



**ANALYSIS OF NEMA'S ROLES, ACTS OR OMISSIONS VIS-A-VIS THE STANDARD
GAUGE RAILWAY PROJECT ALONG MAKUMBI ROAD**

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DECLARATION

I, **SARONGE SAFE MARTINA**, do hereby declare that this research is my original work and that to the best of my knowledge and belief; it has not been previously, in its entirety or in part, been submitted to any other university for a degree or diploma. Other works cited or referred to are accordingly acknowledged.

Signed:

Date:

This Research Proposal has been submitted for examination with my approval as University Supervisor.

Signed:

Date:

DR. ELIZABETH GACHENGA

ABSTRACT

This study shall investigate whether NEMA, as a state agent was able to adequately ensure sustainable development with regards to the Standard Railway Gauge project. Sustainable development requirement can be said to have been fulfilled if NEMA is found to have adequately stricken a balance between its duties under the Constitution of Kenya, pertaining development and environmental conservation and ensuring the right to a clean and healthy environment is realised in the said project. The former mentioned requirement shall be viewed with regards to the activities by the proponents of the project along Makumbi Road.

In attempting to analyse the issue under investigation, a number of related questions emerge: What are NEMA's obligations under the Constitution of Kenya and under the EMCA? Did NEMA meet its obligations under the Constitution and the Act? What was the impact of NEMA's acts or omissions thereof on sustainable development in context of the SGR Project?

This paper recognises the difficulty states have had of implementing the sustainable development goals as conceptualized in the theory. Nonetheless, the paper acknowledges that this challenge ought not to be an excuse relied on by states for failure to fulfill the right to a clean and healthy environment. For;

“It is only through enhancing the human capita that the economic capita can thrive.”

~Amartya Sen.

List of Abbreviations

1. EIA- Environmental Impact Assessment
2. EMCA- Environmental Management and Coordination Act
3. EPA- Environmental Protection Agency
4. ERO- Environmental Restorative Orders
5. NEC- National Environmental Council
6. NEMA- National Environmental Management Act
7. NEPA- National Environmental Policy Act
8. NET- National Environmental Tribunal
9. UNEP- United Nations Environmental Programme
10. WCED- World Commission on Environment and Development

List of Cases

Charles Awiti and 16 others v China Road & Bridges Corporation Kenya Limited (2016) eKLR.
Richard Evans and 6 others v NEMA & 2 others (2008) eKLR.
Friends of Lake Turkana Trust v Attorney General & 2 others (2012) eKLR.
Hungary v. Slovakia, 1997 WL 1168556 (1997) ICJ.
Lamu v National Environmental Management Authority, (2016) eKLR.
Peter K. Waweru v Republic (2004) eKLR.
Samuel Muniu Mugo v the County Government of Nyandarua (2017) eKLR

List of Legal Instruments

The Constitution of Kenya (2010).

The Environmental Management and Coordination (Act No.8 1999).

The Environmental (impact Assessment and Audit) Regulations, 2003.

The Environmental Management and Co-ordination (Noise and Excessive vibration pollution control) Regulations (2009).

International legal instrument

Draft Principles on Human Rights and the Environment (1994).

Rio Declaration on Environment and Development (1992).

Convention on Access to Information, Public Participation in Decision Making and Access to Justice in Environmental Matters (1998).

1.0. CHAPTER 1

1.1. INTRODUCTION

Environmental regulation has always been considered second to economic growth concerns. This has been the case throughout history. However, in 1983, the World Commission on Environment and Development (WCED) sought to tackle the conflict between goals of development set in place and the environment.¹ The first step they took was formulating a working definition as to what constitutes sustainable development. They defined it as development that meets the needs of the present population without hindering the ability of future generations in meeting their own.² The Brundtland Commission³ of 1987 and the Draft Declaration of Human Rights and the Environment⁴ emphasized on the need for the development and environment to go hand in hand in ensuring that development is sustainable.⁵ Therefore, it can be drawn from the foregoing that proper environmental management is of great importance in sustainable urban development.

The first principle of the Stockholm Declaration,⁶ in conjunction with the WCED report-the Brundtland report and the Draft Declaration of 1994- inspired many states (Kenya included), to be inclusive of the right to a clean and wholesome environment and the state's duty in ensuring sustainable development fulfilling its duty of furthering the right to development thereof, in their constitutions and legislations.⁷

Despite the progression in ensuring development is sustainable and the environment is preserved, little attention is often paid to how the regulations in place are put to practice.⁸ This is especially so in Africa where rapid urbanization and infrastructure creation arise in attempts to accommodate rapid urban growth.⁹ This paper argues that the environment should be nurtured while human beings pursue development. Development should therefore be sustainable, taking care of ecological and anthropocentric concerns. Based on qualitative research the study looks at NEMA

¹ Jarvie M, Brundtland Report, the World Commission on Environment and Development, 1987.

² Akpambang E, 'Promoting the right to a clean and healthy environment through constitutionalism in Nigeria' p 40.

³ Harris J, 'Sustainability and sustainable development,' International Society for Ecological Economics Internet Encyclopedia of Ecological Economics, 2003.

⁴ Draft Declaration of Human Rights and the Environment, E/CN.4/Sub.2/1994/9, Annex 1.

⁵ Muigai M, A Paper on Sustainable Development and Equity in the Kenyan Context, 2017.

⁶ Akpambang E, 'promoting the right to a clean and healthy environment through constitutionalism in Nigeria' Nigeria' p 41.

⁷ Akpambang E, 'promoting the right to a clean and healthy environment through constitutionalism in Nigeria' Nigeria' p 42.

⁸ Barczewski B, 'How Well do Environmental Regulations Work in Kenya,' *A Case Study of the Thika Highway Improvement Project*, Center for Sustainable Urban Development, csud.ei.columbia.edu/publications/working-papers-and-report/- 2013.

⁹ Barczewski, How well do environmental regulations work in Kenya p 4.

as a government agency tasked to monitor and access activities in a major infrastructural project: the Standard Gauge Railway Project (SGR Project). While the paper highlights the role of law and NEMA in facilitating environmental protection, there is also an emphasis on the need to move beyond them in looking for answers to the challenges facing sustainable environmental management.

