provides a way of comparing the costs and benefits of delivering an ecosystem service in one location compared to another (for instance, where to establish what kind of an urban green space). Since many of our decisions, as individuals and society are made on the basis of financial costs and benefits, presenting the values of these ecosystems using currency values tends to be easily understood.[87]

To demonstrate the importance of economic valuation of environmental goods and services on development projects affecting ecosystem services, Ndwiga and Mulwa[88] carried out a study on the value of urban green spaces in Nairobi. They divided urban green spaces into neighbourhood parks, multi-use parks and nature parks. They defined neighbourhood parks as the size of a football field, located near residential areas, intended for local use, with basic toilet facilities, featuring' children's playground, trees and open green areas, and benches for relaxation. According to them, multi-use park sizes may vary by location but on average are equivalent to five football fields intended for broader use, featuring sports facilities, children's play areas, benches for relaxation, trees and open green areas, with basic toilet facilities. They posited that nature park sizes may vary by location, but on average are the equivalent of five football fields. Their focus is nature, recreation and preservation, with no facilities for playgrounds or sports activities. They have basic toilet facilities, walkways and other outdoor recreation facilities.

To provide a value for green urban spaces, they surveyed households in Nairobi on their willingness to pay (WTP) for provision of urban green spaces. Using their airtime deductions as the payment vehicle (mode of supporting development of green areas) the results suggest that individuals would derive high utility if neighbourhood parks were located closer to their residential areas, more multi-use parks were developed in each district, and nature parks were also increased in the city. The WTP for these facilities to be developed was also assessed, and results show that on average individuals were willing to lose Ksh. 11.82 per month of their airtime (Ksh. 141.84 per year) to have more multi-use parks developed in each district, and Ksh. 6.10 of their airtime money per month (Ksh.73.17 per year) to have more nature parks developed in the city.[89] The results also indicated that people were willing to pay by Ksh. 77.52 per month (Ksh. 930 per year) if neighbourhood parks were developed less than 5 minutes-walk from their homesteads. [90] This is more pronounced among women respondents, who preferred more neighbourhood parks near their homes. WTP results based on gender indicate

87 J South, G Guintoli & K Kinsella, 'An evaluation of the Walking for Wellness project and the befriender role' (2012) Natural England Commissioned Reports, Number 118.

88 (2019)

89 *ibid.*

90 *ibid.*

that women are willing to pay more than men to have neighbourhoods developed nearer their homesteads; while men are willing to pay more to have more multi-use parks developed in each district. Residents in Westlands district are willing to pay more than residents in other districts to have more multi-use parks developed in each district. [91]

If one was to take the total number of residents in Nairobi, at about 4 million, and multiply them by these figures, then total willingness to pay for neighbourhood parks would be Ksh. 3.2 billion per year; Ksh. 567.38 million per year for multi-use parks; and Ksh. 292.68 million per year for nature parks. These figures are relatively high, and demonstrate the recreational value of urban green spaces in Nairobi without even considering other provisioning, regulatory, habitat or cultural services. Given the clearance of urban green spaces for development of infrastructure projects, one can argue that the debate has been lopsided with more emphasis given to infrastructure using purely economic arguments. This is the same argument that was used in the development of the Nairobi Expressway, and many other road and infrastructure projects especially in Kenya's cities and towns. It seems to be the case that whenever urban green spaces and infrastructure development meet in Kenyan towns, the urban green spaces and the environment lose.

VII. CONCLUSIONS AND RECOMMENDATIONS

This paper has argued that general development and specifically, road infrastructure development is important for the growth of an economy as it creates a lot of economic opportunities by linking economic agents and easing the movement of people, goods and services. It also reduces traffic congestion and increases the efficiency in the economy by reducing lost time and fuel in traffic snarl-ups. It is also true that in the long run, building new roads in developing countries does not solve the problems for which they are constructed. In addition, most of these roads are constructed with little regard for the environment and end up causing a lot of degradation. This is despite the existence of policies and regulations governing the development of these projects. For example, in Kenya, according to Section 58 of the EMCA Act 1999 (Revised 2015), "the proponent of any project shall undertake a full environmental impact assessment (EIA) study and submit an environmental impact assessment study report to the NEMA prior to being issued with any licence by the Authority". This requirement was fulfilled in the Nairobi Expressway. However, it is our position that an EIA may not suffice when dealing with projects of such magnitude and with huge potential for environmental degradation such as the Nairobi Expressway. It is our view that the law require that all projects include a component of environmental valuation, with reports detailing the potential losses quantified in monetary terms so that the environmental impacts can be compared with conventional goods and services that are expressed in market prices.

Since evidence has shown that increasing the length and width of roads is a transitory measure for reducing congestion on roads, developing countries such as Kenya should consider alternative transport modes such as metro and other forms of public mass transport to reduce on-road vehicle volumes. Although some of them, like metro, have

91 *ibid.*

very high initial costs, and because energy in most of these developing countries is unreliable, their adoption would have the double dividend of diverting marginal automobile travellers away from their vehicles, and thereby help to improve air quality. Another alternative is to implement policies aimed at reducing the number of vehicles on the road by designating dates for vehicles with specified registration plates to access certain areas of the city, or introducing carbon taxes that will increase fuel prices and encourage people to carpool or adopt alternative transport modes. This would work well in an environment with a good public transport system that is secure, affordable, and covers the whole city, although, this is currently not the case in Kenya. Other strategies include: pedestrian-only zones in areas with heavy pedestrian traffic exclusive lanes for buses and bicycles that are adequately protected from car traffic; and giving more attention to road infrastructure maintenance rather than to the construction of new infrastructure.

In the long-run, the business-as-usual model of city development risks creating a huge sprawling city with incessant traffic jams, crime, already existing green spaces, albeit few and mismanaged, will be replaced by a concrete jungle. Under such a scenario, green urban spaces will always lose to infrastructure development. The expansion of the city of Nairobi should embrace the UGI concept and develop urban green spaces as proposed in the 1948 Master Plan. In addition, city planners should ensure that there are predetermined spaces in planning and policy making which create room for green urban areas. Finally, the anthropocentric and utilitarian arguments in development need to be replaced with sustainability persuasions, and all future city planners' training should have the value of the environment included in the training curriculum.

EIA AS A TOOL FOR BALANCING ECONOMIC, SOCIAL & ENVIRONMENTAL CONSIDERATIONS IN INFRASTRUCTURE DEVELOPMENT: THE CASE OF NAIROBI EXPRESSWAY

Linda Kosgei & Marrian Mutete Kioko- Mutinda***

I. INTRODUCTION

The Constitution of Kenya recognises the interrelationship between the environment and development, and envisages that environmental considerations will be balanced with socio-economic considerations through the ideal of sustainable development. One of the tools used to achieve sustainable development is the Environmental Impact Assessment (EIA). This article seeks to examine first, the national legal framework for the EIA and the role played by EIA in achieving sustainable development. In particular, a critical analysis of the EIA process with specific reference to the Nairobi Expressway will be undertaken and the limitations of the EIA in achieving sustainable development will be considered. Lastly, the paper will conclude by suggesting that although the EIA is an important tool, Strategic Environmental Assessment (SEA) needs to be utilised together and effectively with EIAs to achieve sustainable development in major infrastructure developments.

II. THE NATIONAL LEGAL FRAMEWORK FOR ENVIRONMENTAL IMPACT ASSESSMENT IN KENYA.

The EIA is important in both national and international environmental law.[1] The process of EIA produces a written statement to be utilised by decision-makers and plays three key roles; *first*, it provides the information about the consequences of the proposed activities on the environment and programmes and policies where applicable, and their alternatives; *second*, the information to influence the decision; and *thirdly*, it provides a mechanism for public participation for those that may be affected in the decision-making process. [2]

EIA is the most commonly known, utilised and globally widespread environmental planning and management tool.[3] The key importance of the EIA is to fully inform decision-makers and the public of the potential environmental impacts, alternatives for

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1 A Kiss & D Shelton, (2004) *International Environmental Law* (3rd edition Transnational Publishers, 2004). p. 237.

2 P Sands (2007) *Principles of International Environmental Law* (2nd edition Cambridge University Press, 2007) p.800.

3 UN Environment, *Assessing Environmental Impacts - A Global Review of Legislation* (UNEP, Nairobi Kenya 2018) p. 2

achieving similar goals, and mitigation measures for reducing negative impacts of proposed projects.[4]

EIA is widely spread across the world, becoming embedded both in public international law as well as in the national laws of almost all nations.[5] This suggests that its practice may be obligatory as a matter of customary law, although, some countries still find EIA expensive and an obstacle to business-as-usual development or government.

A. The Constitution of Kenya 2010

Environmental protection is guaranteed under the Bill of Rights in the Constitution.[6] The Government bears the responsibility of protecting the environment and natural resources in Kenya. In its preamble, the Constitution provides for sustainable development by affirming the need to respect the environment as a heritage of Kenyans and a determination to sustain it for future generations. This introduces the notion of intergenerational equity. The Constitution also outlines national values and principles of governance that bind all public officers whenever they make or implement public policy decisions and when they apply and interpret the Constitution.[7] One of the national values is sustainable development.[8]

The Constitution also provides for the right to a clean and healthy environment for all citizens.[9] This includes the right to have the environment protected for the benefit of the present and future generations through legislative and other measures, particularly those contemplated under Article 69,[10] and to have the obligations relating to the environment fulfilled under Article 70 which provides for the enforcement of environmental rights.[11] It recognises actions that may be taken by the public to ensure a clean and healthy environment and the orders and directions that the court may give.[12]

In particular, it provides the obligations that the State has with respect to the environment.[13] These include the obligation to ensure public participation in the management, protection, and conservation of the environment.[14] This is amplified by including public participation in the policymaking process as one of the values and principles of public

4 VP Nanda & GR Pring (2013) *International Environmental Law & Policy for the 21st Century* (2nd Revised Edition Martinus Nijhoff Publishers 2013) p.65.

5 Tseming Yang, '*The Emergency of the Environmental Impact Assessment Duty as a Global Norm and General Principle of Law*' [Vol. 70:525] Hasting Law Journal (February 2019) pp.252, 532.

6 The Constitution of Kenya 2010.

7 *ibid* Article 10.

8 *ibid* Article 10 (2) (d).

9 *ibid* Article 42.

10 *ibid* Article 42 (a).

11 *ibid* Article 42 (b).

12 Under Article 70, a court may make any order, or give any directions, it considers appropriate to prevent, stop or discontinue any act or omission that is harmful to the environment; to compel any public officer to take measures to prevent or discontinue any act or omission that is harmful to the environment; or to provide compensation for any victim of a violation of the right to a clean and healthy environment.

13 *ibid* Article 69.

14 *ibid* Article 69 (1) (d).

service.[15] The Constitution also obliges the government to establish systems of EIA, environmental audit (EA), and monitoring of the environment,[16] and to eliminate processes and activities that are likely to endanger the environment.[17] There is a corresponding duty on every person to co-operate with State organs and other persons to protect and conserve the environment and to ensure ecologically sustainable development and the use of natural resources.[18]

The Constitution lays the basis for EIA, environmental audits and monitoring as well as public participation in the decision-making process to achieve a clean and healthy environment. The co-operation of the general public is thus needed to ensure that EIA is undertaken. The obligation to eliminate processes and activities that may endanger the environment would also require that an EIA be undertaken.

A. The National Environment Policy

The National Environment Policy (The Policy) provides the framework to guide Kenya's efforts in addressing environmental issues and challenges.[19] It recognises that the socio-economic well-being of Kenyans is intertwined with the environment, [20] and that some socio-economic rights such as the right to water, food, and shelter also have environmental components.[21] To realise sustainable development, the government is required to integrate the environment into all government policies,[22] and to promote the use of SEA, EIA, and EA.[23]

Finally, to achieve the goals and objectives of the Policy, both the National and County governments are required to integrate environmental considerations into all relevant sectoral policies, planning and development processes and to institutionalise SEA approaches in all policies, plans and programmes.[24] It recognises that a fundamental precondition for sustainable development is public participation in the decision-making process with access to timely and accurate information based on openness and participation at all levels.[25]

The Policy defines an EIA as 'a systematic examination conducted to determine whether or not a programme, activity or project will have any adverse impacts on the environment',[26] and defines an SEA as 'a range of analytical and participatory approaches that aim to integrate environmental considerations into policies, plans and programmes and evaluate the interlinkages with economic and social considerations'.[27]

15 *ibid* Article 232(1)(d).
16 *ibid* Article 69 (1) (f).
17 *ibid* Article 69 (1) (g).
18 *ibid* Article 69 (2).
19 Ministry of Environment Water & Natural Resources, Sessional Paper No. 10 of 2014, The National Environment Policy 2014, p.4.
20 *ibid* p 1.
21 *ibid* p 2.
22 *ibid* p 2-3.
23 *ibid* p 8.
24 *ibid* p 51.
25 *ibid* p 6.
26 *ibid* p 54.
27 *ibid* p 55.

The Policy affirms the need for integrating environmental considerations not only in projects, but also in programmes, plans, and policies and therefore the need to carry out EIA, SEA, and EA. This is to be done both at the National and County levels while ensuring there is public participation in the decision-making process.

A. The Environmental Management and Coordination Act

The Environmental Management and Coordination Act (EMCA),[28] provides for the establishment of an appropriate legal and institutional framework for the management of the environment. The enactment of EMCA was a big step by the Government in promoting sustainable environmental management in the country.[29] EMCA provides the general principles of: entitlement to a clean and healthy environment;[30] the duty of every person to cooperate with State organs;[31] the duty to safeguard and enhance the environment; and the principles to guide the Environment and Land Court in decision-making, one of them being sustainable development.[32]

The National Environment Management Authority (NEMA) is established under EMCA.[33] Its object and purpose is to ensure sustainable management of the environment through exercising general supervision and coordination over matters relating to the environment, and also to be the principal instrument of government in the implementation of all policies relating to the environment.[34] NEMA's mandate now finds its basis in the Constitution as it addresses the fundamental right to a clean and healthy environment.

In this regard, EMCA is fulfilling the aspiration of the Constitution under its preamble to respect the environment, which is a heritage, and the determination to sustain it for the benefit of future generations. Further, it is also fulfilling the aspiration under Article 10 of the Constitution on sustainable development. NEMA is therefore required to promote the integration of environmental considerations into development policies, plans, programmes, and projects. This is to ensure the proper management and rational utilisation of environmental resources on a sustainable yield basis for the improvement of the quality of human life in Kenya.[35]

Under EMCA EIA means, 'a systematic examination conducted to determine whether or not a programme, activity or project will have any adverse impacts on the environment',[36] while SEA means, 'a formal and systematic process to analyse and address the environmental effects of policies, plans, programmes and other strategic initiatives'.[37] Key in both the EIA and SEA process is access to information.[38]

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28 The Environmental Management and Coordination, Act No. 8 of 1999.
29 C O Okidi & K Mbote, '*The Making of a Framework Environmental Law in Kenya*', ACTS Press, Nairobi (2001).
30 EMCA 1999 (n 28) Section 3 (1).
31 *ibid* Section 3 (2A).
32 *ibid* Section 3 (5).
33 *ibid* Section 7.
34 *ibid* Section 9 (1).
35 *ibid* Section 9 (2).
36 *ibid* Section 1.
37 *ibid* Section 1.
38 *ibid* Section 3 (A) (1) which provides that; Subject to the law relating to access to information, every person has the right to access any information that relates to the implementation of this Act that is in the possession of the Authority, lead agencies or any other person.

EMCA provides for Integrated Environmental Impact Assessment which includes SEA and EIA.[39] It requires that all policies, plans, and programmes for implementation shall be subject to SEA.[40] This requirement applies to both the National and County governments as they prepare or adopt policies, plans, and programmes at a regional, national, county or local level. It also applies to those prepared by NEMA for adoption through the legislative process in Parliament, by government or agreements between the governments or regional authorities,[41] and lastly, where NEMA determines that the policies, plans, and programmes are likely to have significant effects on the environment.[42] The entities involved are required to undertake the SEA at their own cost and then submit the same to NEMA.[43] NEMA is required to prescribe rules and guidelines for SEA in consultation with other lead agencies.[44] A SEA examines not only environmental concerns but also the interlinkages with economic and social considerations.

The proponent of a project is required to apply for an EIA licence before either doing or causing to be done by another person the financing, commencing, proceeding with, carrying out, executing, or conducting any undertaking specified in the Second Schedule (lists projects requiring EIA) and submit a project report.[45] Similarly, a proponent of any project specified in the Second Schedule must undertake a full EIA study and submit an EIA study report to NEMA before being issued with any licence by NEMA. NEMA may, however, direct that the proponent foregoes the submission of the EIA study report in certain cases.[46]

Both the project and study report prepared shall be submitted to NEMA in the prescribed form, giving the prescribed information and shall be accompanied by the prescribed fee.[47] The reports are to be prepared by registered experts.[48] EIA shall be conducted in accordance with the EIA regulations, guidelines, and procedures issued under EMCA.[49]

NEMA has prepared *National Guidelines for SEA*[50] and *EIA Guidelines and Administrative Procedures*.[51] Published guidelines are useful in the EA processes to guide decision-makers, the experts preparing the reports, those consulted, and the general public as they provide more detailed guidance on the different stages of the Environmental Assessment process.[52]

NEMA may, after being satisfied with the adequacy of an EIA study, evaluation, or review report, issue an EIA licence on such terms and conditions as may be appropriate

39 EMCA 1999 (n 28), Part VI.
40 *ibid* Section 57A (1).
41 *ibid* Section 57A (2).
42 *ibid* Section 57A (2).
43 *ibid* Section 57A (3).
44 *ibid* Section 57A (4).
45 *ibid* Section 58 (1).
46 *ibid* Section 58 (2).
47 *ibid* Section 58 (1) & (3).
48 *ibid* Section 58 (5).
49 *ibid* Section 58 (7).
50 National Guidelines for Strategic Environmental Assessment, 2011.
51 EIA Operational Guidelines and Administrative Procedure, 2006.
52 C Jones, S Jay, P Slinn & C Wood 'Environmental assessment: dominant or dormant?' In J Holder and D MacGillivvray, eds., *Taking Stock of Environmental Assessment Law, Policy and Practice* (Routledge- Cavendish 2008) pp 17-44, 39.

and necessary to facilitate sustainable development and sound environmental management.[53]

EMCA gives the Cabinet Secretary for Environment and Forestry, the power to make regulations to give effect to EMCA.[54] In managing the environment, NEMA as a regulator has formulated and enacted Regulations that provide for EIA and SEA. The Environmental (Impact Assessment and Audit) Regulations, 2003 define EIA as 'a systematic examination conducted to determine whether or not a programme, activity or project will have any adverse impacts on the environment'.[55] It makes provisions for the EIA process.[56] The Regulations define SEA as 'the process of subjecting public policy, programmes and plans to tests for compliance with sound environmental management'.[57] It makes provisions for the SEA process.[58]

EIA is a tool that can be used to attain sustainable development where NEMA can weight socio-economic and environmental considerations in the decision-making process. However, the EIA has been criticised for having weaknesses that have made it not as effective as hoped. These shortcomings will be discussed below. If states fail to require the carrying out of EIA and fail to integrate development and environment in decision-making, they fail to utilise the tools to facilitate sustainable development.[59] International law requires states to consider the objectives of sustainable development and to utilise the appropriate processes for doing so.[60]

The constitutional provision making general rules of the international part of Kenyan law,[61] means that the concept of sustainable development incorporating environmental, social, and economic considerations should be applicable in Kenya. It is clear from the above that EIA is a process for identifying the potential or actual impacts of activities on the environment to guide decision-making authorities while making decisions that may have a significant impact on the environment.

