Balancing Conservation and Development in Kenya: Navigating the Legal Tightrope

Unquestionably, Kenya is a leader when it comes to environmental protection and going green. The country now generates a whooping 93 percent of its energy needs from renewables. While its transport sector has been a slow adopter of e-mobility, recent government subsidies and announcements for investments in the sector are likely to kick off a boom in the field and add to the country's eco-credentials. Additionally, as far as the law is concerned, the country's constitution is rather progressive in its enshrining of environmental rights as a constitutional imperative.

Article 42 of the constitution guarantees these rights. Indeed, under article 70 of the same Constitution you can enforce the rights stated in article 42 by seeking redress where your rights to a clean and healthy environment are not only infringed but even when there is a threat of infringement.

> ***42., Environment***
> ***Every person has the right to a clean and healthy environment, which includes the right—***
> ***(a), to have the environment protected for the benefit of present and future generations through legislative and other measures, particularly those contemplated in Article 69; and***
>
> ***(b), to have obligations relating to the environment fulfilled under Article 70.***
> ***----------***
> ***70., Enforcement of environmental rights***
> ***(1), If a person alleges that a right to a clean and healthy environment recognised and protected under Article 42 has been, is being or is likely to be, denied, violated, infringed or threatened, the person may apply to a court for redress in addition to any other legal remedies that are available in respect to the same matter.***
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> ***(2), On application under clause (1), the court may make any order, or give any directions, it considers appropriate—***
> ***(a), to prevent, stop or discontinue any act or omission that is harmful to the environment;***
>
> ***(b), to compel any public officer to take measures to prevent or discontinue any act or omission that is harmful to the environment; or***
>
> ***(c), to provide compensation for any victim of a violation of the right to a clean and healthy environment.***
>
> ***(3), For the purposes of this Article, an applicant does not have to demonstrate that any person has incurred loss or suffered injury.***

To safeguard these rights, developers are legally mandated to obtain various approvals and/or licences before embarking on any development project. Instances where infringement may arise are galore, ranging from ordinary building constructions to major infrastructural projects including roads, dams, mines, etc. Further, the Constitution and other relevant laws stipulate that stakeholder consultations be undertaken prior to development. This is what in common parlance is referred to as ***"public participation".*** You may have seen notices or been involved in meetings where issues of such developments have been discussed.

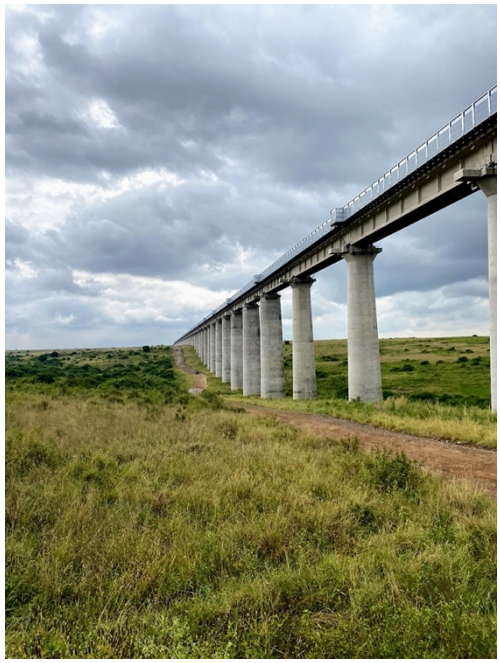
As such, the intersection between your environmental rights and enforceability thereof, on the one hand, and the developer's and society's right to undertake economic advancement, on the other, requires a reasonable balance. In practice, finding this balance can pose several challenges to all parties due to myriad reasons and hence the need to engage professionals whenever possible to secure these coexistent rights.

Some of these challenges may include (but are not limited to);

1. The multiplicity of laws that a person must navigate depending on the nature of engagement or infringement e.g.
    a. The Constitution of Kenya
    b. The Physical Planning and Land Use Act
    c. Environmental Management and Coordination Act.
    d. Forest Conservation and Management Act.
    e. Water Act
    f. The Mining Act.
2. The different institutions involved depending again on the nature of concern. These include;
    a. Government Ministries
    b. The County Government through the Physical Planning and Land Use Liaison Committees.
    c. NEMA or even the Tribunal established thereto
    d. The Environment and Land Court
3. The costs in applying and obtaining the difference licenses and approvals or the costs of mounting such a challenge.

Undoubtedly, there are numerous direct and indirect benefits to be had for stakeholders and society at large when development projects materialise. In 2020 alone, even amidst the ravages of the Covid-19 pandemic, the construction sector contributed an impressive 7.1 percent to Kenya's GDP. However, modern conceptions of benefit are and must be increasingly balanced against that which we are said to inherit from future generations – a healthy environment. It has been our experience in advising both developers and relevant stakeholders that striking this balance yields great rewards. Our years of representing premier residents' associations in Kenya has shown that negotiating in good faith with private or public developers can not only retain property values but serve as a boon to asset appreciation. And really, if praise is to be given where it is due, then we must acknowledge the current legal regime has done fairly well in striking a balance.