1.2. BACKGROUND.

The Constitution of Kenya is one of the constitutions in Africa hailed for progressively handling matters pertaining to the protection of the environment.¹⁰ It provides for environmental obligations¹¹ under article 69. It also provides for enforcement of environmental rights as guaranteed under article 42.¹² Other than the Constitution, Kenya's legislature has enacted the Environment Management and Coordination Act (EMCA),¹³ aimed at addressing regulatory issues facing the state. Both the Constitution and EMCA have brought about normative and institutional change. This is because, before they came into effect, the state's environmental regime was governed by seventy seven statutes founded in common law with numerous regulatory sectors.¹⁴

EMCA is expansive in the contributions it has made, especially its contribution to regulation and governance in the creation of two management organs: the National Environmental Management Authority (NEMA)¹⁵ and the National Environmental Council (NEC).¹⁶ NEMA is the main organ tasked with enforcing EMCA's provisions, alongside subsequent subsidiary legislation. The main function of NEMA is to "exercise general supervision and coordination over all issues pertaining the environment."¹⁷ it is also supposed to identify programs, plans policies and projects that require environmental monitoring and auditing; and assessing and monitoring of these activities to ensure that they do not harm the environment by degradation and also that they adhere to environmental management objectives.¹⁸

Alluding to the above, NEMA owes certain duties with regards to the Standard-Gauge Railway project which was commenced in 2013 for cargo and passenger transportation, along Makumbi

¹⁰ Part 2, Chapter 5, the Constitution of Kenya (2010).

¹¹ Article 69, the Constitution of Kenya (2010).

¹² Article 42, the Constitution of Kenya (2010).

¹³ Environmental Management and Coordination Act (Act of 1999).

¹⁴ <https://conservationatheart.wordpress.com/2016/02/27/how-familiar-are-you-with-the-kenyan-environmental-laws/>- last accessed 14 March 2019.

¹⁵ Section 7, Environmental Management and Coordination Act (Act of 1999).

¹⁶ Migai A, Administrative Law: *Administering the environmental law regime*, Strathmore University Press, Nairobi, 2016, p 239.

¹⁷ Section 9(1), Environmental Management and Coordination Act (Act of 1999).

¹⁸ Section 9(1) (l), Environmental Management and Coordination Act (Act of 1999).

road.¹⁹ The main duty pertains NEMA ensuring that any exploitation with regards to the project ought to be conducted in a sustainable manner, having in mind the impacts the project may have to the present and future generations.²⁰ It should especially consider the latter by ensuring that the stakeholders whose livelihoods are in risk of being impacted negatively, get to enjoy their right to a clean and healthy environment as envisaged under Article 42 of the Constitution.²¹

1.3. PROBLEM STATEMENT

To what extent did NEMA observe its duty under Article 69(1) of the Constitution of Kenya, 2010²² and the duties asserted under EMCA in ensuring development was sustainable with regards to the SGR construction project along Makumbi Road in Mlolongo.

1.4. RESEARCH QUESTIONS

1. What are the pillar aspects states need to balance in a bid to ensure sustainable development?
2. What are NEMA's obligations under the Constitution of Kenya and under the EMCA?
3. What instruments are available to NEMA that enable it to meet its obligations??
4. What extent did NEMA effectively use these instruments in meeting its obligations and the impact thereof on the SGR Project?

1.5. STATEMENT OF OBJECTIVES.

1. The study aims at identifying the pillar aspects that need to be balanced in a bid to ensure sustainable development.
2. The study aims at asserting NEMA's obligations under the Constitution and under EMCA.
3. The study aims at pin pointing the instruments available to NEMA that enable it to meet its obligations.
4. The study aims at determining the extent to which NEMA effectively used these instruments in meeting its obligations and the impact thereof on the SGR Project.

1.6. JUSTIFICATION OF THE STUDY.

The beneficiaries of this study are the citizens of Kenya, particularly those proxy to the Standard Gauge Railway. The study aims to emphasis on the responsibility of the state through NEMA, its state agent with regards to ensuring development is sustainable. Determining the extent of the

¹⁹ <https://www.railway-technology.com/projects/mombasa-nairobi-standard-gauge-railway-project/> -on 10 March 2019.

²⁰ Article 69(1), the Constitution of Kenya (2010).

²¹ Article 42, the Constitution of Kenya (2010).

²² Article 69, the Constitution of Kenya (2010).

fulfilment of its duties, will clearly help in establishing a way forward in pursuit of the sustainable development goals and recommendations on how to better achieve them.

1.7. LITERATURE REVIEW

It has rightly been argued that despite continuing disagreement about the meaning of ‘sustainable development’, what is referred to as the triple-bottom line trajectory – which would see economic advancement being achieved alongside social equity and environmental security – is viewed as one of the promises for future progress regionally, nationally and globally.²³ The concept of sustainable development represents an attempt to go beyond the simple assertion of physical limits to economic-growth. Weiss has observed, sustainable development relies on a commitment to equity with future generations; a commitment which acts as a constraint on a natural inclination to take advantage of our temporary control over the earth’s resources, and to use them only for our own benefit without careful regard for what we leave to our children and their descendants. Sustainable development therefore requires that we look at the earth and its resources not only as an investment opportunity, but as a trust passed to us by our ancestors for our children and their descendants.²⁴

Jonathan Harris asserts that sustainable management of the environment is also seen as a way to enhance the long term economic, social and environmental well-being of people and communities by: promoting social justice and equality of opportunity; and enhancing the natural and cultural environment.²⁵ It is, therefore, suggested that the key principle of sustainable development underlying all others is the integration of environmental, social, and economic concerns into all aspects of decision making. That is to say, in practice, sustainable development requires the integration of economic, environmental, and social objectives across sectors, territories, and generations. It requires the elimination of fragmentation; that is, environmental, social, and economic concerns must be integrated throughout decision making processes in order to move towards development that is truly sustainable.²⁶

The 1987 Brundtland Commission Report observed in the foreword that “what is needed now is a new era of economic growth – growth that is forceful and at the same time socially and environmentally sustainable.” The implication of this is that even as sustainable development

²³ Lawrence, G., ‘Promoting Sustainable Development: The Question of Governance,’ in Buttel, F.H. & McMichael, P. (ed.), *New Directions in the Sociology of Global Development*, (Research in Rural Sociology and Development, Volume 11) Emerald Group Publishing Limited, 2006, pp.145 – 174.

²⁴Weiss F, *In Fairness to Future Generations and Sustainable Development*, 1 American University International Law Review 8, 1992.

²⁵ Harris J, *Basic Principles of Sustainable Development* p 5.

