

THE ROLE OF BANKERS IN PROMOTING COMPLIANCE WITH ENVIRONMENTAL LAW

A presentation by
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by

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It should be noted that the views expressed in this paper are personal to the author and do not in any way reflect the views of Barclays Bank of Kenya Limited, Tourism Promotion Services Limited, IPS or any other organisation that the author may be or may have been associated with either professionally or otherwise.

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Preamble:

As a prelude to my presentation, I propose to briefly situate the role of banking in economic development and thereafter examine why Bankers should have the responsibility, or in journalistic parlance, accept a “gate-keeper role” or, in legal terms, accept to be “surrogate regulators”, in promoting compliance with environmental laws and regulations. The exposition thereafter proceeds to;

- Analyse Kenya’s legal framework as compared to the other jurisdictions and opine on an appropriate legal/fiscal framework that would facilitate responsible environmental stewardship;
- Examine the possible effect of environmental liability on banker/industrial relations;
- Comment on liability and the doctrines affecting possible scope and limitation of lender liability for environmental injuries and/or damage against court decisions made in other jurisdictions with relatively mature legislative frameworks on environmental matters/laws;
- Explore possible implementation mechanisms by Bankers to promote compliance with environmental laws and regulations;
- Risk an evaluation of the National Environment Trust Fund and National Environment Restoration Fund possibly structured on the basis of the American "Superfund";
- Provoke a discussion on how the Bench and the Bar should approach environmental litigation.
- Give an assessment of the challenges lying ahead including the need to exercise judicial restraint in the development of case law in relation to Environmental Management in Kenya particularly in relation to lender liability which is derivable from the facilitative role Bankers are expected to play as Surrogate Regulators;
- Make possible recommendations on the way forward; and
- Draw certain conclusions.

The Role of Banking in Economic Development& Evolution of Environmental Law :

One of the undisputable lessons learnt throughout the history of human development or existence is the fact that there can be no greater force than an idea whose time has come. Indeed as Victor Hugo observes: “All forces in the world are not so powerful as an idea whose time has come”. The inextricable symbiotic relationship between rational economic development and sustainable use of the environment (read as the totality of nature and natural resources including the cultural heritage and human infrastructure essential for socio-economic activities) can no longer be regarded as an arguable or debatable proposition or hypothesis as was the case in the early 70s when Prof. A. R. Kasdan had to publish his outstanding seminal treatise entitled: "Third World War: Environment versus Development" as a way of influencing the direction of international thinking on the subject.

While setting the foundation for soft law on sustainable environmental management, the Earth Summit held in Rio de Janeiro in June, 1992, recognized the now obvious fact that there is an inextricable symbiotic relationship

between rational economic development and sustainable use of the environment. The Summit also acknowledged the fact that:

"Economic conditions ... that encourage free trade and access to markets will help make economic growth [development] and environmental protection mutually supportive ... particularly for developing countries and countries undergoing the process of transition to market economies; economies which are essentially characterized by economic growth, social development and poverty eradication as the first and overriding priorities".

Just before the Rio "Earth Summit", the World Bank published *The World Development Report 1992: Development and the Environment*, in which it underscored the Complementary Agenda and declared that ***"Economic development and sound environmental management are complementary aspects of the same agenda. Without adequate environmental protection, development will be undermined; without development, environmental protection will fail"***.

It is as a result of this complementary agenda that the emerging economies, such as Kenya, are trying to harmonize laws and standards on priority environmental and development subjects. According to the UNEP/UNDP/Dutch Joint Project on Environmental Law and Institutions in Africa, the project approach seeks to operationalise the concept of capacity building in a country, by involving its nationals in the assessment and management of environmental problems, review of the existing environmental laws and drafting of new and streamlined statutes consistent with the modern philosophy and enforcement of environmental law. UN agencies such as the United Nations Environment Program, UNEP, have taken cue by responding to these concerns at the level of national implementation through their Bali Strategic Plan on Capacity Building and Technology Support. Therefore, this colloquium presents an opportunity to discuss such initiatives with a view to supporting their achievement through judicial decisions and legal instruments.

The Millennium Summit of September 2000 adopted the Millennium Declaration whose tenets are well articulated in the Millennium Development Goals (MDGs). Environmental sustainability is one of these principle tenets. The World Summit on Sustainable Development (WSSD) held in Johannesburg in 2002 underscored the principles of the public-private sector partnerships, if the MDGs are to be achieved. Since then, Kenya has seen a spiral wave by the private sector initiatives as they respond to the MDGs in terms of corporate social responsibility. CSR has incorporated social dimensions and environmental management concerns.

The impetus of these initiatives have been driven by several other global and regional initiatives, such as the New Partnership for Africa's Development (NEPAD), including the themes of the annual sessions of the Commission for Sustainable Development (CSD) whose agenda have incorporated human settlements, poverty eradication, access to freshwater, development of energy projects, promotion of tourism as an important economic sector, and protection of eco-systems for environmental equity for the present and future generations. It is imperative to

note that none of these sustainable development issues can be achieved without financing which is mainly derived from the multilateral as well as national commercial banking sources.

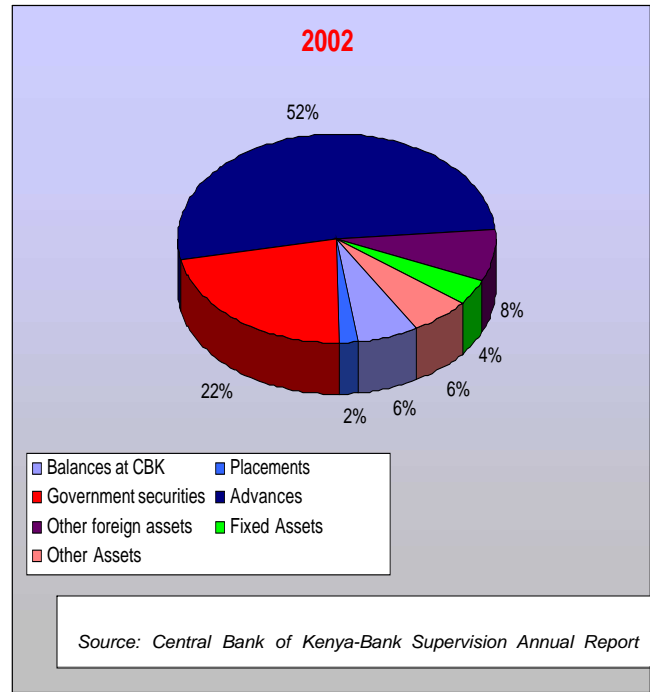
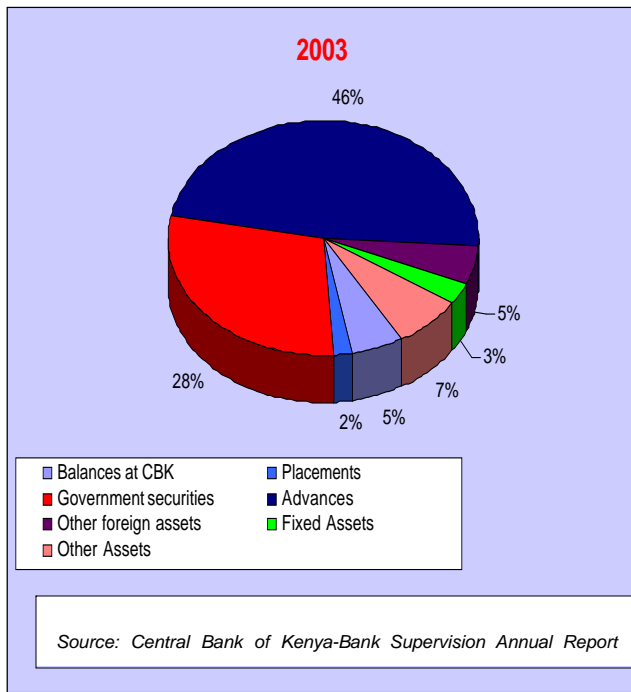
Given the universal acceptance of the complementary agenda and the primary role played by bankers as key participants and stakeholders in the process of economic development, it is expected that bankers must indeed play a critical and pivotal role in the promotion of compliance with environmental laws and regulations by industries.

The Kenyan Banking Scene:

It is observed that as a term of art, there is no agreed definition of the term "Banker". However, the meaning of the term "Banker" can be usefully derived from what constitutes banking business or activities analogous thereto. The Banking Act (Cap. 488 of the Laws of Kenya), embodies technical definitions of the terms "Bank" and "Financial Institutions" and the related activities of "banking business" and "financial business", terms which in their technical meaning imply a fundamental role in financial intermediation. Thus, for the purposes of this presentation, the term "Banker" in the Kenyan context, shall be deemed to apply to any person who, by dint of business activity, mobilizes deposits and employs such deposits by way of loans, investment or in any manner for the account and at the risk of the person so employing the money, including any person directly involved or associated with such business activities. This practical definition will therefore cover the 43 commercial banks, 49 non-banking financial institutions, 2 building societies, 2 mortgage finance companies, 42 insurance companies including 2 re-insurance companies and, approximately 9,000 registered savings and credit co-operative societies currently operating in Kenya and altogether representing 4.9 million members as at December 2004.