There is a linkage between environment and development since the deterioration of the environment threatens economic development, linking environmental stresses and patterns of economic development. Further, to ensure environmental protection, development must internalise the cost of environmental destruction. Integrating environmental stresses and patterns of economic development in decision-making promotes both.[62] It is clear that environmental and economic problems are linked to many social and political factors and also, environmental stress and uneven development can increase social ten-

53 EMCA 1999 (n 28) Section 63.
54 *ibid* Section 147.
55 Environmental (Impact Assessment and Audit) Regulations, 2003, Regulation 1.
56 *ibid* Regulations 7-10.
57 *ibid* Regulation 1.
58 *ibid* Regulations 11-23.
59 P Birnie, A Boyle & C Redgwell (1991) *International Law and the Environment* (3rd edition Oxford University Press 2009) p. 127.
60 *ibid*.
61 Constitution (n 6) Article 2 (5).
62 Report of the World Commission on Environment and Development: Our Common Future (Brundtland Report), p.185.

sions.[63] It has been argued that environmental assessments require public and political endorsement necessary for them to fully deliver their aims.[64]

From the foregoing, it is clear that the current Kenyan EIA regime is provided for under EMCA as well as the EIA Regulations of 2003 promulgated under the Act. The Constitution and EMCA serve as the broader legislative context. However, the EMCA provisions should specifically provide among others, the need for integration of economic, environmental, and social factors just like in the South African Act where the National Environment Management Act provides for sustainable development to include the integration of economic, social, and environmental considerations.[65] To be more effective, there needs to be an increase in the weight given to environmental resources and capacities in existing environmental assessment systems and ensuring that environmental assessments are linked to clear environmentally sustainable development objectives.[66]

III. BRIEF ON THE ENVIRONMENTAL IMPACT ASSESSMENT (EIA) STUDY REPORT FOR THE PROPOSED NAIROBI EXPRESSWAY PROJECT

As discussed above, the EIA process is comprehensively provided for in the EIA Regulations for both the project report (PR),[67] and the Environmental Impact Assessment Study report (EIASR).[68] The Regulations recognise that both the PR,[69] and the EIASR,[70] should consider economic, social, and cultural impacts.

The second schedule of EMCA was amended pursuant to the powers of the Cabinet Secretary of the Ministry of Environment after consultation with the relevant lead agencies and by notice in the Kenya Gazette[71] to categorise projects into low risk, medium risk, and high risk.

For the low and medium risk, a key amendment was made to the EIA Regulations 7 requiring that a summary PR be submitted and upon receipt, NEMA was required to process the same within five days.[72] If NEMA considers that the proposed project may have a significant adverse environmental impact, it may recommend to the proponent to prepare and submit a comprehensive PR.[73] The requirements of a comprehensive PR require socio-economic considerations,[74] while no such provision is required for the summary PR.[75] On the other hand, if NEMA considers that there will be no significant adverse environmental impact, it proceeds to issue a licence.[76]

63 *ibid* 57.
64 Jones et al (n 52) 43.
65 National Environmental Management Act No. 107 of 1998, Section 1.
66 Jones et al (n 52) 44.
67 EIA Regulations (n 55) 7-10.
68 *ibid* 11-23.
69 *ibid* 7 (1) (i).
70 *ibid* 18 (1) (h) & (o).
71 EMCA (n 28) Section 58 (4).
72 EIA Regulations (n 55) Regulation 7 (3).
73 *ibid* (3) (a).
74 *ibid* 7(4) (d) & (k).
75 *ibid* 7 (2).
76 *ibid* 7 (3) (b).

The process of ESIAR was however, not affected. High-risk projects include transport and related infrastructure and in particular all new major roads including trunk roads.[77] Being a high-risk project, the Nairobi Expressway required an EIASR.

A. Project Description

The Government of Kenya through the Kenya National Highways Authority (KeNHA) has partnered with China Road and Bridge Corporation (CRBC) to develop the Nairobi Expressway using a 30 years Built Operate Transfer (BOT) model. The Expressway project is a 26.764 km A8 road traversing Mlolongo – JKIA – James Gichuru and ABC Place in Westlands. The duo carriage Expressway comprises a 15.739 km at grade section from Mlolongo to the Southern Bypass interchange and an 11.025 km elevated section/viaduct from the Southern Bypass Interchange to ABC place.

B. Environmental Impact Assessment Study Report (EIASR) Submission and Dispatch to the Relevant Lead Agencies (SOURCE: NEMA)

Legal Requirement	Nairobi Expressway Project
The Environmental Management and Coordination Act, EMCA, 1999 Section 58 (1) and Legal Notice No. 31 of 2019 Amendment of the Second Schedule	Classified as High-Risk Project under Transportation and related infrastructure projects, including— a) All new major roads including trunk roads The Nairobi Expressway being classified as a High-risk project was required to undergo Environmental Impact Assessment Study
The Environmental (Impact Assessment and Audit) Regulations, 2003	
EMCA, 1999 Section 58 Part III - The Environmental Impact Assessment Study Regulations 11 - Terms of reference.	The terms of reference (ToR) for the Environmental Impact Assessment Study for the project were submitted to NEMA on 11th October 2019. ToR was prepared and submitted on behalf of the proponent by Centric Africa Limited, a registered firm of EIA experts, Reg. No.: 7112. The ToR was received and allocated ToR Ref: NEMA/EIA/ToR/06. Approval of the ToR was issued by NEMA after a technical review.

77 Kenya Gazette Supplement No. 62, Legislative Supplement No. 16, Legal Notice No. 31, 30th April, 2019, Schedule 2 (3), (4) (a).

Regulations, 16, 17 & 18: The EIA study report	The proponent through the EIA team of experts undertook the Environmental Impact Assessment and submitted the EIA study report to NEMA in the prescribed format and information for the proposed project on 31st January 2020.
Regulations 19: Submission of the EIA Study report	The proponent submitted ten copies and an electronic copy of the EIA study report to NEMA in Form 1B set out in the First Schedule. An online submission was done on the NEMA website Licensing portal, Application ID: NEMA/EIA/SR/1684. NEMA Acknowledged receipt: Ref: NEMA/EIA/5/2/1688 dated 3rd Feb 2020.
Regulations 20. (1): Dispatch to lead agencies	NEMA dispatched the copies of the report to 9 lead agencies for comments on 3rd Feb 2020 i. Ministry of Environment and Forestry ii. Ministry of Transport, Infrastructure, Housing & Urban Development iii. The Nairobi City Water and Sewerage Company iv. The National Land Commission v. The Nairobi City County Government – Water Environment and Natural resources. vi. Athi Water Services Board. vii. Water Resources Authority viii. Kenya Power and Lighting Co. Ltd ix. The Nairobi County Director of Environment.
	Considering the nature of the project and the related impacts, comments from more lead agencies were sought by sending a soft copy of the EIA study report on 17th March 2020: i. Ministry of ICT ii. National Transport and Safety Authority (NTSA) iii. Kenya Urban Roads Authority (KURA) iv. Kenya Electricity Transmission Company Ltd. (KETraCo) v. Kenya Pipeline Company (KPC) vi. The Communications Authority (CA) vii. National Museums of Kenya (NMK) viii. Kenya Civil Aviation Authority (KCAA)

EMCA, 1999 Section 59 and Regulations 21: Public disclosure	On 10th February 2020 NEMA issued the proponent with a notice for publication to invite the public to make oral or written comments on the report. The proponents at their own cost published the notice as follows: i) The Standard Newspaper on Monday, 24th February 2020. ii) The Business Daily on Thursday, 27th February 2020. iii) The Kenya Gazette, Gazette Notice No. 1765 of 28th February 2020. iv) Kenya Broadcasting Corporation (KBC) Radio Taifa, on-air mentions on 5th March 2020.
EMCA, 1999 Section 60 and Regulations 22: Comments from lead agencies and Public.	1. **The Kenya Power and Lighting Co. Plc (KPLC)** On 27th March 2020 submitted written comments on the proposed project vide a letter Ref: KPLC1/1F/8/3/1-2020-/JG-SGA. The company raised concern over the relocation of the 220kV, 66kV, and 11 kV electricity transmission lines that are along, overhead, and undergroundin the proposed road. Requested the proponent to provide a detailed resettlement action plan. 2. **GreenpeaceAfrica** on 24th March submitted their comments on the project: their concerns were on failure to incorporate all stakeholders particularly public users and vendors at Uhuru Park, adverse impacts on groundwater, change in the regime of rivers, and loss of biodiversity. 3. **Athi Water Works Development Agency**: on 27th March 2020 Ref: AWWDA/GOK/NEP-W&S/W-06/2019/VOL II (15) – PE (ej) noted that relocation of water and sewerage infrastructure was incorporated in the project and there was ongoing consultation with KeNHA on the infrastructure relocation modalities. 4. **The County Director of Environment (CDE):** The Director submitted review comments and site inspection report: in the report concerns on sensitive environmental and utility infrastructure were raised. Adequate stakeholder involvement was recommended. 5. **Natural Justice**: on 9th April 2020, Ref: NJ/NEMA/Nairobi Expressway/20/2 submitted detailed review comments on the following:

	i) Strategic Environment Assessment ii) Lack of Terms of Reference nor scoping report iii) Inadequate review of alternatives iv) Failure to address the cumulative impacts of the project v) Lack of economic analysis of the proposed Expressway vi) Inadequate baseline information on the environment Inadequate social baseline information vii) Inadequate environmental impacts identification and mitigation measures viii) No address of off-site impacts ix) Inadequate social impacts identification and mitigation measures x) Lack of environmental and social management and monitoring plan xi) Lack of climate risk and vulnerability assessment xii) Inadequate public participation The organisation recommended that the proponent should re-evaluate the impact of the project in a manner that is sufficiently rigorous and in keeping with the procedural and substantive legal requirements.
	6. **Wildlife Direct** on 10th April 2020 via an Email Ref: ENv 4/20 submitted their comments on the proposed project on the following issues: i) **Policy, legal and regulatory framework:** Unavailability of a Strategic Environmental Impact Assessment, Noncompliance with international treaties; Convention on Biological Diversity (CBD), United Nations Framework for Convention on Climate Change (UNFCCC) and Bonn Convention, Noncompliance with the National forest cover strategy and lack of support for the advancement of environmental law precedents. ii) **Social Justice Element:** Social injustice in terms of target users for the Expressway, affected green spaces, and cost factor. iii) **Public Participation:** The EIA public participation comments and responses cannot compound to an effective decision whose elements are pegged on procedural satisfaction, emotional satisfaction, and substantive satisfaction.

	iv) **Potential Environmental Impacts:** Loss of biodiversity, reduce climate change resilience, and air quality v) **Inadequate mitigation and ambiguity of sections in the EIA study report:** Complementary tree planting, loss of habitats, alternative routes/ design, hiving sections of Uhuru Park. In conclusion, the organisation commented that there lacked adequate information to support the effectiveness and importance of the proposed project. They recommended re-strategising of the entire proposed project to fit in, not only with the legal framework Kenya but adhering also the environment and socio-economic status of the Kenyan citizens.
EMCA, 1999 Section 61 & 62: Technical Review:	On 18th March 2020, A technical review of the EIA study report was undertaken in consideration of the public and institutional recognition, confirmation of official notification and position of relevant lead agencies, public disclosure, and the following technical decision-making principles: 1. The Ecosystem Approach 2. Consideration of alternatives 3. Hierarchy to mitigate impacts 4. Adequacy of risk assessment and management 5. Reference to existing planning frameworks and policy direction 6. Adequacy of public participation 7. Adequacy of the Environmental Management Plan (EMP) and the EIA report 8. Applying Polluter Pays & precautionary principle 9. Ensuring equitable sharing 10. Adherence to the "three-simultaneities concept" in which EP facilities must be designed, constructed, and employed simultaneously with the proposed project.

	The proponent was required to address the following issues for NEMA to make an informed decision; i) Clarify the extent to which Uhuru Park shall be acquired for the project ii) The contractual obligations of the proponent (CRBC) on Environmental Management iii) Analysis of Project's access and safety impacts and their mitigation measures iv) Provide detailed Resettlement Action Plan of affected properties, utility infrastructure. On 30th March 2020, the Proponent responded to the Authority addressing the EIA study review issues.
	The proponent was required to address the following issues for NEMA to make an informed decision; i) Clarify the extent to which Uhuru Park shall be acquired for the project ii) The contractual obligations of the proponent (CRBC) on Environmental Management iii) Analysis of Project's access and safety impacts and their mitigation measures iv) Provide detailed Resettlement Action Plan of affected properties, utility infrastructure. On 30th March 2020, the Proponent responded to the Authority addressing the EIA study review issues.
EMCA, 1999 Section 63, Regulations 23: Record of Decision of the Authority	The Authority in consideration of the adequacy of information provided in the EIA study report and the technical review report approved the project on 1st April 2020 and issued an Environmental Impact Assessment Licence with mandatory conditions to facilitate sustainable development and sound environmental management of the proposed project. The EIA licence dated 2nd April 2020 Ref. No.: NEMA/EIA/PSL/9163.

IV. THE LIMITATIONS OF EIA AS A TOOL FOR ACHIEVING SUSTAINABLE DEVELOPMENT FOR THE PROPOSED NAIROBI EXPRESSWAY PROJECT

The use of EIA as a tool for achieving sustainable development faces many challenges. These challenges were also confronted while reviewing the EIASR for the Nairobi Expressway project. The EIA considers a limited range of project alternatives and seldom considers the cumulative effects. It also focuses on obtaining project permission, and rarely with feedback to policy, plan, or programme consideration. EIA emphasises the mitigation of environmental and social impacts of a specific project, but with the identification of some project opportunities and off-sets amongst others.

It is now appreciated that environmental impact is ultimately the cumulative result of inter-related actions.[78] While there are laws to regulate the different spheres of the environment, there is no law that requires anyone to stand back and assess the likely result of an activity on the network of the total environment.[79] It is argued that there is a need for an appraisal to identify the chain effects of actions and their cumulative impact and that this is a basic function of EIA.[80]

Environmental effects are produced not only by physical projects but also by policies, proposals for legislation, programmes, and operational practices.[81] Planning must take into account the socio-economic and ecological impacts and tailor an assessment process to mitigate impacts that may fall on people when development is designed or planned.[82]The EIA denotes a planning tool, a method of incorporating environmental considerations into the earliest stages of the planning process.[83]

The legal framework concerning EIA comprises not only the actual assessment but also the procedure through which an assessment is produced, including consultation with the concerned parties,[84] who may be those directly affected and those indirectly affected (interested parties) of the proposed project.[85]

It is argued that in conducting public participation in EIAs, the participants may be reduced to the role of objectors, reactive to developers' proposals.[86] What is required is public participation in the planning framework that precedes proposals for specific projects or activities which would allow a more proactive stance and more constructive engagement.[87] This can be achieved through a SEA that applies to policies, plans, and programmes.

78 AR Lucas & SK. McCallum, 'Looking at Environmental Impact Assessment in Alternatives: Perspectives on Society' [Vol.5, No.2] Technology and Environment, (Winter 1976) pp. 33-39, 33.

79 *ibid*.

80 *ibid*.

81 *ibid* 34.

82 P. Leelakrishnan, 'Environmental Impact Assessment: Legal Dimensions' [vol. 34, No. 4] Journal of the Indian Law Institute, (October-December 1992) pp541-562, 562.

83 Lucas & McCallum (n 78) 34.

84 D Langlet & S Mahmoudi, (2016) *EU Environmental Law and Policy* (Oxford University Press, 2016) p.157.

85 G Nhamo & E Inyang, (2011) *Framework and Tools for Environmental Management in Africa*, (CODESRIA, DAKAR, 2011), pp. 119–144.p.131 *JSTOR*, <www.jstor.org/stable/j.ctvk3gpk6.12.> (accessed 1 June 2020).

86 J Holder & M Lee (1991) *Environmental Protection, Law and Policy, Texts and Materials* (2nd edition Cambridge University Press, 2007) p.113.

87 *ibid*.

V. CONCLUSION

The EIA for the Nairobi Expressway identified the potential impacts of the proposed road encroaching on Uhuru Park and advised on an alternative that avoided the park among other benefits. Although the EIA is limited in addressing cumulative impacts and comparison of alternatives, it still plays a role in ensuring sustainable development. A SEA of impacts is hence required at the policy, plan, or programme level when more options are open. This comes with its share of challenges including increased costs in redesigning projects and associated delays among others.

EIAs and SEAs are aimed at achieving equal consideration of environmental, social, and economic issues in decision-making, and there is an expectation that decisions will be re-oriented towards outcomes that favour environmental protection. However, it has been recognised that at most times it is difficult to establish the precise effect of the EA process on the outcome of the decision-making since there are other factors to be taken into consideration and not only the information gathered through public participation since information is gathered from multiple sources.[88]

EIA is considered too limited in application to fully answer the broad questions involved in considering the full effects of human activities in sustainability terms.[89] Sustainability assessment or some means of assessing environmental, social, and economic impacts, especially of policies, plans, and programmes, in an integrated manner, seems likely to be a popular assessment tool for use in the future.[90] There is a strong link between the principle of sustainable development and environmental assessment, especially for SEA which expresses potentially more radical aspects of sustainable development that might otherwise be suppressed under an EIA.[91]

In view of the above, a SEA of the transport plan would add value to the EIA for the Nairobi Expressway and any other planned road infrastructure in the country. However, all is not lost, the Government of Kenya should subject the Transport Sector Master Plan to an ex-post type SEA to identify areas of greening it, for more sustainable implementation.

88 *ibid*.
89 Jones et al (n 52) 22.
90 *ibid* 25.
91 Holder & Lee (n 86) 562.