²⁶ Kariuki M, *a Paper on Sustainable Development in the Kenyan Context*, 2017.

efforts focus on economic development, regard has to be had on the aspects of environment and social development so as to ensure that economic development is not achieved at the expense of all these. However, when these principles are incorporated into domestic law, then more often than not they become binding and obligatory on state organs and all persons. For instance, in Kenya's domestic laws, these principles have been incorporated and in an obligatory manner and are binding on state organs, law makers, interpreters and implementers.²⁷

The Environmental Management and Co-ordination Act sustainable development is defined in equitable terms as development that meets the needs of the present without compromising the ability of future generations to meet their own needs.²⁸ As already noted this definition is wanting and it needs further enhancement so as to include the economic, social and ecological aspects captured in the concept of sustainable development. Its centrality is perhaps more explicit when one looks at the Kenyan constitution which provides that the State shall ensure the sustainable exploitation, utilization, management and conservation of the environment and natural resources and ensure equitable sharing of the accruing benefits.²⁹

The constitution of Kenya thus takes an ecological perspective to sustainable development; a perspective geared towards the protection of the environment for ecological reasons as well as for the satisfaction of human needs. In this paper we take the view that there is a need to have a balance between the eco-centric and anthropocentric approaches in sustainable development. Such a balance would be said to be struck by pursuing development in terms of the satisfaction of economic, social, and security needs now and in the future without undermining the natural resource base and environmental quality on which life depends on. Judge Weeremantry, in his dissenting opinion in the Case Concerning the Gabčíkovo-Nagymoros Project (supra) elaborated the proper role of sustainable development as being the balancing of the competing demands of development and environmental protection. Judge Weeremantry notes that, "*The Court must hold the balance even between the environmental considerations and the developmental considerations raised by the respective Parties.*" He further proceeds to state that, "*It would not be wrong to state that the love of nature, the desire for its preservation, and the need for human activity to respect the requisites for its maintenance and continuance are among those pristine and universal values which command international recognition.*"³⁰

²⁷ Article 10, the Constitution of Kenya (2010).

²⁸ Section 2, Environmental Management and Coordination Act (Act of 1999).

²⁹ Article 69, the Constitution of Kenya (2010).

³⁰ Hungary v. Slovakia, 1997 WL 1168556 (1997) ICJ.

What the judge was fronting in the above case is a balance between the eco-centric and anthropocentric approaches to sustainable development. Jonathan Harris in his dissertation on *the Basic Principles for Sustainable development*,³¹ asserted various relationships shared within the sustainable development pillars. That; the social and economic aspect be rendered equitable, the environment and economic aspect be feasible and viable and the social and environment aspects be bearable. This balance is in my view essential in realizing sustainable development in Kenya. This is especially so, contextually, in its applicability in the SGR Project along Makumbi road, which began in 2012, a project conceived with a bid to fulfill the Vision 2030 development goals.³² The projects sees to various stakeholders involved and brings to light various aspects of sustainable development. Such as the economic aim sort by the project- to not only boost the country's economy but also improve the lives of those living close by-, the people whose livelihoods may be affected by the project and the exploitation on the environment involved in the course of drilling and blasting of rocks.³³

It is factually evidenced by the Environmental Impact Assessment Report by Dr. Jacob,³⁴ that an EIA test was indeed conducted with regards to the said project. The paper seeks to investigate NEMA's acts or omissions with regards to its roles that arise from the said project.

1.8. CHAPTER BREAKDOWN

This study shall have five chapters:

Chapter One being an introduction, background, the statement of problem, the research questions, the statement of objectives and chapter breakdown.

Chapter Two will be the conceptual framework and methodology an in depth discussion on the various dimensions of sustainability; and how a balance can be established in all the dimensions thereof.

Chapter Three will analyse NEMA and its obligations with respect to the Constitution and EMCA in relation to the SGR Project.

Chapter Four will constitute of NEMA's acts or omissions with regards to the SGR Project.

³¹ Harris J, the basic principles for sustainable development, p 4.

³² Kenya Vision 2030: A globally competitive and prosperous Kenya, 2007, p 14.

³³ Charles Awiti & 19 others V China Road & Bridges Corporation Kenya Limited, (2016) eKLR.

³⁴ Jacob K, the Environmental and Social Impact Assessment Study Report for the Proposed Nairobi-Mombasa Standard Gauge Railway Project, p 2.

Chapter Five will constitute the analysis of the latter chapter

Chapter 6 will handle the recommendations and conclusion.

2.0. CHAPTER 2

2.1. SUSTAINABLE DEVELOPMENT CONCEPT

Under section four of the infamous Vision 2030 goals of the Kenyan nation, the document states that; “Kenya aims to be a nation living in a clean, secure and sustainable environment by 2030”.³⁵ It goes on further to state that the country will seek to harmonize existing laws that relate to the environment to enable efficient environmental planning and governance.³⁶ This broad definition, coupled with a flagship project that is stated within the document, seem to reflect the goals and objectives set out in the Brundtland report of 1987 on Sustainable development.³⁷

Sustainable development

In its concluding statement, the World Commission on Environment and Development of 1987 stated that;

*“Environment and development are not separate challenges. Development cannot subsist on a deteriorating environmental resource base; the environment cannot be protected when growth leaves out of account the costs of environmental destruction. These problems cannot be treated separately by fragmented institutions and policies. They are linked in a complex system of cause and effect.”*³⁸

This, as asserted earlier, gives a working definition of sustainable development. To however translate it into practical use and to see its purpose realised in different ecological settings and jurisdictions, It can however be further broken down.

The Brundtland report³⁹ of 1987 defines sustainable development as

“Development that meets the needs of the present without compromising the ability of future generations to meet their own needs.”⁴⁰ Within it, two concepts are highlighted:

- a. “The concept of ‘needs’, in particular the essential needs of the world’s population, to which overriding priority should be given.

³⁵ Kenya Vision 2030: A globally competitive and prosperous Kenya, 2007, p 14.

³⁶ Kenya Vision 2030, p 109.

³⁷ Brundtland Commission, Report of the World Commission on Environment and Development (the Brundtland Report): *Our Common Future*, 1987.

³⁸ United Nations. 1987. Report of the world commission on environment and development: our common future. (Annex to document A/42/427). Available: <http://www.un-documents.net/wced-ocf.html> on 5 October 2019.

³⁹ Brundtland Commission, *Our common future*.

⁴⁰ Vallance S, ‘What is social sustainability?’ A Clarification of Concepts, 42 Elsevier 3, 2011.

- b. The idea of limitations imposed by the state of technology and social organisation, on the environment's ability to meet present and future needs."⁴¹

The ideas brought out cannot exist independently, as a result of their intrinsic nature and therefore bring out the need to be carried out in tandem. Sustainable development emphasizes on the importance of cultural values alongside economic development in order to have a wholesome measure of development. It was therefore deduced from these observation that there exists three key pillars that would define the context of sustainable development.⁴²

They include;

1. Economy.

Amartya Sen's (1985) observation that "goods and commodities are important for enriching human lives, but their effectiveness in welfare en-hancement depends on the traits of the society and its institutions."