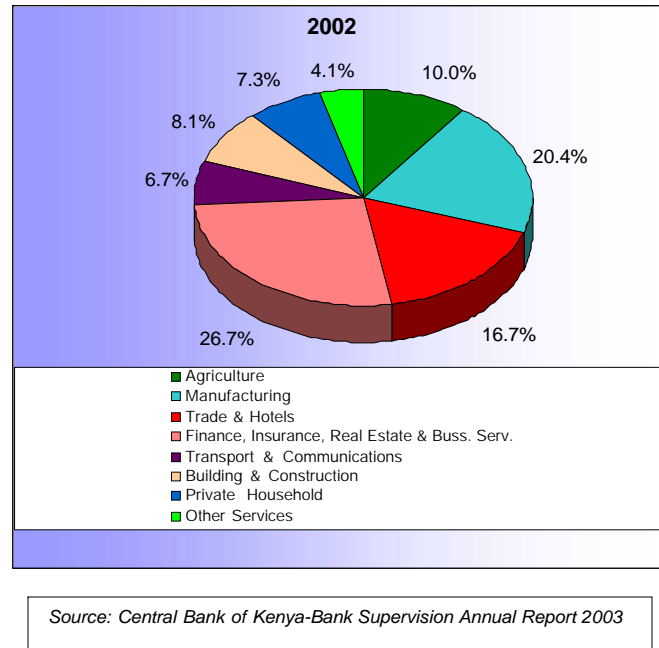
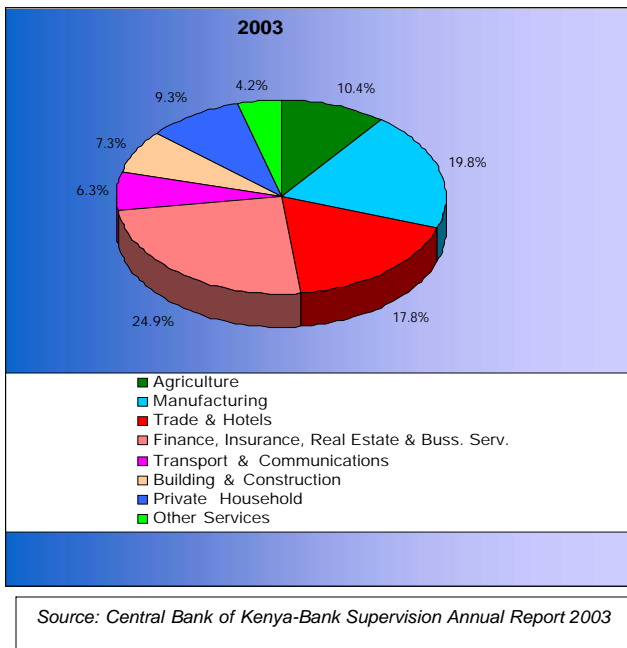
As noted from the preceding paragraph, Bankers play a traditional and fundamental role in financial intermediation by mobilizing deposits from members of the public and employing such deposits by way of loans and investments. As noted in the following charts, as at March 2005, the total assets of the banking sector in Kenya stood at KShs. 608.6 billion (a 15.8% increase compared to the corresponding period in 2004). Loans and advances comprised 58% of the total assets. A significant proportion of such investments in loans and advances is channeled into manufacturing and service industries. For instance, as at December 31, 2003, 46% of the total assets of the banking sector was invested in loans and advances. Of the said total loans and advances made by the sector, a proportion of 19.8% was channeled to the industrial sector during the period ended December 31, 2003.

BANKING SECTOR- BALANCE SHEET:



- 2005(March): Total Assets of the Banking Sector stood at Shs.608.6 bn.
- 2003(December): 46% of total assets of the sector was invested in Loans and Advances

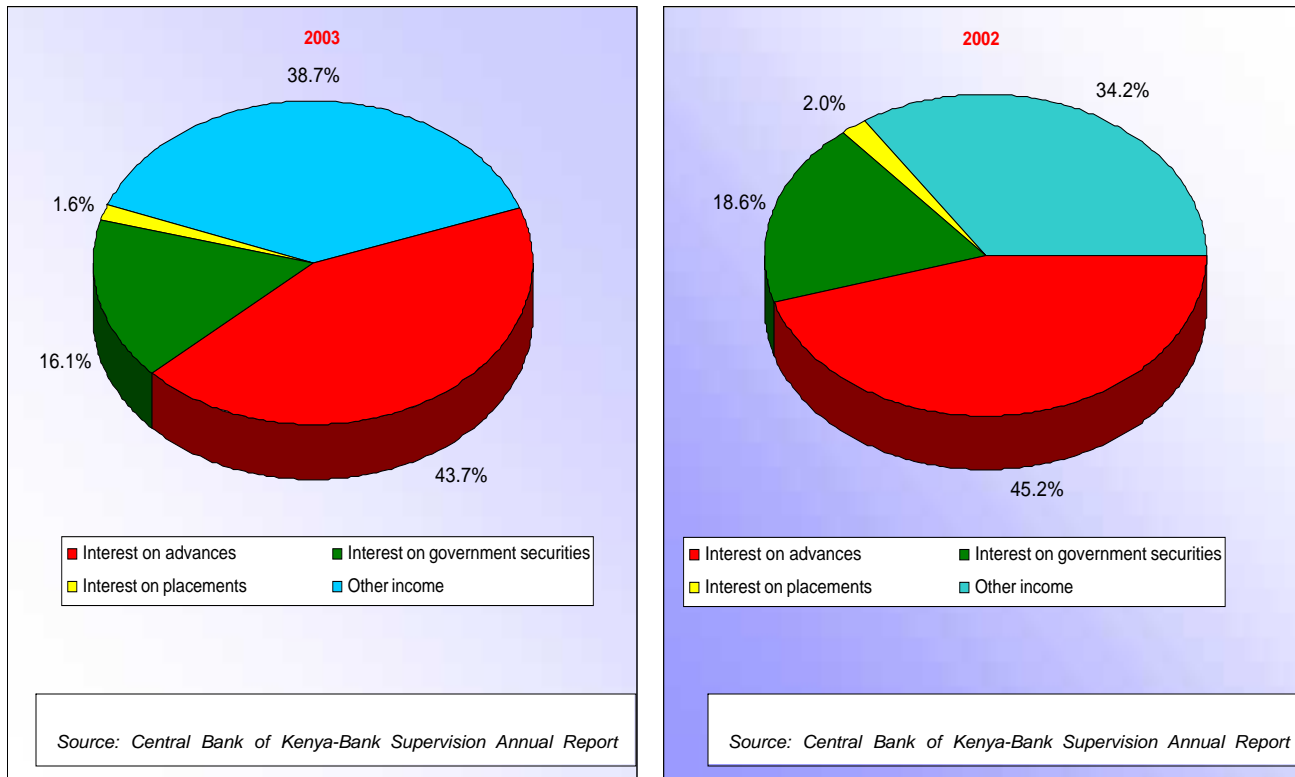
BANKING SECTOR-CREDIT DISTRIBUTION:



- 2003 (December): out of the total assets invested in loans/advances, 19.8% was channeled to the manufacturing sector (industrial sector)

Additionally, the Profit and Loss Analysis for the period ended December 31, 2003, reveals that 43.7% of the sector's income was derived from interest on loans and advances.

BANKING SECTOR-INTEREST INCOME AS A PERCENTAGE OF TOTAL INCOME



- 2003 (December): 43.7% of the banking sector's income was derived from interest on loans and advances.

Besides direct availment of credit, as a part of their portfolio diversification, Bankers may also, within the limits prescribed in the Kenyan Banking Act (Cap 488) and Insurance Act (Cap 487), make direct equity investments in industries either through the Nairobi Stock Exchange or in the non-listed companies in the industrial sector. As a matter of fact, by virtue of section 12(b) of the Banking Act, such equity investments are limited to 25% of an institutions (Banker's) capital and unimpaired reserves. In this instance, one would be concerned with, among other things, the level of returns on the equity investment as well as the continued state of health of the relevant industry. Thus, in this presentation, the terms "credit availment" and "equity investments" are treated as financial exposures to the industrial sector and therefore applied inter-changeably.

During the period ended December 31, 2003, GDP contribution by the industrial and financial services sectors was 13% and 10.5% of GDP, respectively, (expressed in terms of constant 1982 prices). Additionally, through direct involvement in the administration of companies that they have placed under receivership, Bankers may be able to influence and impart sound business practices on these entities.

It can therefore be surmised from the above that the state of health of industries has a substantial direct bearing

on the state of the banking sector and the general economy.

Why Bankers Should be Concerned with Environmental Issues:

On the basis of experience drawn from other jurisdictions, it is known that many development projects have been known to cause serious ecological and environmental problems. Human suffering through displacement and disease has disrupted communities' socio-economic and cultural structures. Some of these projects, such as the Akosombo Hydro-electric Dam in Ghana, and the Narmada Valley Project in India, are a sad reminder of what can go wrong when no adequate provision for environmental impact assessment is given during project formulation. Other issues of concern include the impact of logging, open-cast mining, unsustainable fishing practices and agricultural expansion – especially agro-chemically intensive farming such as horticulture, particularly floriculture. These are some examples of development projects that have had serious environmental implications ranging from their impact on global climate change, human health and socio-economic well-being, and the deleterious effects due to the incidence of UV-radiation passing through the depleted ozone layer.

Major industrial and commercial projects in the world that include extractive industries such as mining; oil prospecting, refining and distribution networks; paper, food, sugar, and agrochemical processing; manufacture of consumer products such as aerosols, fridges and form plastics, are invariably financed by banks or financial institutions that operate as financial intermediaries. Exploitation of forest resources (particularly logging), large-scale irrigation, electricity generation (coal or oil-fired, hydro-electric, and/or nuclear), massive programs of infrastructural development such as roads, can not be undertaken without bank loans. Technical and economic viability has been the major criteria used by banks in their funding procedures to promote industrial growth. In essence, Bankers (be they local or international) have "invisible hands" in almost every major development project.

Therefore, when we recall some examples of celebrated global environmental issues and disasters such as Bhopal in India, Movement for the Survival of the Ogoni People (MOSOP) in Southern Nigeria, forest fires in Indonesia that caused aviation disasters due to smog, the clear-felling of vast areas of tropical rainforests in favour of ranching operations, especially in South America, we can confidently, by extension, point an accusing finger at the invisible hands of the Bankers. Other examples that come to mind are the recent dual chemical leaks into the waterways in the Peoples Republic of China, fuel depot explosion in the United Kingdom, burning oil wells during the war in Iraq, and the draining of the Iraqi Marshlands for agriculture – which has since failed. As they finance these projects, Banks are more often than not well aware of the particulars, and therefore, by implication, are equally responsible for their environmental impacts.

In view of the foregoing, Bankers have been identified as key players and stakeholders in the process of economic development. Although as Lenders Bankers basically play a facilitative role, and it can be persuasively argued that by virtue of the prominent role they play Bankers can ultimately be seen as "surrogate regulators" who must *ipso facto* play a critical and pivotal role in the promotion of compliance with environmental laws and

regulations by industries. It is their collective, ethical and moral responsibility to do so. But the question must be asked: why the responsibility?

Essentially, there are four broad and basic reasons why Bankers should have responsibility for promoting compliance with environmental laws and regulations; a responsibility which should be essentially perceived as participation in risk management in this vital area. The reasons are:

- Corporate Social Responsibility.
- Self-serving and non-altruistic reasons.
- Globalization and integration of world economies and markets.
- Legal responsibilities.

1. Corporate social responsibility:

These are reasons derived from the fact that as corporate citizens, Bankers bear certain amount of corporate social responsibility to shepherd activities aimed at achieving sustainable environmental management and economic/social development.

This relates to moral obligations to perpetuate the seven universal cardinal principles regarding sustainable development that have influenced the thinking and formulation of environmental laws worldwide. These principles may be exemplified by the doctrine of national patrimony or inter-generational justice or equity which essentially espouses Principle 4 of the Rio Declaration on Environment and Development viz; "the right to development must be fulfilled so as to equitably meet the developmental needs as well as environmental needs of the present and future generations".

2. Self-serving and non-altruistic reasons:

These could be reasons derived from responsibilities which flow purely from self-serving and non-altruistic reasons which may include the following;

- a). *Balance Sheet factors*: A project may run into problems as a consequence of certain environmental management liability. This may have negative impact on borrowers' cashflow resulting in delayed payments or write-offs of interest and/or principal which ultimately may impact negatively on a bank's asset quality and earnings; other negative exposures may relate to positional risks in respect of possible diminution in the value of securities held.

