

Commentary on the National Environmental Tribunal Procedure established in Kenya

Introduction

The National Environmental Tribunal Procedure Rules of Kenya consist of seven parts.¹ Part I contains Preliminary information. Part II contains information about Appeals and Referrals to the Tribunal. Part III contains information about “Replies.” Part IV contains information about “Third Parties.” Part V contains information about Hearings. Part VI contains information about “Determination Appeals.” Part VII contains information about Miscellaneous Provisions. “The Kenyan National Environmental Tribunal’s (NET) establishment, operations, composition and modalities of work are defined in the Environment Management and Coordination Act² (hereinafter referred to as the EMCA)³, the Forest Act⁴ and the Tribunal’s Rules of Procedure⁵.” The EMCA came into force in January 2000 and the Forest Act on 1 February 2007. The Tribunal which now draws its jurisdiction from both Acts became jurisdictional in 2002.

Access to the Courts/Standing to Sue

The first issue this commentary will address with respect to this environmental tribunal is how it will increase the population which has standing to sue and whether or not this legislation will enhance access to the courts (and justice). The first clause of Principle 10 of the Rio

¹ *The National Environmental Tribunal Procedure Rules*, Environment & Land Law Reports, <http://www.kenyalaw.org/environment/content/legislation.php> (last visited May 17 2011)

² The Environmental Management and Co-Ordination Act, 1999 No. 8 of 1999, <http://www.nema.go.ke/images/stories/pdf/EMCA.pdf> (last visited May 17 2011)

³ Environmental Management and Coordination Act (EMCA) Act No. 8 of 1999. The tribunal is described in Part 12, Sections 125-131. This reference to the Environmental Management and Coordination Act was cited in Donald Kaniaru, *Environmental Tribunals as a Mechanism for Settling Disputes*, ENVIRONMENTAL POLICY AND LAW, 37/6 (2007).

⁴ Act No. 7/2005 as cited in Donald Kaniaru, *Environmental Tribunals as a Mechanism for Settling Disputes*, ENVIRONMENTAL POLICY AND LAW, 37/6 (2007).

⁵ Legal Notice 191 of 2003 as cited in Donald Kaniaru, *Environmental Tribunals as a Mechanism for Settling Disputes*, ENVIRONMENTAL POLICY AND LAW, 37/6 (2007).

Declaration is that: “Environmental issues are best handled with participation of all concerned citizens, at the relevant level.”⁶

Prior to the implementation of the Environmental Management and Co-ordination Act, 1999,⁷ locus standi⁸ was a major barrier to environmental justice for the Kenyan public.⁹ A key accomplishment of the framework law was lessening the burdensome standard of proving locus standi.¹⁰ Section 3(3) of the Act provides that “any person who alleges that his or her entitlement to a clean and healthy environment is being or is likely to be contravened may apply to the High Court for redress.”¹¹

⁶ Principle 10 of the Rio Declaration on Environment and Development states the following: “Environmental issues are best handled with participation of all concerned citizens, at the relevant level. At the national level, each individual shall have appropriate access to information concerning the environment that is held by public authorities, including information on hazardous materials and activities in their communities, and the opportunity to participate in decision-making processes. States shall facilitate and encourage public awareness and participation by making information widely available. Effective access to judicial and administrative proceedings, including redress and remedy shall be provided.”, Rio Declaration on Environment and Development, <http://www.unep.org/Documents.Multilingual/Default.asp?DocumentID=78&ArticleID=1163> (last visited May 16, 2011)

⁷ The Environmental Management and Co-Ordination Act, 1999 No. 8 of 1999, <http://www.nema.go.ke/images/stories/pdf/EMCA.pdf> (last visited May 17 2011)

⁸ *Locus Standi Law & Legal Definition*, USLEGAL DEFINITIONS, <http://definitions.uslegal.com/l/locus-standi/> (last visited May 17, 2011)

⁹ The well-known case of Wangari Maathai v. Kenya Times Media Trust (Civil Case No. 5403 [High Court of Kenya at Nairobi, Dec. 11, 1989]) exemplifies the barriers to redress by a judiciary when it narrowly applies standing rules in the case of public interest litigation as cited in the *Book Review written by Hannah Cochrane on Environmental Governance in Kenya: Implementing the Framework Law by Charles O. Okidi, Patricia Kameri-Mbote and Migai Akech, Eds. East African Educational Publisher, Ltd 2008* (554 pages), JOURNAL OF COURT INNOVATION 391 (2010), http://www.courts.state.ny.us/court-innovation/Winter-2010/JCI_Winter10a.pdf (last visited May 18 2011)