An economically sustainable system must be able to produce goods and services on a continuing basis, to maintain manageable levels of government and external debt, and to avoid extreme sectorial imbalances which damage agricultural or industrial production⁴³ without compromising quality of life.⁴⁴ This is to say that the economic aspect provides incentives for businesses and other organizations to adhere to sustainability guidelines beyond their normal legislative requirements.⁴⁵

2. Society.

A system is said to be socially sustainable if it "achieves distributional equity, political accountability, public participation and public education on the need to protect the environment,⁴⁶ and awareness of and availability of legislation that seeks to protect the health of the people from the adverse effects of economic development."⁴⁷

⁴¹ Brundtland Commission, Our common future, 1987.

⁴² World Summit on Sustainable Development, Johannesburg, 2002.

⁴³Harris J, Basic Principles of Sustainable Development, Global Development and Environment Institute Working Paper, Tufts University, 2000.

⁴⁴Sustainable development <https://www.sciencedirect.com/topics/earth-and-planetary-sciences/sustainable-development>

⁴⁵ <https://www.sciencedirect.com/topics/earth-and-planetary-sciences/sustainable-development> on 4 August 2019.

⁴⁶Sustainabledevelopment<https://www.sciencedirect.com/topics/earth-and-planetary-sciences/sustainable-development>- on 5 August 2019.

⁴⁷ Jonathan M Harris, Basic Principles of Sustainable Development, p 4.

3. Environment.

An environmentally sustainable system must “maintain a stable resource base, avoiding over-exploitation of renewable resource systems or environmental sink functions, and depleting non-renewable resources only to the extent that investment is made in adequate substitutes.”⁴⁸ It defines how to protect ecosystems, air quality, integrity, and sustainability of our resources⁴⁹

By coming to the realisation that development and environment are not separate challenges and that the environment cannot be protected when growth excludes costs of environmental destruction,⁵⁰ sustainability can therefore be said to cover a wider spectrum that involves environmental as well as institutional, human and physical capital. Whilst a common measure of success of a country is gross domestic product (GDP), this measure does not account for the depletion or degradation of natural resources or depreciation of assets.⁵¹

The foregoing alludes to the overall goal of sustainable development to being the long-term stability of the economy and environment; and can only be achieved by acknowledging and integrating of environmental, economic and social concerns. ⁵²*“Our inability to promote the common interest in sustainable development is often a product of the relative neglect of economic and social justice within and amongst nations.”*

Sustainable development aims to improve the quality of life in a comprehensive manner, including economic prosperity, social equity and environmental protection. Economic, social, environmental and cultural aspects must be integrated in a harmonious manner to enhance the intergenerational well-being.⁵³ The *World Charter for Nature*,⁵⁴ was partly informed by the conviction that the benefits which could be obtained from nature depends on the maintenance of natural processes and on the diversity of life forms and that those benefits are jeopardized by the excessive exploitation and the destruction of natural habitats.⁵⁵ Considering that each state has exclusive jurisdiction within its territory and people and permanent sovereignty over the natural resources therein, as far as international law is concerned, sustainable management and governance of world

⁴⁸ Jonathan M Harris, *Basic Principles of Sustainable Development*, p 5.

⁴⁹ <https://www.sciencedirect.com/topics/earth-and-planetary-sciences/sustainable-development> on 5 August 2019.

⁵⁰ Brundtland Commission, *Our common future*, 1987.

⁵¹ Perkins H, *‘Economics of development’* 7ed, New York: W. W. Norton & Company S, 2013.

⁵² Rachael E, *Brief for GSDR, Definition and defining principles*, 2015, p 15.

⁵³ Kariuki M, *nurturing our Environment for Sustainable Development*, 2017.

⁵⁴ UN General Assembly, *World Charter for Nature*, 28 October 1982, A/RES/37/7.

⁵⁵ Kariuki M, *nurturing our Environment for Sustainable Development*, p 4.

resources can only be achieved through the concerted efforts of each state taking care of the environmental resources falling within the confines of their sovereign territory.

Nonetheless, it is clear from the three pillars of sustainability there arises potential difficulties to the original definition established in the Brundtland Commission.⁵⁶The objectives implied or expressed are multidimensional, thus raising issue of how to practically balance objectives and how to judge their success or their failure.⁵⁷ This raises questions because of the uncertainty of which goal takes precedence in situations such as; when providence of adequate supply of food and water require land use changes which will ultimately decrease biodiversity, or in situations where industrial growth conflicts with preserving natural resources.⁵⁸ The former was supported by scholars such as Norgaard, who in his writing “Development Betrayed”, asserts that “one can only maximize on one objective at a time as trade-offs are rarely avoided.”⁵⁹ He concludes that sustainable development cannot be defined with the control level presumed in modernity logic.⁶⁰ In that, it is difficult to analytically pin down sustainable development because of its irrefutable normative nature.

Keeping the foregoing in mind, this paper shall apply the limitations of rights test and choosing to move from a point of unsustainability as suggested by Jonathan Harris,⁶¹ by seeking to determine what sustainable development limbs have not been adequately been met in seeking the balance. This will be with regards to NEMA as a lead agency tasked with ensuring sustainable exploitation⁶² in accordance with Article 69 of the Constitution, in the SGR-Project.

⁵⁶ Harris J, Basic principles of sustainable development p 4.

⁵⁷ Harris J, Basic Principles of Sustainable Development p 5.

⁵⁸ <https://www.sciencedirect.com/topics/earth-and-planetary-sciences/sustainable-development> on 10 August 2019.

⁵⁹ Schmid A, American Journal of Agricultural economics, 77 Oxford 2, 1995.

⁶⁰ Schmid A, American Journal of Agricultural economics, p 435.

⁶¹ Harris J, Basic Principles of Sustainable Development, p 9.

⁶² Article 69(1), the Constitution of Kenya (2010).

3.0. CHAPTER 3

3.1. OBLIGATIONS OF NEMA UNDER THE CONSTITUTION OF KENYA AND EMCA

3.1.1. The touchstone of effective environmental governance

Environmental governance is often defined as a set of regulatory organizations, processes and mechanisms via which environmental actions and outcomes are influenced.⁶³ Fundamentally, it refers to how power is exercised through the management of a country's natural resources. The aim of environmental governance is to ensure that these resources are managed in a sustainable and equitable manner.⁶⁴ Alluding to the foregoing, the regulatory organisation, processes and mechanisms of environmental governance strive to ensure that development related activities meet the needs of the present generation without much compromise to the ability of the future generations to meet their own needs.⁶⁵ In that, natural resources are exploited in a manner that is fair and prudent keeping in mind the need to preserve them for the benefit of generations to come.

