The Role of the Judiciary in Promoting Environmental Compliance and Sustainable Development*

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1. THE LAWYER’S CONCERN WITH THE ENVIRONMENT: ILLUMINATING THE CONTEXT

The environment is thus typified by Rosalind Malcolm in her work entitled, A Guidebook to Environmental Law (London: Sweet & Maxwell, 1994) (at p.1):

“The environment then becomes that combination of material and social things which conditions the well-being of people. In the workplace, this could mean the measures which are available for the health and safety of the workers, the presence of asbestos on the construction site, or the fumes from the dry-cleaning solvents at the laundrette. In the home, it could mean the absence of excessive noise from the neighbours, the freedom from smoke from a nearby demolition site or the impact of a proposed new motorway. In the countryside, it could be represented by the loss of amenity for nearby urban dwellers caused by the opening of an open-cast coal mine or a stone quarry.”

From such a characterisation, it can be seen that our pre-occupation with the integrity of the environment addresses three cardinal issues: (i) prudence in the use of environmental resources – to the intent that they may, as the capital base for the economy, not be exhausted; (ii) effective control and management of social and economic activities – so that they may not generate harmful levels of pollution and waste; and (iii) ecological planning and management – so as to achieve and maintain an aesthetic and healthful arrangement of the structures, features, assets and resources surrounding us. To such extent as we achieve those goals, so much is the quality of life for humanity enhanced; and so the constant concern for the sustenance of the integrity of the environment, is a fundamental dimension in the quest for greater civilisation in the human world.

The foundation of today’s preoccupation with environmental conservation lies squarely in scientific inquiry, which has shown that regression in environmental quality is driven by over-use or misuse of scarce natural resources, by pollution and waste flowing from human economic and social

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activities, and by neglect in the planning and arrangement of environmental resources.

It is not surprising that it is at the international level, with its relative distance from national economic policy, and with its more substantial professional and financial resources, that the concerns of the environment have been most effectively articulated. Another consideration in this regard, is that the many sectors of the environment are invariably set in an extensive functional continuum, that runs across national boundaries and assumes a regional or global significance.

International law’s basic mode of seeking to achieve environmental goals is through treaty law; and at that level, there are global treaties and regional treaties. Of global environmental treaties, the following examples may be given:

(i) Convention on Fishing and Conservation of the Living Resources of the High Seas (Geneva, 1958);
(ii) Convention on Wetlands of International Importance especially as Waterfowl Habitat (Ramsar, 1971);
(iii) Convention for the Protection of the World Cultural and Natural Heritage (Paris, 1972);
(iv) Convention on International Trade in Endangered Species of Wild Fauna and Flora (Washington DC, 1973);
(v) Convention on the Conservation of Migratory Species of Wild Animals (Bonn, 1979);

Such treaty law provides the umbrella under which regional treaty law is then adopted, in respect of the environmental situations prevailing in particular regions of the world. The following are examples:

(i) African Convention on the Conservation of Nature and Natural Resources (Algiers, 1968);
(ii) Lusaka Agreement on Co-operative Enforcement Operations Directed at Illegal Trade in Wild Fauna and Flora (Lusaka, 1994)

The international community, at the global or the regional level, has adopted hundreds of different treaties seeking to address problems associated with the varied sectors of the environment – the atmosphere; the oceans and the seas; freshwater resources; hazardous substances and activities; waste
It should be noted that there is a significant difference, in relation to the environment, between the enforcement mechanisms in international law and in national law; but at the same time the two schemes go to complement each other. International law involves agreements between and among states, and it imposes obligations of compliance upon States Parties, once they have adopted and then ratified the treaties in question. But such obligations as the States Parties assume, are in many cases not self-executing, and require further action through the national constitutional set-up – specifically, through national legislation, through judicial decision-making, and through policy-making and administration by the executive organ.

It is from this point, that the importance of this colloquium becomes manifest. Where Kenya’s environmental obligations need to be more specifically defined for the purposes of enforcement, the Executive must first address the policy implications, and then place before our Parliament a specific bill, for the making of any required institutional arrangements; for the elaboration of activities; for the specification of powers; for the prescription of sanctions. Thereafter, the task of adjudication falls at the doors of the Judiciary. And the main concern in this regard is, how does the Judiciary apply the law, in the enforcement of environmental conservation principles? Secondly, how does the original source of environmental norms, namely the international law itself, influence the operative judicial approach to environmental conservation?

