PUBLIC INTEREST LITIGATION DRAFT MANUAL

February 2019

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Preamble

The Preamble of the Constitution of Kenya in acknowledges that the People of Kenya in adopting the Constitution for themselves and for future generation, place the environment as a key pillar of posterity. It states; respectful of the environment, which is our heritage, and determined to sustain it for the benefit of future generations, the constitution is adopted. Further, in the Bill of Rights we have recognized the importance of a clean and healthy environment to the keen extent of dedicating the letter and spirit of the Constitution towards its enforcement and realization. Chapter 5 of the Constitution provides an elaborate environmental protection structure. Parliament has been given the mandate to legislate and has indeed enacted numerous legal instruments among them Environmental Management and Coordination Act No. 8 of 1999 as Amended in 2016 (hereinafter called 'EMCA') that governs the protection and conservation of the environment.

The National Environmental Complaints Committee (hereinafter called 'NECC') is an impartial entity charged with the in-depth investigations of any allegations against any person or entity in respect of the environment in Kenya or on its own motion any suspected case of environmental degradation. Further, Parliament through Section 32 of EMCA mandates NECC to prepare and submit to the Cabinet Secretary periodic reports of its activities. The report shall form part of the annual report on the state of the environment. NECC has a further mandate to conduct Public Interest Litigation on behalf of the citizens and to perform such other functions and exercise such powers as may be assigned to it by the Cabinet Secretary in charge of the environment.

NECC is composed of seven members appointed by the Cabinet Secretary led by a Chairperson being an individual qualified to be appointed as a judge of the High Court of Kenya, a representative from the office of the Attorney-General, a person nominated by the Council of Governors who is the secretary to the Committee, representatives from the Law Society of Kenya and the business community and two other members who are appointed by the Cabinet Secretary for their role in environmental management.

VISION

To be the leading environmental ombudsman in the World / globally
To be a leading environmental ombudsman globally

MISSION

To facilitate access to environmental justice to the public through investigation on environmental degradation, Public Interest Ligation (PIL) and alternative dispute resolution

CORE VALUES

The NECC shall commit to the following core values;

- Practice professional integrity
- Build and maintain team work
- Show transparency and accountability
- Practice equity within and outside the organization
- Commitment to environmental justice

- Commitment to excellence and timely responsiveness;
- Continual learning and staff development, and
- Effective and efficient service delivery

GOALS

In the NECC Strategic Plan 2018 -2023, the institution has identified the following five strategic goals;

Strategic Goal 1: Conduct investigations on environmental degradation complaints and identify appropriate redress
Strategic Goal 2: Inform policy formulation and implementation
Strategic Goal 3: Promote environmental justice
Strategic Goal 4: Enhanced NECC human and institutional capacity
Strategic Goal 5: Scale-up public awareness of environmental justice process and governance

JUSTIFICATION

1. To guide the NECC committee in undertaking the PIL mandate
2. Raise awareness and promote debate on environmental management
3. To improve public order in environmental management

PART 1: NECC MANDATE

1.1 NECC Mandate

Inspired by the Preamble of the Constitution of Kenya 2010 which states "We, the people of Kenya –Respectful of the environment, which is our heritage, and determined to sustain it for the benefit of future generations." NECC is committed to these ideals.

Environment is protected under Chapter 5 and the Comprehensive Chapters touching on the Bill of Rights. The Constitution guarantees the right to a clean and healthy environment at Article 42. This Article further guarantees the right to have the environment protected for posterity through legislation and other measures particularly those contemplated in Article 69 and the right to have obligations relating to the environment fulfilled under Article 70.

Article 69 imposes obligations on the State including but not limited to;

a) ensuring the sustainable exploitation, utilization, management and conservation of the environment and natural resources, and ensure the equitable sharing of the accruing benefits;
b) working to achieve and maintain a tree cover of at least ten per cent of the land area of Kenya;
c) protecting and enhancing intellectual property in, and indigenous knowledge of, biodiversity and the genetic resources of the communities;
d) encouraging public participation in the management, protection and conservation of the environment;
e) protecting genetic resources and biological diversity;
f) establishing systems of environmental impact assessment, environmental audit and monitoring of the environment;
g) eliminating processes and activities that are likely to endanger the environment; and
h) utilizing the environment and natural resources for the benefit of the people of Kenya.

The Constitution of Kenya fundamentally changed the concept of PIL in Kenya. The Constitution makes salient provisions clarify the place of PIL in Kenya today.

Article 22 2(C) (Enforcement of the Bill of Rights) provides as follows:

1. Every person has the right to institute court proceedings claiming that a right or fundamental freedom in the Bill of Rights has been denied, violated or infringed or is threatened; and
2. In addition to a person acting in their own interest, court proceedings under clause (1) may be instituted by:

   (c) A person acting in the public interest; or

Article 258 further provides that every person has the right to institute court proceedings claiming that the Constitution has been contravened or is threatened with contravention and that such proceedings may be instituted by same persons as above.

With regard to environmental protection through PIL, the Constitution has offered adequate grounding:

i. Article 2(5) states that the general rules of international law shall form part of the law of Kenya. For the purposes of protection of the environment several principles of international environmental law which act as a guide on development of environmental legislation have been identified. Among the said principles are;

- Sovereignty over Natural Resources
- Obligation Not to Cause Damage
- Principles of Preventive Action and Precaution
- Polluter Pays Principle and Equitable Sharing of Cost
- Equitable Utilization
- Common but Differentiated Responsibilities
- The polluter pays principle;
- principle of sustainability;
- principle of inter & intra- generational equity;
- principle of public participation;

ii. The principle of sustainable development is entrenched in Article 10 2(d) as one of the National values and principles of governance, Articles 60, 66, 67, 68, 69 & 70 of the Constitution insisting on Sustainable Development and Management of Environment and Natural Resource to ensure a sustainable Environment for current and future Generations;

iii. Article (69) (2) imposes obligations on every person, to cooperate with state organs and other persons to protect and conserve the environment and ensure ecologically sustainable development and use of natural resources;

iv. Article 70 provides an avenue for redress for any person who alleges that the right to a clean and healthy environment has been is being or is likely to be denied, violated, infringed or threatened. The Court is empowered to issue preventive or compensatory orders;

v. Article 70 relaxes the rule on *locus standi* as a result of which, there is no need to prove loss or injury by an applicant. Anyone may institute a claim seeking to enforce the environmental rights and obligations stipulated in the Constitution; and

vi. Enforcement contemplated by Article 70 will be done through the Environment and Land Court established under Article 162 (2) (b). The Court has the same status as the High Court.

According to Section 32 of EMCA, the mandate of the NECC is:-

(a) to investigate:-

(i) any allegations or complaints against any person or against the Authority in relation to the condition of the environment in Kenya;

ii) on its own motion, any suspected case of environmental degradation, and to make a report of its findings together with its recommendations thereon to the Cabinet Secretary;

(b) to prepare and submit to the Cabinet Secretary, periodic reports of its activities which report shall form part of the annual report on the state of the environment under Section 9(3);

(bb) undertake public interest litigation on behalf of the citizens in environmental matters; and

(c) to perform such other functions and exercise such powers as may be assigned to it by the Cabinet Secretary.

1.2 Legal Framework

NECC is established under Section 32 of EMCA. Pursuant to its mandate, NECC adheres to the provisions of the legal framework touching on environmental matters which include;

1. Water Act, 2016,
2. Environment and Land Court Act, 2012,
3. Environment Policy, 2014,
4. Forest Conservation and Management Act, 2016,
5. Mining Act, 2016,
6. Land Act, 2012,
7. Physical Planning Act, 2017,
8. Wildlife Management and Conservation Act, 2016,
9. County Governments Act, 2012,
10. Agriculture Fisheries and Food Authority Act, 2013,
11. Maritime Act, Revised Edition 2012 [2006],
12. Public Health Act, Cap 242,
13. Climate Change Act, 2016,
14. Energy Act, 2006,
15. International Treaties and Conventions, and
16. Any other enabling legal provision.

PART 2: UNDERSTANDING ENVIRONMENTAL PIL

2.1 Introduction

Public Interest Litigation refers to strategic litigation that positions law as a tool of advancing human rights and equality, or raising issues of broad public concern. It helps advance the cause of minority or disadvantaged groups and individuals. It is most commonly used to challenge the decisions of public authorities extensively through judicial review

The term PIL has two component parts, (i) public interest and (ii) litigation which must be understood to unravel the concept of PIL. What constitutes public interest consists of two words that trace their origin in Latin. 'Public' (*publicus*) which means having to do with the affairs of all people as opposed to a private group. Interest (*interessee*) which refers to the people in general regardless of membership of any particular group. The term is used in reference to a right, title claim or some share in property. Therefore to say that an activity is done in public interest is an affirmation that the general welfare and rights of the public that are to be recognized, protected and advanced have been addressed. Public good or public interest is that which is for a larger community as opposed to individual.

With specific reference to environmental public interest litigation, this deals with litigation on environmental matters where rights of individuals or communities have been infringed or are likely to be infringed upon. This involves cases of poor land use practices, pollution, waste management, water abstraction, Environmental Impact Assessment (hereinafter called 'EIA') and licensing among others novice areas such as noise pollution, technological intrusion, aspects of Traditional Environmental heritage loss etc. It is meant to prevent, mitigate, remedy or compensate for harm done to the environment and the affected persons. Environmental PIL is therefore strategic litigation aimed at protecting the environment and upholding the overriding public interest. .The strategy is informed by the need to secure public environmental interests, or to protect the public environment from damage and continued damage, or to recover and make up environment which has been damaged.

Environmental PIL reflects the very essence of democracy; it gives the public a right of action to safeguard the community and public interest, which is the development direction of modern legal society. It is theoretically housed within the principle of public participation and due diligence by duty bearers. It is noteworthy that compared to other avenues of public participation, judicial proceedings are the most effective and direct means of securing rights and compliance. Litigation has proven to hold great significance for environmental activism promotion of accountability among state and non-state actors. Environmental PIL does not only play a relief role to remedy harm which has already occurred, but also as a mean of abating imminent damage and restoration of the environment.

2.2 History of Environmental PIL

The term PIL originated in the United States in the mid-1980s. The phrase public law litigation was first prominently used by American academic Abram Chayes. It essentially described the practice of lawyers or public spirited individuals who sought to precipitate social change through judicial decrees that reformed legal rules, enforced existing laws and articulated public norms. For distinction purposes it should be noted at the outset that PIL, at least as it had developed, is different from class action or group litigation. Whereas the latter is driven primarily by efficiency considerations, the PIL is concerned with providing access to justice to all of society's constituents.