¹⁰ S. Amos Wako, Foreword to *Environmental Governance in Kenya: Implementing the Framework Law* (Charles Okidi, Patricia Kameri-Mbote & Migai Akech eds., 2008) as cited in the *Book Review written by Hannah Cochrane on Environmental Governance in Kenya: Implementing the Framework Law by Charles O. Okidi, Patricia Kameri-Mbote and Migai Akech, Eds. East African Educational Publisher, Ltd 2008* (554 pages), JOURNAL OF COURT INNOVATION 391 (2010), http://www.courts.state.ny.us/court-innovation/Winter-2010/JCI_Winter10a.pdf (last visited May 18 2011)

¹¹ Environmental Management and Coordination Act (EMCA), No. 8 (1999), Kenya Gazette Supplement No. 3 Pmb1 §3(3) as cited in the *Book Review written by Hannah Cochrane on Environmental Governance in Kenya: Implementing the Framework Law by Charles O. Okidi, Patricia Kameri-Mbote and Migai Akech, Eds. East African Educational Publisher, Ltd 2008* (554 pages), JOURNAL OF COURT INNOVATION 391 (2010), http://www.courts.state.ny.us/court-innovation/Winter-2010/JCI_Winter10a.pdf (last visited May 18 2011)

The issue of standing has been an important aspect of Kenyan jurisprudence generally and with respect to the environment. By far, the most litigated matter in Kenya has been the question of standing. For a long time, the courts adopted an unduly restrictive approach to standing. As we have seen, however, EMCA has since settled the issue.¹² Nevertheless, it is interesting to review how the courts have approached this question.

On the whole, Kenyan courts have adopted a rigid approach to standing. They have insisted on the plaintiff having a personal stake in the matter before the court. Accordingly, they have required the plaintiff to demonstrate that he or she has suffered some concrete injury in order to be granted standing as seen in the case of *Wangari Maathai v. The Kenya Times Media Trust*.¹³ But in cases decided after *Wangari Maathai*, the courts have adopted a more liberal approach to standing, where *KHAMONI, J*,¹⁴ stated that an applicant only needs to demonstrate that he or she has a “sufficient interest” in the matter before the court and comply with the procedural requirements of Order 53 of the Civil Procedure Rules in order to be granted standing.¹⁵ More recently the court¹⁶ stated that “as part of reasonable, fair and just procedure to uphold the constitutional guarantees, the right of access to justice entails a liberal approach to the

¹² This refers to the Environmental Management and Coordination Act of 1999.

¹³ In *Wangari Maathai v. The Kenya Times Media Trust*, , DUGDALE, J., ruled that the applicant has no standing since she had not alleged that “the defendant company [was] in breach of any rights, public or private in relation to the plaintiff nor [had] the company caused damage to her. The citation to this case is [1989] KLR 267 as referenced in *Department for International Development/Kenya Law Reports, Land, the Environment and the Courts in Kenya, Background Paper for The Environment and Land Law Reports* by Dr. J.M. Migai Akech (2006).

¹⁴ This decision was stated in *Republic v. Minister for Information & Broadcasting and Ahmed Jibril, ex parte East African Television Network Limited* as referenced in *Department for International Development/Kenya Law Reports, Land, the Environment and the Courts in Kenya, Background Paper for The Environment and Land Law Reports* by Dr. J.M. Migai Akech (2006).

¹⁵ Nairobi High Court Miscellaneous Civil Application No. 403 of 1998 as referenced in *Department for International Development/Kenya Law Reports, Land, the Environment and the Courts in Kenya, Background Paper for The Environment and Land Law Reports* by Dr. J.M. Migai Akech (2006).

¹⁶ This was stated in the case of *Albert Ruturi and others v. Minister for Finance and Anor* as referenced in *Department for International Development/Kenya Law Reports, Land, the Environment and the Courts in Kenya, Background Paper for The Environment and Land Law Reports* by Dr. J.M. Migai Akech (2006).

question of locus standing.”¹⁷ This liberal approach provides an important instrument for environmental protection, as it enables courts to act to save the environment in cases where government agencies may be reluctant to do so. Indeed, it is keeping with the emerging approach in the Commonwealth, which is to encourage public-spirited individuals and groups to challenge unlawful government action or inaction, even though they are not directly affected.¹⁸

For the avoidance of doubt, however, EMCA has adopted a liberal approach to standing in environmental matters, thereby giving public-spirited individuals a firm foundation from which they can seek to ensure the conservation of the environment.¹⁹ The courts have affirmed EMCA’s liberal approach to standing.²⁰ The courts have also begun to interpret the provisions of the EMCA as they did in the case of *Park View Shopping Arcade Limited v. Charles M.*

¹⁷ [2002] 1 KLR 54 as referenced in *Department for International Development/Kenya Law Reports, Land, the Environment and the Courts in Kenya, Background Paper for The Environment and Land Law Reports* by Dr. J.M. Migai Akech (2006).