2. KENYA: THE NATIONAL SCHEME OF ENVIRONMENTAL LAW

2.1 The Basic Structure of Kenya’s Environmental Law Regime

The many human activities that degrade the environment invariably occur at the level of the smallest political unit – the nation-state. It is within that unit, that policies, politics, economics, cultures and practices exist which will allow or disallow environmental degeneration. It is precisely in such a context that, initiatives leading to the destruction and wastage, or to the conservation of the natural resources do proceed; it is within such a context that industrial or other effluents and emissions that corrupt the water bodies, are generated; etc.

Professor Okidi in his article, “Reflections on Teaching and Research on
Environmental Law in African Universities” (Published in *Journal of Eastern African Research and Development*, Vol.18 (1988), 128, at p.130) thus defines environmental law:

“Environmental law is the ensemble of norms...statutes, treaties and administrative regulations to ensure or to facilitate the rational management of natural resources and human intervention in the management of such resources for sustainable development.”

Before the enactment of the *Environmental Management and Co-ordination Act, 1999* (Act No.8 of 1999) Kenya had no integrated body of national environmental law. Instead, there were scores of disparate statutes each one concerned with one aspect or another of the environment, such as agriculture, antiquities and monuments, livestock, river basins, particular crops, fish, forests, lands, pests, etc. Such *sectoral legislation* largely remains in place, however, save that the Environmental Management and Co-ordination Act now provides institutional mechanisms of *co-ordination*, as well as the broad *principles* to guide the conduct of environmental management in the country at large. The said Act thus describes itself:

“An Act of Parliament to provide for the establishment of an appropriate legal and institutional framework for the management of the environment and for matters connected therewith and incidental thereto.”

The Act defines the essential *language* of environmental conservation, and establishes *core institutions* responsible for the management of the Kenyan environment, towards the crucial ideal, recognised internationally as *sustainable development*. “Sustainable development,” in relation to the human world as it interacts with the *environment*, is thus defined (s.2 of the Act):

“...present use of the environment or natural resources which does not compromise the ability to use the same by future generations or degrade the carrying capacity of supporting ecosystems.”

By declaring *general principles* on the environment (Part II of the Act), the statute, in effect, establishes a *framework for civil litigation*, in quest of the stated objects – and in this way the *judicial function* is called into action. The Act stipulates, for instance, that:

“Every person in Kenya is entitled to a clean and healthy environment and has the duty to safeguard and enhance the environment.”

Such entitlement incorporates “*access by any person in Kenya to the various public elements or segments of the environment for recreational,*
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Not only does the Environmental Management and Co-ordination Act establish a framework for civil litigation, it also establishes a criminal jurisdiction – and these aspects are of definite relevance to the working of the Courts of law.

By s.137 of the Act, offences are created in relation to interference with environmental inspections; s.138 creates offences in respect of failure to comply with environmental impact assessment requirements; s.139 creates offences relating to the keeping of environmental records; s.140 creates offences in relation to non-compliance with prescribed environmental standards; s.141 creates offences in relation to the management of hazardous wastes, materials, chemicals and radioactive substances; s.142 provides for offences related to polluting activities; s.143 provides for offences in relation to compliance with environmental-restoration orders. Penalties for such offences include fines and terms of imprisonment, as well as forfeitures.

2.2 The Judiciary, and Environmental Compliance

As already noted, the Environmental Management and Co-ordination Act has called forth the role of the Judiciary in environmentalism, both at the civil and the criminal-process level.

The civil process is likely to turn on certain areas, which practice has already shown to be grievance-prone. These are as follows:
(i) access to and utilization of land;
(ii) access to and utilization of water;
(iii) disposal of waste matter generated by industrial plants;
(iv) safety in the industrial working environment;
(v) environmentally-wasteful cultural practices;
(vi) planned and regulated land-use, versus spontaneous occupancy and plying of trade initiatives.

Civil disputes of the kind exemplified above have no pre-determined answers; and for the judicial officer determining the question, the path of the law is not yet well-trodden enough. And hence for every judicial officer, the question must be, what decision is best- lodged within correct legal principles; is fair and just to the parties; and carries the judicial officer’s conviction as a conscientious exercise of the judicial mandate?

There are notable, potential factors of uncertainty in the mind of the judicial
officer. Some of these may be set out here:

(i) the ministerial powers for the conservation of the environment, which are provided for in the Environmental Management and Coordination Act, 1999 have not yet been fully exercised; there is, for example, no comprehensive gazettement of riverbeds, wetlands, etc while those environmental categories are already being invoked by squatters to dispute the rights of private land-owners: see Park View Shopping Arcade Ltd v. Charles Kang’ethe & 2 Others, HCCC No. 438 of 2004;

(ii) there is random, legally-unregulated control by local public bodies over lands claimed to be environmentally important: see Park View Shopping Arcade Ltd v. Charles Kang’ethe & 2 Others, HCCC No. 438 of 2004;

(iii) land title-holders, even where they obtained their titles irregularly, will demand protection for their property-rights;

(iv) the procedures by which private land can be acquired for environmental-conservation purposes, by the State under s.75(6)(a)(vii) of the Constitution, do not seem to be well understood by most suitors with land grievances; and only very rarely if at all has the State resorted to this opening, in pursuit of environmental goals.