PROMOTING PUBLIC INTEREST LITIGATION IN KENYA TO PROTECT PUBLIC OPEN SPACES

*Emily Kinama**

I. INTRODUCTION

In Kenya, Public Interest Litigation (PIL) gained momentum with the promulgation of the Constitution of Kenya in 2010. This was mainly because under the repealed Constitution[1], PIL had several common law restrictions with respect to having the standing to file a suit in the public interest.[2] Still, prior to the Constitution of 2010, the restriction on the *locus standi* was later relaxed but not many Kenyans explored PIL as an avenue for protecting their rights. The promulgation of the Constitution in 2010 breathed life on many Kenyans' wish to file court cases in the public interest and this was further aided by the enactment of the 'Mutunga Rules'.[3] In relation to the protection of the right to a clean and healthy environment, the Environment and Lands Court has made efforts to ensure that the right to a clean and healthy environment is enforced.[4] In relation to public open spaces, PIL had commenced before the 2010 Constitution with the famous *Wangari Mathai* case,[5] where she was denied the opportunity to sue on behalf of the public in order to protect Uhuru Park and later in the *Khelef Khalif* case,[6] on who could sue on behalf of the public to protect a park in Mombasa. This paper interrogates the differences between PIL and strategic litigation which are subtle but critical in understanding the type of cases being filed in court. Ramsden and Gledhill argue that there is a difference between the two forms of litigation with strategic litigation being broader with regard to the extent of the outcomes expected and the preparations of the case.[7] An analysis will also be carried out on the constitutional and legislative anchors of PIL in Kenya, with emphasis on environmental PIL. In another section, a critical examination of PIL in open spaces in Kenya will be undertaken looking at physical planning laws and cases that have been filed touching on the protection of open spaces to establish whether or not they are PIL cases. A comparative analysis of PIL cases filed in India will also be undertaken to establish the salient features in the protection of open spaces in the two countries as well as to draw inspiration as to the different remedies that can

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1 Constitution of Kenya 1963.

2 P Kameri-Mbote & C Odote, 'Courts as Champions of Sustainable Development: Lessons from East Africa' Sustainable Development Law & Policy (Fall 2009) 31-38, 35 <https://digitalcommons.wcl.american.edu/cgi/viewcontent.cgi?article=1008&context=sdlp> accessed on 30 September 2020.

3 Constitution of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules, 2013 (Mutunga Rules), which were named after the former Chief Justice Willy Mutunga which were enacted during his term as the first Chief Justice under the 2010 Constitution.

4 CB Soyapi 'Environmental Protection in Kenya's Environment and Land Court' Journal on Environmental Law (2019) 31,151-161, 161.

5 *Wangari Maathai v. Kenya Times Media Trust Ltd* Civil Case 5403 of 1989; [1989] eKLR (*Wangari Mathai* case).

6 *Khelef Khalifa El-Busaidy v. Commissioner of Lands & 2 others* Civil Case No. 613 of 2001; [2002] eKLR (*Khelef Khalif* case)

7 Ramsden, Michael and Gledhill, Kris, 'Defining Strategic Litigation' (4) Civil Justice Quarterly (2019) 407, 8, 9 and 21 <https://ssrn.com/abstract=3467034> accessed on 23 September 2019.

be used to protect open spaces. In conclusion, an overview of challenges to PIL such as locus standi and filing fees will be discussed,[8] and recommendations given on the best way for protecting public spaces, with an emphasis on the need for all persons to respect court orders,[9] and the public's responsibility to demand and use available information and participate in meetings held by state organs that will impact their open spaces and their right to a clean and healthy environment.

II. UNDERSTANDING PUBLIC INTEREST LITIGATION AND STRATEGIC LITIGATION

PIL is a term that is not widely defined but is used interchangeably with terms such as 'strategic litigation' 'public interest litigation', 'impact lawyering', 'cause litigation', or 'social interest litigation'.[10] Ramsden and Gledhill state that although the terms strategic litigation and public interest litigation (PIL) are used interchangeably they denote different actions, objectives, and outcomes.[11] Strategic litigation and public interest litigation (PIL) are similar to the extent that both actions seek to promote specific causes, for example, the protection of the right to health,[12] or changes in laws relating to the right to adequate housing,[13] forced evictions of persons and which cause will affect the public.[14] PIL, unlike strategic litigation, seeks to ensure access to justice for a group of people who will be affected by specific actions and usually also affects the general public.[15] For this paper, PIL means the use of the courts to file cases on behalf of a group of people and which seeks to secure their access to justice and enforce their rights.[16] On the other hand, strategic litigation, also referred to as 'strategic human rights litigation',[17] means a targeted legal action filed in court which seeks objectives such as changes in laws, policies, creation of public awareness whereby the impact of the case is usually felt beyond the parties in the case.[18]

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8 B YK Sang, 'Tending towards greater eco-protection in Kenya: Public Interest Environmental Litigation and Its prospects within the new constitutional order' (57)1 Journal of African Law (2013) 29-56.

9 Soyapi (n 4).

10 Sang (n 8) above 30.

11 Ramsden & Gledhill (n 7) 21.

12 A Maleche & E Day 'Right to Health Encompasses Right to Access Essential Generic Medicines: Challenging the 2008 Anti-Counterfeit Act in Kenya' Health and Human Rights Journal (2014) 16/2, <https://www.hhrjournal.org/2014/11/right-to-health-encompasses-right-to-access-essential-generic-medicines-challenging-the-2008-anti-counterfeit-act-in-kenya/> accessed on 20 September 2020.

13 JM Maithya 'The role of public interest litigation in the promotion and protection of the right to adequate housing: the case of Muthurwa estate in Nairobi Kenya' (Masters of Arts thesis, University of Nairobi, February 2016) <http://erepository.uonbi.ac.ke/bitstream/handle/11295/97557/Munyithya_The%20Role%20Of%20Public%20Interest%20Litigation%20In%20The%20Promotion%20And%20Protection%20Of%20The%20Right%20To%20Adequate%20Housing,%20%20The%20Case%20Of%20Muthurwa%20Estate%20In%20Nairobi,%20Kenya.pdf?isAllowed=y&sequence=1> accessed on 18 August 2020.

14 Ramsden and Gledhill (n 7) 9.

15 *ibid*.

16 Kenyans for Peace with Truth and Justice, Africa Center for Open Governance and Katiba Institute, *A guide to Public Interest Litigation in Kenya* (2014) pp. 1. See also Brickhill (ed), *Public Interest Litigation in South Africa* (Juta South Africa, 2018) 6, where PIL is defined as "the use of litigation to pursue objectives that extend beyond the interests of individual litigants in a case and that are normatively justifiable." Munyithya (n 13) 2 and 3 also states that PIL goes beyond court action and seeks to uphold social justice on behalf of the public.

17 Open Society Justice Initiative, 'Strategic Litigation Impacts: Insights from Global Experiences' Opens Society Foundations (2018) 25 <https://www.justiceinitiative.org/uploads/fd7809e2-bd2b-4f5b-964f-522c7c70e747/strategic-litigation-impacts-insights-20181023.pdf > accessed on 5 June 2020.

18 Ramsden and Gledhill (n 7) 13.

In a nutshell, some of the features of strategic litigation are: (i) the impact of the case must be felt beyond the litigant; (ii) several causes of actions can be attached to the litigation; (iii) the importance of the targeted outcomes such as the change in laws, policies and the interpretation of such laws and policies as well as advancing the quality of the law or jurisprudence; and (iv) litigation is a process which seeks to advance the cause of a specific matter domestically but also in line with the changes taking place regionally and internationally.[19] It is worth noting that strategic litigation also goes beyond the litigant and has several other actors that aim to achieve similar outcomes beyond the confines of the adjudication or adversarial court process.[20] It also entails identifying the global trends in terms of enforcing rights or championing causes that affect several people.

However, a case could have both PIL and strategic litigation features. For example, where a group of persons take a case to court in the public interest, but whose outcome has an impact on policies and legislative or social reforms. Therefore, there might be restrictions in analysing the strategic litigation actions and results because such preparations of a strategic litigation case are not widely published by the lawyers. In this paper, I will use the term PIL to analyse whether or not there have been deliberate efforts made in Kenya concerning the protection of public open spaces for the public interest.

The life cycle of a PIL case begins before the case is filed and entails the recognition of the proposed impacts and outcomes of the case. Several factors must be considered to increase the chances of success of the case. These factors include the interests of the party or parties that instituted the case; whether or not the parties have a right to file the case;[21] whether or not an issue can be the subject of a legal dispute or the justiciability of a case;[22] the different persons that can be sued, from the State to private persons, dependent on their obligations; whether or not it is necessary to have interveners such as interested parties or *amicus curiae* and finally to the remedies that a party can seek to right the wrongs caused by the violations and non-compliance with the Constitution and other laws.

III. PUBLIC INTEREST LITIGATION IN KENYA

In Kenya, PIL has developed over time with a transformative shift in its role during the pre- and post-2010 Constitutional dispensation. The main challenge to PIL litigation under the 1963 Constitution was that at the time the common law approach on *locus standi* was restricted to those that were directly affected by an action or inaction of the other parties that resulted in a direct infringement of rights.[23] If a person or group of persons could not show direct harm or interest in the case, they were considered not to have the right to initiate the suit. This is what is known as lacking *locus standi*.

19 Ramsden and Gledhill (n 7) 8-16.

20 Open Society Justice Initiative (n 17).

21 This is known as *locus standi*, which in fact means whether a party has the standing to file a case in court. *Locus standi* is determined in several Constitutions or legislation.

22 In some jurisdictions such as Uganda socio-economic rights are not justiciable as they are in Kenya and in South Africa. Therefore, the parties must be creative in the way they challenge the violations of socio-economic rights. In India, the right to life has been interpreted widely to cover other rights that are not justiciable under their laws.

23 Kameri-Mbote and Odote (n 2). See also *Gouriet v. Union of Postal Office Workers* (1977) A.C. 729 (Q.B.)

A. Public interest litigation under the 1963 Constitution of Kenya,

One of the cases that was determined prior to the promulgation of the 2010 Constitution illustrating the limited scope in standing to file suits in Kenya, is the *Wangari Mathai* case. The cause of action is the subject matter of this article, which is the protection of a public open space (Uhuru Park).

The facts of the case are that on 27th November 1989, Prof Wangari Maathai who was the then coordinator of the Green Belt Movement,[24] filed a case seeking an interlocutory injunction against the defendant, the Kenya Times Media Trust Ltd, from constructing the Kenya Times complex at Uhuru Park pending the hearing and determination of the suit. In the main suit, the plaintiff sought to challenge the actions of the defendant as being contrary to the Land Planning Act, regulations and building by-laws.[25] The court held that the Attorney General had the powers to bring a suit in the public interest; that Prof. Maathai was not able to show the direct cause of action she had against the defendant; and did not also have the power to lodge the suit, in the public interest, in her bid to protect Uhuru Park.

Nearly seven (7) years after the *Wangari Mathai* case, the limitations of appearing before a court to institute a case were relaxed slightly and only to the extent that a group of banks with the same interest that formed an association could file a case before the court.[26] The facts in the case involved the Kenya Association of Bankers, which was a registered Society with a membership of 48 individual banks, each of which was interested in the matter, but nevertheless effectively represented by the association. By filing the suit through the association, they had simplified the handling of the matter rather than each bank bringing a separate suit. The court established that all the banks within the association had a common interest and instead of each filing its case, the bank could file the case to represent the interests of the member banks. The court further held that Section 60 of the [repealed] Constitution empowered it to do justice without heavy consideration of the technicalities and procedural challenges, especially when dealing with cases in the public interest and human rights cases.[27]

Yet again, the protection of a public open space - a recreation park - came to the forefront when the High Court adopted the expanded approach to *locus standi* in the *Kenya Bankers Association* case.[28] The case was filed by a plaintiff, Khelef Khalifa El-Busaidy, a resident of Tudor in Mombasa to protect a public park, the "Dickson Garden", also popularly known as "Uwanja wa Mayaya". The plaintiff claimed that the 1st defendant, the Commissioner of Lands, had allocated the land to a private developer, yet the land

24 Specifically, Regulation 10 of the Development and Use of Land (Planning) Regulation. The Green Belt Movement was formed in 1977 by Prof Wangari Maathai under the National Council for Women of Kenya to support the livelihoods of women in rural Kenya. It later also championed for the protection of the environment and good governance as this was ultimately impacted the livelihoods of persons. See also <https://www.greenbeltmovement.org/who-we-are/our-history> accessed on 20 May 2020.

25 Development and Use of Land (Planning) Regulation of 1961.

26 *Albert Ruturi, J. K. Wanywela* & *Kenya Bankers Association v. The Minister of Finance & The Attorney-General and Central Bank of Kenya* Nairobi High Court Misc. Civil Application No.908 of 2001, [2002] 1 KLR 56 (*Kenya Bankers Association* case).

27 *ibid* [61].

28 *Khelef Khalifa* (n 6).

was originally under the ownership of Mombasa Municipality and later the central government. The plaintiff stated that he filed the case in the public interest, on his behalf and on behalf of the residents of Mombasa who used the park for recreation purposes. Although the defendants challenged the standing of the plaintiff to file the suit through a preliminary objection, the court in its ruling struck out the preliminary objection and agreed with the *Kenya Banker's Association* case that the scope of *locus standi* had been expanded, thus the plaintiff could therefore file the case.

Notably, the *Khelef Khalifa* case was filed after the enactment of Section 3(3) of EMCA,[29] which enshrined every persons' right to a clean and healthy environment even if it was not provided for in the Constitution. The inclusion of the term "every person" in section 3(3) of EMCA was the first sign of the doors opening to PIL in cases touching on the right to a clean and healthy environment.[30]

The case of *Priscilla Nyokabi Kanyua v. Attorney General & Another*[31] is another important PIL case in that it changed policy in relation to the voting rights of prisoners. The case was filed by an advocate and Executive Director of Kituo Cha Sheria, a Non-Governmental Organisation that was established to offer legal aid assistance and the promotion of the human rights of marginalised persons such as prisoners. She filed the case on behalf of paralegal inmates of Shimo La Tewa Prison seeking the court to interpret the repealed Constitution,[32] about only restricting inmates to voting in Presidential and National Assembly elections but to allow voting in a Referendum such as the one for the Constitution. The court held that the *Kenya Bankers Association* case expanded the scope of *locus standi* and therefore Ms. Kanyua could file the suit on behalf of the paralegals at Shimo la Tewa prison. The impact of the case was to change existing policies at the time that excluded prisoners from voting in referendums. The court held that prisoners could vote in the referendum, and ordered the Interim Independent Electoral Commission (IIEC) to gazette prisons as polling stations and the Attorney General to facilitate the IIEC to access prisons to register prisoners who wished to vote in the Referendum.

B. Public Interest Litigation under the 2010 Constitution

The 2010 Constitution was a radical departure from the 1963 Constitution and has been hailed by the Supreme Court as a transformative Constitution.[33] This is because it altered the state of affairs that had centralised power in an imperial presidency, placing sovereign power in the people who were to be governed by the norms within the national values and principles that seek to bring social change and reforms.[34] It stipulates that every person must respect, uphold, and defend the Constitution.[35] Every person also has the right to institute proceedings in a court in instances where they raise claims that their rights have been violated or are threatened.[36] It further expands the scope for

29 Environmental Management and Coordination Act, 1999, Chapter 388 of the Laws of Kenya. (EMCA).
30 Sang (n 8) 42.
31 Constitutional Petition No. 1 of 2010; [2010] eKLR.
32 Section 43 of the Constitution of Kenya of 1963 (repealed).
33 *In the Matter of the Speaker of the Senate & another* [2013] eKLR [51] and [52]. See also Sang (n. 8) 30.
34 Art 1(1) and 10(2) of the Constitution.
35 Article 3(1) of the Constitution.
36 Article 22(1) of the Constitution.

filing cases to include not only a person whose rights have been violated or threatened with a violation, or a violation of other constitutional provisions, but also to a person acting: "on behalf of someone who cannot act in their name as a member of, or in the interest of a group or class of persons; in the public interest; and an association acting in the interest of one or more of its members". [37]

The 2010 Constitution is also considered progressive because unlike the 1963 Constitution, which only expressly provided for civil and political rights, it expressly provides for a wide range of rights.[38] It also recognises a non-exhaustive list of rights that are recognised internationally perhaps through some of the international treaties which Kenya has ratified and are part of Kenyan law.[39]

The 2010 Constitution also strengthened the independence of the courts and empowered the High Court to determine questions on the interpretation and application of the Bill of Rights or the Constitution.[40] The constitutional powers of persons to lodge suits seeking to uphold the Bill of Rights is buttressed in the Mutunga Rules, which were enacted to provide for the proceedings in the protection of the Bill of Rights.[41] The overriding objective of the rules is to ensure access to justice.[42] These Mutunga Rules define a person to include individuals, organisations, companies, associations, or any body of persons whether incorporated or unincorporated.[43] Any party could also institute a suit in court including the poor, illiterate, uninformed, unrepresented, and persons with disabilities.[44] This means that even if a person does not have a lawyer they can represent themselves and argue a case before the court. The Rules also provide for the joining of interested parties and *amicus curiae* in petitions where another party may have an interest in the case or may seek to join and assist the court as a friend of the court respectively.[45] These rules also state that a petition may be supported by an affidavit[46] and this shows it is not a prerequisite for all petitions to be supported by affidavits.

In relation to the right to a clean and healthy environment, the Constitution expands the scope of locus standi in the enforcement of the right to a clean and healthy environment.[47] It further removes the common law restrictions of *locus standi* by expressly

37 Articles 22(2) and 258 of the Constitution. In the Supreme Court case of *Jasbir Singh Rai and 3 Others v. Tarlochan Singh Rai Estate* Petition No. 4 of 2012; [2013] eKLR *(Jasbir Rai)* [96] Mutunga CJ (as he then was) in his concurring opinion stated that Articles 22 and 23 give the courts a special and wide responsibility for the enforcement of the Bill of Rights.

38 JK Bosek 'Implementing environmental rights in Kenya's new Constitutional Order: Prospects and Potential Challenges' (14) AHRLJ (2014) 489-508, 496.

39 Article 19((3)(b) as read with Article 2(6) of the Constitution.

40 Article 165(3) of the Constitution.

41 C Odote, 'Public Interest Litigation and Climate Change: An Example from Kenya' in O Ruppel, C Ruschmann & K. Ruppel-Schlichting (eds), *Climate Change: International Law and Global Governance* (2013) p. 809.

42 Rule 3(2) of the Mutunga Rules. This is enshrined in Article 48 of the Constitution.

43 Rule 2 of the Mutunga Rules.

44 Rule 3(7) of the Mutunga Rules.

45 Rules 6 and 7 of the Mutunga Rules.

46 Rule 11 of the Mutunga Rules. This rule assists those who are unrepresented by allowing them to file a petition and attach supporting documents without the need to go have an advocate draw and file an affidavit on their behalf which then also needs to be commissioned before a commissioner of oaths after it is sworn.

47 Article 70(1) of the Constitution provides that*"[i]f 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*."

providing that the applicant seeking to enforce the right does not need to prove any loss they have suffered.[48] These provisions are progressive and have elevated PIL in environment-related matters, allowing different stakeholders to file a suit in court in instances where there is a threat to, or violation of the right to a clean and healthy environment.