In another discourse, it is noteworthy that, environmental governance ought to be within the scope of law, in order to protect groups and individuals against abuse of power by those charged with the duty to implement and enforce it.⁶⁶ This is to avoid the objectives of intergenerational equity, fair use and prudence from being compromised. It is therefore necessary to subject environmental governance to the norms of a democratic society and to the rule of law by making it accountable and participatory.⁶⁷ This in turn ensures environmental justice, premised on the equality of all human beings and the need for them to be treated as such.⁶⁸

Thus the scope of the duties and powers of NEMA asserted in Kenya's legislation.

3.1.2. The scope of NEMA's obligations in discharging its duties to protect the right to a clean and healthy environment and ensuring sustainable development

The environment is the resource base for all life thus the need to protect it.⁶⁹ It has been defined as "the biological, chemical and physical factors external to a person and their related behaviour."⁷⁰ EMCA, defines environment to include biological factors of plants, animals and the social factors of aesthetics, including both the built and natural environment, and the physical factors of the

⁶³ Lewis C, and Agrawal A, 'Environmental governance,' 31 Annual review of environmental resources 1, 2006.

⁶⁴ Article 69, the Constitution of Kenya (2010).

⁶⁵ World Commission on Environment and Development, *Our Common Future*, 16.

⁶⁶ Migai A, Administrative Law, *Administering the environmental law regime*, 242.

⁶⁷ Migai A, Administrative Law, *Administering the Environmental Law Regime* 242.

⁶⁸ Finger M, and Zorzi B, Environmental Justice, UFRGS Model United Nation Journal, 2013.

⁶⁹ Kariuki M, Reconceptualising the right to a clean and healthy environment in Kenya, 2017.

⁷⁰ Kariuki M, reconceptualising the right to a clean and healthy environment in Kenya p 4.

surrounding, inclusive of and not limited to; water, land, atmosphere, sound, climate, taste and odor.⁷¹ The Draft International Covenant on Environment and Development defines environment as “the totality of nature and natural resources, inclusive of the cultural heritage and infrastructure essential for social-economic activities.”⁷² From the definitions, one can infer that the environment is intertwined with the enjoyment and realisation of other fundamental rights.⁷³ It is the major reservoir for most resources that are essential for the realisation of social and economic rights. Thus a need arises for measures to ensure a clean and healthy environment and also the need for the adaptation of approaches which will involve all relevant actors. The relationship enshrined in the environmental and social rights was affirmed in the case of *Friends of Lake Turkana Trust v Attorney General & 2 others*⁷⁴ where the learned judge *inter alia* stated that “the right to life, dignity, social and economic rights are all connected and are indivisible and it cannot be asserted that one set of rights is more important than the other. All these necessity rights ought to be observed for a person to be said to have attained a reasonable livelihood.”⁷⁵ The foregoing alludes to Principle 1 of the Draft Principles.⁷⁶

Premised on the *trite law* that where there is a right there is a duty corresponding to it. The Constitution of Kenya guarantees the right to a clean and healthy environment⁷⁷ and confers obligations to administrative bodies with its protection for the present and future generations. This constitutional provision does not explicitly define the asserted right to which a duty is owed. Rather, it is broadly defined in EMCA to include “access by any person to the various public segments or elements of the environment for educational, health, spiritual and recreational purposes.”⁷⁸ The broad scope of the right to a clean and healthy environment was asserted in the case of *Peter K. Waweru v Republic*⁷⁹ where the judge *inter alia* stated that “the right to life does not entail keeping soul and body together as it is not only in this way that it is threatened but also by other things such as harming the environment. It is a right primary to human beings, inherent in nature and is universal, indivisible and interdependent.”⁸⁰

⁷¹ Section 2, Environmental Management and Coordination Act (Act no 8 1999).

⁷² Draft International Covenant on Environment and Development, Environmental law and policy paper, 1995.

⁷³ Lador Y, The challenges of human environmental rights, in human rights and the environment: *Proceedings of a Geneva environment network roundtable*, the United Nations Environment Programme for the Geneva Environment Network, 2004.

⁷⁴ (2012) eKLR.

⁷⁵ Migai A, Administering the environmental law regime, p 250.

⁷⁶ Principle 1, Draft Principles on Human Rights and the Environment, E/CN.4/Sub2./1994/9, Annex 1, 1994.

⁷⁷ Article 42, the Constitution of Kenya (2010).

⁷⁸ Section 3 (2), Environmental Management and Coordination Act (Act no 8 1999).

⁷⁹ (2004) eKLR.

⁸⁰ Principle 2, Draft Principles on Human Rights and the Environment.

The right espoused brings forth a corresponding duty, of upholding the right by ensuring that development is sustainable. The Constitution stipulates that sustainable development is one of the national values and principles of governance that must bind all State organs, State officers, public officers and all persons whenever any of them—applies or interprets the Constitution; enacts, applies or interprets any law; or makes or implements public policy decisions.⁸¹ The implication of these constitutional provisions is that both national and county levels of government are tasked with promoting sustainable development especially with regard to natural resources and environmental management.⁸² NEMA, being the main administrative organ tasked with ensuring environmental protection, protects the right under Article 42 of the Constitution⁸³ through legislative measures (among other measures) contemplated under Article 69 of the Constitution⁸⁴ and to have them fulfilled under Article 70.⁸⁵ It does so, as earlier asserted, by coordinating and supervising all matters concerning the environment. To be more specific, it coordinates lead agencies' activities⁸⁶ and promotes the integration of environmental considerations into development plans, policies projects and programs that require environmental monitoring and auditing⁸⁷ and also assesses activities in a bid to ensure that they do not degrade the environment and that they adhere to environmental management objectives.⁸⁸ NEMA fulfils its duties by not only adhering to the above but by also adhering to the principles of natural justice, under the ambit of the rule of law and following its expectations in a democratic society.

3.2. TOOLS AVAILABLE TO NEMA TO MEET ITS OBLIGATIONS UNDER THE CONSTITUTION AND THE ACT

The Constitution of Kenya requires the State to establish systems of environmental impact assessment, environmental audit and monitoring of the environment.

EMCA empowers the Minister to create any necessary regulations to enable NEMA to perform its functions.⁸⁹ In so doing, EMCA tasks NEMA with the responsibility of carrying out Environmental Audit of all activities that are likely to have significant effect on the environment. The Environmental Impact Assessment is conducted before commencement of any new development

⁸¹ Article 10(d), the Constitution of Kenya (2010).

⁸² Section 3, Environmental Management and Coordination Act (Act no 8 1999).

⁸³ Article 42, the Constitution of Kenya (2010).

⁸⁴ Article 69, the Constitution of Kenya (2010).