2.2.1 A Personal Experience from the Bench

It is well known that no judicial officer is allowed, as a matter of firmly-established law, to decline to resolve a dispute falling within his or her jurisdiction on the ground that the issues are too difficult, or do not lend themselves to a correct answer. It follows from this principle that even where Parliament has not made a law regulating a specific matter in detail, it does not follow that the relevant question, therefore, lies outside the purview of the law; it is the mandatory obligation of the Court to interpret the incomplete law of Parliament, and declare a complete scenario of law on the question.

Therefore, when a judicial officer comes face-to-face with the ill-defined contests touching on the environment, he or she must still decide the question. How ought the judicial officer to be guided, in such a situation, in order to arrive at a correct decision?

A judicial decision, in the proper sense, must always be founded on a careful and deliberate attention to the facts; and so the greatest importance must be attached to the evidence; without this, a just decision is a very remote
possibility. But the evidence must then be applied to a correct appreciation of the governing law.

In the case of the environment, as already portrayed in this paper, the state of the law may well be relatively obscure; yet a decision must be pronounced. From my understanding of the law, and from my own experience of judicial decision-making, where the question before the Court relates to the environment, and the legislature’s guidance is by no means comprehensive, the Court, once it ascertains the facts, must appreciate the relevant principles which ought to be reflected in the law. I have already indicated at the beginning the capital nature of the environment and its resources, in the sustenance of the commonplace social and economic activities which directly spell the rights and duties regulated by law and which are daily, canvassed in civil litigation. The Court ought to train its sights, as a matter of principle, on the concept of sustainability of the human activities that immediately translate into legally-actionable rights and obligations. The legislature has given guidance, by its definition of sustainable development as “present use of the environment or natural resources which does not compromise the ability to use the same by future generations or degrade the carrying capacity of supporting ecosystems.” So, whenever the Court has an opportunity to declare the law on an environmental question, the shape of that law should be conservatory of the environment and the natural resources; and the Court should apply this principle to determine, where possible, such rights or duties as may appear to be more immediately linked to economic, social, cultural, or political situations.

It is appreciated that the Court is sometimes denied the opportunity to apply such principles of construction. In civil litigation, the governing law of procedure requires the plaintiff to formulate his or her pleadings, and then to prove these, by evidence. The Court may not go out on a limb, departing from the lines of pleading and proof placed before it. It is thus conceivable that a none-too-punctilious party could forgo the opportunity to engage the Court on environmental principles, leaving no opportunity for a decision other than a technical one based on the limitations of civil procedure.

I will share with participants the several decisions bearing on the environment which I have had the opportunity to give in the last three years of judicial service; and some of these will be seen to bear the kinds of procedural limitations to which I have alluded.
(i) Janet Ngubia Githieya v. Wairimu Gitau HCCC No. 667 of 2004

In this interlocutory application by Chamber Summons, the plaintiff/applicant sought a temporary injunction against the defendant/respondent restraining her from proceeding with the advertised cremation of her late husband, the late Johana Gitau. Of relevance to the theme before this colloquium are two specific passages in the findings that I did make:

• “All indications are that the plaintiff/applicant has not shown a prima facie case with a probability of success.”
• “I have not been persuaded that the practice of cremation, which is well recognised worldwide, and which appears to be a hygienic and an environmentally-wholesome mode of disposal of the dead, cannot in these modern times be accommodated under the evolving Kikuyu customary law or indeed any other customary law in force in this country.”

I did apply the above-stated environmental consideration, among other considerations, as a basis of principle for refusing the plaintiff’s application.

(ii) Park View Shopping Arcade Ltd. v. Charles M. Kang’ethe & 2 Others HCCC No. 438 of 2004

The plaintiff/applicant was the registered owner of a parcel of land in Westlands, Nairobi, L.R. No. 209/12174, which land was under the exclusive, active occupation and use (as flower nursery) by the defendants together with some 50 others. The applicant sought orders of restraint and eviction against the defendants who, for their part, claimed the suit land was wetland which they were the ones protecting against environmental degradation by the plaintiff.