However, at the High Court, the question of standing continued even after the promulgation of the Constitution. In the case of *Michael Osundwa Sakwa v. Chief Justice and President of the Supreme Court of Kenya & another,*[49] the High Court settled this issue when it recognised that in public law litigation under the 2010 Constitution, there was expanded standing to sue.[50]

Another perspective where PIL can make an impact is at the interlocutory stage, to safeguard rights as the parties wait for the case to be finally determined. Upon the filing of a case and before the hearing and determination of a petition, the court has the power to issue conservatory or interim orders in the suit and the application of these orders can be by way of a written application or through an oral application, which the court will reduce into writing.[51] The power of conservatory orders, especially in the public law sphere where there is a public interest, was expounded on by the Supreme Court in the case of *Gatirau Peter Munya v. Dickson Mwenda Kithinji & 2 others*,[52] as being important to uphold the court's adjudicatory role as well as allow proper functioning of public agencies. It also held as follows:

> Conservatory orders, therefore, are not, unlike interlocutory injunctions, linked to such private-party issues as "the prospects of irreparable harm" occurring during the pendency of a case; or "high probability of success" in the supplicant's case for orders of stay. Conservatory orders, consequently, should be granted on the *inherent merit of a case*, bearing in mind the *public interest, the constitutional values, and the proportionate magnitudes, and priority levels attributable to the relevant causes*.[53]

The party lodging any PIL suit must also be able to identify the cause of action as well as the parties that are either liable for the violation of the Constitution and laws or acting illegally. This will assist the person or groups lodging the claim to correctly invoke the proper jurisdiction of a court or tribunal which they are approaching for the relief which they are seeking.

Concerning the parties to a suit, the Constitution, being the supreme law of the land, binds all persons and all State organs.[54] Every person must respect, uphold, and defend the Constitution.[55] The Bill of Rights also binds all State organs and all persons.[56] The State and all State organs also have a fundamental obligation to observe, respect, pro-

48 Article 70(3) of the Constitution.
49 Petition No. 167 of 2016; [2016] eKLR.
50 *ibid* [61].
51 Rules 23 and 24 of Mutunga Rules, 2013.
52 SC Application No. 5 of 2014; [2014] eKLR.
53 *ibid* [86].
54 Article 2(1) of the Constitution.
55 Article 3(1) of the Constitution.
56 Article 20(1) of the Constitution.

tect, promote, and fulfil the rights and freedoms in the Bill of Rights.[57] These provisions outline the positive and negative obligations imposed on persons as well as the State to uphold rights.[58] The negative obligation is the duty to "respect" as binds all persons to ensure that they refrain from violating any rights.[59] The positive obligations to protect, promote, and fulfil entail positive steps or actions performed by the State and State organs to ensure that a person(s) rights are not violated. The duty to protect entails the State placing measures to ensure that third parties do not interfere with a person's enjoyment of their right; the duty to *'promote'* requires the State to put up measures aimed at the promotion of tolerance, raising awareness and building infrastructure to enhance the enjoyment of rights; and to *'fulfil'* means that the State is required to adopt appropriate legislative, administrative, budgetary, judicial, promotional and other measures to realise the right.[60]

PIL aims to also ensure that there are appropriate remedies to right any wrongs done. Article 23(3) of the Constitution provides for a non-exhaustive list of remedies,[61] that are available when there is a violation of the Constitution such as a declaration of rights;[62] an injunction;[63] a conservatory order;[64] a declaration of invalidity of any law that denies, violates, infringes, or threatens a right or fundamental freedom in the Bill of Rights and is not justified under Article 24;[65] an order for compensation;[66] and order of judicial review.[67]

C. PIL and the Right to a Clean and Healthy Environment

The Constitution also places additional obligations, where it provides the right to a clean and healthy environment. The right is accompanied by obligations relating to the environment under Article 70.[68] Bosek states that the right to a clean and healthy environment is a two-fold right which includes first, the right of protection of the environment

57 Article 21(1) of the Constitution.

58 See *June Seventeenth Enterprises Ltd (Suing on its own behalf & on behalf of & in the interest of 223 other persons being former inhabitants of KPA Maasai Village Embakasi within Nairobi) v Kenya Airports Authority & 4 others* Petition No. 365 of 2013; [2014] eKLR,[30] *and Florence Amunga Omukanda & another v. Attorney General & 2 others* Petition No. 132 of 2011; [2016] eKLR.

59 Articles 3(1) and 21(1) of the Constitution provides for the negative obligations of the State.

60 See the African Commission on Human Rights case of *Social and Economic Rights Action Centre (SERAC) v. Nigeria 2001 AHRLR 60 (ACHPR 2001)* (*SERAC case*) [46]- [47]; the European Court on Human Rights case of *Osman v. the United Kingdom* (87/1997/871/1083).

61 In the Supreme Court of Kenya case of *Communications Commission of Kenya & 5 others v. Royal Media Services Limited & 5 others Petition Nos. 14, 14A, 14B and 14C of 2014; [2014] eKLR (CCK)* [359], the term including was interpreted to mean a non-exhaustive list. See also the Constitutional Court of South Africa cases in *Fose v. Minister of Safety & Security [1997] ZACC 6; 1997(7) BCLR 851; 1997 (3) SA 786,* [69] and *Minister of Health and Others v Treatment Action Campaign and Others (No 2) (CCT8/02) [2002] ZACC 15; 2002 (5) SA 721; 2002 (10) BCLR 1033* [101], where the Court interpreted the term including to mean that Courts can be creative in fashioning remedies that are best suited to offer the most appropriate relief.

62 Article 23 (3)(a) of the Constitution.

63 Article 23 (3)(b) of the Constitution.

64 Article 23 (3)(c) of the Constitution.

65 Article 23 (3)(d) of the Constitution.

66 Article 23 (3)(e) of the Constitution.

67 Article 23 (3)(f) of the Constitution.

68 Article 42(b) of the Constitution. (Sang n 8) 49 states that Article 42 provides an innovative express recognition of the right to a clean and healthy environment in the Constitution.

for present and future generations, and second, the right to have obligations to the environment fulfilled.[69] Obligations of the state are also enshrined in the Constitution.[70]

The people's duty to cooperate can be manifested in various forms from respecting the right to a clean and healthy environment by refraining from interfering with the State when they are performing their duty to protect and conserve the environment, or taking actions to support the State and other persons who are taking measures to protect and conserve the environment.[71] These obligations are not only limited to the State as other stakeholders are bound to cooperate with State organs and other persons in the conservation of the environment.[72]

These additional provisions are a dual protection mechanism which was constitutionally incorporated and accepted by the Kenyan people and shows the commitment to achieve a clean and healthy environment for the benefit of future generations. The right to a clean and safe environment is also a justiciable right under the Constitution of Kenya 2010.[73]

Just as in ordinary constitutional petitions where interlocutory orders may be issued pending hearing and determination of the petition, in environmental related cases, Parliament provided an inbuilt interlocutory safeguard of the environment in EMCA. In cases touching on the environment where appeals lie with the National Environment Tribunal, an order for stay pending hearing and determination of the appeal is automatically provided from the moment the appeal is lodged.[74] For example where a party lodges an appeal at the National Environment Tribunal against the issuance of an Environmental Impact Assessment Licence to a project proponent by the National Environment Management Authority, an automatic stay will occur staying the project pending the hearing of the appeal.[75] This automatic stay is considered a legislative codification of the precautionary principle which "recognises that lack of certainty regarding the threat of environmental harm should not be used as an excuse for not taking action to avert

69 Bosek (n 38) 496.

70 Article 69 provides for State obligations in respect to the environment as follows:

> "(1) The State shall—
> (a) ensure sustainable exploitation, utilisation, management and conservation of the environment and natural resources, and ensure the equitable sharing of the accruing benefits;
> (b) work to achieve and maintain a tree cover of at least ten per cent of the land area of Kenya;
> (c) protect and enhance intellectual property in, and indigenous knowledge of, biodiversity and the genetic resources of the communities;
> (d) encourage public participation in the management, protection and conservation of the environment;
> (e) protect genetic resources and biological diversity;
> (f) establish systems of environmental impact assessment, environmental audit and monitoring of the environment;
> (g) eliminate processes and activities that are likely to endanger the environment; and
> (h) utilise the environment and natural resources for the benefit of the people of Kenya."

71 Sang (n 8) 50.

72 Article 69(2) of the Constitution.

73 *Mohamed Ali Baadi and others v. Attorney General & 11 others* Petition 22 of 2012; [2018] eKLR, [282] (*Mohamed Ali Baadi* case).

74 Section 129(4) of EMCA 1999.

75 *ibid*.

that threat."[76] This environmental law principle also seeks to assist States to ensure they "anticipate, avoid, and mitigate threats to the environment".[77]

Even though the Constitution and legislation have placed several measures to assist in the protection of the environment, especially when appeals are filed, Parliament has made two attempts to amend this crucial provision on automatic stays.[78] The first time was through the Prevention of Torture Act.[79] After the court gave conservatory orders stopping the effect of the amendment, Parliament again proceeded to make a second amendment through the Statute Law (Miscellaneous Amendment) Act.[80] However, two separate cases were filed in court to challenge the unconstitutionality of these provisions and the Court issued conservatory orders against the operation of the amendments, pending hearing and determination of the suit.[81] These cases are still pending hearing and determination at the Constitutional and Human Rights Division of the High Court. However, on 29th October 2020, a High Court bench of three judges in the case of *Senate of the Republic of Kenya & 4 others v Speaker of the National Assembly & another; Attorney General & 7 others (Interested Parties)*,[82] found one of the impugned laws which seek to remove the precautionary principle, the Statute Law Miscellaneous Act, as being unconstitutional because the National Assembly passed the law without it going through the Senate which is required for all laws concerning counties. The remedy issued by the court is that of suspended invalidity-that is, the legislation was declared as being invalid, but the invalidity was suspended for 9 months to allow for Parliament to rectify the illegalities and pass the legislation under the Constitution.[83]

Constitutional provisions that impose obligations on different persons mean that any person can be liable for violations of the Constitution if they fail to meet their obligations. The national principle of the rule of law[84] also binds all persons to follow the laws of the land. Therefore, if laws that have been enacted and are being disobeyed either by ignoring the laws or through court orders, or acting outside the bounds of the law, then a party has the right to institute a claim in court to challenge these laws.

With regard to the enforcement of environmental rights and the remedies about threats to or violations of such rights before the Environment and Land Court, the Constitution provides additional remedies to those provided in the Constitution for violation of

76 Guidelines for applying the precautionary principle to biodiversity conservation and natural resource management as approved by the 67th meeting of the IUCN Council 14-16 May 2007, 1 <https://www.iucn.org/sites/dev/files/import/downloads/ln250507_ppguidelines.pdf > (accessed on 24 May 2020).

77 *ibid*.

78 Environmental Management and Coordination Act, 1999, Chapter 388 of the Laws of Kenya.

79 Section 29 of the Prevention of Torture Act No. 12 of 2017.

80 Section 2 of the Statute Law Miscellaneous Act No. 18 of 2018.

81 *Okiya Omtata Okoiti and Another v. National Assembly of Kenya and Another* Petition No. 251 of 2017 (against the amendment through the Prevention of Torture Act) the Court issued orders on 6 June 2017 stopping the amendment and *Katiba Institute v. Attorney General Petition* No. 268 of 2018 (against the amendments through the Statute Law Miscellaneous Amendment Act, the Court issued conservatory orders on 24 September 2018 stopping the amendments.

82 [2020] eKLR.

83 *ibid* [146].

84 Article 10(2) of the Constitution.

the Bill of Rights.[85] These include giving appropriate direction to prevent harm to the environment,[86] to compel a public officer to take measures discontinuing any harm to the environment,[87] and to compensate victims whose right to a clean and healthy environment has been violated.[88]

Regarding the jurisdiction of the courts to determine questions on the protection of the right to a clean and healthy environment, the Environment and Land Court has this specialised jurisdiction.[89] Soyapi argues that in some instances there might be overlaps between cases that are hybrid and whose issues for determination could fall within the jurisdiction of the Environment and Land Court, and the High Court. This, he states, must be addressed using the 'predominant purpose test' which has been set out in case law to establish the core issues for determination of the suit.[90] The National Environment Tribunal also has jurisdiction to deal with cases challenging among others the issuance of Environmental Impact Assessment Licences by the National Environmental Management Authority.[91]

There have been several judgments issued by courts on the protection of the right to a clean and healthy environment. However, I will analyse two recent landmark judgments from PIL that greatly impacted both the substantive and procedural aspects of environmental rights. These are *Mohamed Ali Baadi and others v. Attorney General & 11 others*[92] *(Mohamed Ali Baadi case)* and *Save Lamu & 5 others v National Environmental Management Authority (NEMA) & another* (*Save Lamu case*).[93] The *Mohamed Ali Baadi* case was a petition filed by some residents of Lamu County who were impacted by how the government designed and implemented the Lamu Port-South Sudan-Ethiopia-Transport Corridor project ("the LAPSSET Project"). The case involved one of the largest infrastructure projects to be undertaken by Kenya demonstrating the public interest in the matter. Due to the complexity of the case, the litigation also involved several expert witnesses provided by different parties as well as a site visit for the court to have a clear picture of the dispute filed before it.[94] The landmark judgment held that environmental justice has three components, namely access to information, public participation, and access to justice.[95] It also recognised the need to protect the marine environment which was key to the protection of traditional fishing rights of the community, rights which were interconnected with several rights in the Bill of Rights.[96] The court also held that public participation was important for the members of the community in Lamu to know of the impact and

85 Article 23(3) of the Constitution provides for remedies for violation of rights and Article 70(2) stipulates the remedies for violation of the right to a clean and healthy environment.
86 Article 70 (2)(a) of the Constitution.
87 Article 70 (2)(b) of the Constitution.
88 Article 70(2) (c) of the Constitution.
89 Article 162(2) of the Constitution and Section 13 of the Environment and Land Court Act No. 19 of 2011. See also Bosek (n 38) 499 who states that the Constitution prioritized the protection of the environment by creation of the specialized Environment and Land Court.
90 Soyapi (n 4) 156. See also *Mohammed Ali Baadi* (n 73) [105].
91 Section 129 (1) of the EMCA.
92 *Mohamed Ali Baadi* (n 73).
93 Tribunal NET Appeal No. 196 of 2016; [2019] eKLR.
94 *Mohamed Ali Baadi* (n 73) [10], [12]-[17].
95 *Mohamed Ali Baadi* (n 73) [250]-[253]. See also the Rio Declaration 1991.
96 *Mohamed Ali Baadi* (n 73) [304].

mitigation measures put in place in the process of putting up the project and that there was need to protect Lamu Island as a United Nations World Heritage Site and put in place measures including an Environmental Management Plan to protect it.

The second case of *Save Lamu* was filed in the National Environment Tribunal challenging the National Environment Authority's (NEMA) decision to issue a licence for the construction of the first-ever 1500 MW coal-fired power plant in Kenya. Again, in that judgment, the community based non-governmental organisation that championed the environmental protection of Lamu Island and other individual members of the community filed the case to stop the construction of the coal plant. The impact of the case touched on the centrality of the involvement of the public in public participation through genuine consultations as provided in EMCA and its regulations governing EIAs. Like the *Mohamed Ali Baadi* case, this was a complex case with several witnesses being brought forth to explain the issues raised challenging the coal plant. Site visits were also used for the tribunal to see the possible impacts on the environment and the people living near the area if the coal plant proceeded.[97] The tribunal held that there was no adequate public participation in the process of the Environmental Impact Assessment Study as required under the law and that other critical factors such as the impact of the project on climate change issues as provided under the Climate Change Act were never considered by the project proponent as he had testified to not considering these factors.[98] Therefore, these factors rendered NEMA's issuance of a licence and its conditions contrary to the law and NEMA did not meet its mandate in the protection of the environment, thus, the project was stopped.[99]

These two cases have shown that members of seemingly small communities can challenge critical, and big infrastructural projects in a bid to protect their interests; the public interest and the interests of future generations. These cases also showed that PIL cases can sometimes be complex, time consuming and expensive and may require several expert witnesses and site visits to ensure that the adjudicating body has a clear picture of issues for determination and the cause of action as well as possible impacts of their decision. The impact of the judgments is critical as they touch on the national values and principles of public participation in environmental matters as well as the need for State organs to consider sustainable development for the benefit of not only the present generations but future generations.

IV. PIL AND THE PROTECTION OF OPEN PUBLIC SPACES

To understand the impact of PIL on the protection of open public spaces, it is critical to understand the definitions of what open urban or public spaces are as well as the different laws regulating the operations and conservation of the open spaces.

Open spaces are not defined in the Constitution, but are mentioned in the Physical Planning and Land Use Act.[100] This legislation provides that subject to its provisions, the Ur-

97 *Save Lamu* (n 93) [10].
98 *ibid* [151].
99 *ibid*.
100 Physical Planning Act No. 13 of 2019.

ban Areas and Cities Act,[101] and the County Governments Act,[102] the power of the County government over development control includes the power to "preserve and maintain all the land planned for open spaces, parks, urban forests, and green belts following the approved physical and land use development plans".[103] The repealed Physical Planning Act[104] also dealt with the control of development in which it empowered local authorities (which are now the County governments): "to preserve and maintain all the land planned for open spaces, parks, urban forests, and green belts in accordance with the approved physical development plan."[105] The County Government Act also states that the objectives of county planning include to "maintain a viable system of green and open spaces for a functioning eco-system."[106]

The National Land Use Policy[107] also provides for urban environment management specifically about open spaces and the mandate of the Government to mitigate problems of an urban environment. This could be done through zoning of open spaces in the urban areas to establish green areas in residential areas and reclaiming open spaces and parks which might have been allocated back to public ownership."[108]

Considering the role of County governments in planning and governance of public land in their possession, there was an unsuccessful attempt by the Nairobi City County Government to pass the Nairobi City County Public Open Spaces Use and Maintenance Bill.[109] This Bill was sponsored by the Member of County Assembly Hon. Samuel Kagiri Mwangi, with its first reading on ~~16~~th May 2017, and the second reading on 8th May 2017. However, it did not proceed from this stage as there was no third reading or subsequent enactment of the Bill. The proposed Act aimed to regulate public open spaces within the County of Nairobi. Some of the provisions included clauses, that define parks to mean parks, open spaces, pleasure resorts, recreation areas, gardens, squares, reserves, and bird sanctuaries within the County and being held by the County, including all buildings, grounds, and spaces situated in such areas;[110] control of public spaces by the County which must maintain and use them solely for purposes for which they were laid out or otherwise reserved;[111] and the duty of users of public parks in the protection of the environment.[112]

Literature defines an open space as one that is not occupied by buildings or structures and public open space is one that falls on public land.[113]Public open space is defined as

101 Act No. 13 of 2011.
102 Act No. 17 of 2012.
103 Section 56(f) of the Physical Planning Act.
104 Formerly Cap 286 of the Laws of Kenya.
105 Section 29(f) of the Repealed Physical Planning Act.
106 Section 103(c) of the County Governments Act.
107 Sessional Paper No. 1 of 2017, October 2017 by the Ministry of Lands and Physical Planning.
108 *ibid* 47 and [3.1.6].
109 Nairobi City County Public Open Spaces Use and Maintenance Bill, CA No. 11 of 2 May 2017.
110 Clause 2 of the Bill.
111 Clause 3 of the Bill.
112 Clause 6 of the Bill.
113 A Nochian, O MohdTahir, S Maulan & MehdiRakhshandehro 'A Comprehensive Public Open Space Categorization Using Classification System for Sustainable Development of Public Open Spaces' University Putra Malaysia Alam Cipta (December 2015).