In this regard, it may be pertinent to observe by way of foot note that in assessing the performance of

Commercial Banks and Non-banking Financial Institutions, the Central Bank of Kenya is normally guided by an acronym bench mark (judgment index) known as CAMEL which means Capital Adequacy; Asset Quality; Management; Earnings (Profitability) and Liabilities. Thus, to the extent that the quality of a Bank's Balance Sheet is substantially driven by the quality of its Assets which in turn include the Advances portfolio, the quality of the Advances is one of the major determinants of the quality of Assets for Banks.

It is noted that one of the key challenges for Banks in Kenya has remained the stock of non-performing loans (NPLs) which as at December 31, 2004 stood at 20.8% of total loans as compared to 25% of total loans as at December 31, 2003.

- (b) Ensuring continued existence of *systemic stability* in the overall financial system i.e. protection of the "goose that lays the golden egg". In this connection, it may be useful to be guided by the refrain of Paul Tsongas (US Senator/ Presidential Candidate) when he observes that:
“ the great political tugs of the past 35 years have concerned the distribution of the golden eggs. In the 1980s and 1990s we must focus on the health of the goose that lays the golden egg(s)”.
- (c) Business development: the potential favourable perception the market would have for a Bank adopting a credit rating policy that is sensitive to environmental issues, would provide a competitive advantage for the Bank in terms of marketing and public relations.
- (d) Triple Bottom Line (TBL) concerns worldwide: by adopting operational and credit policies that are environmentally sensitive, the Bank adds to its triple bottom line. TBL is now gaining recognition as a framework for measuring business performance. In its broadest sense, TBL captures the spectrum of values that modern organizations must embrace namely; economic, environmental and social impacts of the business. Thus, in practical terms, TBL accounting means expanding the traditional company reporting framework to take into account not just financial outcomes but also environmental and social performance.

3. Globalization and integration of world economies and markets:

The rapid pace at which world economies and markets are getting globalized and integrated is acting as a catalyst to the observance of international norms in the sustainable management of the environment. Embracing the principle of globalization and integration of markets with strict adherence to agreed international standards with respect to product quality, production processes, packaging, labeling etc (through for instance GATT, UNCTAD, COMESA, SADDC, PTA, EAC and EEC Treaties) requires that Bankers should be in the front line in encouraging investors borrowing money to embrace such global concepts as Total Quality Management (TQM) under ISO 9000 series of standards, Environmental Management Systems (EMS) for commerce and industry under ISO 14000 series of standards which are essentially based on the well tested British and

American standards as well as European Good Agricultural Practice (EUREPGAP) which are essentially a European standard aimed at ensuring farming and agricultural practices that appropriately demonstrate sensitivity to environmental and health issues. The rigorous certification processes undertaken by such accredited Certifiers as Bureau Veritas Quality International (BVQI) and Société Générale De Surveillance (SGS) etc. ensures compliance with exacting standards.

4. Legal Responsibilities:

The cluster of reasons falling under this rubric may be predicated on statutory liabilities that would stem from violations of or non-compliance with legal responsibilities whether based on statutory or common law as outlined below;

- Civil/tortious liabilities under the common law principle of general duty to take care under the concept of agency relationship, vicarious liability, etc; Situations under which duty to take care can arise are multifarious and for our purposes one may be persuaded to adopt the following dictum of Lord Atkin in Donoghue v Stevenson [1932] A.C. 562, H.L. at page 580.

“The rule that you are to love your neighbour becomes in law, you must not injure your neighbour; and the lawyer's [industrialist's] question, who is my neighbour? receives a restricted reply: You must take reasonable care to avoid acts or omissions which you can reasonably foresee would be likely to injure your neighbour. Who, then, in law is my neighbour? The answer seems to be: *persons who are so closely and directly affected by my act that I ought reasonably to have them in contemplation as being so affected when I am directing my mind to the acts or omissions which are called in question.*” [Emphasis supplied].

The other cluster of cases that could be grouped with Donoghue –vs- Stevenson in enunciating the principle of general duty to take care in terms of good neighbourly behaviour include: Rylands –vs- Fletcher (1868) LR 3 HL 330, Read –vs- J Lyons & Co. Ltd (1947) AC 156, (1946) 2 All ER 471 HL, Crum-vs- Lamberl (1867) LR 3 Eq 409, Christie-vs- Daver (1893) 1 Ch 316, Pride of Derby and Derbyshire Angling: Association Ltd-vs- British Celanese Ltd (1953) Ch 149, (1953) 1 All ER 179, CA which were cases primarily in respect of actions brought for injury done to the property of, or the enjoyment of it, by Plaintiffs therein and for redress by way of injunction or damages, as opposed to the general concept of degradation of the environment *per se*.

As Justice A.M Akiwumi rightly observes in a Paper he presented at the Global Judges Symposium on Sustainable Development and the Role of Law (2002): “It is not easy to say that these authorities which have been routinely applied in our courts in Kenya and in the courts of the other countries....., are the origins of judicial intervention in environmental causes and that it is a more acceptable theory that these common law decisions though not originally conceived as such, now fit in cosily with the modern principles of the protection of the environment”.

While agreeing with Pollock, Justice A.M Akiwumi, further notes in the Paper cited above that :

“.....The law of Torts is concerned with those situations where the conduct of one party causes or threatens to harm the other interests of other parties. One may define “ *interest*” in this context as a claim or want or desire of a human being or group of human beings which the human being or group of human beings seek(s) to satisfy, and of which, the ordering of human relations in civilized society must take into account. It is accordingly the aim of the law of Torts to define the obligations imposed on one member of society to his/her fellows, and to adjust, once it is decided that some adjustment is to be made, those losses which must inevitably result from the ever-increasing activities of those who live in a common society. This adjustment is made by providing compensation for the harm suffered by those whose interests have been invaded owing to conduct of others.....”

- Lender liabilities can therefore be derived from the following sources :
 - ❖ Statutory/Criminal sanctions arising out of statutory law such as specific environmental legislation;
 - ❖ Common Law liabilities arising out of common law principles such as Negligence, Tort, Trespass, Vicarious liability, Principal/agency relationship and other clusters of civil/tortious liabilities etc;
 - ❖ 'Superfund' or restoration fund related liabilities;
 - These would be costs arising out of contaminated sites:
 - ❖ Clean-up costs.
 - ❖ Cost recovery Actions.

It is emphasized that in discharging this onerous responsibility which should essentially be regarded as a collaborative effort, Bankers have to be competent dialogue partners with the other stakeholders.

As noted above, legal responsibilities that could compel Bankers to be sensitive to civil/tortious liabilities under the common law principle of general duty to take care are numerous and could arise for instance out of laws related to Tort, Negligence and Trespass; lender liabilities arising out of "Superfund" or "Restoration fund"-related legislation resulting in penalties and fines, and compensation claims.

By implication, the liabilities may arise from such circumstances as when a Banker plays one or more of these roles: lender, investor, investigator, profit sharer, manager, adviser, shadow director; security enforcer, receiver, receiver's appointor or indemnifier.

Thus, as observed by Kwame Mfodwo, in his article on "The Environmental Liability of Lender and Financial Institutions in New Zealand: An Analysis of Current and Proposed Regimes" published in *The Australian Journal of Natural Resources, Law and Policy*, Volume 2, as lenders, "***Bankers should therefore be legitimately concerned with, and sensitive to, their relationship to polluting activity; their relationship to land on which polluting activities takes place or has taken place, and their***

relationship with enterprises engaged in polluting activity".

At international and to some extent and varying degrees at national levels, Bankers have recognized the risk they take on some projects financed by them. For that reason alone, many banking institutions have created risk departments. The assessment by the risk departments have a major bearing on whether the requested funds would be provided, and if approved, by what margin above the base lending rate should the interest rate charged vary. These decisions depend on the magnitude of the assessed risk. Unfortunately for Kenya, except for a few instances, environmental considerations, as risk factors, have not been systematically incorporated in lending regulations and/or practices presumably due to a lack of adequate appreciation of the implications of the deleterious utilization of the environment (or unsatisfactory enforcement of) a legislative framework. Elsewhere, in Europe or North America, such environmental considerations are a pre-requisite to lending by banks as is required by law.

Governments too have realized that economic incentives to induce environmentally sound behaviour must become a feature of macro-economic or sector policies if wide-ranging results are to be achieved. Thus, it is because of the pivotal role they play, and the powerful invisible hand they flex on projects that portend environmental threats, that Bankers should be concerned with environmental issues.

Any cursory review of the above reasons will lead to the inescapable conclusion that Bankers should not only have, but must also share, in the responsibility of promoting compliance with environmental laws and regulations by industry.

At this point, it may be appropriate to examine Kenya's legal framework in relation to environmental management

Analysis of Kenya's legal framework as compared to other jurisdictions:/ Suggested legal/fiscal framework:

Although the Government of Kenya has explicitly accepted *Agenda 21* (The Rio de Janeiro Declaration) as part of the National Environmental Policy by appropriate incorporation in the country's National Development Plans and translating this into legislative action by enacting the Framework legislation: The Environmental Management and Co-ordination Act, Act No: 8 of 1999 (EMCA), it must be mentioned that at operational level, the legal landscape is still characterized by fragmented sectoral laws covering approximately 32 statutes that are of a distinctive environmental character. (For further details on the statutes, reference should be made to Appendix "A"). Justice Akiwumi reckons that there are approximately 72 such statutes. However, to avert possible conflict in statutory interpretation and in conformity with the well known canons of statutory interpretation, Section 148 of EMCA, stipulates that existing laws have been subsumed by EMCA which is to take precedence in case of any conflict between such laws and EMCA

Kenya is also a signatory to the major international conventions, treaties and protocols relating to the environment and aiming at the achievement of sustainable development. Some of such conventions include;

Convention on Biological Diversity, the United Nations Framework Convention on Climate Change, the Vienna Convention for the protection of the Ozone Layer and the United Nations Convention to combat Desertification.

As Prof. Okidi correctly notes in his article on "International Perspectives on the Environment and Constitutions" published in *The South African Journal of Environmental Law and Policy, Volume 3 No.1, March 1996*, **when it comes to establishing an appropriate legal and institutional regime for environmental law, it is a matter of firm principle that there must be a complete array of normative provisions as well as institutional and procedural arrangements for the enforcement of the now recognized universal principles governing environmental legislation.** In my view, such a legal and institutional regime has been clearly provided for in EMCA.