Other observers however, point to the existence of PIL as far back as the 1700s when it was used to expose the evil of slavery in England. Judges in England also occasionally directed lawyers to act for the indigent, an element of contemporary PIL. While the roots of PIL remain contested, what is clear is that the late 1960s and 1970s witnessed an increasing number of American lawyers getting involved in PIL work at a time when the country grappled with pressing political and social issues, among them the struggle for civil rights, the anti-war movement and the debate over abortion.

The history of PIL in Kenya is a very short one. Before the promulgation of the Constitution of Kenya 2010, the state was by definition the embodiment of the public interest and as a result law and politics were tightly connected but controlled. The articulation of an alternative view or an Non-Governmental Organisation (hereinafter called 'NGO') perspective of PIL pursued through legal means was nonexistent. Even if this was possible the courts lacked the independence to nurture or vindicate such a vision. PIL was hard if not impossible to sustain because of the rules on standing. For example, in *Wangari Maathai v. Kenya Times Media Trust Ltd (1989) eKLR.*[1] In this case Maathai sued the government of Kenya alleging breach of local government laws and brought a representative suit on behalf of the public. The court held that she did not have the legal standing (locus standi) to bring a representative suit on behalf of the public. Under the then Constitution only the Attorney General could institute suits on behalf of the public.

Similarly in *El-Busaidy v. Commissioner of Lands and 2 others (2002), eKLR*,[2] the court maintained that in matters of PIL only the Attorney General can litigate up on them. The process of transforming the law, judicial culture and systems as hallmarks of dictatorial governance was partly fueled by PIL. History shows that the Kenyan courts have at various times served as a critical platform for the political mobilization of disadvantaged people to demand justice. There has been a history of individual Kenyan lawyers and civil society organizations launching PIL actions as part of broader struggles, to draw attention to the underlying structural issues that result in injustice, inequality and poverty.

[1] http://kenyalaw.org/caselaw/cases/view/53011 (last accessed 9 November, 2018)
[2] http://kenyalaw.org/caselaw/cases/view/53143 (last accessed 9 November, 2018)

In general, PIL cases deal with major environmental and social grievances. They are often used strategically as part of a wider campaign on behalf of disadvantaged and vulnerable groups in society. Where individuals, groups and communities do not have the necessary resources to commence litigation, PIL provides an opportunity for using the law to promote social and economic justice. PIL cases are often concerned with preventing the exploitation of human, natural and economic resources.

2.3 Environmental PIL in Kenya

Public interest litigation to prevent, mitigate, remedy or compensate for harm done to the environment has grown since the early 1970s when it began.

In Kenya, Environmental PIL began by Wangari Maathai (the Nobel Laureate),[3] testing this by filing a suit in the High Court in an attempt to protect public land on which construction of a private property was to be made. Although the suit failed for lack of *locus standi*,[4] it formed a basis upon which PIL would thrive for the future. Upon the promulgation of the Constitution of Kenya in 2010 one of its key reforms was the expansion of doctrine of *locus standi* and the removal of previous challenges that inhibited access to justice for the poor and marginalized persons in society.

Ultimately, Locus has been sufficiently given life and expanded to remove the shackles limiting locus by removing procedural technicalities while observing rules of natural justice and alluding to the very fact that "**every person**" has a right to institute court proceedings claiming that a right or fundamental freedom in the bill of Rights has been denied, violated or infringed, or is threatened.[5]

Our Kenyan Experience resonates very well with mainstream conception PIL, as **Mativo. J** opined thus "According to Black's Law Dictionary[40] "Public Interest Litigation means a legal action initiated in a court of law for the enforcement of public interest or general interest in which the public or class of the community have pecuniary interest or some interest by which their legal rights or liabilities are affected.[6]

2.4 Emerging concepts

Counties are emerging as key units of governance in Kenya and are the new avenue for public service delivery, resource allocations and the realization of human rights, particularly social rights. As can be expected with the introduction of an overhaul of a system of governance, there will be challenges over the interpretation of the powers and functions of counties, how they use public resources and how they deal with diversity, among others. PIL actions can play a critical

[3] https://www.nobelprize.org/prizes/peace/2004/maathai/biographical/ (last accessed 9 November 2018)
[4] http://kenyalaw.org/caselaw/cases/view/53011 (last accessed 9 November, 2018)
[5] Article 22 1, 2 & 3(d) on Enforcement of Bill of Rights.
[6] Brian Asin & 2 others v Wafula W. Chebukati & 9 others [2017] eKLR

role in helping citizens to shape the process of establishing county governments, as well as informing their priorities and processes in ways that ensure they work efficiently, effectively and have some transformative value for people's lives.

Another frontier for PIL action relates to the potential of Kenya's newly discovered mineral, water, and energy resources to improve the quality of life for more people. This is because all these activities are extractive in nature and the chance of resultant environmental degradation is high. For instance the oil exploration and drilling results in disruption of wildlife, agriculture, community pastures, traditional habitats, water sources, human health, recreation and other purposes for which public lands were set aside for.[7] Increased vehicle traffic at oil drilling sites contributes significantly to noise pollution in such areas.

As new discoveries continue to be made, attracting increasing attention from global mining and energy interests, there is the risk that these new-found resources may be exploited in ways that disadvantage local communities - for instance by causing their displacement from ancestral lands, changing environment sanctuaries and affecting natural biodiversity. Where government policies and institutions do not adequately offer protection, PIL will become an important option for these communities to effectively bargain with government and corporations to safeguard their interests and address emerging issues and areas of environmental conservation, protection and compensation if necessary.

2.4.1 Recent legislation and environmental cases, e.g. climate change, ban on plastics, moratorium on logging

Kenya has seen the enactment of new legislation in relation to the environment and natural resources. These acts of parliament are aimed at better resource utilization, sustainability, protection, conservation and management of natural resources which are finite in nature: water, wildlife, forests, minerals, oil and gas among others. The laws include Forest Management and Conservation Act, Mining Act, Wildlife Management and Conservation Act, Water Act as well as the revision of the Environment Management and Coordination Act. The Ministry of Environment and Forestry is also in the process of developing a National Sustainable Waste Management Act and Policy,[8] to address the issues surrounding waste management in the country. This is important because poor waste management affects the utilization of the existing natural resources. The main objective of the act is to promote sustainable waste management as an income generating venture by improving waste valorization through the promotion of resource recovery from materials and energy generation, and processing activities aimed at reusing, recycling, or composting waste materials into useful products.

[7] https://www.wilderness.org/articles/article/7-ways-oil-and-gas-drilling-bad-environment (last accessed 9 November, 2018)

[8] http://www.environment.go.ke/wp-content/uploads/2018/09/2018-NATIONAL-WASTE-MANAGEMENT-BILL-Sept-20-2018-draft-read-only.pdf (last accessed 9 November 2018)

In addition to the new legislation, environmental policy in the country has been shaped by current events. For instance, the ministry of environment banned the use and sell of single use plastic bags in Kenya in August 2017. This move was informed by the menace that the plastic bags had caused to the environment; blockage of drainage channels, littering affecting the aesthetic value, ingestion by animals, lack of decomposition affecting soil productivity, burning leading to release of toxic gases to the environment among others. Since the ban, waste management across the country has drastically improved.

Another event that has shaped policy is the 90-day moratorium imposed on timber harvesting in all public and community forests in the country.[9] This was to allow reassessment and rationalization of the entire forest sector. The ban was extended for 6 more months after the findings and recommendations of a task force appointed through Gazette Notice No. 1938 Vol.CXX-No.28 dated 26 February 2018,[10] to look into the forest resources management and logging activities in Kenya. Deforestation, degradation and encroachment of water towers and other catchment areas, uncontrolled human activities including wanton logging have threatened and undermined the country's capability to ensure food security. This situation poses a threat to the achievement of the Big Four agenda items.[11]

[9] Taskforce Report on Forest Resources Management and Logging Activities in Kenya, Ministry of Environment and Foresty, 2018. http://www.environment.go.ke/wp-content/uploads/2018/08/Forest-Report.pdf (last accessed 9 November, 2018)

[10] http://kenyalaw.org/kenya_gazette/gazette/volume/MTY2OA--/Vol.CXX-No.28 (last accessed 9 November, 2018)

[11] http://www.president.go.ke/ (last accessed 9 November, 2018)

PART 3: STRATEGIES FOR EFFECTIVE ENVIRONMENTAL PIL

3.1 Introduction

Kenyan courts relied on the English tradition rule on standing to determine who could sue for a long time. The English rule barred private individuals from litigating the rights of the public in courts. The English rule of standing was elaborated in such cases as **Gouriet vs Union of Post Office Workers and Others [1977] 3 All ER 70.**[12] In that case, the court wrote: "It can be properly said to be a fundamental principle of English law that private rights can be asserted by individuals, but, that public rights can only be asserted by the Attorney General as representing the public. In terms of constitutional law, the rights of the public are vested in the Crown, and the Attorney General enforces them as an officer of the Crown. And just as the Attorney-General has in general no power to interfere with the assertion of private rights, so in general no private person has a right of representing the public in the assertion of public rights. If he tries to do so his action can be struck out."

However, later on some Kenyan judges attempted to deviate from this English rule, allowing for a more relaxed rule of standing, where one could still sue even though he or she could not show that he or she had suffered more harm than the general public. For example in **Albert Ruturi, J. K. Wanywela & Kenya Bankers Association vs The Minister of Finance & The Attorney-General and Central Bank of Kenya ([2001] 1 EA. 253 Nairobi High Court Misc. Civil Application No.908 of 2001)** two judges of the High Court, sitting as a Constitutional Court, held that one could sustain a public interest suit if the person established "a minimal personal interest", even in a case where the person could not show that he or she was more affected than any other member of the public.