"the sum of the areas of the built-up areas of cities devoted to streets, sidewalks, walkways and public parks, squares, recreational green areas, public playgrounds and open areas of public facilities".[114] Urban public open spaces are considered important to the extent that they help promote health and well-being, as some parks act as recreation places where people can relax, exercise, or have a livelihood.[115] Some parks with trees help the environment by reducing pollution. Failure to protect these urban open spaces can lead to congestion in the cities, degradation of the environment if trees have been cut, and insecurity.[116]

There are different types of public open spaces and such open spaces do not include areas set aside for public use such as for schools, hospitals, or stadiums which are used by the public. The institution of suits to protect these spaces therefore depends on the constitutional violations or legislative illegalities that arise. The anchor of filing these suits is to ensure that there is the promotion of the constitutional right of access to justice,[117] and the national values and principles which binds the State and all persons when applying and interpreting the Constitution, law, and policies of devolution of power, participation of the people, human dignity, social justice, inclusiveness, equality, human rights, protection of the marginalised, good governance, integrity, transparency, accountability and sustainable development.[118]

In relation to the use of PIL to ensure protection of Uhuru Park as a public open case against the construction of the Uhuru Highway Expressway, so far two cases have been filed to challenge decisions made by various stakeholders. This section will summarise some of the concerns raised in these suits and the remedies sought as highlighted in the public court documents. This section will not discuss the merits of the cases as they are still pending hearing and determination in the Court and the National Environment Tribunal.

The first case was filed on 28th January 2020, by two Kenyan citizens, Henry Namiti Shitanda and Rhoda Aoko[119] through a judicial review application on their behalf and in the public interest against the Attorney General and the Kenya National Highway Authority (KeNHA),[120] seeking to stop the construction of the multi-billion highway linking Jomo Kenyatta International Airport and Wetlands (the Expressway). The parties claimed that on 16th October 2019 the President, H.E. Uhuru Kenyatta in conjunction with KeNHA launched the construction of the Expressway. However, the design, negotiations, structures, and or planning were conducted in secrecy and the policy decision to commence the construction of the Expressway was concealed, with no infor-

114 UN HABITAT, *Adequate Open public Spaces in Cities; A Human Settlements Indicator for Monitoring Post 2015 Sustainable Development Agenda* (New York City 25-26 February 2015) pp. 2 <https://unstats.un.org/unsd/post2015/activities/egmonindicatorframework/docs/Background%20note%20by%20UN%20Habitat-%20Proposal%20for%20a%20public%20open%20space%20indicator-EGM_Feb2015.pdf> accessed on 30 November 2020.

115 M Makwono & C Mireri 'Public Open Spaces in Nairobi City Under Threat' (54)8 Journal of Environmental Planning and Management (2011) 1107-1123, 1109.

116 *ibid*.

117 Article 48 of the Constitution protects the right of access to justice.

118 Article 10 of the Constitution.

119 The applicants filed the suit for self-representation.

120 Judicial Review Application No. 24 of 2020.

mation provided on how the project would be undertaken, neither was there public participation. This, they contended, was contrary to the national values and principles of governance,[121] the right of access to information,[122] and the principles of public finance of the Constitution.[123] They also stated that the project was contrary to the Public-Private Partnership Act of Kenya as no feasibility study was ever conducted.[124] The applicants further argued that since no environmental impact assessment was conducted before the launch and design of the project, it offended the provisions of the Environmental Management and Conservation Act. The applicants stated that the project violated Article 227 of the Constitution as read with provisions of the Public Procurement and Asset Disposal Act as there was no proper tendering process in a competitive, transparent, and cost-effective manner.

In that regard, the project was contrary to the right to access information, national values and principles of governance as well as principles of public service; and contrary to the Public-Private Partnership Act.

The second suit was filed at the National Environment Tribunal on 2 June 2020. The Appellants in the case are the *Green Belt Movement and 4 others v. National Environment Management Authority Kenya (NEMA) and the China Road and Bridge Corporation (CRBC)*.[125] A summary of the grounds of appeal shows that the Appellants are challenging: the issuance of the EIA licence by NEMA without adequate public participation required under law; the issuance of the licence without a proper Strategic Environmental Assessment; and that NEMA issued the licence without due regard to the fact that the project proponent failed to include substantial information, which was necessary for them to adequately get involved in the process.[126]

The Appellants have prayed for the Tribunal to set aside the NEMA's decision to issue a licence to CRBC; issue an order requiring that a Strategic Environmental Assessment is conducted before commencing a new EIA process; a requirement that the Respondents undertake a Resettlement Action Plan before a new EIA process can commence; that CRBC commences a new EIA Study considering the all the legal requirements set out in the law and finally, that the Tribunal directs NEMA to guarantee that all information or documents submitted to NEMA by any person in connection with an EIA licence, and NEMA's decisions and reasons be available for public perusal at all times; and where there has been a request made for copies to be provided, that such is immediately provided unless there are written reasons that can be provided to the contrary.

The two cases above show that PIL is an attempt to protect Uhuru Park as was earlier done in the *Wangari Mathai* case. However, because the merits of the case are still pending, it is also critical to analyse what Kenyan courts have stated in relation to cases that have been filed touching on the protection of public open spaces. I will analyse two cases dealing with the protection of public open spaces.

121 Article 10 of the Constitution.
122 Article 35 of the Constitution
123 Article 201 of the Constitution.
124 Section 18 of the Public-Private Partnership Act No. 15 of 2013.
125 Tribunal Appeal No. 19 of 2020.
126 *ibid* 4.

The first is a civil case is of *James Chege and Another v. Daniel Mwani and 9 Others*, (*James Chege* case)[127] where the plaintiffs filed a suit claiming that the suit property within Jamhuri estate was their private property because the Nairobi City Council had issued them letters of allotment. However, the defendants refuted this stating that the City Council illegally issued the letters of allotment on the property which was already reserved as an open space that was to be used as a public utility by residents of the estate. The Environment and Land Court made a finding that the suit land was an open space because at the time the estate was developed the plot in contention was never given a land registration number.[128] It was held that under the now-repealed Physical Planning Act,[129] the City Council of Nairobi had an obligation to maintain the open spaces within Jamhuri Estate following the approved Physical Development Plan and the Council could not allocate the land to the plaintiffs as it was alleged it did.[130] Therefore the land remained a public open space.

This case was never filed as a PIL case but a civil suit by private parties against eight private parties and the Nairobi City Council and the Commissioner of Lands, seeking to protect their claim on 'private land' which was found not to be their land but public land. However, it is the defence of the suit by the defendants that led to the protection of the public open space.

In the second case of *Jimmy Gichuki Kiago and Another v. Transitional Authority and 7 Others*,[131] (*Jimmy Kiago* case) the plaintiffs filed a civil suit but relied on Article 22 of the Constitution as a basis for filing the suit. They claimed to own pieces of land within Trans Nzoia County. They also stated that they were interested parties in a parcel near their property that was set apart for Trans Nzoia County to construct a trading centre, which could also be used for public utilities such as an open space, administrative headquarters, an industrial area, a church, nursery, a primary school and a cemetery.

The main challenge in the suit was that the County Council of Trans Nzoia issued letters of allotment to the 2nd to 7th defendants for them to erect their structures in an area meant for public utilities. The defendants argued that the land was only reserved for a trade centre and that the now County Council of Trans Nzoia had the constitutional and statutory powers to subdivide, plan and allocate portions of the land to the suitable person and for designated purposes. It also argued that the plaintiff did not have the *locus standi* to file the suit.[132] The Environment and Land Court made a finding that the Physical Development Plan that was presented before the court by the plaintiff showed that the suit property was set aside for a trading centre and public utilities.[133] The Court further held that the actions of the defendants could be equated to "land grabbing" a

127 Civil Suit No. 131 of 1998; [2018] eKLR (*James Chege* case).
128 *ibid* [23].
129 Section 29(f).
130 *James Chege* (n 127) [24].
131 ELC Case No. 2 of 2011; [2019] eKLR (*Jimmy Kiago* case).
132 On the issue of *locus standi* the court had earlier on in a ruling dated 2 July 2011 already determined that Article 22 empowered the plaintiffs to file the case before the court.
133 *Jimmy Kiago* (n 131) [19] and [53].

phenomenon in Kenya where land that was reserved for a public utility was taken over by private developers for their gain.[134] It also held that:

> The land in the instant suit includes portions reserved for a dispensary, but in my view, the other public utilities provided for are equally important. It is only proper to look at the bigger picture and assume that if the same element of land grabbing affected a thousand similar plans across our republic, what a disaster it would be especially for modern youth who with the changing lifestyles have become acquainted with the value of recreational facilities to relieve the stresses of modern life. In the absence of any study by persons in the position of the defendants, who knows, with the current demographic growth what population the area may hold in the near future? Should all the citizens travel to towns far away to access recreational parks, hospitals, abbatoirs, schools, and other facilities? The answer is an emphatic "no". These facilities will be needed close to the persons for whom they were originally meant and placing them at a pittance in the hands of the so-called private developers will rob entire future generations of their use. To make it worse, it may with time possibly lead to compensation of the very same developers in process of their re-acquisition for the original intended purpose.[135]

The court also stated that before converting a public utility to a commercial plot, the Director of Physical Planning must exercise the mandate for conversion which must meet the minimum standards of justification and public participation.[136] The learned Judge found that the defendants failed to provide any evidence of justification or public participation.[137] The court also pronounced itself to the extent that public utilities even for aesthetic purposes, serve a public purpose and the court must protect them;[138] and changes in land use are major changes which require the Director of Physical Planning to submit to the National Environment Management Authority (NEMA) an Environmental Impact Assessment under the Environmental Management and Coordination Act,[139] which in this case the Director of Physical Planning did not submit to NEMA. [140] Therefore, the proposed change of user of the public utility and the letters of allotment were a nullity. The change of user was nullified as well and an order given for a permanent injunction to restrain the 1st defendant from issuing further letters of allotments and for the 2nd to 7th defendants to desist from erecting structures on the disputed land.[141]

The two cases above illustrate that cases touching on the protection of public open spaces have been filed in court as civil suits and not ordinary constitutional petitions. The *Jimmy Kiago* case, although filed as a civil suit was a strategic PIL case to protect a public open space while the *James Chege* case was never a PIL suit, but the result and impact of the suit was the public interest in nature to protect a public open space due to the defence raised. Besides, the parties still claimed that the impact of the suit would be

134 *Jimmy Kiago* (n 131) [54].
135 *ibid* [55].
136 *ibid* [58].
137 *ibid*.
138 *ibid* [59].
139 Section 58.
140 *Jimmy Kiago* (n 131) [60].
141 *ibid* [67] and [68].

public interest in nature. The main challenge in both cases is that the County Governments illegally allocated land reserved for public use as an open space to private persons without following the procedures in law and for a financial benefit. In the *Jimmy Kiago* case, the judge referred to such actions as land grabbing and the courts in both the cases were swift in protecting the public land and requiring that the public authority with the powers of conversion and change in land use to do so as required by the Constitution and relevant laws.

The issue of *locus standi* also arose in the *Jimmy Kiago* case but the court reaffirmed the role of the Constitution,[142]in expanding the scope of *locus standi* to allow persons to file petitions in the protection of violation of rights and in remedying the violation.[143] Comparatively, in India experiences in PIL in the protection of open spaces is at a more advanced stage than in Kenyan courts. However, the content of the cause of actions is the same to the extent that the PIL cases in Kenya and India are filed in the protection of open spaces based on the contention that local authorities illegally converted land reserved for public use as green spaces, selling it for commercial benefit without following the law.

As in the *Jimmy Kiago* case, issues of standing have also been raised in courts in India in public interest cases. The Supreme Court of India dealt with the issue of protection of an open space in Bangalore city in the case of *Bangalore Medical Trust v. B.S. Muddappa and Ors.*[144] The residents of Bangalore city filed the petition in the public interest and challenged the Authority's action of allotment of the public open space contrary to the Bangalore Development Authority Act.[145] The residents argued that the actions of the Authority violated the Act whose intent is to protect and preserve the environment through the preservation of public open spaces for ventilation as well as the improvement and maintenance of good public health through people using the playgrounds and parks. One of the objections raised by the Respondents was that the Petitioners did not have the right to file the case in court in the public interest. However, the Supreme Court reiterated that in India there was now an expanded scope as to what a "specific injury" and who "an aggrieved person" is.[146] Therefore the parties were within their right to challenge the decision of the BDA in the public interest. [147]

It is also clear from the court that once a piece of land has been designated for use as a public utility or green space, it does not matter whether the land has been set aside for aesthetic purposes, the court must protect the public land. Also, the court recognised the seriousness in land-use conversion and the requirement under EMCA,[148] for the preparation and issuance of an EIA report and licence which brings to the fore the content of the EIA report which is access to information about the report and public participation on publication of information on EIAs. This finding shows that at the core of urban plan-

142 Articles 22 and 23 of the Constitution.
143 See ruling by Koome J., (as she then was) dated 22 July 2017.
144 1991 AIR 1902, 1991 SCR (3) 102 (*Bangalore Medical Trust* case)
145 Bangalore Development Authority Act, 1976.
146 *Bangalore Medical Trust* (n 144) [133 B]-[133 C].
147 *ibid* [141 A].
148 Section 58 of EMCA.

ning the State must ensure that they uphold environmental justice and where there are critical conversions of public open spaces sold or converted for commercial use, an EIA must be undertaken to safeguard a clean and healthy environment and a participatory process followed before such conversions.

The Environment and Land Court also recognised that the protection of public open spaces has an extended impact on the right to the highest standard of health as these spaces can be used for recreation and to relieve stress. The conversions from public to private use, and placing public utilities in the hands of private developers have an impact on future generations and this is tied to the national value and principle of sustainable development. There is need to protect what we have presently, especially our environment, for future generations. One of the Sustainable Development Goal's is sustainable cities and communities and a goal target herein is "by 2030 provide universal access to safe, inclusive and accessible, green and public spaces, in particular for women and children, older persons and persons with disabilities."[149]

It is also important to identify the roles and obligations of different State offices in line with physical planning laws in support of cases relating to protection of open spaces. The above judgements have also shown that physical planning is at the forefront of ensuring that the relevant public bodies undertake their functions concerning public open spaces. Urban planning is a discipline that contains several legal processes that have mandatory steps to be followed and if any are breached, there are consequences of legal sanctions.[150] The objects of planning are "the prevention of development of land along lines contrary to the public interest; planning for the enlightened and orderly arrangement on the available land of such things necessary to the community, as houses, roads, open spaces, industries, shops, offices, schools and places of recreation and entertainment and by stages to bring the use of land into conformity with the planned arrangement."[151] These objectives are achieved by the statutory requirement that planning permission is necessary before any development may be carried out, and this brings into focus the role of law in urban planning.[152]

In both the James *Chege* and *Jimmy Kiago* cases, the court relied on Physical Development Plans to ascertain the use which the disputed land was set aside for and in *Jimmy Kiago,* the court went on to interpret the role of the Director of Physical Planning in relation to conversion of a public open space to private land. Similarly, the Indian Supreme Court in a PIL case filed by a leading environmental lawyer M.C. Mehta in the case of M.C. *Mehta v. Union of India*,[153] rendered its judgment on 6th December 1996 in a case brought to challenge the misuse of public parks for wedding ceremonies and commercial purposes. The contention in that case was the construction of a camp office complex in

149 Sustainable Development Goal No. 11.

150 *Republic v. County Government of Nairobi; Kilimani Project Foundation & 21 others (Interested Parties) Ex Parte Cytonn Investment Partners Sixteen LLP;* Judicial Review Application No. 276 Of 2018; [2020] eKLR, [138].

151 JM Mativo, 'The Role of Law in Urban Planning in Kenya: Towards Norms of Good Urban Governance' (University of Nairobi LLM Thesis: November 2015) 74. <http://erepository.uonbi.ac.ke/bitstream/handle/11295/95288/Mativo_The%20role%20of%20law%20in%20urban%20planning%20in%20Kenya.pdf?sequence=1&isAllowed=y> accessed on 7 October 2020.

152 *ibid*.

153 IAs Nos. 34 and 35 in WP (C) No. 4677 of 1985. (*M.C. Mehta* case)

Fountain Park, a public park, for the use of the Chief Minister of Delhi, which could be used for the ceremonies. The Petitioner stated that this construction interfered with the recreation utility of the park, and that it would also degrade the environment. The Supreme Court relied on the City's Master Plan which only allowed the parks to be used for recreation and not for other things. Therefore, the court held that the use of parks for both recreation and aesthetic use could not be curtailed by the Respondents.[154] However, the Supreme Court also balanced this with the society's needs and directed that there needed to be a sustained phased manner to stop the granting of permission for use of the park for wedding ceremonies and commercial purposes.[155] Another key feature of this case which Kenyan courts can borrow from the Indian Supreme Court are the remedies that the Supreme Court issued that were also pragmatic to remedy the wrong, as well as ensuring that it supervised the actions of the Respondents to prevent further harm to the environment.[156]

The courts in India have also shown the importance of protection of public open spaces through respect for the right to life and its connection with the environment. Unlike in Kenya, the Constitution of India does not expressly provide for the protection of the right to a clean and healthy environment, but the courts have interpreted the right to life to include the right to a clean and healthy environment. In *Society for Protection of Culture, Heritage Environment, Tradition and Protection of National Awareness (SPCHETNA) v. Union of India through Secretary, Ministry of Environment, Forest and Climate Change and Ors*, [157] an Non-Governmental Organisation filed a case in the Green Tribunal challenging the decision of the Delhi Department Authority (DDA) to issue a letter of allotment handing over a green area to a private entity for commercial activities such as weddings and parties.[158] The tribunal held that the 3rd Respondent who was to facilitate weddings was prevented from putting up any permanent structures in the green area and was to ensure that any temporary structures put up for events did not affect trees in the green area.[159] This order was issued after the tribunal interpreted the right to life under the Constitution of India to include decent living with peaceful conditions and in this instance, the right to life of senior citizens, children, and persons who were undergoing medical treatment who used the green space.[160] As an appropriate remedy the Green Tribunal also authorised the DDA to take any legal action against M/S Banquets if they failed to meet the conditions of the order.[161]

154 *ibid* [6].
155 *ibid*.
156 *ibid* [8], the Court also held as follows:
1. "Use of parks by authorities for commercial/marriage purposes by authorities shall not be permitted for more than 10 days in the designated parks.
2. The authorities shall endeavor to build community halls for marriage ceremonies.
3. The number of parks indicated by the [three authorities] used for marriage shall be reduced by 30 % by 30 June 1997, by 20% by 31st December 1997 so that by the end of December the use of parks for the functions shall be reduced by 50%. The [authorities] were also to file affidavits stating progress in projects for construction of halls and stopping use of parks for marriage ceremonies by the end of December 1997.The Court will monitor this further in January 1998.
4. No tree shall be cut from any of the parks for any purpose specifically to facilitate holding of functions."
157 Original Application No. 60 of 2014. This judgment was delivered on 10 July 2015 (SPCHETNA case).
158 *SPCHETNA* (n 157) 1-3.
159 *ibid* 30-1.
160 *ibid* 30.
161 *ibid* 31.