The said principles, which are basically premised on the soft law as enunciated in The Rio de Janeiro Declaration are appropriately incorporated in EMCA and may be summarized as follows;

- Sustainable utilization principle: (Section 3(5)(d)).
The principle restates the doctrine of inter-generational justice or equity in the use of the environment and natural resources.
- Precautionary principle: (Section 3(5)(f)):
The principle requires that every precaution and prudence should be exercised to prevent any possible deleterious environmental consequences of any socio-economic or military activities. Such measures would include Environmental Impact Assessment (EIA), Environmental Risk Assessment (ERA), and various forms of Environmental Audit and Environmental Monitoring. As an off-shoot of EIA, Environmental Action Plan (EAP) aims to ensure that the environmental effects of projects are assessed and monitored during the planning and implementation stages and that the same is done during the operational stage and that any harmful effects are minimized and mitigated.
- Integration of Environmental Considerations into Development Planning and Management: (Section 3(5)(b)):
Restates and preserves the cultural and social principles traditionally applied by Kenyan communities in the management of the environment and natural resources subject of course to the well known repugnancy clause.
- The principle regarding promotion of Public Participation in Environmental Decision- Making: (Section 3(5)(a)) .
- The Polluter Pay Principle: (Section 3(5)(e)).
- Prior Consultation and Ultimate Co-operation in the management of environmental resources shared by two or more states: Section 3(5)(c)).

As already noted, these principles may be exemplified by the principle of sustainable utilization which restates the doctrine of inter-generational justice or equity in the use of the environment and natural resources, and the precautionary principle.

As noted above, and further explained below, in the Kenyan situation, the Framework Legislation, EMCA seems to be substantially in line with the suggested approach. It is in this regard that I believe that based on the experience gained from other common law jurisdictions such as U.S.A., Australia, New Zealand, Canada and U.K., as well as other African Countries, the proposals regarding reform of environmental law in Kenya contained in EMCA and which has been enacted as part of Kenya's legislative framework, should with proper implementation, provide the initial pedestal for comprehensive environmental legislation in Kenya. **In essence, the legislation espouses/embraces framework statute, i.e., centralized legislated system of environmental management which provides the mechanisms of administrative regulation as well as criminal sanctions.** The Framework Legislation puts in place the vital machinery of environmental standards setting, which besides, should have the capacity to control the entire sphere of the beneficial use of the environment, through its mechanisms such as requirements related to EIA and the licensing of projects. Such other constitutive organs as the National Environment Action Plan Committee (Section 37(1) and the Standards and Environment Review Committee (Section 70) have readily complemented the reinforcement capacity of one of the major regulatory organs namely; National Environmental Management Authority (NEMA) (Sections 7-23). The Legislation also advocates retention of sectoral statutes provided that the operative standards and the scheme of enforcement of the statutes are to be harmonized with the framework statute.

With respect to the retention of sectoral statutes and harmonization of the same with the framework statute, it may also be pertinent to note that The Water Act (Act No: 8 of 2002) and The Forest Act (Act No: 7 of 2005 which is to replace Cap. 385 once the commencement date is advised) have since been promulgated, and are consistent with the provisions under EMCA as far as the conservation and management of these resources are concerned. The wildlife conservation policy and the mining policy are currently being formulated by the Kenya Government.

It is further noted that as the Framework legislation, EMCA combines the following three key policy planks:

- (i). Rule/Command-and-Control regulation system: Part XIII, Sections 137 -148 dealing with various categories of Environmental Offences.
- (ii). Self regulation: Part VI, Sections 58-67 dealing with requirements related to Environmental Impact Assessment and Part VII and Sections 68-69 dealing with Environmental Audit and Monitoring
- (iii). Market driven incentives/instruments such as tax waivers/exemption and favourable import duties: Section 57 covers Fiscal Incentives. The Section empowers the Minister for Finance, on the recommendation of The National Environment Council, to propose to the Government tax and other fiscal incentives, disincentives or fees to induce or promote the proper management of the environment and natural resources or the prevention or abatement of environmental degradation.

(The author is not aware of the implementation/introduction of any such fiscal incentives or disincentives as noted in the section so far and perhaps time has come when serious consideration could be given to conversion of some of the tax holiday benefits into **environmental rebates** and/or **green certificates** with monetary value awards for such positive environmental contribution as planting trees and environmental clean ups).

Constitutional Framework:

Although it may be debatable whether constitutional entrenchment may be the right basis to gauge the degree of importance that a country attaches to environmental matters, given the over-riding nature of constitutional provisions, a case may be made for such entrenchment. As Justice Akiwumi has ably argued elsewhere, “enabling constitutional provisions are not necessarily required in order to authorize the enactment of environmental legislation” and that in the case of Kenya the current Kenya Constitution, “Section 71 which deals with the right to life, implies the right, as held in the Pakistan case of Shehla Zia & Others –vs- Wavada,..... to a clean and healthy environment”. However, irrespective of the merits or demerits of Constitutional entrenchment, it may be pertinent to observe that within the African context, Equatorial Guinea, Ethiopia, Uganda, Malawi and South Africa have clearly led the way in their path-breaking initiatives to include such entrenchment provisions. Of the five jurisdictions, the South African provisions have been found, by the Author, to be most appealing. Section 24 of the South African Constitution stipulates as follows:

"Everyone has the right:- (a) to an environment that is not harmful to their health or well-being; and (b) to have the environment protected, for the benefit of present and future generations, through reasonable legislative and other measures that:-

- (i) prevent pollution and ecological degradation;**
- (ii) promote conservation; and**
- (iii) secure ecologically sustainable development and use of natural resources while promoting justifiable economic and social development."**

Besides the legal hierarchical superiority, such constitutional entrenchment gives the desired visibility to environmental matters and thereby assists in the enhancement of the level of public awareness about the critical importance of such matters.

In the Kenyan situation, it may be pertinent to observe that the tentatively aborted The Proposed New Constitution of Kenya, published as Special Issue of Kenya Gazette Supplement No: 63 dated 22nd August 2005 (the Proposed Constitution) makes commendable efforts to place the management of the Environment and Natural Resources in the rightful place. Article 67 of the Proposed Constitution under the Bill of Rights confers on every individual Kenyan the right to an environment that is safe for life and health. Seemingly borrowing heavily from the South African model, in terms of details, the said Section provides that:

“Every person has the right to:

- (a) an environment that is safe for life and health;**
- (b) have the environment protected, for the benefit of present and future generations, through legislative and measures that:-**
 - (i) prevent pollution and ecological degradation; and**
 - (ii) promote conservation and secure ecologically sustainable development and use of natural resources, while promoting economic and social development; and**
- (c) free information about the environment; and**
- (d) compensation for damage arising from violation of the rights recognized under this Article.”**

Chapter VIII of the Proposed Constitution makes generous provisions on such critical issues as: Principles and obligations on the environment; Protection of the environment; Conservation of the environment; Utilization and development of natural resources; etc. In particular, Article 88 of the Proposed Constitution places every individual Kenyan at the centre of stewardship of responsible environmental management. The Article provides that:

“Every person has a duty to co-operate with the State organs and other persons to:

- (a) ensure ecologically sustainable development and use of natural resources;
- (b) respect, protect and safeguard the environment;
- (c) prevent or discontinue an act which is harmful to the environment;
- (d) direct the appropriate authority to take measures to prevent or discontinue an act or omission which is harmful to the environment; and
- (e) maintain a clean, safe and healthy environment.”

Section 3 of the Framework legislation: EMCA stipulates as follows;

“(1) Every person in Kenya is entitled to a clean and healthy environment and has the duty to safe-guard and enhance the environment.

(2) The entitlement to a clean and healthy environment under subsection (1) includes access by any person in Kenya to various public elements or segments of the environment for recreational, educational, health, spiritual and cultural purposes.

(3) If a person alleges that the entitlement conferred under subsection (1) has been, is being or is likely to be contravened in relation to him, then without prejudice to any other action with respect to the same matter which is lawfully available, that person may apply to the High Court for redress and the High Court may make such orders, issue such writs or give such direction as it may deem

appropriate to prevent, stop or discontinue any act or omission deleterious to the environment etc.

- (4) A person proceeding under subsection (3) of this section shall have the capacity to bring an action notwithstanding that such a person cannot show that the defendant's act or omission has caused or is likely to cause him personal loss or injury provided such action is not frivolous or vexatious, or is not an abuse of the court process etc."**

By constitutionally placing individual Kenyans at the centre of environmental management as noted above, the proposed entrenchment, when taken together with the provisions of Section 3 of EMCA regarding entitlement to a clean and healthy environment, would effectively redress the current impediment imposed in the development of case law through the [mis] application of the common law principle of *locus standi* which technically has been limiting prosecution on environmental matters to the Attorney General and restricts the scope of individuals to successfully sue on such matters only to situations where the individual can demonstrate exemplary injuries in matters of public nuisance or injuries to proprietary interest. In Professor Wangari Maathai, Co-ordinator, Green Belt Movement- Vs- Kenya Times Media Trust Ltd (High Court Civil Suit No: 5403 of 1989) Justice N. Dugdale as he then was when considering one of the preliminary objections raised by the Respondent's Counsel on whether or not the Plaintiff had reasonable cause of action against the Defendant Company and hence *locus standi* to file the suit or the application, took the view that only the Attorney General can sue on behalf of the public on such matters and proceeded to hold that the Plaintiff had no right of action against the Defendant Company and that hence she had no *locus standi*. Thus, Professor Wangari, acting on behalf of the silent majority of the Kenyan citizenry, lost the case on a technicality but thereafter cleverly proceeded to successfully prosecute the case through "political processes" by canvassing critical support from the Donor and International Community; a gallant effort that effectively yielded the desired outcome and ensured that the otherwise intrusive proposed sixty storey monolithic eyesore in the recreational grounds of Nairobi's Uhuru Park never saw light of the day.

By way of contrast, in Greenwatch -Vs- Attorney General & Another (In the High Court of Uganda at Kampala: Miscellaneous Application No: 39 of 2001), the honorable Court had to consider one of the preliminary objections on whether the application disclosed a cause of action against any of the Respondents. The application in question had been brought by the Applicant by way Notice of Motion under Article 50(1),(2) of the Constitution of the Republic of Uganda, Rule 3(1) of the Fundamental Rights and Freedoms (Enforcement Procedure) Rules 8,1 No: 26 of 1992, Order 48 Rules 1 and 3 of the Civil Procedure Rules. The Applicant, an NGO focusing on issues and problems related to the proper use and management of the environment, was seeking the following order and declaration, among others;

- A declaration that the manufacture, distribution, use sale, disposal of plastic bags, plastic food wrappers, all other forms of plastic commonly known and referred to in Uganda as "*Kaveera*," violates the rights of citizens of Uganda to a clean and healthy environment as stipulated in Article

39 of the Constitution of the Republic of Uganda (“the Constitution”) as further augmented by the provisions of Section 3 of the National Environmental Statute No 4 of 1995 (“the Statute”) which imposes a mandatory duty on the National Environmental Management Authority (NEMA) to ensure that the principles of environmental management are observed and which principles include the need “to assure all people living in the country the fundamental right to an environment adequate for their health and well being and to establish adequate environmental protection standards and to monitor changes in environmental quality.”