⁸⁵ Article 70, the Constitution of Kenya (2010).

⁸⁶ Section 9(2) (a), Environmental Management and Coordination Act (Act No 8 of 1999).

⁸⁷ Section 9(2) (j), Environmental Management and Coordination Act (Act No 8 of 1999).

⁸⁸ Section 9(2) (l), Environmental Management and Coordination Act (Act No 8 of 1999).

⁸⁹ Section 147, Environmental Management and Coordination Act (Act No 8 of 1999).

to minimise negative environmental impacts, for ongoing activities, an Environmental Audit ascertains if the activities in question have significant environmental effects.⁹⁰

3.2.1 Pre decision by NEMA

EIA process and procedure:

First, a project report by the project proponent is submitted to NEMA.⁹¹ The report ought to have been prepared by a licensed EIA expert⁹² in consideration of social, ecological, use, landscape and water⁹³ and has also incorporated the public's views.⁹⁴ NEMA submits a copy of the report, within seven days of receipt, to all relevant lead agencies⁹⁵ who in another seven days, are to comment on the report. NEMA then proceeds to review the report to determine whether it handles important issues such as the impact on the environment, the adequacy of both the proposed measures and the environmental plan and regulation compliance.⁹⁶ If NEMA is satisfied that there would be no significant impact, then it can proceed to issue a license and has such powers as to attach certain conditions to this license. This includes the requirement of the project proponent to sign off on his (her) acceptance of the approval conditions or could require the proponent to conduct an EIA.⁹⁷

In the case where NEMA requires an EIA to be conducted, the first step to be carried out will be scoping, whose purpose is to determine the range and identify significant issues to be addressed.⁹⁸ In addition to, scoping gives room for public participation by holding public hearing, conducting exploratory visits of the site and workshops.⁹⁹ If NEMA approves the scoping study, the proponent can then hire an EIA NEMA-approved expert to conduct the EIA study.¹⁰⁰ In the actual EIA study, the public will again be required to participate by airing out its views regarding the proposed project. Notice ought to be given according to the methods listed under Regulation 17 of the Environmental (Impact Assessment and Audit) Regulations. The public's input is also required after the report has been submitted to NEMA, lead agencies involved and publicised.¹⁰¹ After NEMA receives the public's comments, it may hold a public hearing, which forms part of

⁹⁰ FAO, 'Environmental Impact Assessment (EIA) and Environmental Auditing (EA),' available at <http://www.fao.org/docrep/005/v9933e/v9933e02.html> accessed on 10 April 2020.

⁹¹ Section 58, the Environmental Management and Coordination Act (Act No 8 of 1999).

⁹² Regulation 7(3), the Environmental (impact Assessment and Audit) Regulations, 2003.

⁹³ Schedule 2, the Environmental (impact Assessment and Audit) Regulations, 2003.

⁹⁴ EIA Guidelines, 2002.

⁹⁵ Regulation 9, the Environmental (impact Assessment and Audit) Regulations, 2003.

⁹⁶ Richard Evans and 6 others v NEMA & 2 others (2008) eKLR.

⁹⁷ Migai A, Administering the Environmental Law Regime p 251.

⁹⁸ Regulation 11, the Environmental (impact Assessment and Audit) Regulations, 2003.

⁹⁹ EIA Assessment Guidelines and administrative Procedures.

¹⁰⁰ Regulation 16, the Environmental (impact Assessment and Audit) Regulations.

¹⁰¹ Regulation 20, the Environmental (impact Assessment and Audit) Regulations.

information useful to NEMA in decision making. NEMA's officers review all the information gathered and decides whether or not to issue an EIA license.¹⁰²

3.2.2 Post decision by NEMA

EIA follow up rationale and characteristics:

EIA follow up is usually primarily concerned with the post decision stage of a plan or project. It relates to the project's life cycle after a decision has already been consented to (for example, final design detail, and operation and construction phases).¹⁰³ The rationale of EIA follow up has been well researched and documented on literature. It is usually justified by its probable benefits. Glasson¹⁰⁴ stated that "follow up ought to aid in achieving proper environmental management in the life cycle of a project, for if a follow up is successful, the information produced will be forthcoming in decision-making." This in turn enables learning from experience by determining the actual developmental impacts. Follow up information tends to be useful in various ways, for instance; it may aid in preventing or reducing negative effects of projects and also helps in the management of uncertainties and risks and can help in determining whether the EIA predictions were right and by so doing, can enhance a project's effectiveness by using mitigation measures that are appropriate.¹⁰⁵ Follow up act as a guarantee that an EIA is not just a linear exercise with the objective of making a one-time decision on the feasibility of a project but a continuous learning process aimed at searching for potential improvements as required.¹⁰⁶

Jill Baker¹⁰⁷ suggested a practical framework that highlighted four main activities that comprise follow-up: monitoring and auditing, evaluation, communication and management. Monitoring in essence refers to the collection of data so as to obtain information on the characteristics and functioning of environmental based variables.¹⁰⁸ The collected data is then compared to the specified standards, expectations and predictions through auditing.¹⁰⁹ Evaluation refers to "value judgment by structuring, analysing and appraising information." Management refers to "decision making and taking up necessary action in response to matters arising from evaluation and

¹⁰² Regulation 25, the Environmental (Impact Assessment and Audit) Regulations.

¹⁰³ Arts J, Caldwell P and Morrison S, Environmental impact assessment follow-up: *Good practice and future directions- findings from a workshop at the IAIA 2000 conference*, 2001.

¹⁰⁴ Kimomo J, Haakana A and Kuitunen M, Impact assessment project appraisal, *The Rationale of EIA Follow-up: An Analysis of Finnish Road Projects*, 33 Taylor and Francis Online.4, 2015, <https://www.tandfonline.com/doi/full/10.1080/14615517.2015.1069997>- p 255.

¹⁰⁵ Morrison S, Assessing impact handbook, lessons from Practice towards Successful Follow-up in Impact Assessment and Project Appraisal, London Earthscan Publications, London, 2004, 27.

¹⁰⁶ Kimomo et al, Impact assessment project appraisal, p 28.

¹⁰⁷ Morrison S, Assessing impact handbook, p 25.

¹⁰⁸ Kimomo et al, Impact assessment project appraisal, p 30.

¹⁰⁹ Kimomo J, Kimomo et al, Impact assessment project appraisal, p 34.

monitoring activities.”¹¹⁰ Communication refers to “informing all the relevant stakeholders and the general public about the EIA follow-up results.”¹¹¹ The former discussed framework proves useful in elucidating the potential difficulties in practical processes.