¹⁸ J.M. Migai Akech, *Judicial Review of Spending Powers: Should Kenyan Courts Entertain Taxpayers’ Actions?*, 44 JOURNAL OF AFRICAN LAW 195 at 214 (2000) as referenced in *Department for International Development/Kenya Law Reports, Land, the Environment and the Courts in Kenya, Background Paper for The Environment and Land Law Reports* by Dr. J.M. Migai Akech (2006).

¹⁹ See EMCA, §3. as referenced in *Department for International Development/Kenya Law Reports, Land, the Environment and the Courts in Kenya, Background Paper for The Environment and Land Law Reports* by Dr. J.M. Migai Akech (2006).

²⁰ Thus in the case of *Rodgers Muema Nzioka & others v. Tiomin Kenya Limited*, HAYANGA J., stated that in cases where a person seeks to vindicate his or her right to a clean and healthy environment, he or she does not need to demonstrate a right or interest in the land alleged to be invaded. Further, the judge reasoned that the traditional tests for the grant of an injunction established in the seminal case of *Giella v. Cassman Brown* may need to be revised in cases concerning environmental degradation. In particular, he was of the opinion that since environmental degradation affects the public at large, the balance of the convenience test should be applied with a view to considering the convenience of the public as opposed to that of the parties to the suit. Further, he stated that EMCA prevails over the sectoral legislation where there is conflict, on the reasoning that “where the provisions of one statute are so inconsistent with the provisions of a similar but later one, which does not expressly repeal the earlier Act, the courts admit an implied repeal.” Accordingly, he held that EMCA prevailed over the Mining Act. This case was decided in the Mombasa High court and was known as the Civil Suit No. 97 of 2001. This citation and text describing the case can be found in *Department for International Development/Kenya Law Reports, Land, the Environment and the Courts in Kenya, Background Paper for The Environment and Land Law Reports* by Dr. J.M. Migai Akech (2006).

Kangethe.²¹ This case is novel since the court sought to compel the minister responsible to take measures to protect an environmental resource.

Scientific Knowledge

The next inquiry addresses the question of whether the National Environmental Tribunal Procedure Rules for Environmental Cases facilitates the application of environmental science to decision-making.

Part II entitled Appeals and Referrals to Tribunal in the section on “Additional Matters” contains a reference to experts. Specifically, the section states, “The appellant may include in his notice of appeal, or in a separate application to the Tribunal (among other requests), a request that a particular expert, if any, who took part in the disputed decision shall attend the hearing of the appeal and give evidence.”²²

This clause provides for the incorporation of expert testimony where necessary and thus will ensure that science is incorporated into decision-making. The other indication that science will be incorporated into decision-making is an understanding of the composition of the tribunal.

²¹ This concerned the relationship between the constitutional guarantee of private property and the conservation of environmental resources, which in this case was a wetland. After reviewing the powers granted by EMCA to the responsible minister, OJWANG, J., issued an order to the minister to “ensure the conduct of a professional and policy assessment” of the land in question “in accordance with section 42” of EMCA. The citation for this case is Nairobi High Court Civil Suit No. 438 of 2004 as referenced in Department for International *Development/Kenya Law Reports, Land, the Environment and the Courts in Kenya, Background Paper for The Environment and Land Law Reports* by Dr. J.M. Migai Akech (2006).

²² *The National Environmental Tribunal Procedure Rules*, Environment & Land Law Reports, <http://www.kenyalaw.org/environment/content/legislation.php> (last visited May 17 2011)

The EMCA provides for the appointment of a chair and four members and outlines the procedure for nominating each of these by name and appointment by the Minister.²³ The chair is nominated by the Judicial Service Commission, and should be a person qualified to be a judge of the High Court of Kenya. The other two members should be lawyers; one nominated by the Law Society of Kenya and the other a lawyer with professional qualifications in environmental law appointed by the Minister. The two others are persons who have demonstrated exemplary academic competence in the field of environmental management appointed by the Minister.