The State Counsel appearing for the Respondents, the Attorney General and NEMA, raised two basic preliminary objections which are relevant to the present inquiry namely; (i) that the application did not disclose a cause of action against any of the Respondents and (ii) that the application had violated the provisions of Order 1 Rule 8 of the Civil Procedure Rules which required that such actions be instituted by way of representative action.

In his arguments, in relation to the first objection regarding whether the application disclosed a cause of action against any of the Respondents, the State Counsel submitted that the application did not satisfy the three essential elements to support a cause of action as set out in Auto Garage-Vs- Motokov (No:3) 1971, EA 514 to wit;

- (i) That the Plaintiff (Applicant) enjoyed a right;
- (ii) That the right had been violated and
- (iii) That the Defendant (Respondent) was liable.

After reviewing the facts placed before him and the law and in particular the provisions of Article 39 of the Constitution and section 4 of the Statute, the Acting Judge came to the reasoned conclusion that the three elements to support the cause of action against each of the two Respondents had been satisfied and proceeded to overrule the first preliminary objection.

As to the second ground of preliminary objection which touched on the issue related to the need for the Applicant to have initiated the application as a Representative action pursuant to the provisions of Order 1 Rule 8 of the Civil Procedure Rules, citing The Environmental Action Network Ltd -Vs- The Attorney General and National Environment Management Authority (Application No. 39 of 2001), the Acting Judge relied on Mr. Justice J.H. Ntabgoba’s ruling in the cited case to determine that there is a distinction between actions brought in a representative capacity pursuant to Order 1 Rule 8 of the Civil Procedure Rules and what are called Public interest litigation which are the concern of Article 50 of the Constitution. The Acting Judge went on to note that the two actions are distinguishable by the wording of the enactments or instrument pursuant to which they are instituted. Order 1 Rule 8 of the Civil Procedure Rules governs actions by or against the parties (i.e Plaintiff or Defendant) together with parties that they seek to represent and they must have similar interest in the suit. On the other hand, Article 50 of the Constitution does not require that the Applicant must have the same interest as the parties he or she seeks to represent or for whose benefit the

action is brought.

It is necessary to observe that Article 50 of the Ugandan Constitution provides as follows:

- (1) Any person who claims that a fundamental or other right or freedom guaranteed under this Constitution has been infringed and threatened is entitled to apply to a competent Court for redress which may include compensation.
- (2) Any person or organization may bring an action against the violation of any person's or group's human rights"

The Acting Judge went further to note that from the wording of Article 50(2) of the Constitution, any concerned person or organization may bring a public interest action on behalf of groups or individual members in the Country even if that group or individual is not aware that his fundamental rights and freedoms are being violated. Citing the case of Rev. Christopher Mtikila - Vs- The Attorney General (High court of Tanzania Civil Case No.5 of 1993 (unreported), the Acting Judge went on to refer to the level of illiteracy in East Africa to underscore the limited public awareness of the fundamental rights or freedoms provided for in the Constitution, let alone legal rights and how the same can be enforced. Thus, he observed that "it is just appropriate that a body like the Applicant, comes up to discharge the Constitutional duty cast upon every Ugandan to promote the Constitutional rights of the citizens of Uganda and that the institution of a suit of this nature is one of the ways of discharging that duty. This Court is under an obligation to hear the concerned citizen, in the instant case the Applicant." The good Judge then proceeded to similarly overrule the second preliminary objection.

As there are several similarities between the Ugandan Constitution and the New Proposed Constitution for Kenya as well as the Environmental Management legislations in the two jurisdictions, one can reasonably surmise that with such proposed constitutional entrenchments and development in case law, it is now clear that *locus standi* as an impediment to Public interest action (litigation) is soon going to an impediment of the past. However, the Author is constrained to observe that notwithstanding the optimism expressed herein with respect to judicial attempt to exorcises the stigma of *locus standi* in relation to Public Interest Litigation based on Section 3 of EMCA, a quick review of Court decisions in Kenya both in the Pre-EMCA and Post-EMCA era do not seem to yield any discernible consistent trend on the subject matter. For instance, in the Pre-EMCA era, while in Prof. Wangari Maathai –vs- Kenya Times Media (HCCC No: 5403 of 1989), the Court invoked the doctrine of *locus standi* to disable the Plaintiff from prosecuting the case, in Abdikadir Sheikh Hassan & 4 Others –vs- Kenya Wildlife Service (HCCC No: 2059 OF 1996-Unreported) and Paul Nderitu Nduneu and 2 Others (HCCC No: 3063 of 1996-Unreported), the Courts vacated the doctrine and allowed the Plaintiffs to prosecute the respective cases. On the other hand, in the Post-EMCA era, in Rodgers Muema Nzioka & 2 Others –vs- Tiomin Kenya Ltd (HCCC No: 97 of 2001) and El-Busaidy –vs- Commissioner of Lands & 2 Others (HCCC No: 613 of 2001), the Courts vacated the doctrine and allowed the Plaintiffs to prosecute the cases while in Park View Shopping Arcade Ltd –vs- Charles M. Kangethe & 2 Others (HCCC No: 438 of 2004), the Court invoked the doctrine to partially incapacitate the Defendants/Respondents from prosecuting the case. Thus, despite the statutory fortification as contained in

Section 3 of EMCA which it is hoped should have exorcized the *locus standi* as an impediment to prosecuting environmental cases, it would appear that in the absence of any consistent judicial trend on the subject matter, the Bar and the Bench will continue to wrestle with the stigma of *locus standi* for a little longer in the management of environmental cases in Kenya.

It is also noted that the fact that the tentatively aborted Proposed Constitutional provisions did not yield any known controversy in the referendum debacle, it may be safe to presuppose that Kenyans are in general agreement about the suitability of the proposed constitutional entrenchment provisions as they relate to environmental management.

Possible effects of environmental liability on the Banker/Industry relationship:

Cognisance has to be taken of the fact that in the Kenyan situation, the proper implementation of EMCA will fundamentally change the manner in which issues related to environmental management are to be addressed and will by extension re-define the banking landscape and practice in Kenya. It is in this regard that, as a way of enhancing the level of public awareness about Environmental responsibility and stewardship, the path-breaking initiative taken by some major Corporates as well as some Professional Associations such as Kenya Association of Manufacturers (KAM) in publishing their Corporate Environmental Mission Statements should be applauded.

As a consequence of the attendant liabilities, it goes without saying that depending on how the relationship is managed, there could be considerable strain in the relationship between Bankers and Industry as well as the other stakeholders.

Thus, to avoid a strained relationship when EMCA starts to be implemented in earnest, I would advocate for initiatives aimed at achieving informed dialogue/partnership amongst all the stakeholders to create business practices/systems which are anchored on a pedestal that shows appropriate sensitivities to environmental matters and which go beyond minimum compliance requirements.

It is emphasized that in the process of discharging and sharing this onerous responsibility, Bankers have to be competent dialogue partners with the other stakeholders in articulating their position on environmental stewardship; a position that should essentially be understood as a collaborative effort.

Liability & the Doctrines affecting possible scope and limitation of lender liability for environmental injuries and/or damages:

As evidenced by the experience gained from the USA jurisdiction, lender liability should not, on policy grounds, be left open-ended. Under section 106 of the "Superfund" *...any person who willfully violates or refuses to comply with an order* from the Environmental Protection Agency (EPA) without sufficient course is potentially subject to penalties of US \$ 25,000 per day for each day that the violation or failure to comply

continues. Given the many potential “costs of response” the average cost of cleaning up a site in the USA was recently estimated to be approximately US \$ 25 million. Thus, it is my opinion that any attempted replication of such experiences as obtainable in the USA, would lead to the scarce resources, which should have otherwise been utilized in improving the management of the environment, to be misdirected into such supplementary transaction costs as various types of professional fees.

In my view, there are three effective ways of scoping limitation of lender liability for environmental injuries and damages. These could be:

- (i). Incorporation of appropriate and satisfactory statutory defences/exemptions for secured lenders;
- (ii). Judicious application of the "Public Welfare Offense" doctrine to avoid creating strict criminal liability for environmental regulations violations;
- (iii). Devisal of Compensation Schemes based on Pre-determined Statutory Scale.

(i). Statutory Defences/Exemptions for Secured Lenders:

Section 58(1)(2) of the Kenya Framework legislation, EMCA stipulates as follows;

“Notwithstanding any approval, permit or licence granted under this Act or any other law in force in Kenya, any person, being a proponent of a project, shall, before *financing*, commencing, proceeding with, carrying out, executing or conducting *or causing to be financed*, commenced, proceeded with, carried out, executed or conducted by another person any undertaking specified in the Second Schedule to this Act, submit a project report to the Authority, in the prescribed form, giving the prescribed information and which shall be accompanied by the prescribed fee. (Emphasis supplied)

“The proponent of a project shall undertake or cause to be undertaken at his own expense an environmental impact assessment study and prepare a report thereof where the Authority, being satisfied, after studying the project report submitted under sub-section (1), that the intended project may or is likely to have or will have a significant impact on the environment, so direct”.

A “proponent” is defined in EMCA as “a person proposing or *executing* a project, programme or an undertaking specified in the Second Schedule and a “project” is defined as “including any project, programme or policy that leads to projects which may have an impact on the environment”.

The Second Schedule specifies various categories of projects that should undergo environmental impact assessment and include any activity which is out of character or harmony with the surrounding or any structure of a scale not in keeping with the surrounding or major changes in land use.

Part XIII of EMCA (sections 137-145), prescribe the various classes of Environmental offences. For instance, section 138(a), (b) and (c) of the Act stipulates that;

“Any person who:

- (a) who fails to submit a project report contrary to section 58 of this Act;
- (b) fails to prepare an environmental impact assessment report in accordance with the requirements of this Act or regulations made thereunder;
- (c) fraudulently makes false statements in an environmental impact assessment report submitted under this Act or regulations made thereunder;

commits an offence and is liable on conviction to imprisonment for a term not exceeding twenty four months or to a fine of not more than two million shillings or to both such imprisonment and fine.

A view is taken in this presentation that “*financing*” or “*causing to be financed*” is part of “*execution*” and that by virtue of lending activities to fund projects, Bankers could be regarded as project proponents and therefore covered under the ambit of the EMCA. Additionally, as already noted Lender liability may attach by virtue of the common law principles related to Tort, Negligence, Trespass, Principal/Agency relationship and vicarious liability etc.

At this point, being driven to this direction basically by the primal survival instinct of self preservation, I would seek your indulgence ladies and gentlemen that you should allow me to be a little selfish and self-centered and to make the following observation as a Banker.