In fact, balanced development practices can not only mitigate environmental impacts, but promote some level of environmental integrity by retaining fidelity to the tenets of a clean and healthy environment through enhanced and community-based compliance with the various legal provisions.



A bridge on the Standard Gauge Railway traversing the world-famous Nairobi National Park. Photo by: Bryan Mutiso

The law however falls short in cases where parties fail to find common ground. Developers should be aware that even where the requisite licences and approvals have been secured, stakeholders have the liberty to challenge any actions to test their legality, sufficiency, or adequacy in addressing environmental concerns. Parties have done this individually as well as collectively through resident associations and other bodies which have acquired legal recognition as vehicles of mobilisation to safeguard common interests of occupants and owners of land within a given area. Notably, a common error often experienced either in the pursuit or opposition of these developmental and environmental concerns is the choice of forum.

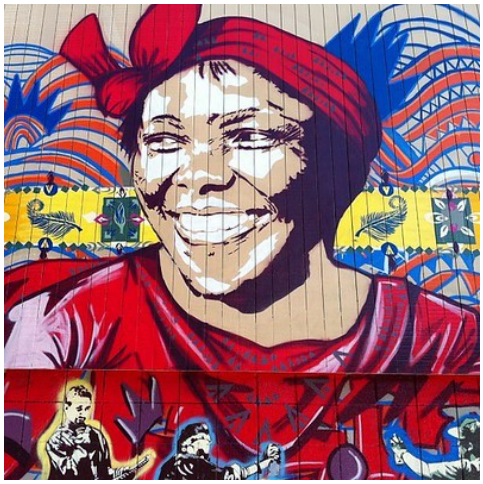
For instance, this might seem straightforward an issue, considering Article 70 (1) of the Constitution which provides that a person so aggrieved ***"...may apply to court for redress in addition to any other legal remedies available in respect of the same."*** Yet, as with many legal issues, the answer on forum for redress is not as easy as laid out, and the problem has confounded both the lawyers and even the courts.

After a lot of confusion where Environment and Land Courts (ELC) were giving conflicting interpretations, with some allowing cases filed before them and others rejecting them, we now fortunately have a definitive conclusive resolution of the matter by the Court of Appeal in **Kibos Distillers Limited & 4 others Vs. Benson Ambuti**

Adega & 3 others 20 eKLR, which held that before approaching the ELC, aggrieved persons should first exhaust avenues available in other fora. This is what is referred to as the doctrine of exhaustion. The Court of Appeal decision was affirmed by the Supreme Court.

Nevertheless, the Supreme Court's decision, although legally sound, presents major practical conundrums. The first handicap has been that Physical Planning and Land Use Liaison Committees as provided for are virtually non-existent on the ground, especially at the county level. Even where they are established, they are appendages of the county government(s) that clients may ordinarily be acting against. This dilemma further recalls the famous dicta by Lord Denning, where he railed against the diktats of powerful interests especially in the context of the "small man". Similarly, it serves to reason that our social contract with each other and the state mandates all persons to be redeemed from "take it or leave it" scenarios, more so when it comes to existential matters like a conducive, healthy environment.

Another frustrating circumstance arises where the said committees are for one reason or another interfered with to ensure matters are not heard to begin with, thus diminishing the value of the doctrine of exhaustion. Further still, even where the committees conduct hearings, they are not capable of granting conservatory or injunctive reliefs in a situation where a remedy is required as an interim measure.



A great irony is also evident where government agencies are at odds with the programs of other government bodies - an unusual but not infrequent occurrence that elicits tense political supremacy battles. We've seen this tug-of-war play out numerous times while advising such agencies and departments here, locally. Picture a CEO of a state agency anticipating a promotion down the road - how likely are they to staunchly petition against the environmental framework guiding a senior bureaucrat's pet project?

Contrastingly, our work in the early 2000's with the Green Belt Movement, then under Nobel laureate Wangari Maathai, proved that injunctive reliefs were the most effective ways of stopping environmental degradation. The jurisprudence then was more amiable to indirect stakeholders, while still preserving the rights of developers and society to economic progress.

Mural of the late Kenyan environmentalist and human rights activist Professor Wangari Maathai painted by Delvin Kenobe and Kate Deciccio in 2012 on an apartment building at Haight and Pierce. Photo by: Art around, Flickr.

Fortunately, Supreme Court decisions are not necessarily binding on future Supreme Court decisions, and perhaps the jurisprudence will soon evolve to level the playing field for all stakeholders, while still entrenching the rights to economic advancement and environmental protection.

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