Gouriet v. Union of Post Office Workers and Others [1977] 3 All ER 70 at p. 80. Fortunately for public interest litigators and the public-at-large, the Constitution has now largely settled issues relating to standing, especially on matters relating to human rights specifically Article 22 (1) which provides that ;

"Every person has the right to institute court proceedings claiming that a right or fundamental freedom in the Bill of rights has been denied, violated, or infringed, or is threatened"

2. "In addition to a person acting in their own interest, court proceedings under clause (1) may be instituted by-

a) a person acting on behalf of another person who cannot act in their own name;

[12] http://picat.online/wp-content/uploads/2016/09/Gouriet-v-Union-of-Post-Office-Workers-1977-1-AllER-696-CA.pdf (last accessed 9 November, 2018)

b) a person acting as a member of, or in the interest of, a group or class of persons;

c) a person acting in the public interest;

d) an association acting in the interest of one or more of its members."

Under Article 258 of the Constitution entitles every person the right to institute court proceedings, claiming that the constitution has been contravened, or is threatened with contravention. Both articles allow persons with or without direct interest in a matter to approach the courts. Each provides that "**every person has the right to institute court proceedings, claiming that this Constitution has been contravened, or is threatened with contravention**". Initiating a PIL action on the basis of individual standing is envisioned in Articles 22(1) and 258(1), which grant a person who is directly affected by an action to institute proceedings against the perceived perpetrators. Individuals approaching the courts on the basis of individual standing must be prepared to demonstrate their "personal interest" in the relevant matter. Articles 22(2c) and 258(2c) allow Kenyans to institute court proceedings based on public interest.

However, the Constitution does not define the idea of 'public interest'. Instead, those invoking these articles need themselves to demonstrate why their action qualifies as a public interest matter, and ultimately, the courts will determine what constitutes the public interest on a case-by-case basis.

3.2 Assessing the potential of environmental PIL action

PIL efforts can be counterproductive if not well planned for especially where an action results in a decision that is likely not to be implemented. This in turn inhibits what is to be gained through litigation as well as erodes confidence in the law as an effective tool for change. It is therefore prudent for NECC to have a checklist for assessing the potential of an environmental PIL action as such below;

a) From the investigated complaints, is there a clear public interest dimension in the case
b) What available forum would be most favorably inclined to the case; NECC, NET, ELC?
c) Can the case elicit public reaction e.g. sympathy, interest?
d) Is it the right time to launch the case? Do the right conditions exist for success?
e) Is the litigation timeline consistent with the achievement of the overall goal, or are other approaches more appropriate like ADR?
f) Can the case cause positive change in the policy, legal and socio-economic environments?

To achieve a positive outcome, NECC therefore needs to evaluate each case and determine a threshold for likelihood of success. As such, a number of considerations ought to inform the optimal chances of success.

3.3 Case preparation plan

A public interest representative shall have the interest of the party he is representing as the yardstick and shall at all times in the course of trial and after uphold to the interest of the client. This shall be achieved with the direction of the following guidelines.

a) Identify the cause of action as one of public interest.
b) Identify the right party with relevant knowledge in the field.
c) Identify the right expert and seek advice before filing of the suit on expertise knowledge.
d) Asses the security and safety of the witnesses before trial, during trial and after trial.
e) Assess if there are conflicting issues between the client and other stakeholders likely to affect the free trial of the suit.

3.3.1 Set specific goals

In PIL suits, there must be the objective that is sought. Its achievement is the guideline for filing of the PIL and generally it is a suit in which the intended outcome will affect a mass of people or an area.

Therefore, there must be clear and unambiguous objective sought to be achieved which objective informs the creation of law and policy or in the alternative results in the abating of an infringement for the greater good. Identify the area of jurisprudence to be addressed and maintain the objective as an end in itself.

3.3.2 Research

Factual Research

- Compilation of received complaints
- Collection of facts through witness interviews
- Taking of photos
- Collection of real evidence (samples)
- Collection of maps
- Partnering with other stakeholders
- Looking for any previous reports
- Seeking more information on academic publications
- Identification of offenders
- Interviewing experts
- Interviewing victims

Legal Research

- Applicable Kenyan laws
- Applicable International laws
- Relevant Kenyan case laws
- Applicable International case laws

- Identifying the course of action/redress
- Identifying the right place to lodge a case

3.3.3 Assessment (PIL OR ADR) statutory notice

The traditional function of a lawsuit is to settle disputes between private parties about private rights. The development of jurisprudence for private rights in the form of public rights has given rise to public litigation. For which purpose the settling private dispute for any person, party and or group of persons can now be sought even without the consent of the group of persons.

The constitution of Kenya 2010 at Article 70 provides that any person whose right has been threatened and or is about to be threatened shall have right to seek redress from the courts to avert the intended violation of the right.

Emphasis has been given to the class of environmental disputes where the courts have applied the no locus requirement for any party to file a suit if the party is able to demonstrate that there is a violation of environmental right and or there is a likely violation of environmental right of any person, group of person and the party himself.[13]

In assessing a case for PIL, one shall be required to consider the following underlying factors;

a. Checklist for assessing the case as fit for PIL
   i. Is there a clear public interest dimension in the suit?
      Whenever a case will appear for any alleged and or likely environmental violation, what will come to one's mind will be whether there is a violation. Further, whether the said violation public in nature that is to say involving a mass of persons and that the nature of relief sought is of general public interest. At times and going by the current development in legal jurisprudence, the nature of relief will appear private that seeks to address general dispute. The applicant must address itself to the larger picture of the orders or relief sought to the effect that it shall be for the general good since otherwise no consent is sought from the parties who are likely to be beneficiaries.

   ii. Will the outcome result in legal, policy and socio- economic change in environmental jurisprudence?
      The end result should be public good. That effectively the legal framework existing either constitutionally or in statute books will morph on account of the PIL. The resulting relief will be used to inform policy formulation and eventually formulation of the law.

[13] Antony ***Oposa clasica case on right of unborn children to the use of forest https://www.ciel.org/about-us/2008-international-environmental-law-award-recipient-antonio-a-oposa-jr/*** (last accessed 9 November 2018)

iii. Will the case elicit public interest jurisprudence?
Environmental protection as enshrined under the doctrine of inter-generational and intra-generation equity is forward looking. The desire is to evoke debate, policy and statutory interest that will likely shape jurisprudence. The question is, what do we want to advance within the tenets of environmental law?

iv. Has the issue been settled in other forum of judicial redress?
Many a times, the purpose of PIL is to move the court to interpret, apply and give guidance on the law. The result sough being smoking out the violation complained of an issuing redress.

v. What is the philosophical orientation/ideological orientation of the current judiciary or specific judicial officer?

vi. Which forum will best offer redress?

In PIL, there is need to assess the best forum available for seeking redress.

The constitutional and human rights division of the High Court of Kenya and the Environment and Land Court Division (hereinafter called 'ELC') have concurrent yet differentiated jurisdiction in respect of constitutional environmental violations.[14] Further, the National Environment tribunal has jurisdiction to entertain environmental dispute and any aggrieved party can appeal to the ELC as a final appeal as provided for under the EMCA and ELC Act 2012.

Effectively, upon adopting a PIL matter one must assess, in light of the redress sought, the most appropriate forum where the matter ought to be instituted.

3.3.4 Consultation and cross-reference (develop standard notice to CS/AG)

The NECC is a committee under the Ministry of Environment and Forestry. Pursuant to Article 156 of the Constitution of Kenya and in keeping with the Office of the Attorney General Act, the Attorney General is the government's legal representative in all civil suits filed against the government and any suit to be filed by the government, shall be filed by the Attorney General.

Whenever there is allegation of violation of the environment, the NECC undertake investigations on its own motion or on a complaint by a member of the public and to make a report of its findings together with its recommendations thereon to the Cabinet Secretary in Charge of Environment.

[14] **Patrick Musimba v National Land Commission & 4 others [2016] eKLR http://kenyalaw.org/caselaw/cases/view/120478/ (last accessed 9 November 2018) and Mohamed Ali Baadi and others v Attorney General & 11 others[2018] eKLR http://kenyalaw.org/caselaw/cases/view/156405/ (last accessed 9 November 2018)**

The committee then can commence public interest litigation on behalf of the citizens in respect of this finding.

In furtherance of Alternative forms of dispute resolution, the committee may undertake alternative measures such as service of notice to:

a. prevent environmental degradation or pollution.
b. to stop the offending acts.
c. to restore the healthy environment.
d. to engage the affected community through arbitration or remedial compensation.
e. educate and create awareness on better environment management and environmental civic awareness.

3.3.5 Building of PIL consortium

Capacity building

Also known as **capacity development** and is the process by which individuals and organizations obtain, improve, and retain the skills, knowledge, tools, equipment and other resources needed to do their jobs competently or to a greater capacity(larger scale, larger audience, larger impact). Capacity building schemes are required for lawyers to increase their litigation and advocacy skills in the domain, as well as encouraging them to embrace the idea of strategic interest litigation. Capacity building should not only be limited to NECC but the community as well.

Aims and principles of capacity building for the environment

Capacity building is a multi-faceted, systematic process owned and driven by the organization in which it is based.

The objectives are:

- to promote sound environmental considerations and criteria in the development process.
- to strengthen institutional pluralism.

This process should[15]:

- integrate environment and development concerns.
- take environmental issues fully into account in all aspects and levels of development and implementation.
- seek to develop appropriate approaches to include all disadvantaged groups in society.
- use a variety of management techniques, analytical tools, incentives and organizational structures in order to achieve a given policy objective.
- involve the affected and interested public in all aspects of the process.

[15]OECD, 1997

- enhance coordination among government agencies.

Community sensitization and capacity building, arguably one of the most important impacts of public interest litigation, is the opportunity to engage with communities about their rights and the obligations of the state. Organizations that engage in public interest litigation already have a strong community sensitization and empowerment capacities, and these skills must be deployed throughout the litigation process. Communities that are directly impacted by the litigation need to play an active part in the process. Rights-based education should be a part of any public interest litigation process. Educating NECC members and communities about their rights from the outset will ensure that communities have the knowledge to effectively participate in strategy decisions.

In addition, it is important to provide NECC and communities with skills to maintain cohesion and resilience through the process. In some instances, PIL may subject NECC to negative publicity, political backlash, misinformation, harassment, and other attacks designed to undermine cohesion and commitment to the issue. It would be therefore prudent to ensure that NECC and communities have strong support networks, as well as capacity to counter misinformation and rumors, to disseminate accurate information, and to provide urgent support to those in need, help communities grow and become more empowered through the litigation process.