Public open spaces lie on public land, therefore in Kenya there is a need to include the National Land Commission in the protection of such spaces. The Constitution recognises the mandate of the National Land Commission (NLC) to include monitoring and oversight responsibilities over land use planning throughout the country.[162] The NLC also has the mandatory duty to manage public land on behalf of the National and County governments and "evaluate all parcels of public land based on land capability classification, land resources, mapping considerations, the overall potential for use and resource evaluation of data for land use planning."[163] The NLC also has a big role to play concerning public open spaces where counties might want to convert the use of the land from public to private use. The NLC is required to keep a register of all conversions of public land; may make rules for easing the process of conversion of public land and such rules must be tabled before Parliament.[164]

Based on the above constitutional and legislative provisions, public open spaces touch on issues surrounding urban planning, the right to a clean and healthy environment, the right to health and dignity, life, the national value and principles of public participation, devolution, and sustainable development as well as the preservation of public spaces for the public rule and protection of public land. The actors that play a role in the protection of public open spaces include individuals, groups of persons, the County and National governments, NEMA as well as other private persons or public and state organs or agencies that may have an interest in the public open spaces. Therefore, if a party were to institute a case in the public interest, several parties could be respondents depending on the duties and obligations they carry as well as the rights that need to be protected.

V. CONCLUSION

In recent times landmark cases such as *Mohamed Ali Baadi* and *Save Lamu* in Kenya demonstrate that individuals and communities can use PIL to ensure the protection of the environment and the promotion of environmental justice. The protection of public open spaces through PIL is therefore still a strong option to protect the interest of the public, specifically linked to sustainable development goals, the right to a clean and healthy environment, and the right to dignity, health, life, and the rights of marginalised groups. The main causes of action will also depend on the source of violations or actions which lead to violations of the Constitution and other legislation.

Still, most of the challenges for public open spaces in Kenya involve the sale or conversion of the public land reserved for use as open spaces into commercial properties without consultation with the relevant agencies dealing with the management of public land such as the NLC or most importantly, the people who are affected by the decision of conversion or change of use of the land. This is contrary to set physical planning policy and laws as well as established physical development plans. Such a challenge

162 Article 67(2) of the Constitution and Section 5(1)(h) of the National Land Commission Act No. 5 of 2012.

163 Section 8(1)(b) of the Land Act, 2012 and the Supreme Court Advisory Opinion *In Re the Matter of the National Land Commission SC Advisory Opinion* No. 2 of 2014; 2014 [eKLR] at para 231 where the Court held that the Ministry of Lands and the NLC must work hand in hand to ensure that public land is managed well.

164 Section 9(4), (5) and (7) of the Land Act 2012.

may impact other rights such as the right to the highest attainable standards of health, dignity, and life due to the removal of spaces people can use to maximise the enjoyment of these rights. Adjudicatory bodies must also be pragmatic in the issuance of remedies to address possible violations or threats to violations, especially where the right to a clean and healthy environment has been affected. It is also critical not to reverse steps already taken to protect the environment, for example through the amendment of laws to subvert critical provisions that provide for the precautionary principle. In addition, the strength of PIL cases and the victory of such cases does not lie in the change of policies or laws but in the implementation of the judgments. There are several instances where great judgments have been delivered by the courts but have not been implemented by those that have been found to be in violation of the right to a clean and healthy environment. This includes the respect of stay orders issued under the precautionary principle. Failure to respect court orders leads to negation of the great steps taken in enshrining the right to a clean and healthy environment in the Constitution and legislation making it an aspiration rather than a justiciable right.[165] This can be remedied by courts using structural interdicts as in the *Mohamed Ali Baadi* case,[166] and the Indian case of *M.C. Mehta* to ensure that in instances where there is a structural problem by State organs in respecting the right to a clean and healthy environment, the courts can issue remedies that will be respected to by all parties.

165 Soyapi (n 4).

166 *Mohamed Ali Baadi* (n 73) [H(ii),(iv) and (vi)]. See also structural interdicts issued by the Supreme Court of Kenya in *CCK* (n 61) [415(g)] and *Francis Karioko Muruatetu & another v Republic* [2017] eKLR, [112 (c)].

CASE REVIEW

PROTECTING PUBLIC SPACES UNDER KENYA'S NEW CONSTITUTIONAL DISPENSATION: A REVIEW OF PETITION NO. 15 OF 2018, *OKIYA OMTATAH OKOITI v. NATIONAL LAND COMMISSION*

*Clarice Wambua**

I. INTRODUCTION

Over thirty years ago, Kenyan Nobel Laureate Wangari Maathai launched a court case attempting to halt the construction of the proposed Kenya Times complex in Nairobi City's iconic public open space, Uhuru Park.[1] Her attempts to use the court process were however unsuccessful, with the courts not only dismissing her suit but also ordering that she pay costs to the defendant. Years after this herculean battle was eventually won, albeit outside the courts through spirited public protests that saw the project abandoned, Kenyan courts were once again the centre of a gruelling duel for another green space in the heart of the city of Nairobi. This was in the case of *Okiya Omtatah Okoiti v. National Land Commission*,[2] where Okiya Omtatah, a public interest litigant (the "Petitioner"), challenged the manner in which the National Land Commission, a constitutionally established commission charged with the responsibility of managing public land as well as acquiring land on behalf of the government,[3] (the "Respondent"), had attempted to acquire public land in the Nairobi National Park (NNP) for the construction of the Standard Gauge Railway (SGR).

Notwithstanding the environmental concerns raised about this development, the SGR project not only managed to acquire an Environmental Impact Assessment (EIA) licence from the National Environmental Management Authority (NEMA), which the Petitioner together with the Kenya Coalition for Wildlife Conservation and Management had separately challenged before the National Environmental Tribunal (NET), but the Respondent also proceeded to acquire land within the NNP for the contested project. The latter issue was the subject of the present suit before the Environment and Land Court. On 28th August 2019, Justice Obaga delivered his ruling on the matter. Unlike in the *Wangari Maathai* case, the suit was heard in the era of a new constitutional dispensation, following the promulgation of a new Constitution on August 27th 2010. Under the new dispensation, sustainable development is a national value and principle of governance,[4] the right to a clean and healthy environment is recognised as a fundamental human right,[5] and anyone can assert this right in court without the need to show loss incurred or damage suffered.[6]

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1 *Wangari Maathai v Kenya Times Media Trust Ltd* [1989] eKLR.

2 *Okiya Omtatah Okoiti v National Land Commission* [2019] eKLR.

3 Article 67 of the Constitution of Kenya, 2010.

4 Article 10 (2) (d) of the Constitution of Kenya, 2010.

5 Article 42 of the Constitution of Kenya, 2010.

6 Article 70 of the Constitution of Kenya, 2010.

Despite these advances in the law, the Petitioner's suit was dismissed as in the *Wangari Maathai* case over thirty years ago, although the reasons were different. The central argument in this review is that the transformational provisions of the new Constitution call for transformative approaches to ensuring their realisation. Whereas the present case is an indicator of the continued important role played by public interest litigants in environmental conservation, the dismissal of the suit highlights that it is 'not yet *uhuru*'.[7] There is tension between the conservation of public spaces and infrastructural development, and this calls for the recognition that although Kenya has a new constitutional order, it does not automatically lead to the enhanced protection of public spaces, as economic concerns often still triumph. With this understanding, litigants championing the protection of these spaces need to recalibrate their approach and strategy in bringing such matters before the courts. Courts are also called upon to make interpretations of law that ensure ecologically sustainable development.

II. BACKGROUND AND FACTS OF THE CASE

The SGR project aims to connect major cities in the country and ease travel within the East African Community, and has been billed as the most ambitious project in Kenya since the country gained independence.[8] It is a flagship Vision 2030 project,[9] and according to its proponents, the SGR is Kenya's 'new engine of economic growth',[10] and could enable Vision 2030 goals to be realised before the target date.[11] However, these views have clashed with those of conservationists who have decried its heavy cost to the environment.[12] Construction of Phase 2A of the SGR project was particularly wrought with concerns over its environmental impact, as the railway line was to pass through the NNP, a notable wildlife park famed for being the only game reserve located in a capital city in the world.[13] Its construction would potentially impede wildlife conservation efforts and encroach on a green space that offers recreation amenities as well as an effective pair of lungs absorbing greenhouse gases and reducing pollutants for the people of Nairobi.

The Petitioner had therefore appealed to the NET to object the grant of an EIA licence for the project by NEMA.[14] NET thereafter issued two stop orders, one on 5th April 2017 and

7 This means there is no freedom (*uhuru*) yet for the environment, as such ecologically sensitive cases are still dismissed in court. Adapted from the title of Oginga Odinga's biography. See, Oginga Odinga, *Not Yet Uhuru - The Autobiography of Oginga Odinga* (Heinemann, 1968).

8 P Parke, 'Kenya's $13 Billion Railway Project is Taking Shape' (CNN, 16 May 2016)<https://edition.cnn.com/2016/05/15/africa/kenya-railway-east-africa/> (accessed on 23 May 2020).

9 Encapsulated in Kenya's long-term development plan that aims to transform Kenya into a newly industrializing middle- income country by 2030. See Government of Kenya (GoK), *Kenya Vision 2030* (GoK, 2007).

10 P Mainga, 'Why SGR is Kenya's New Engine of Economic Growth' (People Daily, 12 November 2019) <https://www.pd.co.ke/opinion/commentaries/why-sgr-is-kenyas-new-engine-of-economic-growth-12992/> (accessed on 23 May 2020).

11 V Kabecha, 'SGR puts Kenya on track to achieving higher economic growth' Daily Nation, March 18th 2020<https://www.nation.co.ke/oped/opinion/SGR-puts-Kenya-on-track-to-achieving-higher-economic-growth/440808-4671796-8jtg0a/index.html> (accessed on 23 May 2020).

12 S Mwanza & C Chumo, *Standard Gauge Railway (SGR) Through Nairobi National Park: Will the Iconic Park Survive?*, Perspectives, Issue No.32 (UN Environment, 2019).

13 V Kiprop, 'What Is The Only National Park In The World Located In A Capital City' (World Atlas, 27th May 2019) < https://www.worldatlas.com/articles/which-is-the-only-national-park-in-the-world-in-a-capital-city.html> (accessed on 23 May 2020).

14 Tribunal Appeal No. 200 of 2017.

the other on 6th June 2017, pending the hearing and determination of the claim. Nonetheless, the Respondent proceeded to publish an undated Gazette Notice No. 12526 of its intention to acquire 41.3090 hectares of LR No. 10758, belonging to Nairobi National Park. The Petitioner thus petitioned the Court to quash the Gazette Notice as it was issued contemptuously in violation of the stop orders. In addition to this, the Petitioner contended that the Respondent acted contrary to Article 71 (1) of the Constitution that requires Parliament to ratify certain transactions relating to natural resources; that the Respondent contravened the provisions of Section 44 of the Wildlife Conservation and Management Act, (WCMA) 2013, and that the Gazette Notice did not comply with the provisions of the Statutory Instruments Act. The Respondent however opposed the Petition on the grounds that the construction of the SGR through the NNP was already a matter before the NET,[15] and the appropriate forum for the Petitioner to ventilate his grievances was therefore the NET. The Respondent further argued that the Petitioner had not demonstrated that the impugned Gazette Notice did not meet the constitutional requirements of Article 40 of the Constitution that granted the State the powers of eminent domain, and the stop orders from NET did not stop the Respondent from acquiring land required for public purposes.

III. PROTECTING NAIROBI NATIONAL PARK: ISSUES RAISED IN COURT

Based on the Petitioner's submissions and the Respondent's grounds of opposition, the Court set out the following as the main issues for determination:

A. Whether Gazette Notice No. 12526 is void for having been issued without ratification by Parliament

The transaction in the Gazette Notice falls under the auspices of the transactions constitutionally required to be ratified by Parliament.[16] Parliament having been mandated to enact legislation for transactions subject to ratification, enacted the Natural Resources (Classes of Transactions Subject to Ratification) Act, 2016.[17] By virtue of the Act, any transaction that relates to the excision or change of boundary of a gazetted national park or wildlife protection area must be ratified by Parliament.[18] Given that the construction of the SGR through the National Park involved the excise of 41.3090 hectares of land designated as a national park, the Petitioner argued that the Gazette Notice ought to have been issued after ratification by Parliament. However, in holding that the transaction was valid despite absence of ratification by Parliament, the Court placed its reliance on the fact that the commencement date of the Act is 4th October, 2016, whilst the process of acquisition of the land for the SGR transaction begun before this date, as provided in the Act that:

15 *ibid*.

16 Article 71(1) of the Constitution of Kenya, 2010.

17 Following requirements of Article 71(2) of the Constitution of Kenya, 2010, Parliament enacted the Natural Resources (Classes of Transactions Subject to Ratification) Act, 2016.

18 Schedule of the Natural Resources (Classes of Transactions Subject to Ratification) Act, 2016.

A transaction that is subject to ratification by Parliament, which was lawfully entered into on or after the effective date but before the commencement date, shall continue in effect and be deemed valid and lawful notwithstanding the absence of ratification by Parliament.[19]

B. Whether Gazette Notice No.12526 is void for not complying with the provisions of the Statutory Instruments Act of 2013

The Petitioner claimed that the provisions of the Statutory Instruments Act, 2013 were never followed and Gazette Notice No.12526 therefore lapsed for failure to be submitted to the clerk of Parliament within seven (7) days of its publication, as required under the Statutory Instruments Act.[20] The Court however opined that the Gazette Notice did not fall within the ambits of a 'Statutory Instrument' as defined in the Act which set out a Statutory Instrument as:

> *"any rule, order, regulation, direction, form, tariff of costs or fees, letters, patent, commission, warrant, proclamation, by-law, resolution, guideline or other statutory instrument issued, made or established in the execution of a power conferred by or under an Act of Parliament under which that statutory instrument or subsidiary legislation is expressly authorised to be issued."*[21]

Based on this definition, there was therefore no need for the Gazette Notice to be tabled either in the National Assembly or the Senate.

C. Whether Gazette Notice No. 12526 is void for having been issued contrary to Section 44 of the Wildlife Conservation and Management Act (WCMA)

On this issue, the Petitioner advanced the argument that no development should be carried out in the NNP as the park did not have a Management Plan. According to the Petitioner, the one in existence was no longer in force, having been for the period 2005-2010. His contention was based on the WCMA which provides that no development should be carried out in a national park without a Management Plan.[22] However, the Court interpreted this provision of law as not being applicable. In his judgement, Justice Obaga stated that:

> "*Ecosystem Management Plans are management tools which are supposed to be prepared in accordance with the Fifth Schedule of the Act. They are specifically meant to be guides for the management of National Parks, or Game Reserves or Marine Protected Parks. The Management Plan has nothing to do with the acquisition of land for public purposes as in the present case…"*

Consequently, the court on this issue held that it could not be argued that the acquisition of land for the SGR was illegal and void due to the lack of an Ecosystem Management Plan.

19 Section 16 of the Natural Resources (Classes of Transactions Subject to Ratification) Act, 2016.
20 Section 11(1), Statutory Instruments Act, 2013.
21 Section 2, Statutory Instruments Act, 2013.
22 Section 44 (4), Wildlife Conservation and Management Act, 2013.

D. Whether Gazette Notice No. 12526 is void for having been issued contrary to two stop orders given in Tribunal Appeal No. 200 of 2017

On this issue, the Court held that the Gazette Notice was not contrary to the stop orders issued by the NET due to the difference in nature of the claims before the NET and the Court. NET had issued two stop orders in the case of *Okiya Omtatah Okoiti & another v NEMA & others* filed by the Petitioner questioning the grant of EIA licence for the construction of the SGR.[23] On the converse, the matter before the Court challenged the Gazette Notice by the Respondent that set out an intent to compulsorily acquire land for the construction of the SGR. Whereas under the law, where an appeal is filed before the NET, the status quo of the matter or activity which is the subject matter of the appeal is maintained until the appeal is determined by the NET,[24] in the present case, the Petitioner did not inform the court of the status of case in the NET. Given the lack of direct nexus between the claim before the NET (and orders given therein) and the subject of the Gazette Notice, the Court held that the Gazette Notice could not be held to be in violation of the two stop orders.

E. Whether Gazette Notice No. 12526 is void for having been issued without public participation on the fate of LR No.10758 belonging to Nairobi National Park

The Petitioner contended that there was no public participation, although the Judge found that he did not elaborate on how the public was not involved. The Court reviewed the stop orders that the Petitioner had annexed to his Petition and noted that in the appeal to NET, the Petitioner had argued that NEMA issued the EIA licence hurriedly without following the laid down procedures. Whilst the Court acknowledged the centrality of public participation under the Constitution,[25] and the fact that public participation is a mandatory requirement when undertaking an EIA study,[26] there was no evidence tendered by the Petitioner showing the kind of public participation carried out if any. Further, the Court in making its judgement emphasised that the impugned Gazette Notice had been published pursuant to the provisions of the Land Act,2012, but the Petitioner did not demonstrate how the Respondent had failed to undertake the compulsory acquisition mandatory steps elaborated under the Land Act.[27] According to the Judge, the Petitioner had cited various Constitutional provisions as having been violated, for example Article 40 on the right to protection of property, but had not shown how the publication of a Gazette Notice of intention to acquire land had violated these rights.

F. Whether the Petitioner's legitimate expectations were violated

The Petitioner argued that his legitimate expectations had been violated by the publishing of the impugned Gazette Notice. However, the Judge, relying on the definition of

23 NET Appeal No. 200 of 2017.
24 Section 129(4) of the Environment and Management Coordination Act, 1999.
25 Article 69(1)(d) of the Constitution of Kenya, 2010.
26 Regulation 17 of the Environmental (Impact Assessment and Audit) Regulations, 2013.
27 Section 110 of the Land Act, 2010.

legitimate expectation under Black's Law Dictionary, 10th Edition, noted that legitimate expectation is defined as expectation arising from the reasonable belief that a private person or public body will adhere to a well-established practice or will keep a promise. The Judge re-asserted that in the present case, the Petitioner had tendered no evidence that the Respondent did anything wrong in publishing the impugned Gazette Notice. As such there was no basis upon which the Court could make a finding that the Petitioner's legitimate expectations had been violated or would not be met.