There is often a wrong perception that Bankers are richer or are "deeper in the pocket" than most of the potentially liable parties (PLPs) and therefore perceived by environment protection authorities as better targets when it comes to recovering costs of extensive clean-up of contaminated sites or segments of the environment. For this reason among others, it would be in my view vitally necessary in the Kenyan context that Bankers should vigorously advocate for appropriate statutory defences/exemptions that would recognize the function of lending in the normal course of business as a facilitative and independent activity which should be devoid of any serious consequential third party liabilities because *ipso facto* Bankers would in this particular instance be regarded merely as Surrogate Regulators. In my view, the following exemption from liability clause modeled after the Australian Bankers Association Proposal for inclusion in Federal and State legislation would provide a reasonable starting point:

"A Financial Institution shall not incur any liability under this Act, by reason that:

- (a) it makes a loan or otherwise provides or continues to provide financial accommodation to any party or parties in the ordinary course of its business, or

- (b) pursuant to financial arrangement with another party or parties it holds indicia of title or is the nominal legal owner of any property, or
- (c) it:
 - (i) forecloses upon; or
 - (ii) appoints a receiver or receiver and manager or agent for mortgagee in possession over; or enters into possession of; or otherwise deals with;
 - (iii) attaches land or any other property for the purpose of protecting, enforcing or realising upon any security or;
 - (iv) otherwise deals with land or any other property for the purpose of protecting, enforcing or realizing upon any security, or
- (d) it provides financial advice to any person or persons or otherwise carries out any bonafide activities to monitor or manage a loan or other financial accommodation".

However, although such statutory provisions would provide the desired well-defined, flexible and equitable exemptions from environmental liability for lenders, a feature that is lacking in most jurisdictions where management of Superfund-related cases have been rendered inequitable for lenders, I feel that wholesome and unqualified adoption of the Australian model may not, by itself, provide us with the appropriate direction. This is because as has already been argued, it is critically important that Bankers should play a significant role in promoting compliance with environmental laws and regulations and may be their being made active as opposed to passive Surrogate Regulators is one effective way of achieving this noble objective. *Some measure of residual liability can be justified.* Thus, the Australian model is being cited here to provide a comparative review and basically to disabuse the misplaced notion that of the PLPs, Bankers are richer or deeper in the pocket and to *further fortify the argument as noted immediately below that given the obvious resource constraint, it should be recognized that just like any other stakeholders, Bankers have limited resources and that there is a need for considerable judicial restraint to be exercised in awarding compensations and the general development of the relevant case law in this area.*

(ii). Judicious application of the "Public Welfare Offense" doctrine:

It is an accepted principle in criminal jurisprudence that criminal conviction can only be sustained if the element of *mens rea* or criminal intent or the requisite mental state is established.

In 1992 court decision, the USA jurisdiction has set a trend in invoking the *"Public Welfare Offense" doctrine which creates an exception to the established criminal law requirement of mens rea in the*

enforcement of regulatory offenses, resulting in a judicially created strict liability for environmental regulatory violations. In *Kelly v. United States Environmental Protection Agency* [No. 92 - 1312 (DC Cirri 1992)], the United States Court of Appeals for the District of Columbia rejected the regulation designed by the Environmental Protection Agency (EPA) to shield lenders from environmental liability through promulgation of the Lender Liability Rule. **The court vacated the Lender Liability Rule** leaving lenders to be guided by the earlier ruling in *United States v. Fleet Factors*, 901 F.2d 1550(11th Cirri, 1990) **which established the principle that a lender with unexercised capacity to influence its borrower's waste disposal practices could be held liable for the cost of cleaning up its borrower's property.**

The Author's reading of the relevant sections of EMCA creating the Environmental Offences is that certain sections of the Kenyan legislation seem to be based on the "Public Welfare Offense" doctrine as it would appear that the said sections vacate the element of *mens rea* or criminal intent to judicially arrive at the offence under the legislation. In practical terms, this would in effect mean that there may be a slight shift in the burden of proof and that the standard of proof required to establish the specific offence(s) might not be as rigorous as it would be if the normal standards of proof in criminal jurisprudence were to be invoked. Thus, to the extent that it would appear that by invoking the public welfare doctrine as part of the underlying juridical rationale, obtaining criminal sanctions under EMCA has been made much easier, it is arguable that such a situation would not augur well in circumstances where the prescribed sanction for breach or violation involves deprivation of individual liberties.

Thus, as observed by Edward B. Witte and Mark L. Prager in their article on "Environmental Lender Liability: Searching for Safe Harbours in the Wake of *Kelly -vs- EPA* published in the *Wisconsin Environmental Law Journal Vol.1 No.1*: and Kepten D. Carmichael in the article "Strict Criminal Liability for Environmental Violations: A Need for Judicial Restraint" published in the *Indiana Law Journal Vol.71 No.3*, one would be constrained to note that **considerable judicial restraint should be exercised in the development of the relevant case law in this area particularly in relation to compensation for environmental damage/injury.** (Emphasis supplied).

(iii). Devisal of Compensation Schemes based on Pre-determined Statutory Scale:

As mentioned above, there is a general misperception that of the Potential Liable Parties (PLPs), lenders (read as Bankers) are richer or are deeper in the pocket than most PLPs. Indeed, in the Kenyan situation there is a firmly held, although mistaken belief, that banks and other stakeholders such as industrialists have unlimited resources. It is quite often forgotten that as a business enterprise, when confronted with additional costs in doing business and the range of compensation we are alluding to here would constitute such costs, banks would invariably pass on such costs to the consumers (read as borrowers). **It is therefore suggested that Superfund-related compensation schemes should, as far as is practically possible, be anchored on predetermined statutory scales that would incorporate formulae aimed at facilitating granting of realistic and pragmatic compensation awards which fully recognizes the obvious resource constraints.**

Otherwise, as Christopher Wood cautions in his book on *Environmental Impact Assessment - A Comparative Review*, incurring of uncontrolled expenses as is the case in the USA would have disastrous consequences on the continued viability of managing the relative regulatory regime. It may also be instructive to note Larry A Reynolds' cautionary observation made in his article: "New Directions for Environmental Impairment Liability Insurance in Canada" published in *Journal of Environmental Law and Practice, Volume 6*. that for similar and other reasons, it has not been possible for Canada to devise an effective environmental impairment liability insurance scheme. Observers of the Kenyan insurance scene can recall the fate of the Insurance Motor Pool that collapsed partly as a consequence of the magnitude of the inconsiderate claims made against the pool; thanks to the adversarial system of retributive justice that is prevalent in Kenya which in my view accelerated the untimely demise of the Motor Pool.

In addition to the above, it is also my view that Bankers would be concerned with some of the following further key policy issues:

- (i). application of the principle of retrospective or retroactive liability;
- (ii). apportionment of liability in respect of historically contaminated sites in view of the fact that such liabilities are supposed to be joint and several and such sites would frequently have multi-party character in terms of causation; and
- (iii). limitation periods.

Possible Implementation Mechanisms:

The next question to be posed should then be: What are the possible implementation mechanisms that are available to Bankers to facilitate the discharge of the expected responsibility?

One sees possible implementation mechanisms at two levels. The first level relates to implementation methods that the banking sector can devise and implement at sectoral level, while the second level relates to implementation methods that Bankers can undertake at individual corporate level.

I. First Level Implementation Mechanisms (At Sectoral Level):

This may include:-

- (i). ***Formulation and adoption of an appropriate sectoral code of ethics and conduct, or 'Responsible Financing Programme'*** that appropriately focuses on environmental matters with particular emphasis on availability of credit to industries possibly modeled after the European Chemical Industry's 'Responsible Care Programme' and/or 'The Equator Principle: A framework for financial

institutions to manage environmental and social issues in project finance'¹.

- (ii). ***Formulation and adoption of credit appraisal systems and techniques as well as loan administration procedures that encompasses EIA ,ERA and EDDA as integral parts of project feasibility study and implementation.*** Environmental Impact Assessment and Environmental Audit as tools for achieving sustainable management of the environment, have technical meanings ascribed to them, as terms of art, in the definition section of the Framework legislation EMCA. Such proactive initiatives would demonstrate an appreciable degree of awareness by Bankers on the strategic approach to environmental issues;
- (iii). ***Formulation and adoption of accounting standards and disclosure requirements*** that would appropriately recognize materially significant environment - related liabilities;
- (iv). ***Collaboration with the other stakeholders to ensure that :***
- (a). the creation of an enabling legislative/fiscal framework that centre-plays sensitivity to environmental matters by, for instance, ensuring the establishment of a legally effective Environmental Protection Authority. This has largely been achieved via the Framework legislation: EMCA which would be greatly assisted by positive jurisprudence

¹ Briefly stated, the Equator Principles (EPs) is a voluntary framework that banks can use to manage the environmental and social aspects of project financing. EPs originates from the adoption in 2003 by IFC and some 20 leading banks of common environmental and social standards in their financing of projects around the World. Guided by a strong commitment to a sustainability agenda, IFC and the International banks have stepped forward to take a leadership role on global environmental and social issues. By adopting the EPs, the 20 banks have agreed to use clear, responsible and consistent rules for environmental and social risk management in project finance lending. The EPs provide for categorization of projects according to IFC's procedures, and followed with general application of IFC's environmental and social policies and guidelines. The principles are applicable to all project finance business with a capital cost over US\$ 50 million. From the preamble, the adopting banks commit: "**not to provide loans directly to projects where the borrower will not or is unable to comply with our environmental and social policies and procedures**".

There are two technical components to the environmental and social policies and procedures that IFC applies to its projects namely;

- (i) *IFC/WB industry standards* comprising a series of environmental, health and safety guidelines each designated for a specific industry and providing detailed applicable standards for that industry.
- (ii) *IFC safeguard policies* that cover environmental and social issues such as indigenous peoples, natural habitats and resettlement and are designed to improve project sustainability.

The adopting banks include the following;

- ABN AMRO Bank, NV,
- Barclays Plc,
- HSBC Group,
- Royal Bank of Canada,
- Standard Chartered,
- The Royal Bank of Scotland.

underpinning the Proposed Constitution.

- (b). the establishment of an environmental restoration fund; (Already done legislatively)
- (c). the establishment of centralized professional competencies in such fields as EIA, ERA and EDDA;
- (d). the general sensitization and enhancement of the level of public awareness on environmental management matters;
- (e). offering support for independent private sector development of environmental management consultancy.