Communities must be active participants throughout the litigation decision making process. At the end of the day, it is them to live with the results of the litigation. Accordingly, they must have an active role in the decision-making that directly impacts them. The meaningful participation of those affected by a problem is considered a fundamental right in itself. Participation helps increase accountability, brings the knowledge of those experiencing the problem into the process, and can help to address power imbalances. Meaningful participation is generally understood to mean that the participants have a degree of real decision-making and control in the process

Building of PIL consortium

It is necessary for NECC to establish a consortium that will be required to handle public interest litigation matters in relation to the environment. The consortium can come in as experts during the litigation process where it is deemed necessary.

Prudence always dictates that selecting the best partners to complement the work and efforts of Defenders of PIL would then require partnerships that last. This may be achieved by working in larger groups focused on similar outcomes.

A consortium would allow more PIL groups to combine their capabilities when developing a case study, choosing appropriate fora and parties including the financial aspect of pooling together to ease the burden on one group . The primary driver of a consortium approach is that it

allows for greater economies of scale, efficiency and effectiveness. A consortium can be made up of delivery partners from different industry sectors and this offers a great source of competitive advantage.

This groupings come with various expert skills that may resonate with evidentiary collection and the viability of key PIL defenders on Environmental Protection who would be instrumental in prosecuting such cases.

A practical aspect of collecting empirical evidence would require specialised skills and expertise which would assure that a suit would have reliable cogent and credible evidence to sustain it in a competent court i.e. establishing Placebo controls in water catchment areas to demonstrate effects of Environmental damage.

Specific key players.

***Survey of Kenya*.**

This department implements the Government's policy of sustainable exploitation of land and its natural resources. It is composed of five divisions namely;

- Geodetic and Geographical Information System (GIS Mapping
- Administration
- Cadastral
- Land Adjudication
- Hydrographic

The functions of the department include;

- Establishing and maintaining a national geodetic control network that covers the whole country to facilitate other surveys and research.
- To produce and maintain plans of property boundaries in support of land registration and to ensure guarantee and security of land tenure.
- To produce and continuously update national topographical basic maps for the whole country at various scales for development planning and for production of other maps.

Other functions are;

- To inspect and maintain national and international boundaries.
- To prepare and publish the National Atlas of Kenya, as a documentation of National Heritage and promotion of Nation's identity.

It is also tasked with carrying out hydrographic surveys for safe navigation, exploration and exploitation of natural resources of rivers, lakes, seas and oceans, calibrating and maintaining survey equipment in order to ensure correct measurements, providing quality control and

assurance of geographical data produced by other organizations and establishing and maintaining National Spatial Data Infrastructure (N.S.D.I). These functions are carried out within the provisions of the Survey Act (Cap 299) of the Laws of Kenya.

National Land Commission.

National Land Commission derives its mandate from the Constitution of Kenya 2010, the National Land Policy (2009) and acts of Parliament, namely the National Land Commission (NLC) Act, the Land Act and the Land Registration Act, all of 2012. The broad mandate of the National Land Commission can be categorized as provided for in the Constitution:

1. Manage Public land on behalf of the national and county governments, 67(2) a;

2. Recommend a National Land Policy to the national government, 67(2) b;

3. Advise the national government on a comprehensive program for the registration of title in land throughout Kenya, 67(2) c;

4. Conduct research related to land and the use of natural resources, and make recommendations to appropriate authorities, 67(2) d;

5. Initiate investigations, on its own initiative or on a complaint, into present or historical land injustices, and recommend appropriate redress, 67(2) e;

6. Encourage the application of traditional dispute resolution mechanisms in land conflicts, 67(2) f;

7. Assess tax on land and premiums on immovable property in any area designated by law, 67(2) g;

8. Monitor and have oversight responsibilities over Land Use Planning throughout the country, 67(2) h; and,

9. Perform any other functions prescribed by national legislation. 67(3)

Powers and functions

In line with the NLC's Act, 2012, the Commission is obligated to exercise all the powers necessary for the execution of its functions under the Constitution, the NLC Act 2012 and any other written law. This translates into exercising its powers in a variety of ways like:

1. Without prejudice to the generality of subsection (1), the Commission shall have powers to;

- Gather, by such means as it considers appropriate, any relevant information including requisition of reports, records, documents or any information from any source, including any State organ, and to compel the production of such information where it considers necessary;

- Hold inquiries for the purposes of performing its functions under the NLC Act;

- Take any measures it considers necessary to ensure compliance with the principles of land policy set out in Article 60 (1) of the Constitution as depicted in box 1 below. These principles continue to guide the work of the Commission.

NECC needs to work in harmony with the NLC while conducting due diligence on ownership of properties which will assist in identification of Parties to a suit or to be addressed while seeking Alternative Dispute Resolution.

***National Environment Management Authority*.**

The Authority core functions are:

- Coordinating the various environmental management activities being undertaken by the lead agencies.

- Promote the integration of environmental considerations into development policies, plans, programs and projects, with a view to ensuring the proper management and rational utilization of environmental resources, on sustainable yield basis, for the improvement of the quality of human life in Kenya.

- To take stock of the natural resources in Kenya and their utilization and conservation.

- To establish and review land use guidelines.

- Examine land use patterns to determine their impact on the quality and quantity of natural resources.

- Carry out surveys, which will assist in the proper management and conservation of the environment.

- Advise the Government on legislative and other measures for the management of the environment or the implementation of relevant international conventions, treaties and agreements.

- Advise the Government on regional and international conventions, treaties and agreements to which Kenya should be a party and follow up the implementation of such agreements.

- Undertake and coordinate research, investigation and surveys, collect, collate and disseminate information on the findings of such research, investigations or surveys.

- Mobilize and monitor the use of financial and human resources for environmental management.

- Identify projects and programs for which environmental audit or environmental monitoring must be conducted under this Act.

- Initiate and evolve procedures and safeguards for the prevention of accidents, which may cause environmental degradation and evolve remedial measures where accidents occur e.g. floods, landslides and oil spills.

- Monitor and assess activities, including activities being carried out by relevant lead agencies, in order to ensure that the environment is not degraded by such activities. Management objectives must be adhered to and adequate early warning on impending environmental emergencies is given.

- Undertake, in cooperation with relevant lead agencies, programs intended to enhance environmental education and public awareness, about the need for sound environmental management, as well as for enlisting public support and encouraging the effort made by other entities in that regard.

- Publish and disseminate manual codes or guidelines relating to environmental management and prevention or abatement of environmental degradation.

- Render advice and technical support, where possible, to entities engaged in natural resources management and environmental protection, so as to enable them to carry out their responsibilities satisfactorily.

- Prepare and issue an annual report on the State of Environment in Kenya and in this regard, may direct any lead agency to prepare and submit to it a report on the state of the sector of the environment under the administration of that lead agency

The Kenya Private Sector Alliance (KEPSA).

The Kenya Private Sector Alliance is a limited liability membership organisation registered in 2003 as the apex body of private sector in Kenya

KEPSA is the private sector apex and umbrella body set up in 2003, to bring together business community in a single voice to engage and influence public policy for an enabling business environment. The Kenya Private Sector Alliance (KEPSA) is a limited liability membership organization.

With current membership of over 500,000 direct and indirect members organized through Business Membership Organizations and Corporate members, KEPSA is a key player in championing the interests of the Kenyan business community in trade, investment and industrial relations. KEPSA can be used as an affiliate to champion the popularity of NECC and to sensitize the business community on environmental conservation.

Law Society of Kenya.

The Law Society of Kenya (LSK) is Kenya's premier bar association, with membership of all practicing advocates, currently numbering over fourteen thousand members. It has the mandate to advise and assist members of the legal profession, the government and the larger public in all matters relating to the administration of justice in Kenya.

The Law society of Kenya members also offer pro bono services and NECC can work together with LSK to offer pro bono assistance when it comes to matters PIL. LSK in conjunction with NECC can offer awards to members who offer such services to recognize and enhance a positive attitude amongst LSK members to participate in PIL.

Religious groups and institutions of higher learning.

Environmental Education helps students understand how their decisions and actions affect the environment, builds knowledge and skills necessary to address complex environmental issues, as well as ways we can take action to keep our environment healthy and sustainable for the future.

The church is the foundation for most students and through this institution proper environmental practices can be handed over to children from a young age to carry into the future

What are the advantages of working in a consortium?

- Sharing of skills, experiences and expertise without much concern on costs.
- Consortium partners can share Litigation overheads/costs, which can reduce expenses and the amount of resources required of each individual PIL Player.

3.3.6 Financing

PIL tends to be expensive because of the complex legal and policy issues involved and quite often the lengthy period such cases take to conclude. Financial challenges brought about by inadequate sources of funding make it difficult to fully improve access to justice and promote enforcement of the law.

NECC sources funds from Parliamentary allocations provided for in the EMCA Act[16]and thus receives a budgetary allocation from the Treasury to facilitate the activities of PIL. Further, NECC may move international development partners to consider setting up a funding facility for strategic litigation on environmental matters.

NECC further stresses the need to partner with other governmental institutions such as Kenya Water Institute, Kenya School of Government, Kenya National Human Rights Commission, KAJ and all stakeholders in capacity building its staff in matters PIL.

3.3.7 Picking the right parties

THE RIGHT PARTY TO SUE.

1. Articles 22(2) (a) and 258(2) (a) of the Constitution grant standing to a third party to institute proceedings "on behalf of another" in relation to violation of human rights or other constitutional violations, respectively. To do so, the third party must demonstrate that the person on whose behalf they act cannot "act in their own name." This will have to be worked out also on a case-by-case basis.
2. Articles 22(2) (b) and 258(2) (b) of the Constitution allows individuals to institute PIL actions on the basis that they are "acting as a member of, or in the interest of, a group or class of persons" towards enforcement of constitutional provisions and principles that are under threat or to seek remedy for human rights violations, as the case may be. It is noteworthy that not all cases instituted on this basis will for the good of the public since private rights and gains are also espoused within the same provisions. Articles 22(2) (b) and 258(2) (b) of the Constitution also allow PIL actions to be instituted also by an "association acting in the interests of one or more of its members".

In *Wangari Maathari V Kenya Times media Trust*,[17]the Applicant filed an application in order to prevent Kenya Times Media Trust from proceeding with the building of a proposed high rise structure on public land. Pending the determination of the substantive suit she alleged breach of local government laws and on account of which she instituted the suit on behalf of the public.