In resolving the dispute, I considered the plaintiff’s right of ownership by virtue of the guarantees in s.75 of the Constitution, alongside the design and purpose of the Environmental management and Co-ordination Act (Act No. 8 of 1999), and held as follows:

“If...the defendants/respondents had genuinely wished to pursue the cause of environmental protection, by virtue of the empowerment they have under section 3(1) of the Environmental Management and Co-ordination Act..., then the logical and correct cause of action for them would have been to approach the Ministry of Environment and to plead for compulsory acquisition of the suit land, under section 75(6) of the Constitution. It is not acceptable that they should forcibly occupy the suit land and then plead the public
interest in environmental conservation, to keep out the registered owner. The effect of their action is to deprive the registered owner of his land, without full and fair compensation. Since this act of deprivation is coming from private persons rather than from the State, its unlawfulness is stark and beyond dispute.

“The defendants have, in effect, taken it upon themselves to declare the environmental status of the suit land, but this can only be validly done by the Minister.”

(iii) Adrian G. Muteshi v. Jean Pierre de Leu HCCC No. 259 of 2004

The applicant claimed in his application by Notice of Motion that the respondent, by his trees planted and growing in his own compound, constituted a nuisance to the applicant who lived in the adjoining plot. The applicant was particularly aggrieved that the respondent had planted in his own plot, close to the boundary with the applicant, a set of Ficus benjamina, the large, invasive roots of which were undermining the foundations of houses in the applicant’s compound. The applicant craved leave of the Court to allow him to enter the respondent’s compound and cut down the offending trees, apart from lopping off the branches overhanging his land.

Technicalities, as I have noted earlier, can preclude the Court’s determination of substantive environmental questions; and such was precisely the case here. It was necessary for me to thus hold:

“In the supporting affidavit, numerous trees in the respondent’s compound are referred to as nuisance, whereas they may not at all have featured in the earlier proceedings: this is material for a fresh suit. And in the respondent’s replying affidavit there are serious allegations of nuisance emanating from practices in the applicant’s compound which could very well be the subject of major public health concerns. Indeed, it appeared to me from the respondent’s affidavit that the City of Nairobi’s public health authorities ought, as a matter of urgency, to visit the compound of the applicant, to inspect and take decisions regarding his mode of using that land. A responsible officer in the City Council...would need to make a report on the practices being observed in the compounds of both the applicant and the respondent, as a basis for any subsequent courses of action.”
(iv) The Chairman Rahmat Ghassin (suing on behalf of Nyari Residents Welfare Society) –v- Sadhu Singh Devgun HCCC No. 803 of 2000

In this suit, the complaint was that the defendant, who had a smaller plot than most plots in the residential estate, was improperly crowding it up with under-size buildings, and that this would lower the quality of housing and lessen the value of other homes in the neighbourhood.

Obviously, the planning and aesthetics component of the environment was in issue here. Unfortunately, the City Council was not enjoined in the suit, even though there was credible evidence that all of the defendant’s constructions had the express approval of the City Council of Nairobi. So, due to the plaintiff’s approach to joinder of parties, to pleadings and evidence, the Court was denied an opportunity to consider the urban planning as an environmental question, in arriving at its verdict. The following passage appears in the judgement:

“As the suit belongs to the plaintiffs, it was for them to bring forth such evidence as would create no more than the bare probabilities, in their favour. While it is clear that the plaintiffs have a legitimate concern to keep high standards of buildings and of the residential neighbourhood, they have not, in my view, succeeded in showing unlawful conduct on the part of the defendant. As it emerges that the defendant’s construction was duly approved by the City Council, any claims of impropriety would have to be placed at the doors of the City Council. Since the City Council has neither been sued nor enjoined as a party, it follows that the plaintiffs have no case, in law, against the defendant. And if, in that regard, the plaintiffs lose, then they can make no claim in equity.”

3. CONCLUSION

I have portrayed the claims of the environment as critically important, as the background to rights and obligations recognised in law, and which are constantly enforced through the judicial function. It follows that the Judiciary should, whenever there is an opportunity, make its contribution in promoting compliance with environmental laws and principles. Such a contribution can only be made during the litigation process whether in criminal law or civil law. The Courts’ contribution to the claims of the environment through criminal law is straightforward, since the statute law defines the relevant jurisdiction and powers. It is, however, in the area of civil litigation, that greater opportunities lie for the judicial contribution to the environment. Yet in this civil sphere, the Courts’ possible contribution
is dependent on the *limitations of civil procedure*, and on the litigious courses taken by the parties themselves. From the Bench experience which I have recounted earlier, it is evident that the Courts can make a more, or a less-substantial contribution to compliance with environmental principles, depending on the mode adopted by the claimants. I have proposed that, where the pleadings, the evidence and the submissions before the Courts are right, recourse should be made to the *best principles* of environmental conservation and sustainable development, in determining the claims of parties.

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