IV. JUDGEMENT OF THE COURT

The Petitioner's claim was dismissed for lack of merit premised on the aforementioned reasons, as justified by the Court. Further, given that the petition was filed as a public interest litigation matter, the court ordered that each party bear its own costs.

V. NOT YET *UHURU*? AN ANALYSIS OF THE COURT'S DECISION

The Court notably acknowledged that the 2010 Constitution allows a person to seek multiple remedies where his or her right to a clean and healthy environment is likely to be infringed or has been violated,[28]in addressing the Respondent's claim that the Petitioner should have ventilated the present matter before the NET Appeal No. 200 of 2017,[29] which he was already pursuing before he launched the present matter. As such, according to the Court, the Respondent's claim that the Petitioner ought to have ventilated all his issues in the ongoing NET Appeal were invalid, as the Petitioner was within his rights to approach the Court and still pursue other remedies available to him. The Court also acknowledged the important role played by public interest litigation, providing that although the Petitioner's case was dismissed as lacking merit, each party was to bear its own costs as the petition had been brought in the public interest. This highlights a marked departure from the former constitutional era where Justice Dugdale in the *Wangari Maathai* case on Uhuru Park, not only dismissed her case but also ordered that she pay the costs to the defendant.[30]

The Petition's unsuccessful attempt to protect the NNP can be pinpointed to a confluence of two factors. One is the Court's narrow interpretation of the law and facts, and the other is the Petitioner's failure to cross his T's and dot his I's in asserting his claim. The Court, for example narrowly interpreted the stop orders issued in NET Appeal No. 200 of 2017 and their implication on the present case before it. In holding that the Gazette Notice strictly concerned the Respondent's intent to compulsory acquire land for the SGR and as such no claim of violation of the two stop orders could hold water, the judge failed to appreciate the broader aim of such an order, which is to stop all activities related to the project until the matter is determined.

Similarly, the Court's interpretation of Section 44 (4) of the WMCA which provides that no development will be approved in the absence of approved Management Plans, was

28 Article 70(1) of the Constitution of Kenya, 2010.
29 *Okiya Omtatah Okoiti v. NEMA & Others* NET Appeal No. 200 of 2017.
30 *Wangari Maathai v Kenya Times Media Trust Ltd* [1989] eKLR.

narrow. The Judge opined that a Management Plan was a guideline on the management of the park and had no bearing on the acquisition of land for public purposes. However, the Judge did not broaden his perspective to consider that the public purpose was infrastructural development in the park, which was likely within the purview of 'development' envisaged in section 44 (4) of the WCMA. Thus, such acquisition should not have been allowed to proceed in the absence of a Management Plan. The Fifth Schedule to WCMA provides that management plans include the scale and location of any infrastructural development,[31] further buttressing the view that there is a connection between management plans and any dealings related to infrastructural development, to ensure any such development fits with the scale, and in the location set out in the management plan.

On the Petitioner's part, failure to give full particulars and to tender evidence to substantiate claims emerges as a contributing factor to the outcome of the case. The court held that the claim by the Petitioner that the Respondent had not undertaken public participation had not been substantiated, neither with regard to the EIA process before the NET, nor with regard to the compulsory acquisition under the Land Act.[32] The Petitioner had also cited the violation of Constitutional rights such as the right to property,[33] but had not shown how the publication of the Gazette Notice had violated these rights. Relying on the case of *Anarita Karimi Njeru – Vs- Republic,*[34] the Court reiterated that any person seeking redress from the High Court on any matter that involves reference to the Constitution is required to set out the claim with a reasonable degree of precision of the provisions said to be infringed and the manner in which they are alleged to be infringed. This position has been adopted by other Courts for example in *Mumo Matemu –vs- Trusted Society of Human Rights Alliance & 5 Others,*[35] whereby the court declined to uphold the Petition filed in the High Court on the ground that it was not pleaded with precision and sufficient particularity as is required in the case of constitutional petitions, and that it did not provide adequate particulars of the claims relating to the alleged violations.

VI. CONCLUSION

The decision in the present case is important for clarifying important aspects arising in court challenges on the protection of public spaces. For one, the court affirms the constitutionally bestowed authority that a person has to seek, where he so chooses, multiple remedies where his or her right to a clean and healthy environment is likely to be infringed or has been violated.[36] Secondly, the court affirms that there are no limitations on *locus standi* under Kenya's new constitutional dispensation on such matters, and thirdly, the court's decision on costs reduces the fear among public interest litigants that failure of their suits could lead to the imposition of a heavy financial burden, which would have a chilling effect on parties seeking to assert constitutional rights.[37]

31 Fifth Schedule, Wildlife Conservation and Management Act, 2013.
32 Section 110 of the Land Act, 2012.
33 Article 40, Constitution of Kenya, 2010.
34 [1979] eKLR.
35 (2013) eKLR.
36 Article 70(1) of the Constitution of Kenya, 2010.
37 See Sachs J in *Affordable Medicines Trust vs Minister of Health* 2006 (3) SA 247. Quoted in *Brian Asin & 2 others v Wafula W. Chebukati & 9 others* [2017] eKLR.

Notably and contrary to the *Wangari Maathai case,*[38] the present case enables the promotion of public interest litigation as envisioned in the Kenyan Constitution. The case acknowledges that the Constitution affords protection of public interest in our judicial system by eradicating the requirement for locus standi where a person acting in the public interest exercises their right to institute legal proceedings for infringement of fundamental rights and freedoms under the Bill of Rights.[39] This is unlike in the *Wangari Maathai case,* where the Court blatantly rejected the plaintiff's right of action on behalf of the public. In addition, the plaintiff litigant in the *Wangari Maathai case* was ordered to pay costs to the defendant after dismissal of her suit unlike the decision by the court in the present case where parties were ordered to bear their own costs. The approach in the latter case is reflective of the epitome hallmark of public interest protection in the Kenyan judicial system. It is a representation of the emerging progressive approach taken by courts in exercising their discretion not to award costs in genuine public litigation matters. As echoed by the courts,[40] the rationale for that is to realise the protection of public interest which is hinged in the constitutional spirit obligating every individual to respect, uphold and defend the Constitution.[41]

The case also sets the threshold for environmental litigants to substantiate their claims or allegations, making it clear that though principles like public participation are well recognised constitutional imperatives, a Petitioner needs to assert their claim by providing full particulars. The case also highlights that while Kenyan courts acknowledge the forward-looking provisions of the Constitution, a court's focus on a narrow interpretation of law and fact unaligned to the spirit of the Constitution, will not yield the much-needed protections for public spaces. As such there is need for broader interpretation of law by the Courts, as well as for litigants championing the protection of public spaces to adopt approaches and strategies that ensure all the relevant evidence is adduced and full particulars are given of their claims, to increase the chances of a successful petition.

From this case it is evident that public spaces such as national parks continue to face increased pressures. There is significant contestation about how to conserve such spaces alongside the imperative for economic growth characterised by public infrastructure mega projects in many African countries. Whilst Sustainable Development Goal 9 on industry, innovation and infrastructure calls for sustainable, resilient infrastructure,[42] the reality is that this is not always followed. Infrastructure projects that threaten wildlife and habitats and interfere with the provision of other ecosystem services are ongoing in Kenya. Worse still, there is no freedom yet for the environment. Over thirty years since the *Wangari Maathai case* on Uhuru Park, ecologically sensitive cases are still dismissed in court. *Okiya Omtatah Okoiti v. National Land Commission*,[43] contains relevant pointers to stem this tide.

38 *Wangari Maathai v Kenya Times Media Trust Ltd* [1989] eKLR.
39 Article 22(2)(c) of the Constitution of Kenya, 2010.
40 *Republic v Independent Electoral and Boundaries Commission & 2 others Ex-Parte Alinoor Derow Abdullahi & others* [2017] eKLR
41 Article 3(1) of the Constitution of Kenya, 2010.
42 Goal 9, United Nations, *Transforming Our World: The 2030 Agenda for Sustainable Development*, A/RES/70/1.
43 *Okiya Omtatah Okoiti v National Land Commission* [2019] eKLR.

BOOK REVIEW - BLAZING THE TRAIL: PROFESSOR CHARLES OKIDI'S ENDURING LEGACY IN THE DEVELOPMENT OF ENVIRONMENTAL LAW

Edited by Patricia Kameri-Mbote and Collins Odote (School of Law, University of Nairobi 2019) ISBN 978-9-966-19522-7

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*Reviewed by Angela Waki**

A scholar, pondering the question of how to honour and remember an esteemed colleague, observed that:

> We do not usually present them with flowers, cakes, chocolates, or watches but instead, we honour them with scholarship. For a true scholar, the gift of the scholarship of others is a most appropriate bequest.[1]

This indeed is the idea behind a *festschrift,* directly translated from German to English as a 'celebratory book', referring to a collection of scholarly works usually by colleagues, friends and students of an eminent scholar[2].

On 30th November 2018, Professor Charles Okidi, retired from the University of Nairobi after over four decades of serving the university in various roles. In a bid to recognise and celebrate his remarkable contribution to both the academy and the field of environmental law and governance, the editors deemed it fit to honour Professor Okidi with a *festschrift*. The editors of the book express their intention to 'celebrate a great scholar, mentor, patriot and friend' and to demonstrate how the honouree's scholarship has 'engaged in and contributed to environmental governance, in addition to weaving in Professor Okidi's engagements with the themes chosen'. Do they and the contributing authors achieve this? My response would be yes.

The collection consists of twenty-seven chapters by thirty authors, drawn from eleven countries, spanning four continents. The authors consist of distinguished scholars, senior judicial officers, policymakers at international and national levels, and prominent practitioners of environmental law – some of them, like the honouree, wearing several of these hats at the same time. This reflects to a great extent the global reach of Professor Okidi's work. The testimonials interspersing most of the chapters attest that this impact was not only profound, but also personal for many of the authors.

The *festschrift* commences with two Forewords; the first by the Hon. Keriako Tobiko, the incumbent Cabinet Secretary of Kenya's Ministry of Environment & Forestry, and the second by the Hon. Amos Wako, Kenya's former Attorney General, and a member of the United Nations International Law Commission. Both Forewords pay glowing tribute to

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1 R McGuire, 'Reflections on the Festschrift / Memorial Volume: A Review of Human Expeditions: Inspired by Bruce Trigger' [17] European Journal of Archaeology (2014) 720

2 *ibid*. See also J Richetti, 'The Value of the 'Festschrift': A Dying Genre?' 53(2) The Eighteenth Century (2012) 237.

Professor Okidi, lauding his contribution to the development of environmental law, not just in Kenya but globally. Hon. Tobiko, highlights *inter alia* the honouree's instrumental role in drafting Kenya's 'far-sighted' national environmental law, the Environmental Management and Coordination Act in 1999, and later in the development of the comprehensive provisions on Land and Environment in Kenya's Constitution 2010, emphasising the honouree's work to ensure the linkage between academics and practice. This critical importance of the engagement of scholars in national and international policy processes is one of the threads that connect the varied works in this collection. Hon. Wako celebrates Professor Okidi's various contributions in the international context that lead to the honouree's worldwide renown as 'a champion of environmental law', while at the same time emphasising the honouree's generous efforts in building endogenous knowledge and capacity, ensuring that 'Africa and Africans are not left behind in matters relating to environmental law'.

The main work is structured thematically into five parts. Part I (Introduction) is dedicated to the life and work of the honouree and divided into three chapters. The introductory chapter by the editors, an autobiographical account by the honouree, and a chapter reflecting on the honouree's life's work. Part II comprises five essays around various environmental law capacity building initiatives, all of which benefited from Professor Okidi's attention. This is followed by five chapters on varied aspects of environmental governance in Part III. In Part IV are eight essays on the subjects of International Environmental Law, Law of the Sea, and Water Law. Part V consists of six chapters on selected themes in environmental law and policy. Hidden in the Annexes is Professor Okidi's Curriculum Vitae, crucially containing a list of his published and unpublished works.

The nature of a *festschrift* means that editors select contributors based, not on thematic consistency but, on the contributors' relationship with the honouree[3]. Indeed, it has been said that 'of all types of books of essays, the *festschrift* is most likely to trend toward a bag of marbles in terms of coherence.'[4] In the face of this difficultly, the editors do a commendable job in identifying the unifying theme of 'sustainable development'. The reviewer however submits that another sub-theme also emerges from the work, that of the symbiotic, multidisciplinary, collaborative, cross-pollinating network that is necessary for sustainable development to be realised.

The main title of the book is 'Blazing the Trail', a title that you will see as completely apt once you begin to comprehend the pioneering nature of Professor Okidi's work in the field of environmental governance, both in the academy and in the so-called 'real-world'. The portrait of a remarkable man, a ground-breaking scholar, and an institution-builder deeply committed to capacity building, emerges easily from the first three chapters. The honouree's autobiographical account details his extraordinary journey from a music-loving boy growing up in South Nyanza, whose determined efforts to study abroad take him across the world to Anchorage, Alaska (via a stint with the Kenya Police) and sets him on a trajectory that would lead him to be reckoned as one of the fathers of environmental law. In their essay, Nick Robinson and Jamie Benidickson, dis-

3 McGuire (2014) 721.
4 *ibid.*

tinguished scholars of international environmental law who worked with the honouree in various capacities throughout his career, reflect on the honouree's life's work especially in the evolving search for sustainable development, and what it portends for the future of environmental governance. The authors make a strong case for the adoption of the Global Pact, and leave us to ponder the question, whether (and when) despite all the efforts expended by Professor Okidi and others, States will recognise that (contrary to the popular wisdom) 'sustainable development does not rest on three pillars, in which environmental protection is a late-comer to join economic and social development, but rather exists only with the Earth's biosphere, which sustains the vastness of life, human and otherwise?'

Robinson and Benidickson, in discussing the honouree's capacity building endeavours at the IUCN Academy, and his visionary ideas of building judicial capacity in environmental matters, stress the importance of understanding the complex ecology of capacity building described as 'a broad complex legal and social ecology ranging from courts through to libraries'. Something that Professor Okidi was deeply committed to as he 'enabled UNEP, in the era before the internet, to educate law professors, civil servants, legislators, diplomats and judges about emerging legal norms for stewardship of nature, for protection of the environment' by compiling and publishing the first compendia of international law materials.

Elizabeth Maruma Mrema, then Director of the Law Division at UNEP and now Executive Secretary to the Convention on Biological Diversity, shares the lessons learned on the ambitious Programme for the Development of Environmental Law and Institutions in Africa (PADELLA). This, and the next chapter by Patricia Kameri-Mbote, a distinguished scholar, one of the book's editors, and the current chair of the Association of Environmental Law Lecturers in African Universities (ASSELLAU), detail with refreshing candour the challenging process of institution- making when working across different countries, agencies and institutions on the continent in a bid to do the necessary work, capacity building and fostering collaboration in the development, practice, study and teaching of environmental law. Nicholas O. Oguge, on his part, links the story of the Centre for Advanced Studies in Environmental Law and Policy (CASELAP), an institution established by the honouree at the University of Nairobi, with its social context. Situating it as a response to the need for a critical mass of committed interdisciplinary scholars to combat the real shortage of expertise and institutional capacity in environmental governance in Africa.

This prevailing context is illustrated by Kenneth Kakuru, in his comprehensive review of the legal and institutional framework of environmental management in Uganda. Kakuru, a sitting Judge in the Court of Appeal, is a former practitioner, lecturer and member of the civil society and from this perspective paints a picture that is disappointingly common in Africa; where institutional inefficiencies and institutional conflict undermine timely and effective environmental management; where there is a disconnect between the law in the books and the law in action; where despite having comprehensive laws, enforcement action is stymied by other factors. The author makes a strong case for capacity building of judicial officers, observing that judicial officers who have

not been trained on environmental laws, are prone to issue decisions that detract from the courts' contribution to good environmental governance. Jackton B. Ojwang, uses selected cases to illustrate the difficult balancing act the Kenya courts must make between environmental and community interests versus private economic, or government developmental interests, in making their contribution to sustainable development. Ojwang, previously an eminent constitutional scholar, and now retired justice of the Supreme Court of Kenya as at the time of publishing, seems to have (perhaps understandably) taken a one-sided approach and selected cases 'exemplifying the judicial contribution to the environmental factor in today's social, economic and political settings', whereas there are several instances where this has not been the case. The essay nonetheless offers well-articulated insights into the practical problems facing judges in environmental courts in the socio-economic and political context of a developing country.

Parvez Hassan, an eminent environmental law practitioner and scholar, offers a vision of a radically different judiciary, still in the context of a developing country. Hassan, who has headed a record number of judicial commissions in Pakistan, shares his valuable insights on how the judiciary in Pakistan has deployed this institution as an effective environmental governance tool. His contribution makes for provocative reading, that will rattle the sensibilities of those who hold on to the strict application of the doctrine of separation of powers, whilst rousing those who believe that in the face of 'an apathetic legislature and a weak executive, judicial activism plays a critical role. The following quote from the Chief Justice Syed Mansoor Ali Shah of the Lahore High Court, strikes a chord:

> The fusion of fundamental rights and international environmental law principles resulted in the development of an interdisciplinary and inquisitorial brand of justice, also referred to as environmental justice. The Courts realised that they required skills including environmental science, economics, natural science and technology to adjudicate upon environmental issues. And so, begin the story of commissions. From a mere fact-finding body, the commissions evolved into broad-based fora comprising technical experts, government and members of the civil society to propose sustainable solutions to environmental issues.

Collins Odote, one of the editors of the book and the current director of CASELAP gives a practical and multifaceted introduction to the difficult subject of environmental jurisprudence, conceptualising this novel area and considering what is its true purview and import. Finding that the traditional general jurisprudential ideas are inadequate in explaining the role of law in promoting sustainable development, Odote joins the call for an 'ecological jurisprudence' that recognises the 'interdependence and interconnectedness of the environment internationally', but also incorporates indigenous knowledge and practices.

Robert Kibugi offers a comprehensive appraisal of the current legal, institutional and political context of climate change governance in Kenya. The country has recently put in place a legal and policy framework centred around the mainstreaming of measures aimed at building climate resilience, and enhancing adaptive capacity. The framework adopts an iterative process, to facilitate responsiveness to changes in climate science and

the national context, and is credited for its unique legal tools such as provisions aimed at ensuring empowered public participation. However, Kibugi observes that the country's pursuit of a low carbon climate resilient brand of sustainable development is presently frustrated by 'legal divergence' in the establishment of the climate change funds, and the delays in the formal and lawful appointment of the National Climate Change Council, which is critical to the continued implementation of the governance framework. [The reviewer notes that at the time of writing the Council is yet to be reconstituted].