[16] Section 36. Remuneration and other expenses of the Department.
(1) There shall be paid to the Chairperson and members of the Department, such remuneration, fees or allowances for expenses as the Council may determine.
(2) The remuneration fees or allowances referred to in subsection (1) together with any other expenses incurred by the Department in the execution of its functions under this Act shall be paid out of monies provided by Parliament for that purpose.

[17] http://kenyalaw.org/caselaw/cases/view/53011 (last accessed 13 November, 2018)

The Respondent filed a preliminary objection to have the application struck out on the grounds that 'it disclosed no cause of action and that the applicant had no locus standi to file the suit or the application'.

In its finding, the court held that;

1. there was no merit in the three grounds of objection filed by the applicant against the preliminary objection raised by the Respondent, and
2. only the Attorney General could sue on behalf of the public. In any event, it was clear that the Plaintiff was not bringing an action on behalf of anyone else.

The court was of the opinion that there was no claim for damage or probable damage or injury neither was the Respondent company in breach of any rights, public or private in relation to the Applicant. The court dismissed the Application on the grounds that the applicant has no locus standi.

In a turn around, there have been notable decisions by the Kenyan courts since the promulgation of the Constitution 2010 with regard to locus standi. In the matter of *Dennis Mugambi vs Attorney General and 3 others (2014) eKLR,*[18] the Petitioner challenged the constitutionality of Section 23 of the Sixth Schedule to the Constitution and the Vetting of Judges and Magistrates Act, 2011, he petitioned the High Court in the Interest of the public.

The court held that "the High Court under Article 165(3) (d) of the Constitution has jurisdiction to hear any question respecting the interpretation of the Constitution, including determination of any question whether any law is inconsistent with or in contravention of the constitution. The court held that the said matter squarely fell within these provisions."

It is interesting to note that in the case Dennis Mugambi case the locus standi of the Petitioner was not challenged even though he did not have sufficient interest in the subject matter, he was a law student and had instituted an action on behalf of the judges and magistrates.

Further the court in *John Githongo & 2 others vs Harun Mwau & 4 others Petition no. 44 of 2012, Nairobi (2012) eKLR*,[19] stated that Article 22 of the Constitution provides an independent and direct access to the courts for enforcing rights and freedoms.

In *Kenya Union of Domestic Hotels Educational Institutions Hospitals and Allied Workers (KUDHEIHA) vs Marsh Park Hotel 85 of 2013,*[20] the locus standi of the Claimant to originate the claim on behalf of its members was challenged. The Industrial Court relying on the provisions of Article 22 of the Constitution held that the Claimant had the *locus standi* to bring the matter before the court.

[18] Dennis Mogambi Mong'are v Attorney General & 3 others [2014] eKLR http://kenyalaw.org/caselaw/cases/view/94298/ (last accessed 13 November 2018).
[19] http://kenyalaw.org/caselaw/cases/view/79750 (last accessed 13 November 2018).
[20] http://kenyalaw.org/caselaw/cases/view/88692 (last accessed 13 November 2018).

3.3.8 Preparing the pleadings

PIL being an area of practice where individuals or interest groups represent a wide section of the public is now well anchored in law under Articles 22 and 258 of our Constitution.

Litigation can be said to compose of 3 important stages.

1. Pre trial
2. Institution of suit (Pleadings); and
3. Post-trial (Settlement)

1. <u>Pre trial</u>

This is where the crux of the case is established. It involves thorough research to establish the following:

1. Jurisdiction of the court and Justiciability of the suit,
2. Fact of the case,
3. Specific violations of constitutional rights or threats to specific rights,
4. Legal provisions including Articles of the Constitution, and Statutory Framework and any Subsidiary Legislation if Any,
5. Identifying Parties to the suit,
6. Collection of Evidence in Compliance with the Evidence Act,
7. Commencement of Litigation,
8. Interlocutory Practice and Procedure if any,
9. Remedies available,
10. Mechanisms of execution.

At this stage, one needs to identify the cause of action which forms the bedrock of the claim. Capacities of each party to be involved needs to be established. It is at this stage that one needs to think of like-minded groups and individuals that will add weight and credence to the claim. *Amicii curiae* (friends of court) can also be identified at this stage and invited to apply as such and be enjoined in the suit.

The relevant court with proper jurisdiction to handle the matter should be determined at this stage. Article 23 of the Constitution vests in the High Court unlimited original jurisdiction to hear and determine cases of violations of constitutional rights. The Environment and Land court Act under Section 13 (3) states that nothing in this Act shall preclude the Court from hearing and determining applications for redress of a denial, violate on or infringement of, or threat to, rights or fundamental freedom relating to a clean and healthy environment under Articles 42, 69 and 70 of the Constitution.

Article 42 of the Constitution guarantees that every person has the right to a clean and healthy environment, which includes the right to have the environment protected for the benefit of present and future generations through legislative and other measures, particularly those contemplated in Article 69; and to have obligations relating to the environment fulfilled under Article 70. Article 69 outlines Obligations in respect of the environment whereas Article 70 provides for Enforcement of environmental rights

Once these have been identified, the next stage is institution of the suit.

2. Institution of suit.

Court proceedings are instituted and maintained by way of Pleadings. Section 2 of the Civil Procedure Act gives as list of what constitutes pleadings. These include;

1. petition or summons,
2. the statements in writing of the claim or demand of any Plaintiff,
3. the defense of any Defendant thereto, and
4. of the reply of the Plaintiff to any defense or counterclaim of a Defendant.

Pleadings can be defined as written statements of parties in actions served by each party in turn on the other, setting forth in summary the form the material facts on which each relied in support of his claim or defense as the case may be.

Article 22 of the Constitution provides that every person has the right to institute court proceedings claiming that a right or fundamental freedom in the Bill of Rights has been denied, violated or infringed, or is threatened.

At this stage, it is paramount to determine the kind of case before you and how to commence it.

ThePlaint.

Plaints are widely used to commence all types of action except the ones specifically mentioned to be instituted by way of Originating Summons or Petitions.

In bringing Public Interest Litigation through a Plaint, the rules are provided for under the Civil Procedure Rules, 2018.

Order, 4 is on Plaints and it provides as follows:-

➢ That a plaint shall contain the following particulars—

a) the name of the court in which the suit is brought;

b) the name, description and place of residence of the plaintiff, and an address for service;
c) the name, description and place of residence of the defendant, so far as they can be ascertained;

d) the place where the cause of action arose;

e) where the plaintiff or defendant is a minor or person of unsound mind, a statement to that effect; and

f) An averment that there is no other suit pending, and that there have been no previous proceedings, in any court between the plaintiff and the defendant over the same subject matter and that the cause of action relates to the plaintiff named in the plaint.

➢ The plaint shall be accompanied by:-
a) Verifying affidavit sworn by the plaintiff or a representative of the Plaintiffs verifying the correctness of the averments contained in the Plaint.

b) Where there are several plaintiffs, one of them, with written authority filed with the verifying affidavit, may swear the verifying affidavit on behalf of the others. Where the plaintiff is a corporation, the verifying affidavit shall be sworn by an officer of the company duly authorized under the seal of the company to do so.

c) A list of witnesses and their written statements.

d) List of all documents to be relied on and copies of the same.

The court and each Defendant must have an original copy. Once the Plaint and accompanying documents have been filed, the Plaintiff will take out summons and have the same together with an original copy of the Pleadings served upon each Defendant within 12 months. If by the 12 months, service has not been effected, fresh Summons must be taken out.

Upon service, the Defendant must enter appearance by filing a Memorandum of Appearance within the time specified in the summons provided that the time for appearance shall not be less than ten days.

Where the process server after using all due and reasonable diligence, cannot find the defendant, or any person on whom service can be made, the serving officer shall affix a copy of the summons on the outer door or some other conspicuous part of the house in which the defendant ordinarily resides or carries on business or personally works for gain, and shall then return the original to the court from which it was issued, together with an affidavit of service.

Process Server in all cases in which summons has been served shall swear and annex or cause to be annexed to the original summons an affidavit of service stating the time when and the manner in which summons was served and the name and address of the person (if any) identifying the person served and witnessing the delivery or tender of summons.

Where the court is satisfied that for any reason the summons cannot be served in accordance with any of the preceding rules of this Order, the court may on application order the summons to be served by affixing a copy thereof in some conspicuous place in the court-house, and also upon some conspicuous part of the house, if any, in which the Defendant is known to have last resided or carried on business or personally worked for gain, or in such other manner as the court thinks fit.

Where the Defendant appears by delivering the memorandum of appearance he shall within seven days from the date on which he appears serve a copy of the memorandum of appearance upon the plaintiff and file an affidavit of service. The Defendant shall state in the memorandum of appearance the addresses for service being the place of business within Kenya and postal address.

A Defendant appearing in person shall state in the memorandum of appearance his addresses for service being either his place of residence or his place of business and his postal address, and if he has neither residence nor place of business in Kenya he shall state a place and postal address within Kenya which shall be his addresses for service.

When a corporation appears without an advocate the memorandum of appearance shall state the addresses for service which may be either the registered office or a place of business of the corporation together with its postal address.

Where a defendant has been served with a summons to appear he shall, unless some other or further order be made by the court, file his defence or Counter-claim within fourteen days after he has entered an appearance in the suit and serve it on the plaintiff within fourteen days from the date of filing the defence or counter-claim and file an affidavit of service.

The matter will then be set down for Directions and pre-trial preliminaries then hearing. At any stage, the parties may be referred to an alternative Dispute Resolution process.

ALTERNATIVE DISPUTE RESOLUTION (ADR)

Alternative dispute resolution (ADR) is a term that refers to several different methods of resolving disputes outside traditional legal and administrative forums. These philosophically similar methodologies have surged in popularity in recent years because courts have become extremely frustrated over the expense, time, and emotional toll involved in resolving disputes through the usual legal avenues. The adversarial system tends to be expensive, disruptive, and protracted. More significantly, by its very nature, it tends to drive the parties further apart, weakening their relationship. ADR programs emerged as an alternative, litigation-free method of resolving disputes.