Effectiveness

The next factor that must be evaluated is the extent to which the legal process protects nature and improves the environment instead of simply determining that one particular party prevails and the other party does not. The fourth clause of Principle 10 of the Rio Declaration states that, “Effective access to judicial and administrative proceedings, including redress and remedy shall be provided.”²⁴

²³ Section 125(2) of the EMCA Environmental Protection Act No. 11 1996 as cited in Donald Kaniaru, *Environmental Tribunals as a Mechanism for Settling Disputes*, *Environmental Policy and Law*, 37/6 (2007). See also Section 125(1)(2) as cited in Donald Kaniaru, *Environmental Tribunals as a Mechanism for Settling Disputes*, *Environmental Policy and Law*, 37/6 (2007).

²⁴ Principle 10 of the Rio Declaration on Environment and Development states the following: “Environmental issues are best handled with participation of all concerned citizens, at the relevant level. At the national level, each individual shall have appropriate access to information concerning the environment that is held by public authorities, including information on hazardous materials and activities in their communities, and the opportunity to participate in decision-making processes. States shall facilitate and encourage public awareness and participation by making information widely available. Effective access to judicial and administrative proceedings, including redress and remedy shall be provided.”, Rio Declaration on Environment and Development, <http://www.unep.org/Documents.Multilingual/Default.asp?DocumentID=78&ArticleID=1163> (last visited May 16, 2011)

In Kenya's case the effectiveness of the tribunal can be measured in some part by its composition. In the Kenyan case, according to Donald Kaniaru,²⁵ the High Court normally would, unhesitatingly, accept the National Environmental Tribunal's (hereinafter referred to as NET) description of facts, on any appeal from a NET ruling given the combination of legal knowledge and environmental management in the five NET members (of whom three are appointed on the basis of their skills in environmental law).²⁶ To further express his point he quotes Dr. Ahmed Nazif, the Egyptian Prime Minister, who, on the occasion of the creation of the Union of Arab Supreme Courts for the Protection of the Environment, stated, "we must enhance awareness of environmental authorities, judges, and the public of the environment so that we can achieve sustainable development. Moreover we need professional training of judges and other legal stakeholders in this matter."²⁷ Adding: "we do not expect the judge to be an expert on environment but we expect that he be aware of the issues relating to the environment".²⁸

Procedural Elements

Procedural issues with respect to the environmental courts and tribunals can be evaluated in a variety of ways. This includes general accessibility, the costs in creating environmental tribunals, the efficiency or lack thereof when multiple states in one country have to create environmental tribunals, the existence of an appellate system, the issue of transparency, the existence of online electronic filing systems to make access to the courts logistically easier, and

²⁵ Mr. Donald Kaniaru is Chairman of the National Environment Tribunal of Kenya and former director of the United Nations Environment Program.

²⁶ Donald Kaniaru, *Environmental Tribunals as a Mechanism for Settling Disputes*, Environmental Policy and Law, 37/6 (2007)

²⁷ Proceedings of the Regional Meeting of the Arab World's Chief Justices, Cairo, November 24-25, 2004, published in 2005 as cited in Donald Kaniaru, *Environmental Tribunals as a Mechanism for Settling Disputes*, Environmental Policy and Law, 37/6 (2007).

²⁸ In Kaniaru's view this would not hurt but only enhance the process as cited in Donald Kaniaru, *Environmental Tribunals as a Mechanism for Settling Disputes*, Environmental Policy and Law, 37/6 (2007).

global transparency as a whole. The second clause of the Rio Declaration is that at the national level, each individual shall have appropriate access to information concerning the environment that is held by public authorities, including information on hazardous activities in their communities and the opportunity to participate in the decision-making process.

Part II of the National Environmental Tribunal Procedure Rules which deal with Appeals and Referrals to the Tribunal states, “Any person who is aggrieved by any determination or decision of the Authority or any of its Committees or officers as specified in the subsections (1) and (2) of section 129 of the Act may appeal to the tribunal in accordance with this rule.”²⁹

The fact that this rule provides that any person aggrieved can appeal demonstrates that Kenya provides broad standing to those who want to appeal environmental decisions. The above quoted right to a clean and healthy environment means any person can proceed straight to the High Court without first appearing before NET on the environmental issue. Appeals through the NET therefore would be facilitative until the law in place is reviewed to a different effect. In one matter, for example the Plaintiff had first gone to the High Court. At that point, the parties, acting by consent, asked the High Court to refer the matter to the Tribunal which then invoked the procedure set forth in EMCA, sections 126(2) and 132. Chairman Kaniaru commended this approach, which should administratively be followed in the Courts. The matter having been heard and sieved through the NET would have the benefit of a review by experts at the NET level before a “final” appeal to the High Court following the procedure outlined in section 130 of EMCA. Had the High Court heard the case in the first instance and a party was dissatisfied, that party could proceed to the Court of Appeal. If such became the way of life, then no party would