Robert Alex Wabunoha's contribution on Environmental Law in Africa, seeks to answer the question of how the endowment of natural capital wealth influences the development of environmental laws in Africa. In so doing, the author starts by mapping out the natural resources on which the continent heavily relies on for its development agenda, and how these environmental resources are 'threatened by their usefulness to humanity'. The author, who is the present Africa Regional Coordinator for Environmental Governance at UNEP, looks at continental and regional agreements, and the trends in the development of national laws, and the increasing use of regional courts to enforce environmental rights as some of the responses of environmental law. The author notes the importance of economic agreements, such as the Continental Free Trade Agreement 2018, recognising that 'the environmental pillar of sustainable development underpins the overall survival of the continent', and broaches the subject of the free- trade of environmental goods and services.

Michel Prieur and Mohamed Ali Mekouar report on a pilot study in Francophone Africa that is an important first step in considering the importance of 'science-based legal indicators' to measure the effectiveness of environmental law in Africa. The study was initiated following a 'pioneering' recommendation of the International Symposium of Environmental Law in Africa, and is still in the early experimental phase, but the two distinguished scholars foresee that it will enable the recognition and measurement of effective application of environmental law, and foster better decision-making by policymakers and judges.

In her first of two contributions, Iwona Rummel Bulska, who served in the international law community for decades, in various capacities including as Head Environmental Law at UNEP, gives her retrospective on UNEP's contribution to international environmental law, despite the difficulties posed by nationalist economic interests and the idea of absolute national sovereignty in reaching agreements for the greater global environmental good. While Dan Bondi Ogalla, the former Principal Legal Adviser to the UNFCCC uses the backdrop of the multilateral climate change negotiations from Copenhagen to Paris to convincingly demonstrate the importance of process and procedural issues - primarily 'transparency, inclusiveness, party-*drivenness* and procedural integrity'- in the final outcome. Of particular value in both pieces are their insider insights in the process of international environmental law-making.

Oliver C. Ruppel and Barbara Varekamp, look at the mechanisms provided under international and continental, soft law and hard law instruments to combat illegal wildlife trade in Africa, observing that despite a variety of protective legislation, 'poor governance, corruption and indifference' frustrate enforcement. Hope, it seems, is to be found

in innovative approaches, such as those employed by the organisation Wildlife Justice Commission (WJC), who apply an inventive approach in a bid to 'activate justice' where national authorities fail to take action. The work of the WJC makes evident the value of international collaboration and the involvement of teams of multidisciplinary experts in the tackling of complex environmental concerns.

Several essays are dedicated to the areas of water law, and the law of the sea. FDP Situma, offers a comprehensive analysis of the international law of the sea framework and Kenya's evolving legal and administrative response, which proves a confused mixed bag of harmony and disconnect. Situma cites the maritime delimitation dispute between Kenya and Somalia, currently before the ICJ, as a consequence of this 'situation of confusion' and calls for a repeal and replacement of the problematic Maritime Zones Act. In his chapter, Paul Musili Wambua, carefully illustrates how the traditional distinction between international maritime law (representing the private interest) and the law of the sea (representing the public interest) is blurred to the point of collapse. Looking at three well known cases involving mass loss of human life, marine based pollution and hijacking, and the establishment of the International Maritime Organisation, the author observes the shift of the core considerations of IML from private contractual concerns to public questions of 'maritime safety, security and discharge control'.

Stephen McCaffrey's short chapter on the idea of planetary stewardship of the hydrologic cycle in recognition of the universal dimensions of the water cycle, and to ensure equitable benefits of this vital global resource, is thought-provoking and calls for additional attention to this important subject. Albert Mumma tells the story of water law in Kenya, reviewing the ongoing thirty-year reform process, that recently produced the Water Act, 2016. Philippe Cullet, gives a comparative perspective of the relationship between water law and development, looking primarily at Kenya and India. Both essays show how the regulation of this vital resource is characterised by the proliferation of institutions (fostering conflict and inefficiencies), and a disconnection from the social reality, be it the reality of customary and traditional normative frameworks or the financial and technical constraints inhibiting implementation of the laws. On the pertinent issue of the impact of the constitutional recognition of the right to water, Mumma's relative silence, is perhaps as eloquent as Cullet's conclusion that in the face of the privatisation and commodification, such rights have had no real effect.

Four essays address the practical issues arising from natural resource exploitation and management. Professor Emmanuel Kasimbazi's chapter on mining law and sustainable development is an elegant and elucidative piece, using select examples to demonstrate the elements of sustainable mining, the progress that has been made towards its achievement in Africa, and the efforts that are still required to ensure it does not remain an illusion. Iwona Rummel Bulska and Hilda Mutwiri, bring this discussion to practical application, in their case study of titanium mining in Kwale, which makes evident how issues such as lack of adequate public participation, benefit sharing and equitable realisation of mining proceedings, and the compulsory acquisition of land with questionable compensation, interrogate whether mining can indeed be sustainable. Richard Mulwa's essay 'You are What You Eat: Kenya's Probable Economic Outcomes in Light of Min-

eral Discoveries', stands out for its economic perspective. The chapter introduces the political economy of natural resource management, and illustrates, using the example of Kenya, the difficulties posed by resource rich developing countries in attempting to sustainably exploit natural resources, without suffering the 'resource curse'. The related question of natural resource conflicts management is covered by Kariuki Muigua, who advocates for the use of ADR mechanisms to enhance both access to, and the expeditious delivery of environmental justice.

The final two chapters address emerging issues that have not received much scholarly attention in Africa. John Ouma Mugabe's essay on Science Technology Innovation governance provides great material for a long overdue rethink of the space in Africa, despite seeming to be misplaced in a volume dealing primarily with environmental governance. It also serves as a reminder that the volume is a f*estschrift*, and stands witness to the honouree's broader impact on the African academy. Robert Wabunoha's second contribution, conceptualising a comprehensive sustainable governance framework to address the particular environmental issues concerning mountains, not only provides a useful introduction on the subject, but serves as a fitting close to the *festschrift* with a tribute to the honouree.

The volume fulfils its mandate of celebrating 'Professor Charles Okidi's Enduring Legacy in the Development of Environmental Law'. In itself, it serves as a testament to the honouree's dedication to capacity building, with many of the authors being his students and mentees, as well as beneficiaries or participants in the institutions he founded. The book's substantive content contributes to its fields of knowledge and to the visibility of African scholarship. It would be of interest in particular to scholars, practitioners, policy-makers, and judicial officers interested in environmental matters.

BOOK REVIEW: USING EVIDENCE IN POLICY AND PRACTICE: LESSONS FROM AFRICA

Edited by Ian Goldman and Mine Pabari (Routledge, Oxford and New York 2020)
ISBN. 978-0-367-44007-7

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*Reviewed by Elizabeth Gitari**

I. INTRODUCTION

There have been numerous scholars who have sought to shed light on the issue of evidence-based policy making in Africa. This book, however, offers a fresh look into the subject. The book interrogates the role of evidence in informing policy decisions in Africa and investigates the wins and misses by various governments in this endeavour. Goldman and Pabari start with a stark example of what can go wrong when evidence is not accepted by policy makers and leaders. They use the South African HIV/AIDS fiasco that led to millions of deaths as a result of reluctance by the then South African President to accept evidence that Anti-Retroviral Drugs (ARVs) prolong the lives of persons infected with HIV.

The book is divided into three parts: four introductory chapters; followed by eight chapters presenting case studies; and a final concluding chapter that summarises the book, outlines key assumptions and presents overall recommendations.

The book offers rigorous and analytical insights into evidence informed policy making processes in Africa and outlines a number of recommendations for policy makers across the continent. The authors, thankfully, lay their emphasis on the use of evidence to inform policy as opposed to the generation of evidence to inform policy, setting the scene for an in-depth analysis of factors enabling and hindering evidence uptake by policy makers, and postulating solutions to each of the challenges.

Readers will be pleased to note that the authors have analysed the issues using a rigorous but easily understandable analytical framework. They have outlined a theory of change based on a contextual analysis drawing from two contextual tools: 1) the science of using science framework; and 2) the context matters framework. The chapters are thus quite easily comprehensible as all the chapter authors continuously make reference to the analytical framework making it easy for non-technical readers to not only enjoy the read but also find utility in the book. The case studies directly answer the question "what contributed to use of evidence?[1]" and succinctly outline and effectively describe the various uses of evidence:

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* Environmental Lawyer, The Green Brief

1 I Goldma & M Pabari (2020), *Using Evidence In Policy And Practice Lessons From Africa* Edited By Ian Goldman And Mine Pabari 1st Ed. (Oxford And New York: Routledge, 2020).

a) Instrumental
b) Conceptual
c) Symbolic
d) Positive/negative symbolic
e) Process use
f) Unintended

The authors also offer the reader key insights into the historical evolution of policy through colonial statistics bureaus to present day Monitoring and Evaluation departments. This offers a contextual understanding of the importance of quality supporting ecosystems as enabling factors for the uptake of evidence in policy making.

II. CHAPTER SUMMARY AND REVIEW

Chapter three in the book reviews the M&E culture in Africa using the *Twende Mbele Monitoring and Evaluation Partnership*[2] as a case study. A commendable approach by the authors is the provision of constant distinctions throughout the book to assist non-technical readers with a thorough understanding, an example being the definitions of monitoring (review of how resources invested are used) and evaluation (review of successes or failures of interventions applied).

One of the key highlights in this chapter is the discussion of the role of the ignorance of political leadership as an impediment to mainstreaming an M&E culture in African countries. In reviewing the M&E culture in the study countries, the authors (Langer & Weyrauch, 2020) use the context matters framework by focusing on organisational context. The chapter identifies key elements in this context that impact M&E mainstreaming. These are: the macro context; management and processes; culture; organisational capacity; inter/intra institutional linkages and other reasons.

Case study chapters begin at chapter five by looking at the use of evaluation to inform policy practice, demonstrated by the review of the department of education in the South African Government. The authors, (Pophiwa et al, 2020)[3] set the context of the discussion by highlighting one of the key challenges faced by the newly minted South African Government - creating an effective educational system that is not tainted by the legacy of apartheid. They identify longevity of service of the leadership[4] as a key enabling factor that contributed to the success of the department of education. The chapter clearly demonstrates the various types of use of evidence as well as the lessons learnt. The authors are also keen to draw the reader to the fact that the post-apartheid government started using evidence to drive policy change in the department as soon as two years post-independence, a factor that supported the streamlining of evidence-informed policy making in the department. Despite all the successes outlined in the chapter, it would have been useful to interrogate whether or not the context of new workers in the department (blacks replacing mostly white departmental heads and officers) led to the acceptability of use of evidence to drive policy change/making.

2 An initiative that engages with a variety of national governments who are interested to use M&E to strengthen government performance and accountability to citizens.
3 This chapter is written by Nedson Pophiwa, Carol Nuga Deliwe, Jabulani Mathe and Stephen Taylor.
4 South Africa has had four education ministers in its 27-year history post-independence.

In chapter six, the book interrogates the use of evidence in a complex social programme by using the evaluation of State response to violence against women and children (VAWAC) in South Africa. South Africa has long had a struggle with VAWAC. Mogale et al, 2012 summarises the situation as follows:

> *Human Rights Watch report, 1997 indicated that a total of 50,481 cases of sexual violence were reported in 1996. Of these, 21,863 cases were prosecuted, but only 4,100 led to conviction. More recently, the South African Police Services informed Parliament that between July 2006 and June 2007, a total of 88,784 incidents of "domestic violence," as defined by the 1998 Domestic Violence Act No. 116, were reported. Between April 2006 and March 2007, a total of 52,617 cases of rape were reported, of which 7% were successfully prosecuted (Amnesty International, 2008).*

Against such a backdrop, the authors (Amisi et al, 2020)[5] offer a good example of the different moving parts of policy intervention that are influenced by the different departments and heads. In the case study, VAWAC is a responsibility of both the justice department and the social department. The chapter clearly outlines the challenges that are faced by policy makers and implementers in using evidence where there are different government departments responsible for the effective use of such evidence. The authors effectively explore the demand for evidence as a framework in addressing the issue.

The next case study discussed in chapter seven of the book on the influence of ownership and politics in policy making in public procurement in Uganda, is an interesting reading dealing with a multiplicity of issues.[6] In this chapter, we see an additional thread into how the interests of development partners influence public financial management and policy reforms taken up by governments. The chapter also discusses political will as a key enabler for the sector, and further interrogates the issue of trust and credibility of evidence as an influencer of how and to what extent evidence is used.

Chapter eight, perhaps the most interesting chapter of the book, still draws the reader to the Ugandan context in the discussion of the utility of rapidly responding to policy queries with evidence. The authors[7] here introduce an excellent example of how understanding context has far-reaching implications and has the potential to impact life and death outcomes for policy consumers. The authors demonstrate this by using an example of a case where a drug, misoprostol, was recommended for use to reduce maternal deaths among women who gave birth in their homes. This policy recommendation by the World Health Organisation, was based on evidence that the drug was successfully used to stop post-partum haemorrhage. The rejection of this drug by the end consumers was primarily based on two factors; one, that the government implementing partner was a non-state actor known for advocating for reproductive health rights[8] and second, that consumers knew that the drug was prescribed in many instances where abortion had occurred. The policy being implemented in a conservative community should have

5 *Ibid*.
6 Chapter is authored by Matodzi M. Amisi, Thabani Buthelezi and Siza Magangoe.
7 This chapter is authored by Ismael Kawooya, Isaac Ddumba, Edward Kayongo and Rhona Mijumbi-Deve.
8 Which in the Ugandan context was equated with supporting abortion.

warranted a better contextual understanding of the culture of the intended consumer. Additionally, the availability of evidence played a key role in demonstrating the utility of the policy interventions proposed and allaying any fears that the consumers had. The authors correctly argue that rapid response to policy queries using credible and trusted evidence is a key influencer in the uptake and use of evidence for controversial policy interventions.

This chapter also makes what can be considered one of the core takeaways from the book: that the demand for evidence increases as comprehensive and inclusive consultations increase. In addition to highlighting the critical role of public participation in the policy process, Kawooya *et al*, 2020 underscore the need for junior officers to take policy decisions and thus help in generating evidence at the local level. Additional analysis into how evidence use could be supported in a bottom-up approach would have offered immense utility at this juncture, as questions arise of whether or not the factors considered in the macro level discussions are translocatable to local scenarios.

In chapter nine, Bonaventure Kouakanou *et al* discuss the potential and challenges of evaluations in positively influencing policy reforms, by using the Benin agricultural sector as a case study. Political will and a leadership that appreciates the role of M&E in policy was emphasised in this chapter. The authors made the important assertion that *relevance* of evidence and not just *evidence generation* was a cornerstone in supporting the use of evidence in policy interventions.

Chapter ten in the book explores the theme of public participation as a mechanism for using evidence in policy formulation through a Kenyan case study on the review of the country's Wildlife Act. The authors (Pabari et al, 2020[9]) offer an excellent historical analysis of the legislative review process of the Wildlife Conservation and Management Act, 2013 and a succinct description of how Parliament led the robust engagement of the public. The authors present Parliament as the midwife in the birthing process of a new legislative dispensation for the wildlife sector in the country. The authors elaborately take the reader through the public participation process and the role of the Parliamentary Committee on Environment in convening and leading public participation processes and thereafter collating the views, synthesising them and presenting them for debate in Parliament.

Despite this commendable discussion, the discussion warranted an interrogation of instances where views proposed by a constituency represented in Parliament differed with the elected officials position and how such a situation influenced the uptake of evidence. It would also have been critical to discuss instances where evidence presented through the public participation process faced any challenges in the verification process and whether or not the debate on the floor of Parliament included any rejection of such evidence by the members of parliament.

9 The chapter is authored by Mine Pabari, Yemeserach Tessema, Amina Abdalla, Judi Wakhungu, Ahmed Hassan Odhowa and Ali Kaka.

The authors further highlighted the challenge of misinterpretation of research by divergent stakeholders to support their own policy perspective. Additionally, the chapter opines that the *influence* of local and international interest groups was a barrier to effective public participation. Whereas we understand the underlying apprehension especially in light of earlier discussions in the book about the role and influence of donors, we take a differing approach. Public participation presupposes that government agencies seeking public views are inviting "influence" from the multiplicity of stakeholders in the sector. Recalling the earlier argument from the Ugandan case study on the importance of "relevant" evidence, we argue that one way of achieving that relevance in public participation is collecting views from stakeholders with influence on the subject matter. Thus, the assertion that influential interest groups' participation in the process presents a barrier is challenged.

Laila Smith *et. al*, ably discuss the contribution of civil society generated evidence in chapter eleven. They use a case study of sanitation services in Ghana to demonstrate its importance. They concede that the participation of civil society in generating evidence is not an intentional endeavour but rather an attempt to fill in the gaps left by inept governance systems that offer weak incentives at all levels of government around the use of evidence. It is interesting to note that despite Ghana being the only case study in the book with a stand-alone Ministry of Monitoring and Evaluation, it has the lowest demonstration of generation and use of State led/commissioned evidence for policy making.

Additionally, the intermingled responsibility of various government agencies in the sanitation sector were identified as a key hinderance. The authors present the illustration where the ministry of health engages in hygiene dimensions and illnesses arising from poor hygiene, ministry of education is in charge of public awareness, and the ministry of sanitation and water resources is in charge of latrine construction. The authors buttress the point that partnerships between government and civil society make the uptake of civil society-generated evidence easier to use to inform policy. This however left the unanswered question, whether or not this over-dependence by government on civil society contributed to the government's lack of motivation to fix the ailing parts within it and adequately take up the roles that should ideally be theirs.

Chapter twelve brings to a close the case study reviews. Mane *et al*, 2020[10] discuss the use of evidence for tobacco control in West Africa, taking the ECOWAS region as a case study. They excellently demonstrate the use of evidence to drive policy change on a regional scale and propose the use of action research as the best methodology to achieve this. The chapter would perhaps do with a more in-depth interrogation and discussion about how to overcome strong and well-funded lobby groups that are opposed to the proposed policy interventions.

10 Papa Yona Boubacar Mane, Abdoulaye Diagne and Salifou Tiemtore.

III. CONCLUSION

The rigorous interrogation of factors facilitating and hindering the use of evidence to drive policy by the authors and editors provides extensive learning opportunities for public policy practitioners across the continent. The editors concede that the over-representation of government policy makers in the authorship presents a likelihood of bias, this could however be mitigated in future by including independent authorship and discussion of the same issues in subsequent editions of the book.

One of the conspicuously identifiable gaps that the book reveals, is the all-too-common oversight by authors of Africa-centric books and articles, the exclusion of experiences from the North African/Maghreb region. We concede that historically it has been difficult to access research and analysis on the public policy processes of this region. However, this would be a useful inclusion in subsequent editions of the book and would present an all-rounded analysis for use of evidence to drive policy in Africa.

For policy formulators, implementors and scholars of public policy governance systems, this is an important read. The book offers the reader analysis that is well founded on an extensive bibliography and diversity of authorship.

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