On the other hand, Traditional dispute resolution mechanisms (TRDM) refer to all those conflict management mechanisms that African communities have used since time immemorial and passed from one generation to the other. Different tags have been used to describe these mechanisms. Terms such as African, community, traditional, non-formal, informal, customary, indigenous and non-state justice systems, are often used interchangeably in describing localized and cultural-specific dispute resolution mechanisms. Traditional justice systems are firmly embedded in the culture and customs of African communities. Their effectiveness in enhancing access to justice would thus largely depend on the recognition of African customary law. To a great extent, traditional justice systems seek to promote restorative justice as opposed to

retributive justice. They aim at reconciliation by restoring parties' relationships, peace-building and focusing on parties' interests rather than allocating rights between disputants. Traditional justice systems have been resilient despite non-recognition in law for decades. It is only recently, that they have received strong legal backing in the law, an indication that they are critical in enhancing access to justice

Conflicts and disputes management mechanisms consist of alternative dispute resolution mechanisms (ADR) such as negotiation, mediation, conciliation, expert opinion, mini-trial, ombudsman procedures, arbitration; traditional dispute resolution mechanisms and also formal mechanisms namely court adjudication.

Basis for ADR in Kenya

In Kenya, ADR and traditional dispute resolution mechanisms are recognized in the law. Article 159(3) of the Constitution of Kenya 2010 recognizes promotion of ADR mechanisms as one of the guiding principles of the Judiciary in the exercise of their constitutionally conferred judicial authority, and from this they cannot depart. Courts are entering an era where they are required to increasingly incorporate ADR mechanisms in settling some disputes, and this is reflected in various laws. It has been argued that although ADR had been used by human society since antique times, it only got wide acceptance and recognition in countries 'laws recently. Recognition of ADR and TDRM processes in the Constitution is meant to enhance access to justice as guaranteed in Article 48 thereof.

Under the Civil Procedure Act there are provisions dealing with the use of both mediation28 and arbitration. Sections 59, 59B and 59C of the Civil Procedure Act give the court jurisdiction to refer any dispute to ADR mechanisms where parties have agreed or where the court considers it appropriate. Order 46 Rule 1 of the Civil Procedure Rules 2010, provides that where all parties agree, the court has jurisdiction to refer any matter in difference between the parties to arbitration. Under Order 46 Rule 20, a court can adopt and implement of its own motion or at the request of parties, any other appropriate means of dispute resolution including mediation for the attainment of the overriding objective under sections 1A and 1B of the Act. The overriding

objective under the Civil Procedure Act is to facilitate the just, expeditious, proportionate and affordable resolution of civil disputes.

Justification for ADR in NECC

Environmental problems that NECC investigates are among the most complex and challenging areas of conflict in Kenya. These problems result in aspects including but not limited to; air pollution, water pollution, noise pollution, poor waste management and illegal logging. They may occur in areas where previous practices have already had detrimental effects. Any new decisions now may make things worse. It is important to remember that new decisions may also mitigate previous errors and improve the overall situation. When environmental disputes rise to the level of public concern, they may be emotionally charged and push stakeholders toward rigid postures making it more difficult to negotiate.

Resolution of environmental conflicts is thus critical for the survival of the parties as it restores and preserves the relationships between the diverse users of environmental resources inter se and/or between environmental resources and the user. Therefore, when NECC is able to resolve environmental conflicts through ADR, it ensures security in terms of a guarantee of sustainable use of natural resources for intra and intergenerational equity.

ADR MECHANISMS

1. Arbitration

- Arbitration is a process that is subject to statutory controls i.e. Arbitration Act 1995, The Civil Procedure Act.
- It arises where a private tribunal or an individual is appointed to determine a dispute and render a final binding decision called an award.
- In Arbitration any person can represent a party in the dispute.
- The process is adversarial and in many ways resembles litigation.
- An arbitration award can be filed in court for enforcement.

2. Negotiations

- Negotiations are any form of communication between two or more people for purposes of arriving at a mutually agreeable solution to a dispute.
- In negotiations the disputants may represent themselves or may be represented by agents. Whatever the case the disputants have control of the negotiating process.
- The objective of negotiations is to arrive at a "win- win" solution to the dispute at hand.

3. Mediation

- Mediation is a non-binding process in which an impartial party (Mediator) facilitates negotiation process between the disputants.
- The mediator has no decision making powers and the parties maintain control over the process and the substantive outcome of the mediation process.
- In mediation the parties are assisted to voluntarily reach their own mutually acceptable settlement of the issues in dispute.
- Since mediation is, in essence a form of assisted negotiation, it does not have a direct legal authority.
- It also affords the disputants authority over the mediator, mediation, over the process and over outcome and preserves relationships.

4. Conciliation

- Conciliation is not universally defined mechanism and may bear different meanings in different jurisdictions.
- Locally it is described as a mechanism used to test the possibility of two disputing parties making up and assuming prior cordial relationship.
- The Commission for conciliation, mediation and arbitration of S. Africa defines it process where a Commissioner meets with parties in a dispute and explores ways to settle the dispute by agreement.
- The 3rd party, a Conciliator separately discusses the dispute with each party, then prepares a solution based on what he considers to be just and optimal compromise.

- Conciliation is used to restore the parties to the pre- dispute relationship after which other ADR technique may be applied.
- In conciliation, the conciliator is the Architect and designer of the solution.

5. Adjudication

- Adjudication is defined as a dispute settlement mechanism where an impartial 3rd party (Adjudicator) makes a fair, rapid and inexpensive decision on a given dispute arising from a construction project.
- Adjudication is thus limited and appropriate to unique needs in construction industry, which usually involves Engineering and civil contracts.
- The adjudicators' decision operates as binding order unless the matter is referred to Arbitration or litigation.

6. Expert Determination

- This is a process where Parties submit issues and dispute to an expert knowledgeable in a particular field of dispute for determination.
- The expert evaluates the dispute and makes a decision based on his expertise, i.e. an accountant valuing shares in a company.
- It is also used in the construction industry to determine issues of a specific technical nature or specialized kind.

7. Ombudsman

- Ombudsman is an organizations designated person who confidentially receives, investigates and facilitates resolution of complaints.
- The ombudsman may meet, discuss and advise the parties or even review evidence but normally is not empowered to impose decisions.
- The mechanism can also exist within government set ups as exist in Kenya.
- In Kenya the Ombudsperson handles complaints from the public and tries to resolve them outside courts.

Advantages and disadvantages of Alternative Dispute Resolution

The goal of these processes is to find a solution that suits both parties. Each party makes some compromises and tries to reach a decision that is in the interests of both parties.

The main advantages of ADR are;

- It costs significantly less money as well as less time to reach a final resolution than if the matter was to go to trial
- The dispute can be dealt with in private, avoiding publicity if this is not appropriate.
- They give rise to less conflict. This is important if you want to maintain a good relationship with the other party (i.e. this may be the case if a company provides a lot of jobs and benefits to your community, but you want it to change one aspect of its behavior).
- You can reach compromises or solutions benefitting both parties that may not be available in a court case.
- If the other party has not committed a legal wrong (i.e. broken the law), ADR still allows you to try to change its behavior.
- The parties can also have their dispute arbitrated or mediated by a person who is an expert in the relevant field. In an ordinary trial involving complicated and technical issues that are not understood by many people outside a relevant profession, a great deal of time has to be spent educating the judge, just so they can make an informed decision. This large time investment often translates into a great deal of money being spent. Both sides might have to call expert witnesses, who may charge very large fees for their time.

Disadvantages of ADR

- Generally, arbitrators can only resolve disputes that involve money. They cannot issue orders requiring one party to do something, or refrain from doing something (also known as injunctions). They cannot change title to property, either.
- Also, there is very limited opportunity for judicial review of an arbitrator's decision. While a large arbitration service could, if it so chose, have some kind of process for internal appeals, the decision is usually final and binding, and can only be reviewed by a

court in limited cases. This generally happens when the original arbitration agreement is found to be invalid

- Also, if the decision of the arbitrator is patently unfair, it will not be enforced. This is a difficult standard to meet. The fact that the arbitrator made a decision that the court would not have made is not, by itself, a basis to overturn the decision.
- A court might also overturn an arbitrator's decision if it decided issues that were not within the scope of the arbitration agreement.

What could we achieve through Mediation and Negotiation?

The first objective of ADR is to ensure that the other party stops the actions complained of.

The next step is for NECC to draft a report of the investigated cases that includes interviews of the relevant parties, observations, findings, recommendations and policy recommendations. This report seeks to resolve the problems created by their actions, step-by-step.

- For example, if an industry is polluting a water source, you can agree on an action plan in which the company would commit to stopping the actions that led to the pollution. You would then seek to remedy the damages this pollution caused. Finally, you would agree on measures to monitor the situation to prevent any future pollution. This could include, for instance, an action plan for the company to preserve the environment.

Without legal processes of enforcement, the solution agreed may be ignored by the other party. Or the party may deny having made commitments during the negotiations.

- To avoid this outcome, make sure that all decisions taken during the mediation or negotiation are in writing, and are signed by both parties. This can give agreements legal force, meaning you can take the party to court if it breaks the agreement.
- An effective media strategy, publicizing the agreements and the party’s breach, can help avoid this outcome.

The negotiators could agree a solution that does not suit the needs of all the people or communities affected.

- To avoid this, make sure all the people affected can participate in all stages of the process, and are able to review the proposed solutions before they are agreed to.

If a party is hostile, ADR will likely be unsuccessful. In fact, trying to begin negotiations could be dangerous and should be avoided. While some of the risks of ADR can be avoided, when the above risks are high, it may be better to consider going to court or launching a campaign instead.

What if ADR isn't working?

If you have tried to negotiate and enter into negotiations with the other party, but it has failed, you can still bring a legal action in court through PIL.

Make the other party understand that if the mediation fails, you will still consider taking legal action. This can be a form of leverage over a more powerful adversary, making them to enter into meaningful mediation or negotiation. In this way, PIL and ADR can complement each other.

A Petition.

The most widely used pleading in cases of violations or threats of violation of Constitutional is a Petition. A petition has not been defined but a format given in Section 22 Rules known as Constitution of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules, 2013, or simply, Mutunga Rules.

Rule 10 states:-

An application under rule 4 shall be made by way of a petition as set out in Form A in the Schedule with such alterations as may be necessary.

The petition shall disclose the following—

a) The petitioner's name and address;
b) The facts relied upon;
c) The constitutional provision violated;
d) The nature of injury caused or likely to be caused to the petitioner or the person in whose name the petitioner has instituted the suit; or in a public interest case to the public, class of persons or community;
e) Details regarding any civil or criminal case, involving the petitioner or any of the petitioners, which is related to the matters in issue in the petition;

- The petition shall be signed by the petitioner or the advocate of the petitioner; and (g) the relief sought by the petitioner.