The need for a follow-up has been recognised in Kenya in its legislative framework. The constitution empowers NEMA to “monitor and access the operation of any project, industry or activity in light of determining its environmental effects.”¹¹² Furthermore, EMCA also empowers NEMA to “conduct monitoring and auditing on all activities that are likely to have significant impact on the environment¹¹³ and it is empowered to do so by establishing environmental quality standards and itself (EMCA), for the former stated purpose, establishes a Standards and Enforcement Review Committee.”¹¹⁴ Following from the foregoing discussions, the idea behind the follow-up recommended by the Constitution and the Act is that once an EIA license has been issued and the project has commenced, NEMA takes initiative to send inspectors to determine whether and to what extent the activities of the project are in conformity with the statements made in the EIA report that was issued in respect of the project.¹¹⁵

Morrison Saunders¹¹⁶ emphasises on the need to consider all stakeholders, this is with reference to authorities, developers and the public. This tripartite affect the techniques and approaches utilized in the realisation of follow-up and thus how it occurs.in addition to, they act as checks and balances for each other. For instance, if the developers are not conducting their activities, with regards to the project, in a sustainable manner, then the public has a vested interest in seeking a remedy from NEMA. An example of such a remedy is the issuance of Environmental Restorative Order (ERO), which is given in order to restore, as much as is possible, the environment to the state it was before the harming activity was conducted and the ERO also acts to prevent or stop an action that has or is likely to harm the environment.¹¹⁷ In an instance where NEMA fails in performing its duties, the public or the developers may seek redress from the National Environmental Tribunal (NET) which is empowered by EMCA to review NEMA’s administrative decisions.¹¹⁸ This is all in a bid to ensure sustainable exploitation and utilisation of resources,¹¹⁹ to attain balance among the three

¹¹⁰ Kimomo J, Kimomo et al, Impact assessment project appraisal, p 35.

¹¹¹ Kimomo J, Kimomo et al, Impact assessment project appraisal, p 35.

¹¹² Article 69(2), the Constitution of Kenya (2010).

¹¹³ Section 68(1), the Environmental Management and Coordination Act (Act No 8 of 1999).

¹¹⁴ Section 70, the Environmental Management and Coordination Act (Act No 8 of 1999).

¹¹⁵ Section 68(2), the Environmental Management and Coordination Act (Act No 8 of 1999).

¹¹⁶ Morrison S, lessons from Practice towards Successful Follow-up in Impact Assessment and Project Appraisal, p 10.

¹¹⁷ Section 108(2), the Environmental Management and Coordination Act (Act No 8 of 1999).

¹¹⁸ Section 125 and 129, the Environmental Management and Coordination Act (Act No 8 of 1999).

¹¹⁹ Article 69, the Constitution of Kenya (2010).

pillars of sustainable development with due regard to the needs of the present and future generation.¹²⁰

¹²⁰ World Commission on Environment and Development, *Our Common Future*.

4.0. CHAPTER 4

4.1. THE IMPACT OF THE ACTS OR OMISSIONS BY NEMA IN THE SGR PROJECT

In the case of *Charles Awiti & 19 Other v China Roads and Bridges Corporation Kenya Limited*, the Plaintiffs averred that their right to a clean and healthy environment and to quiet possession had been violated. They asserted that they were proprietors of the parcel of land located near Makumbi Road approximately 150 metres from the Mombasa-Nairobi Railway line.¹²¹ The suit property comprised of 48 apartments. The Plaintiffs averred that the Defendant (project proponents) engaged in a method of rock excavation that involved blasting. Which in turn subjected the Plaintiffs to excessive noise, nuisance and disturbance less than 2 kilometres away, contrary to blasting requirements.¹²² More so, the learned judge in the case *inter alia* stated that through the intensity of excessive vibrations exceeding the acceptable limit of 0.5 centimetres,¹²³ the suit property started developing cracks, compromising on their structural integrity.

In the case study, it is evident that the project proponents had acquired most of the necessary licenses in order to conduct their activities. However, the proponents did not acquire license to grant them permission to increase the intensity of blasting beyond that required under regulation.¹²⁴ In addition to the learned judge in the case stated *inter alia* that none of the permits and licenses issued authorised the Defendants to cause damage to private property contrary to Article 40 of the Constitution.¹²⁵

The proponents also raised an issue of public interest; alluding to the benefits of the project to both the local and regional economy, against the request by the Plaintiffs for an injunction. Inferring from the same, the proponents seemed to stating the importance of economic development at the detriment of the right to a clean and healthy environment by seeking its limitation in the circumstances, as was the case in *Symon Gatatu Kimamo and 587 others v East African Portland Cement Company Limited*,¹²⁶ according to Article 24 of the Constitution.¹²⁷

¹²¹ (2016) eKLR.

¹²² Regulation 14(2), Environmental Management and Coordination (Noise and Excessive Vibration Pollution) (Control) Regulations, (2009).

¹²³ Regulation 14(3), Environmental Management and Coordination (Noise and Excessive Vibration Pollution) (Control) Regulations (2009).

¹²⁴ Regulation 16, Environmental Management and Coordination (Noise and Excessive Vibration Pollution) (Control) Regulations, (2009).

¹²⁵ Article 40, the Constitution of Kenya (2010).

¹²⁶ (2011) eKLR.

¹²⁷ Article 24, the Constitution of Kenya (2010).

From the above evidence and findings it is conclusive that there was indeed damage caused by the negligence of the proponents in how they conducted their activities within the site.

5.0. CHAPTER 5

5.1. ANALYSIS

As earlier asserted, NEMA has an obligation to ensure sustainable exploitation in a bid to further economic development, environmental protection and the overall protection of the right to a clean and healthy environment of the people.¹²⁸ From the analysis of sustainable development concept, NEMA would be found to have performed its function if it meets the balance of the three tenets of sustainable development concept or its omission thereof justified if its actions were justifiable under the limitations under the law.¹²⁹ In that, “the relationship; between the social and environmental dimensions is found to be bearable, the social and economic dimensions is found to be equitable and the environmental and economic dimensions is found to be feasible and viable.”¹³⁰ The following analysis shall investigate whether the balance between the aspects was achieved in the case study and whether the lack of achieving the said balance was found to be reasonable:

The proponents of the SGR project, as asserted in the EIA project report, stated its reason for engaging in the project to be “for the purpose of bringing both regional and local economic growth.”¹³¹ In terms of economic growth, the EIA report highlighted how it would improve the livelihood of the people; both during the life cycle of the project and after the project has been completed.¹³² The report asserted that the former would happen through the generation of income collected through taxes and fees, the growth and emergence of markets and businesses, creation of employment, reduction of air pollution and littering along the highway, increase property value and reduce road accidents.¹³³ Thus from the foregoing, the aim being sought is legitimate and meets the feasibility and viability conditions of the economic aspect. The former informed NEMA in its decision to issue a license as it was geared towards its objective of promoting economic prosperity based on its duties under the Constitution.¹³⁴

¹²⁸ Article 10, 69, 42 and 70, the Constitution of Kenya (2010).