II. Second Level Implementation Mechanisms (At Individual Corporate Level):

Among others, the following four elements may apply at this level;

- (i). ***Development of internal professional competencies in such fields as EIA and ERA;***
- (ii). ***Formulation and adoption of credit appraisal systems and loan administration procedures that recognize and appropriately reward projects that show sensitivity to environmental matters.*** Such rewards would be reflected, *inter alia*, in the costing/pricing of the underlying entrepreneurial risks expressed in terms of the interest rates and the other related transaction costs charged;
- (iii). ***Insistence on EIA, ERA, Environmental Due Diligence/Audit as a pre-requisite to initiating and subsequently sustaining loan relationships;***
- (iv). ***Use of legal documentation with appropriate protective/indemnification covenants on Environmental Risk Management.***(Examples : Changes in Tenancy laws that are increasingly imposing specific environmental responsibilities and obligations on Tenants stemming from EMCA for instance and scoping appropriate indemnifications for non-compliance and or violations)

Establishment of an Environmental Trust Fund and an Environmental Restoration Fund:

To my mind, some of the key issues to be addressed on the establishment of environmental trust/ restoration fund would be related to the funding arrangements and the responsibilities to be discharged by such a fund.

For comparison purposes, in the USA jurisdiction, The Comprehensive Environmental Response Compensation and Liability Act ("Superfund" or "CERCLA") constitutes the necessary medium for funding

environmental restoration. The Act establishes liability for classes of parties who are associated with contaminated sites. In Superfund terms, the following are the four classes of potentially responsible parties (PRPs):

- (i). any person who currently owns or operates a property contaminated by hazardous substances (a "current owner" or "current operator");
- (ii). any person who owned or operated a property presently contaminated with hazardous substances at the time the same hazardous substances were disposed of (a "prior owner" or "prior operator");
- (iii). any person who arranged for disposal of hazardous substances which are later identified at a contaminated site (a "generator");
- (iv). any person who transports hazardous substances to any site which is later found to be contaminated with the same hazardous substance (a "transporter").

Courts in the USA have endorsed the aggressive interpretation of these categories by the Environmental Protection Agency (EPA) and other private third party plaintiffs to cast a broad net of liability on a wide array of business and individuals. Most disturbingly for lenders, the term "owner" or "operator" has also been liberally construed to potentially include parties who take security interest in properties which are found to be contaminated.

The Superfund PRPs are responsible for all costs of "removal or remedial" actions (also known as "response costs") to investigate and clean-up a "release" of a "hazardous substance" from a "facility". Superfund also provides private parties who investigate and clean-up contaminated sites in a manner consistent with the EPA's national contingency plan with a private right of action against other PRPs, known as a Cost Recovery Action, and also a right of contribution against other PRPs.

In the Kenyan context, as already stated in this presentation, one would be persuaded to support the proposals contained in the EMCA which suggests separate establishment of an Environmental Trust Fund (section 24(1) and an Environmental Restoration Fund (section 25(1)), both possibly modeled after the Superfund. The main object of Environmental Trust Fund is the facilitation and maintenance of rational management of the environmental and natural resources through research, capacity building, environmental awards, scholarships and grants etc and by covering the project and operational expenses. The funding is to be sourced from:

- (i). Such sums of money or other assets as may be received by the Trust Fund in the form of donations, endowments, grants and gifts from whatever source and specifically designated for the Trust Fund;

- (ii). Such sums of money or other assets as may be specifically designated to the Trust Fund by the Authority out of its General Fund.

On the other hand, the object of the Environmental Restoration Fund is to be a supplementary insurance for the mitigation of environmental degradation where the perpetrator is not identifiable or where the exceptional circumstances require the Environmental Management Authority to intervene towards the control or mitigation of environmental degradation.

The funding is to be sourced from:

- (i). such proportion of fees or deposit bonds as may be determined by the Authority from time to time;
- (ii). such sums as may be donated or levied from industries and other project proponents as a contribution towards the restoration fund.

As evidenced above, the sourcing of funds reflect collective responsibility and collaborative effort from an array of stakeholders and the proposal should therefore be easily acceptable to Bankers and other stake stakeholders. *It is also hoped that the insurance industry will develop appropriate environmental impairment liability products, beyond the apparently overstretched Public Liability Policy Insurance covers, to complement the above initiatives.*

How should Bench and the Bar approach environmental litigation?

In my view one of the most attractive features of Kenya's Framework legislation: EMCA is that it creates jurisprudence that allows for proactive management of the environment and appropriately focuses on mitigative approach to environmental management. In my view, the legislation tones down quite considerably the adversarial approach to environmental management. *It can therefore be reasonably argued that the Framework legislation has as part of its underlying criminal jurisprudential rationale, restitutive as opposed to retributive criminal justice which may explain the predominance of mitigative and precautionary approach to environmental management that characterizes the Framework legislation.*

It is therefore my view that the actions of the Bench and the Bar as well as the other key players such as Project Proponents, Regulators etc on issues related to environmental management, should be guided by the jurisprudential rationale underpinning the Framework legislation, EMCA, because by themselves, criminal sanctions would not in my view yield the expected results. After all, as noted above and as enunciated in the Rio de Janeiro 1992 "Earth Summit" and as recognized in *The World Development Report 1992*, the **Sustainability Agenda** calls for striking a delicate balance between economic development and sustainable use

of the environment; a balance that, among other things, calls for a philosophical commitment to the pursuit of sustainable economic development policies and practices that recognize the existence of a symbiotic link between sustainable economic development and rational use of the environment and which should not be perceived as being an either or option. The comments that follow should therefore be taken against this background and should be used basically as a starting point to the debate on: How the Bench and the Bar should consider approaching environmental litigation.

Given the relative youthfulness of EMCA and in the absence of consistent and systematic reporting of Court decisions on environmental matters, it is not clear to the Author whether interpretation of the relevant sections of EMCA have been extensively tested in Kenyan courts and as such no discernible trends can be deduced from the very few environmental cases that have come up for litigation in the recent past. However, as a glimpse into the Bench's likely thinking on the possible approach, it may be useful to make reference to: Rodgers Muema Nzioka & 2 Others (Plaintiffs) –Vs- Tiomin Kenya Limited (Defendants) HCCC No.97 of 2001.

In the cited case, Justice Andrew Hayanga as he then was, had to consider applications by the Plaintiffs that were based on the failure of the Defendants, as a project Proponent to submit a Project Report and undertake the preparation of an Environmental Impact Assessment Report (the Reports) pursuant to section 58 of EMCA. The Plaintiffs had sought injunctive reliefs to restrain the Defendants from carrying out acts of mining in any part of the affected area of Kwale District and secondly, a declaratory order that the mining activities being carried were illegal on account of the failure of the Defendants to comply with the mandatory provisions of section 58 with regards to the submission of the Reports to NEMA.

The Defendants had argued, inter alia, that at the point at which the Plaintiffs had commenced the proceedings, they (the Defendants) were not engaged in any mining activity that should have required prior submissions to NEMA under section 58 of the Act as they were essentially at prospecting stage, an activity that had been licensed under the Mining Act (Cap 306). The Defendants had therefore argued that the application was premature.

In determining the application before him and in trying to set the judicial direction on environmental litigation in Kenya under the EMCA legal regime, Justice Hayanga posed the basic issue in the following terms;

“The question may well be asked if legal cases based on Environment are to be resolved on any distinct principles, but the answer is that if there is distinct law of Environment it is not conclusive, and most environmental disputes are resolved by application of the principles of Common Law like law of tort, property, injunctions and those principles of administrative law, but the applicable law is the statute law which in this case is THE ENVIRONMENTAL MANAGEMENT AND CO-ORDINATION ACT NO: 8 OF 1999. It is imperative to resort to this statute to decide whether the claimant not only has entitlement to an action but a case for injunction with probability of success”. Page 7 of the judgment. (Emphasis supplied)

On the basis of the observation as noted above, the Judge then proceeded to strictly interpret and apply the provisions of section 3 of the Act which confers the entitlements and section 58 of the Act that provides for the mandatory submission of the Project Report and Environmental Impact Assessment Reports to NEMA. After reviewing some literature on Environmental Law as well as case law decided in other jurisdictions and in a way relying on the underlying legal principles of restitutive criminal jurisprudence as noted above, the Judge granted the injunctive relief sought by the Plaintiffs while coming to the conclusion that;

“In my judgment, I would say that the breaches of Environmental statute should be looked at without embracing exclusive trappings of equity in applying the law of injunction under Environmental Management and Co-ordination Act No: 8 of 1999, but to apply them with close adherence to what the Statute Law prescribes. Section 3 thereof prescribes general principles of application by the Court in adjudicating over this kind of case. First, the Court is given wide discretion to make such orders by issuing such writs or give such directions as it may deem appropriate including an order to restore the degraded environment”. Pages 19 -20 of the judgment.

While relying on the combined effect of sections 3 and 58 of EMCA to assist him to overrule the conflicting provisions contained in the Mining Act and on which the Defendant company had predicated part of its case, the honorable Judge could as well have fortified his arguments by specifically invoking the provisions of section 148 of EMCA which stipulates that the Framework legislation would override any existing written law, in force immediately before the coming into effect of the EMCA, on matters relating to the management of the environment.

Review of the legal regimes of the other common law jurisdictions reveals that the doctrine of environmental lender liability has evolved through *extended liability approach*. Under this approach, both the regulatory authorities and judicial authorities can interpret the applicable legislation as extending to Bankers (read as lenders) although Bankers may not clearly be the prime targets of the legislation in some primary sense. As Kwame Mfodwo (1995) further explains "***Lenders' liability is thus an important but essentially residual aspect of the litigation driven, court-mediated model for securing environmental clean-up and the allocation of associated costs that is currently dominant in western economies***". The concept addresses those situations where a secured creditor would be made liable for its debtor's (borrower's) obligations to third parties. The notions are essentially judge-made or common law concepts. So it is that as already noted such common law principles related to vicarious liability, principal/agency relationship, product liability e.t.c. are often invoked to provide the underlying juridical rationale.

Challenges:

One sees the following as some of the key challenges in the attempts to achieve sustainable development through the sustainable use of the environment and natural resources;

- (i) Raising the level of public awareness on Environmental issues and management.

- (ii) Capacity constraint and operationalization of EMCA. There is a clear capacity deficit all the way round and consistent effort must continue to be made to remedy the deficits.
- (iii) Developing a culture of partnership and collaboration.
- (iv) Judicial restraint in the development of case law particularly in relation to compensation for environmental damages/injuries.
- (v) Introduction/implementation of the fiscal incentives or disincentives to induce or promote the proper management of the environment and natural resources or the prevention or abatement of environmental degradation as envisaged in Section 57 of EMCA.
- (vi) Cost of Implementation: As the primary business of Banks is to lend money, the question may be posed as to how much of their resources they may be willing to allocate to enhancing the levels of their internal capacities to effectively address issues related for instance to the internal management of Environmental Impact Assessment (EIA), Environmental Risk Assessment (ERA) and Environmental Due Diligence & Audit (EDDA) requirements when such requirements are viewed in the context of immediate cost-benefit considerations especially for relatively small to medium sized Banks, etc
- (vii) Over-regulation and Cost of Compliance: Cost and challenges to industries, banks and other stakeholders. For example how is NEMA managing its “Improvement Orders” and how practical and/or realistic are the prescribed “Environmental Quality Standards” from a compliance stand point?
- (viii) Moving to a system that appreciates and urges involvement of all stakeholders and that encourages voluntary compliance as opposed to trying to achieve compliance out of fear for punitive sanctions.