²⁹ The National Environmental Tribunal Procedure Rules, Environment & Land Law Reports, <http://www.kenyalaw.org/environment/content/legislation.php> (last visited May 17 2011)

wish to go via the mandate established and provided in EMCA Part XII, which has, as the final appeal, the decision of the High Court.³⁰

Access To Information

The concept of access to information is that whereby the public is given access to information that is being decided by a particular court or jurisdiction. The third clause of Principle 10 of the Rio Declaration is that “States shall facilitate and encourage public awareness and participation by making information widely available. The objective of the Aarhus Convention is that in order to contribute to the protection of the right of every person of present and future generations to live in an environment adequate to his or her health and well-being, each Party shall guarantee the rights of access to information, public-participation in decision making, and access to justice in environmental matters in accordance with the provisions of this Convention.”³¹

In Part VII of the National Environmental Tribunal Procedure, in the section on the recording of proceedings, there is a clause that provides that a verbatim record of every hearing shall be made by the Tribunal, and copies of the transcript thereof shall be circulated to all members of the Tribunal and, on request, to any party to the hearing.

This verbatim record is definitely useful with respect to providing parties with access to information. In addition, cases can be downloaded from the website of the National

³⁰ EMCA Part XII, section 130 (5) as cited in Donald Kaniaru, *Environmental Tribunals as a Mechanism for Settling Disputes, Environmental Policy and Law*, 37/6 (2007).

³¹ Introducing the Aarhus Convention, UNITED NATIONS ECONOMIC COMMISSION OF EUROPE, <http://www.unece.org/env/pp/> (last visited May 16 2011)

Environmental Tribunal.³² This also provides access to information and should serve as an example for other courts which do not already have a mechanism for this in place.

Traditional measures

How does this legislation/tribunal/court address traditional concerns expressed by courts that litigation is costly and wastes time?

Part VII entitled “Miscellaneous Provisions” has a section on Filing Fees. According to this section, “There shall be paid to the Tribunal such filing and other fees, including fees for service by the Tribunal of any notice or process, as shall be prescribed by the Minister. Provided that the Tribunal may, if it considered it to be in the interest of justice, or on the grounds of financial hardship on the part of the appellant waive all or part of the filing fees payable in any appeal.”³³ This provision takes into consideration traditional measures which addressed the maximization of savings.

There is a provision known as “determination appeal” that is discussed in Part VI of the National Environmental Tribunal Procedure. This section provides the following,

“If no reply is received by the Tribunal within twenty one days or such longer time as the Tribunal may allow; or

a. the Authority states in writing that it does not resist the appeal, or in writing withdraws its opposition to the appeal,

³² *Find Case Law*, ENVIRONMENT & LAND LAW REPORTS,
http://www.kenyalaw.org/environment/content/search_cases_index.php?SearchTerm2=National%20Environmental%20Tribunal (last visited May 17 2011)

³³ The National Environmental Tribunal Procedure Rules, Environment & Land Law Reports,
<http://www.kenyalaw.org/environment/content/legislation.php> (last visited May 17 2011)

b. and if there is no other subsisting opposition to that appeal, the Tribunal may determine the appeal on the basis of the notice and grounds of appeal without proceeding to a hearing.”

This can be a time-saving procedure which will ensure that a decision is made in a timely fashion and parties do not have to wait indefinitely to know the outcome of their appeal.

History

A final factor one must consider when analyzing environmental acts creating environmental tribunals is that of the rationale which led to the creation of the environmental tribunal.

Prior to 1999, Kenya did not have a cohesive environmental law system but instead a piecemeal coordination of policies and laws reminiscent of its colonial past. The Environmental Management and Coordination Act sought to remedy this by “providing for the establishment of an appropriate legal and institutional framework for the management of the environment in Kenya”, while recognizing that coordination of the current sectoral and functional laws already on the books leads to better environmental management.³⁴

³⁴ The Environmental Management and Coordination Act (EMCA), No. 8 (1999), Kenya Gazette Supplement No. 3 Pmb1. As cited in *Book Review written by Hannah Cochrane on Environmental Governance in Kenya: Implementing the Framework Law* by Charles O.Okidi, Patricia Kameri-Mbote and Migai Akech, Eds. East African Educational Publisher, Ltd 2008, JOURNAL OF COURT INNOVATION 390 (2010) , http://www.courts.state.ny.us/court-innovation/Winter-2010/JCI_Winter10a.pdf (last visited May 18 2011)