¹²⁹ Articles 24 and 25, the Constitution of Kenya (2010).

¹³⁰ Jonathan H, the Basic Principles for Sustainable Development, p 5.

¹³¹ Jacob K, the Environmental and Social Impact Assessment Study Report for the Proposed Nairobi-Mombasa Standard Gauge Railway Project, p 2.

¹³² Proposed Nairobi-Mombasa Standard Gauge Railway Project, *positive social and environmental impacts*, p 124-125.

¹³³ Proposed Nairobi-Mombasa Standard Gauge Railway Project, *positive social and environmental impacts*, p 122-125.

¹³⁴ Article 10, the Constitution of Kenya (2010).

However, it is not in contention that NEMA had approved the SGR project and issued a license in pursuance of economic prosperity. Seeing the impacts of the project to the people living along Makumbi Road, questions of whether there was a need for issuance of the license at all arise.

In the SGR- EIA project report, it was pointed out that there were not only alternative projects, but also alternative routes to the chosen site. The first alternative scheme had good conformity to the terrain and was efficient because of the already existing roads and railway, the second scheme would be efficient because of the ease in improving the railway in future as the railway would pass through most economic towns and the third scheme would have been advantageous because of its low expense.¹³⁵ In addition to, it also pointed out that there were other options such as; retaining or refurbishing the existent railway,¹³⁶ constructing an underground railway line or do away with the project in its totality and improve the existing road infrastructure.¹³⁷

NEMA can only be said to have objectively acted in its decision if it used the least restrictive means in ensuring the legitimate aim being pursued was attained in a sustainable manner. Which means, that not only would the economic aspect be deemed feasible and viable, but also the social aspect equitable and the environmental aspect bearable. From the foregoing, it is evident that it was not necessary to have the SGR project. However, despite the presence of alternatives, NEMA went ahead and approved a project site that was less than 2 kilometres away from human settlement, with the knowledge the project would involve explosives contrary to regulations stipulated.¹³⁸ Moreover, after approving the project, no action is seen to be taken by NEMA to oversee the project within its life cycle. This is to say, NEMA did not take necessary action to follow up on the project proponent's commitment to implement their suggested management plan when they were called upon by the affected people to reduce the intensity of blasting of rocks¹³⁹ and engaging in noise pollution disturbance and nuisance. Furthermore, it did not take initiative in sending inspectors to the site to ensure everything was in order, as far as their duty to conduct monitoring and auditing is concerned.¹⁴⁰ In this light, NEMA portrays (contributory) negligence to the duty of care to the people leaving near Makumbi Road of equity and protection of their right to a clean and healthy environment. Thus NEMA can be said to be liable for the destruction of

¹³⁵ Proposed Nairobi-Mombasa Standard Gauge Railway Project, *Analysis of Project Route Alternatives*, p 145.

¹³⁶ Proposed Nairobi-Mombasa Standard Gauge Railway Project, *retaining or refurbishing the existent railway*, p 147.

¹³⁷ Proposed Nairobi-Mombasa Standard Gauge Railway Project, *Construction of an Underground Railway and/ or Upgrading the Existing Mombasa-Nairobi Road Super Highway*, p 148.

¹³⁸ Regulation 14(2), Environmental Management and Coordination (Noise and Excessive Vibration Pollution) (Control) Regulations, (2009).

¹³⁹ Charles Awiti & 19 Other v China Roads and Bridges Corporation Kenya Limited, (2016) eKLR.

¹⁴⁰ Section 68 and 69, the Environmental Management and Coordination Management Act (Act of 1999).

property, noise pollution and disturbance caused by the project proponents. Therefore, NEMA failed to strike a balance between its duty to promote development and the duty to protect the livelihood of the people and their right to a clean and healthy environment, by prioritising the economic viability of the project without proper consideration to be equity and bear ability of the social and environmental aspects respectively. Thus, from the foregoing, NEMA failed to strike a balance between the tenets of sustainable development.

6.0. CHAPTER 6

6.1. RECOMMENDATIONS AND CONCLUSION

NEMA has made significant efforts to ensure participation by the public. Regardless, the public participation is still seen to be ineffective. First, the procedures that exist do not enable meaningful participation by the public in the decision making process of EIA licensing. In that, they require proponents to issue questionnaires to the community likely to be affected and have minimal to no participation in situations where NEMA intends to base its decision solely on a project report if it considers a public hearing unnecessary. This contravenes Article 6(8) of the Aarhus Convention¹⁴¹ which requires parties to ensure that in the decision due account is taken of the outcome of the public participation.

In addition to, it is unclear whether the EIA licensing was informed by public participation, as NEMA does not usually show how the public hearings affect and influence NEMA's decision in licensing and in considering the general environmental effects stated by the proponents of the project. Therefore, in order to make the public participation more significant, NEMA should no longer be given the leeway of choosing whether to conduct and use the information given by the public or not, rather, it should be compelled to take into account the considerations made by the public as the project is not only for their benefit but also could cause them serious harm.

Furthermore, NEMA is usually not required to involve the public in its follow up, rather, it is required to report the findings to the public. This is both insufficient and inadequate, since the public is most likely to be affected by the impacts of the project. As seen from the case study, the public suffered a harm because their participation was ignored. More so, there is only evidence that a follow-up would be conducted as stated in the EIA report, however, there has not been such evidence to the effect that a follow-up was conducted by either the proponents of the project or by NEMA and a report released. Thus, I recommend that, NEMA takes steps to ensure that a follow-up is conducted and involves the public and all relevant stakeholders in the implementation management plan. This is in a bid to ensure effective realisation of the follow-up and to also ensure accountability and reasonableness as the stakeholders will act as checks and balances for one another. Thus, ensuring all relevant stakeholders play a part in the life cycle of the project.

Finally, it is worth noting that the review process by NEMA often faces the challenge of their resources being stretched too thin. This is because of inadequate financing to fund its various

¹⁴¹ Convention on Access to Information, Public Participation in Decision Making and Access to Justice in Environmental Matters, 1998.

mandates. For instance, NEMA's activities are often crippled by shortage of staff and experts to help in conducting inspections and scientific testing necessary for the confirmation of the findings of the EIA study. I therefore recommend, an increase in NEMA's budget considering its wide range of responsibilities which may not be properly performed without adequate funding.

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