Recommendations:

As noted above, responsible environmental stewardship should be seen as a risk management challenge and should be achieved through collaborative efforts by all stakeholders, including but not limited to industries and Bankers. To this end, one would suggest the following recommendations as a possible way to achieve sustainable environmental management and economic and social development.

(i) Legislative framework supported by effective “self-regulatory and “co-regulatory” enforcement mechanisms:

It is evident that agriculture, mining, transport and energy, as domains of industrial development and activities in

Africa, need particular attention in view of their impact on the environment. While governments may formulate generic environmental policies through the imposition of fiscal/ market-based incentives and legislative measures, it is upon the industries to translate, adopt and promote practices of sound environmental management, especially through espousal of cleaner production technologies. Whichever way any government may choose to approach this, am of the view that it is only through the establishment of enabling legislative framework which embodies punitive/deterrent measures, accompanied with a supportive effective "self-regulatory" and "co-regulatory" enforcement mechanisms that go beyond minimum compliance requirements that effective environmental governance can be guaranteed.

(ii) Judicial restraint and creative application of the restitutive jurisprudence underpinning EMCA:

Exercising Judicial restraint by the Bench and the Bar in the development of case law particularly in relation to compensation for environmental damages/injuries as well as creative application of the restitutive jurisprudence underpinning EMCA.

(iii) Sectoral Codes of Conduct and Best Practices:

Generally, businesses and chambers of commerce should voluntarily promote the development and use of appropriate sectoral codes of conduct regarding sound environmental performance. In addition, compliance with regulations should be enforced by governments by encouraging self-regulation and co-regulation as well as market-based incentives to industry to facilitate the achievement of environmental management targets beyond minimum compliance requirements. Businesses, corporates and individuals should also be encouraged to adopt Triple Bottom Line accounting frameworks as noted in the earlier sections of this presentation.

(iv) Developing generic Environmental Impact Assessment requirements for the Jua kali enterprises:

Special focus has been given to small-scale enterprises and the activities of the informal sector, who in aggregate collectively impart significant impacts on the environment. The collective impact of these concerns must be quantified and accounted for in order to allow for planning and set targets to reduce environmental degradation. However, recognizing the obvious resource constraints, any regulations in relation to such small scale informal sector activities should not be let to stifle their operations, but seen to encourage development of clean production techniques and technology and acute awareness to environmental stewardship. In this regard, a suggestion was made at the UNEP/UNDP/Dutch Joint Project Kisumu workshop that serious consideration should be given to adoption of strategic and/or abbreviated environmental impact assessments when it comes to projects emanating from the informal sector.

(v) Developing partnership and mutual trust between the Regulators and the Regulated:

It is also recommended that greater attention should be directed by UNEP and other international organizations through governments, in co-operation with industry, to adopt "co-regulatory" and "self-regulatory" policy instruments. These elements require espousal of principles of "partnership" and "mutual trust" between "the regulators" and "the regulated". In addition, these institutions need to promote and develop programs to increase human resource capacity through public and industrial awareness in all sectors, and particularly in the small business sector and government bodies, regarding sound environmental performance.

(vi) Fiscal incentives/disincentives:

It is suggested that serious consideration should be given to the implementation/introduction of fiscal incentives or disincentives as contemplated in Section 57 of EMCA; such incentives could include conversion of some of the tax holiday benefits into **environmental rebates** and/or **green certificates** with monetary value awards for such positive environmental contribution as planting trees, reforestation and environmental clean ups.

(vii) Financial Reporting Standards: Accounting and Auditing Standards:

It is suggested that based on the experiences gained from other jurisdictions, serious consideration should be given by ICPAK to the introduction of the relevant International Accounting Standards (IAS) and International Financial Reporting Standards (IFRS) as well as the International Auditing Standards (IAS) to impose certain disclosure requirements and address materially significant environment- related liabilities.

(viii) Specific recommendations related to Bankers:

- a) Banks should set, as a pre-requisite, the requirement for an EIA report and the record of decision of the relevant planning permission authority before any loan is approved for undertaking an activity;
- b) Banks should develop and adopt generic check-lists to determine the potential liabilities from projects before financing any activity, such check lists could for instance include the mandatory requirement for Borrowers to submit to the Banks copies of Project, Environmental Impact Assessment, Environmental Action Plans and Environmental Audit Reports as well as responses to Improvement Orders;
- c) As part of the EIA procedure and based on the Environmental Action Plans, Banks should promote regular post-project environmental audits to verify the predictability of the impacts of the project. This would encourage industries to proactively institute appropriate environmental management systems to monitor and control environmental damage;

- d) Banks should encourage industry to adopt policies of environmental protection that include precautionary principles, and those which favour anticipatory and proactive measures rather than reactive strategies aimed at mitigating or remediating specific environmental damage;
- e) Banks should take a leading role in promoting compliance and sound environmental performance by industry by including environmental sustainability issues as part of their lending criteria.

Conclusion:

By way of conclusion, I would like to summarize my presentation as follows:

- (i) This presentation has attempted to discuss how environmental law translates the dominant international view point on environmental issues into legal obligations and has situated the role of Bankers in the promotion of compliance with environmental laws.
- (ii) The presentation has tried to demonstrate that Bankers, as key players and stakeholders in the economic development process, are expected to, and must indeed be seen to, play a critical and pivotal role in the promotion of compliance with environmental law and regulations. This may be done, for instance, at sectoral level, through formulation and adoption of an appropriate sectoral code of ethics and conduct or 'Responsible Financing Programme' that appropriately focuses on environmental matters with particular emphasis on avilment of credit to industries possibly modeled after the European Chemical Industry's 'Responsible Care Programme' or 'The Equator Principle: A framework for financial institutions to manage environmental and social issues in projects financed'.
- (iii) The presentation has argued that Bankers and other stakeholders do not have unlimited resources and, therefore, compensation / re-mediation schemes must be devised and governed by realism and pragmatism as to resource limitation. Banks stand to improve their image, and gain a marketing competitive advantage, if they insist on continuous improvement in environmental evaluation by going beyond legislative requirements in averting environmental problems/disasters. In the process of discharging the expected responsibility for promoting compliance with environmental law and regulations, Bankers should also be competent dialogue partners with the other stakeholders in articulating their positions in what is essentially a collaborative effort.
- (iv) The presentation further posits that given the worldwide trend, Kenyan Bankers can not afford to escape or ignore their role in ensuring compliance with environmental law and regulations and that they can in deed use their influential position to bring to bear on compliance with environmental law and regulations. After all, as is well known, "*there can be no greater force than an idea whose time has come*". Responsible environmental stewardship is a responsibility that Bankers must play a more direct role in as not to do so will ultimately result in a systemic failure where human kind would be, to its detriment, failing to protect the "*goose that lays the golden egg*".

- (v) The presentation has also tried to provoke a debate on how the Bench and the Bar should approach environmental litigation, arguing that the approach should be informed by the restitutive as opposed to retributive criminal jurisprudence that seems to be underpinning the Framework legislation .
- (vi) Finally, the basic question is posed: As part of the human race, are we going to do more than just pay lip service to our individual responsibilities towards the environmental stewardship? In considering our individual responsibilities, are we as individuals, businesses or professionals going to be casting our horizons on a short term scale or a long term scale bearing in mind issues related to, for example, intergenerational equity? The stewardship ball is clearly in your and my court as well as in the court of public opinion and in this connection, one would fully concur with Justice A.M Akiwumi's proposition that we all have individual responsibility for environmental stewardship when he aptly notes that:

“The underlying principle (regarding public participation) is that the task of protecting the environment belongs to the individuals and the collective society *pari-passu*. It is born out of the philosophical position that the environment is a seamless web; protect it as a whole or there will be no life on earth, or the universe for that matter. The protection must also take into account the present as well as the future generations”

And in final conclusion, let's derive some inspiration from Prof. Wangari Maathai when during her Acceptance Speech at the Oslo's Nobel Prize Award (2004), she underscored the Complementary Agenda by observing that ;

“The Norwegian Nobel Committee has challenged the World to broaden the understanding of peace: there can be no peace without equitable development; and there can be no development without sustainable management of the environment in a democratic and peaceful space. This (paradigm) shift is an idea whose time has come”.

Thank you all for being such a distinguished audience.

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Appendix “A”

SECTORAL STATUTES ON ENVIRONMENTAL MANAGEMENT IN KENYA

- (i) Agriculture Act (Cap. 318);
- (ii) Antiquities and Monuments Act (Cap. 215);
- (iii) Explosives Act (Cap. 115);
- (iv) Factories Act (Cap. 514);
- (v) Fertilisers and Animal Foodstuffs Act (Cap. 545);
- (vi) Fisheries Act (Cap. 378);
- (vii) Food, Drugs and Chemical Substances Act (Cap. 254);
- (viii) Forests Act ((Act No: 7 of 2005 which is to replace Cap. 385 once the commencement date is advised);
- (ix) Government Fisheries Protection Act (Cap. 379);
- (x) Grass Fires Act (Cap. 327);
- (xi) Kerio Valley Development Authority Act (Cap. 441);
- (xii) Lake Basin Development Authority Act (Cap. 442);
- (xiii) Lakes and Rivers Act (Cap. 409);
- (xiv) Land Planning Act (Cap. 303);
- (xv) Malaria Prevention Act (Cap. 246);
- (xvi) Mining Act (Cap. 306);
- (xvii) Pest Control Products Act (Cap. 346);
- (xviii) Petroleum (Exploration and Production) Act (Cap. 308);
- (xix) Plant Protection Act (Cap. 324);
- (xx) Prevention of Cruelty to Animals Act (Cap. 360);
- (xxi) Protected Areas Act (Cap. 204);
- (xxii) Public Health Act (Cap. 242);
- (xxiii) Radiation Protection Act (Cap. 243);
- (xxiv) Seeds and Plant Varieties Act (Cap. 326);
- (xxv) Suppression of Noxious Weeds Act (Cap. 325);
- (xxvi) Tana and Athi Rivers Development Authority Act (Cap. 371);
- (xxvii) Physical Planning Act (Act No: 6 of 1996 which replaced The Town Planning Act Cap.134);
- (xxviii) Trout Act (Cap. 380);
- (xxix) Use of Poisonous Substances Act (Cap. 247);
- (xxx) Water Act (Act No: 8 of 2002 which repeals Cap 372);
- (xxxi) Wildlife (Conservation and Management) Act (Cap. 376);
- (xxxii) Coast Development Authority Act (Cap. 449);