- The Petition is accompanied by a Supporting Affidavit and all documents to be relied upon.

- The petitioner must serve the respondent with the petition, documents and relevant annexures within 15 days of filing or such time as the court may direct.

- An Affidavit of Service must then be filed as proof of service.

- The Attorney-General or any other State organ shall within fourteen days of service of a petition respond by way of a replying affidavit and if any document is relied upon, it shall be annexed to the replying affidavit.

- A private respondent who is neither the Attorney General nor a State agent shall within seven days file a memorandum of appearance and either a Replying affidavit or Grounds of Opposition and provide any other written document as a response to the petition within fourteen days.

- The respondent may also file a cross-petition, which shall disclose the following:-
  a) The Cross-petitioner's name and address;
  b) The facts relied upon;
  c) The constitutional provision violated;
  d) The nature of injury caused or likely to be caused to the petitioner or the person in whose name the petitioner has instituted the suit; or in a public interest case to the public, class of persons or community;
  e) Details regarding any civil or criminal case, involving the Cross-petitioner or any of the cross-petitioners, which is related to the matters in issue in the cross-petition;

- If the respondent does not respond within the time stipulated in rule 15, the Court may hear and determine the petition in the respondent's absence.

- Also, the Court may set aside annex-parte order on its own motion or upon the application of the respondent or a party affected by the order.

- The Court may on its own motion or on application by any party consolidate several petitions on such terms as it may deem just.

- A party that wishes to amend its pleadings at any stage of the proceedings may do so with the leave of the Court.

Hearing Stage.

- ➢ Before the suit is brought down for hearing the Court can on its own motion or upon application by the Plaintiffs/ Petitioners make an interlocutory order for the protection of the subject matter, including interlocutory injunctions and avoiding the common law legal restrictions in the ***Giella vs Cassman Brown test.***[21]

- ➢ The hearing of the petition shall, unless the Court otherwise directs, be by way of— Affidavits, Written submissions, or Oral evidence.

- ➢ The Court may limit the time for oral submissions by the parties.

- ➢ The Court may upon application or on its own motion direct that the petition or part thereof be heard by oral evidence.

- ➢ The Court may on its own motion, examine any witness or call and examine or recall any witness if the Court is of the opinion that the evidence is likely to assist the court to arrive at a decision.

- ➢ A person summoned as a witness by the court may be cross examined by the parties to the petition.

- ➢ In giving directions on the hearing of the case, a Judge may require that parties file and serve written submissions within fourteen days of such directions or such other time as the Judge may direct.

- ➢ A party who wishes to file further information at any stage of the proceedings may do so with the leave of the Court.

- ➢ The Court may frame the issues for determination at the hearing and give such directions as are necessary for the expeditious hearing of the case.

- ➢ Each party may file written submissions and subject to such directions as may be issued by the court, written submissions shall contain the following—

[21] Recognising the inappropriateness of this practice, the Land and Environment Court has adopted a different approach in public interest litigation. The failure of a plaintiff to offer an undertaking as to damages is not determinative of how the court should exercise its discretion to grant or refuse an interlocutory injunction, but rather is only a factor to be taken into account when considering where the balance of convenience lies. In Kenya for instance the high court has applied this while granting an interlocutory injunction in environmental public interest litigation in the case of **Fadhila S Ali & 2 others v National Housing Corporation & Another [2012] eKLR**, E. M. Muriithi J

i. A brief statement of facts with reference to exhibits, if any, attached to the petition;
ii. Issues arising for determination; and
iii. A concise statement of argument on each issue incorporating the relevant authorities referred to together with the full citation of each authority.
iv. Copies of the authorities to be relied on shall be attached to the written submissions.

- Despite any provision to the contrary, a Judge before whom a petition under Certificate of Urgency is presented shall hear and determine an application for conservatory or interim orders and service of the Application) may be dispensed with, with leave of the Court.

- The ex-parte orders issued shall be personally served on the respondent or the advocate on
- Record or with leave of the Court, by substituted service within such time as may be limited by the Court.

- An application for conservatory orders may be made by way of notice of motion, by informal documentation or orally.

- Where an oral application is made, the Court shall reduce it in writing.

- An order issued under rule 22 may be discharged, varied or set aside by the Court either on its own motion or on application by a party dissatisfied with the order.

- The award of costs is at the discretion of the Court. In exercising its discretion to award costs, the Court shall take appropriate measures to ensure that every person has access to the Court to determine their rights and fundamental freedoms.

- The petitioner may—

(a) On notice to the court and to the respondent, apply to withdraw the petition; or
(b) With the leave of the court, discontinue the proceedings.

- The Court shall, after hearing the parties to the proceedings, decide on the matter and determine the juridical effects of that decision. The courts have previously refused parties from withdrawing a suit as Public Interest Litigation transcends the wishes of an individual or few people and the Court may, for reasons to be recorded, proceed with the hearing of a case petition in spite of the wish of the petitioner to withdraw or discontinue the proceedings.

- If the respondent does not dispute the facts in the petition whether wholly or in part, the Court shall, after hearing the parties, make such orders as it may deem fit.

- As for Filing fees, Rule 34 provides that there shall be paid in respect of all proceedings under the Mutunga Rules the same court fees as are payable in respect of civil proceedings in the High Court in so far as the same are applicable.

- Rule 35 provides a reprieve in that a person who wishes to be exempted from paying court fees may apply to the Registrar by informal documentation. The Registrar may then exempt the person from paying filing fees and the reasons for the Registrar's decision shall be recorded.

3.3.9 Trial or settlements

- Rule 29 provides that parties may, with leave of the Court, record an amicable settlement reached by the parties in partial or final determination of the case.
- Rule 31 allows the Court to refer a matter for hearing and determination by alternative dispute resolution mechanism.

- If the final judgment of the court does not favor the Petitioner, the rules allow for appeal and an appeal or a second appeal shall not operate as a stay of execution or proceedings under a decree or order appealed.

- An application for stay of execution needs, therefore, to be made informally immediately following the delivery of judgment or ruling and the court may issue such orders as it deems fit and just.

Sometimes, the remedies will require changes in Policies or laws. This will need a Memorandum to be submitted to the Attorney General to engineer the process for change of Policy. Lobbying for legislative amendments will also be key in ensuring compliance with the Court Order.

At this stage, collaborations with the media is necessary to keep members of the public appraised and maintain focus of all parties involved.

Format for a Plaint:-

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT OF KENYA

AT

ELC NO. OF 2018

LIST PARTIES SUING..... PLAINTIFFS

-VERSUS-

LIST PARTIES BEING SUED.....DEFENDANTS

PLAINT

"TRACK

(mostly Multi-Track"

1. Describe the Plaintiffs in details. Include their respective capacities. Each Plaintiff under separate paragraph

2. Describe the Defendants in details, each under separate paragraph.

3. Describe the facts, not evidence or the law. Just the facts giving rise to the cause of action. Particularise events of misrepresentation, fraud, breach of trust, wilful default or undue influence on which the party pleading relies; and/or any malice, fraudulent intention or other condition of mind except knowledge, particulars of the facts on which the party relies.
4.
5. Briefly state how the said misrepresentation, fraud, breach of trust, wilful default or undue influence on which the party pleading relies; and/or any malice has led to the harm or is threatening to cause harm.
6.
7. Give a brief statement on efforts that have been initiated out of court to try and remedy the

situation; if any Demand letter has been sent and if there has been any response from the Defendants. This is to caution you from being guilty of filing frivolous suits which, in the opinion of the court, ought to have been settled at preliminary stages.

8. Include a clause to the effect that there is no other suit pending in court and that there have been no previous proceedings in any court between the plaintiffs and the Defendants on the same subject matter.(The rule on sub-judice and res-judicata)

9. Assert the Jurisdiction of the court. (This Honourable court has the jurisdiction to hear and determine this matter)

10. REASONS WHEREFORE the Plaintiff prays for judgment against the Defendant for (List reliefs/remedies that you seek), for example:-

    a) A Declaration that a constitutional right has been infringed.
    b) A Declaration that a constitutional right has been infringed
    c) A Declaration that the actions threatens an infringement of constitutional right
    d) An order of permanent injunction restraining the defendants by themselves, their officers, employees , servants and/or agents or otherwise whoever howsoever instructed by them from furthering the infringement
    e) An order for Mandamus
    f) An order for prohibition
    g) An Order for Compensation on General and special damages.
    h) Costs of the suit (at the discretion of the Court)
    i) Any other or further relief the Honourable court may deem fit or just to grant
    j) You may also ask for compensation in terms of
        - Special damages for monetary loss suffered and/or
        - General damages for infringement or threatened infringement

DATED at ..... this day of 2018.

__Sign__

ADVOCATES FOR THE PLAINTIFFS

DRAWN AND FILED BY:-

XXXX & Company

Advocates,

P.O.BOX XXXXXX

TO BE SERVED UPON

All Defendants.

Format of a Petition:-

THE REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAKURU

PETITION NO. 57 OF 2015

IN THE MATTER OF THE ALLEGED CONTRAVENTION OF FUNDAMENTAL RIGHTS AND FREEDOMS UNDER ARTICLES 42, 69 & 70 OF THE CONSTITUTION OF KENYA, 1969

AND

IN THE MATTER OF ATRICLES 22, 23, 258 AND 259 OF THE CONSTITUTION OF KENYA 2010,

AND

IN THE MATTER OF PAST AND CONTINUING INFRINGEMENT OF FUNDAMENTAL RIGHTS OF THE PETITIONER

BETWEEN

NAME PARTIES.....PETITIONERS

-AND-

NAME PARTIES..... RESPONDENTS

1. Description of Petitioners
2. Description of Respondents
3. Statement of facts

4. Statement of law
5. Concise statement on how the facts lead to infringement of a right or threatens to infringe on constitutional right
6. List the reliefs/remedies that you seek, for example:-

a) A Declaration that a constitutional right has been infringed or threatened
b) An order of permanent injunction restraining the defendants by themselves, their officers, employees , servants and/or agents or otherwise whoever howsoever instructed by them from furthering the infringement
c) An order for Mandamus
d) An order for prohibition
e) Costs of the suit (at the discretion of the Court)
f) Any other or further relief the Honourable court may deem fit or just to grant
g) You may also ask for compensation in terms of
    - Special damages for monetary loss suffered and/or
    - General damages for infringement or threatened infringement

DATED at ..... this day of 2018.

__Sign__

ADVOCATES FOR THE PETITIONER

DRAWN AND FILED BY:-

XXXX & Company

Advocates,

P.O.BOX XXXXXX

TO BE SERVED UPON

All Respondents

3.3.10 Post litigation strategy

1. **Publicizing the decision**

At another level, the impact of a PIL ruling likely depends largely on how well the ruling is disseminated and publicized. Beyond members of the public, an effective dissemination and publicity strategy for judgments in Public interest litigation cases ought to target the duty bearers and other parties affected by the judgment who will be instrumental in implementing its directives. For example, in *Satrose Ayuma and 11 others v Registered Trustees of the Kenya Railways Staff Retirement Benefit Scheme & 2 Others* [2011] eKLR, the High Court directed that the Kenya Water Act should be amended to ensure compliance with relevant constitutional requirements. In this case, the court ordered the Attorney General to consider amendments to the Water Services Act of 2002 to bring it in line with the Constitution under Article 43.

Publicizing the case lets the public be aware of the impact the case has on the applicants.

3.3.11 Media strategy

1. **Introduction**

The media, as a trusted institution of the public, is a powerful tool for PIL that if used accordingly it could;

- Explain complex or unfamiliar legal topics to the public when it comes to Public Interest Litigation on the environment
- Create awareness and educate the public on environmental cases and issues in general
- Inform NECC on environmental degradation issues thus inform the institution on where to seek litigation on alarming issues
- Inform the public on the need to take precautionary measures including environmental research towards natural resource conservation and protection
- Highlight issues on environmental degradation so that necessary action is taken by relevant bodies to stop their escalation

2. **Objectives**

1. To ensure that the public is informed on case development and how its outcome may affect them

2. To build capacity of the media personalities on Public Interest Litigation on environment issues

3. To increase visibility of NECC pertaining to Public Interest Litigation on the environment

4. To facilitate behavioral change of the general public by making them aware of the underlying environmental issues and desired impact of Public Interest Litigation

3. **Activities**

Objective 1-News bulletin on court proceeding and investigations, interviews of NECC staff and affected people, updating trending court cases as they come up on social media

Objective 2-Include media on NECC training seminars, workshops, preliminary meetings and briefings on pertinent environmental issues

Objective 3-Publicity on both print and electronic media

Objective 4-Interviews of the NECC officials, campaigns on electronic media

4. **Desired outcomes**

1. The public is informed on case development and how its outcome may affect them

2. Capacity of media personalities is built on Public Interest Litigation on environment issues

3. NECC is visible to the public as a Public Interest Litigation on the environment agency

4. The public exhibits behavioral change and is aware of underlying environmental issues and desired impact of Public Interest Litigation

5. **Methodology**

- Print media
  Success stories and investigative features (proceedings) be highlighted on newspapers, magazines and flyers
- Electronic media
  Have breakfast interviews, debates, live coverage and infomercials to highlight Public Interest Litigation procedures, use social media to give the public updates on court proceedings

3.3.12 Maintaining dialogue with the clients

6. Kenya's Judiciary Training Institute (JTI) has demonstrated openness to interacting closely with public interest lawyers and the PIL issues they focus on. Social rights litigation in Kenya is likely to become an important field in the future, and there will be a need to enhance the capacity of judicial officials to adjudicate on this particular set of rights. This presents an opportunity for public interest lawyers, human rights groups and legal aid organizations to open a dialogue with the courts.

7. **Advocacy.**

Lobbying can be an important tool in shaping legislation. Citizen views are brought to the attention of decision making authorities.

1. **Execution of judgment.**

This is method by which a judgment creditor can enforce the judgment. The winning party has a right to attach the losing parties' assets, in the cases of money decrees.

2. **Analyzing the court's judgment.**

It is important to reflect on the merits of the judgment. This is especially in cases where the matter involves a dissenting judgment. Minority judgment may raise some crucial points reflecting upon the values an individual and the society.

Analyzing the court judgment is also crucial in reshaping the strategy of future litigation.

3. **Voluntary Organizations.**

Public interest litigation may be filed by a registered voluntary organization. There are many Non- Governmental Organizations that are on the ground which would serve as Petitioners, interested Parties or *Amicus Curiae* in public interest matters.

3.4 Crimes against the environment

CRIMES UNDER THE ENVIRONMENTAL MANAGEMENT CO-ORDINATION ACT

Section 42- Protection of rivers, lakes, seas and wetlands.

Section 43- Protection of traditional interests.

Section 44- Protection of hill tops, hill sides, mountain areas and forests.

Section 45- Identification of hilly and mountainous areas.

Section 46- Re-forestation and afforestation of hill tops, hill slopes and mountainous areas.

Section 47 - Other measures for management of hill tops, hill sides and mountainous areas.

Section 48- Protection of forests.

Section 49 – Conservation of energy and planting of trees or woodlots.

Section 50 - Conservation of biological diversity.

Section 51- Conservation of biological resources in-situ.

Section 52 - Conservation of biological resources ex-situ.

Section 53 - Access to genetic resources of Kenya.

Section 54 - Protection of environmentally significant areas.

Section 55 - Protection of the coastal zone.

Section 56 - Protection of the ozone layer.

Section 72 - Water Pollution prohibition.

Section 87- Prohibition against dangerous handling and disposal of wastes

Section 93- Prohibition of discharge of hazardous substances, chemicals and materials or oil into the environment and spiller's liability

Section 93- Offences relating to pesticides and toxic substances

Section 102- Noise in excess of established standards prohibited

CRIMES UNDER THE AGRICULTURE AND FOOD AUTHORITY ACT No. 13 OF 2013

Section 30 Penalty for non-compliance with order.

A person who contravenes or fails to comply with the terms of a land development order commits an offence and shall be liable, on conviction, to a fine not exceeding one hundred thousand shillings or to imprisonment for a term not exceeding three years, or both, and in the case of a continuing offence to a fine not exceeding fifty thousand shillings for every day of which the offence continues

Section 37 Penalty for failure to comply

A person who contravenes or fails to comply with the terms of any land preservation order duly served upon him or her commits an offence and shall be liable, on conviction, to a fine not exceeding two hundred thousand shillings or imprisonment for a term not exceeding one year or both, and in addition, in the case of a continuing offence, to a fine not exceeding one hundred shillings for each day on which the offence continues.

CRIMES UNDER THE FISHERIES AND DEVELOPMENT ACT NO. 35 OF 2016

Section 42-Prohobited fishing gear and methods

Section 44-Leaving of abandoning of objects in the sea

Section 49-Pollution of Kenya fisheries waters

CRIMES UNDER THE FOREST CONSERVATION AND MANAGEMENT ACT NO. 34 OF 2016

Section 64 - Prohibited activities in forest e.g. illegal grazing, felling of trees, burning, cultivation, encroachments etc.

Section 66 - Illegal quarrying.

CRIMES UNDER THE MINING ACT NO. 12 OF 2016

Section 202-An authorized operation relating to mining

Section 210-Unlawful disposal of minerals

CRIMES UNDER THE NATIONAL MUSEUMS AND HERITAGE ACT NO. 6 OF 2016

Section 45-Destruction of monuments

Section 51-Wilful destruction or damaging an antiquity or protected object

CRIMES UNDER THE PLANT PROTECTION ACT CAP 324

Section 7-Wilful introduction of pest or disease

CRIMES UNDER THE OCCUPATIONAL SAFETY AND HEALTH ACT NO. 15 OF 2007

Section 83 the handling, transportation and disposal of chemicals and other hazardous substances

Section 89 control of air pollution, noise and vibration

CRIMES UNDER THE PUBLIC HEALTH ACT CAP 242

Section 115 Nuisances prohibited

Section 121 Penalty respecting nuisances

Section 130 Rules for protection of water supplies against pollution

CRIMES UNDER THE RADIATION PROTECTION ACT CAP 243

Section 16 (2)

A person who contravenes any of the provision of this Act relating to or in connection with the importation, possession, transportation, use or disposal of irradiating devices, radioactive materials or any other sources of ionizing radiation without being in possession of a valid license shall be guilty of an offence and shall be liable to imprisonment for a term not exceeding two years.

CRIMES UNDER THE WILDLIFE CONSERVATION AND MANAGEMENT ACT NO. 47 OF 2013

Section 30-Prohibition

Any activity which is likely to have adverse effects on the environment, including the seepage of toxic waste into streams, rivers, lakes and wetlands is prohibited.

Section 33-Conservation and management of wetland areas

Section 36- Declaration of a marine conservation area

Section 45- Consent for mining and quarrying in National Parks. No person shall mine or quarry in a national park without the approval and consent of the Service.

Section 46- Protection of endangered and threatened ecosystems

Section 89- Offences relating to pollution

Section 96, 97 and 98- Offences relating to hunting

The above list is not exhaustive as it is for guidance purposes only

Conclusion

Third generational rights as they have now come to be appreciated, carry a sacred space in our body of rights that ensure we live within accepted and dignified environments. Countries like Kenya that have an ever widening gap between the rich and the poor then have a duty to ensure that the lives of its citizens are well taken care of to insulate an already vulnerable group from the impact and the ill-effects of national and international environmental woes. The challenge is further exacerbated by their unawareness of the law and their rights. This environmental injustice is aggravated by an ever vigilant Public who are divided over political groupings, gaps in access to legal experts, PIL awareness and a responsive judiciary including political interferences at best and severe threats and intimidation at worst by groups that benefit from the injustice.

In a country where the government is the main actor of developmental activities, the role of community participation in various forms in balancing the tension between development and environmental protection is crucial. PIL is one of the avenues for the participation of communities in the decision making process because it enables representatives, interest groups, bona fide individuals and human rights NGOs to challenge the decisions of government agencies' and polluters in the court of law.

As this manual demonstrates, the linkages between development and environmental sustainability go hand in hand. The partnerships in Consortiums proposed to address PIL will thus be a prudent step in addressing the prudence of PIL in development.

Courts of law have become an ever willing Partner to infuse the concept of PIL as they have demonstrated with many pronouncements within the law on Environmental protection and thus play a key role together with other Key players in ensuring that sustainable development is achieved.

Kenya's long standing march towards Constitutionalism and Democracy would then billow a smoke of hope that, we are heading in the right direction. More needs to be done though. The last 30 Years has seen drastic improvement in Civil and Political Rights and with the Promulgation of the Constitution of Kenya 2010, there is a reason to smile.