THE PROF. O. K . MUTUNGI

RESEARCH AWARD MONOGRAPH”

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FOREWORD

THE PROFESSOR ONESIMUS K. MUTUNGI RESEARCH AWARD.

Why Professor O. K. Mutungi?

If you attendedtheSchool of Law, you have been his student, you have heard of him, you have read his work, or you know him. Professor Onesimus K Mutungi, the first East African Professor of Law. As an academician he was peerless, as an educator he was matchless, and as a role model he was the trailblazer who awoke in a student's the longing fires to attain the highest standards possible in life for he debunked the myth of impossibility.

Who would not look up to him? His achievements and his humility, his character, his principles are the master piece of what a mentor and role model should be. Naming a research award after such a great and honorable scholar gives it an identity. It also builds on his lifelong contributions and carries on his name. Through this Award, we remember him even more.

The topics chosen this year are:

- Arbitration Online Dispute Resolution
- Commercial Law
- Environmental and Biodiversity Law
- Governance and Transitional justice

These are thought provocative thematic areas, fertile for research, to help face legal issues concerning the Legal profession in Kenya. Through this award, skills in research and writing are sure to be nurtured, knowledge shared and wholesome growth for scholars.

It is evident that the O. K. Mutungi Research Award is definitely for a great cause. We should all be grateful for its existence and the life of a great man, Professor Onesimus K Mutungi.

The SALAR Law Review Editorial Board is also grateful to all those who helped materialize this great cause. There is beauty in being part of something bigger than just ourselves.

ACKNOWLEDGEMENTS

The SALAR Law Review Editorial Board bears great gratitude to all those who enabled the materialization of the O. K. Mutungi Research Award Project. Both directly and indirectly.
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Special appreciation to all organizations that supported us and our sponsors; the Kenya Law Report, Kariuki Muigua and Company Advocates, Pendekezo Letu , Anjarwalla & Khanna Advocates, Gerane and Company Advocates, and Sihanya Mentoring & Innovative Lawyering for the moral and financial support in the hosting of the Research Award Ceremony.

We aregrateful to the Dean School of Law Prof. Patricia Kameri-Mbote, our Patron Mrs. Joy K.Asiema , for their continued support and motivation in the endeavors of the SALAR Review Editorial Board and SALAR as a whole.

We also, recognize Mr. Tirimba Machogu for his guidance, immense contribution and facilitation of the Research Award; Prof. Otieno Oguge, Dr. Seth Wekesa, Dr. KariukiMuigua, Dr. Collins Odote, Ms. Ayieke Anyango, Mr. Ken Ogutu, Mrs. Naomi Njuguna and Mr. William Olechina, for their sacrifice in evaluating the submitted articles.

In winding-up, we also recognize the SALAR Law Review Editorial Board for their dedication, commitment and resilience in seeing to it that the O. K. Mutungi Research Award.
Ars longa, vita brevis Prof. Mutungi O. K.

THE CASE FOR A DERIVATIVES MARKET IN KENYA: IDENTIFYING THE FUNDAMENTAL ISSUES

Kirimi Kenneth Kithinji

Modern-day derivatives have been a key component of the Financial Services Sector of many jurisdictions across the world. These instruments came to the fore in the late 20th century which had witnessed increased financial innovation. The period was characterised by the development of computes and algorithms whose use in finance facilitated the development of complex models and the solving of computations quickly. Derivatives are financial instruments which derive their value from an underlying right or asset. They transfer risk from one party to another.

Some of the underlying assets include:

i. Bonds
ii. Currency
iii. Credit
iv. Commodities
v. Agricultural produce
vi. Interest rates
vii. Equities, among others

There are various categories of Derivatives in the financial sector. These differ based on different factors such as, the underlying asset, parties to the instrument, period of existence, regulatory authorities concerned, among others. They include:

i. Futures

These are also referred to as future contracts. A future is an agreement to buy or sell a specified quantity of an asset at a specified price with delivery at an ascertained date in the future. They are standardized and are traded at a derivatives exchange.

ii. Option contracts

There are two types of option contracts:

a. Call options – These give the buyer the right, but not the obligation to buy a specified quantity of a commodity of financial asset at a particular price (called a strike price) on or before a certain future date.

b. Put options – These give the buyer the right, but not the obligation to sell an ascertained quantity of a commodity/ asset at a particular price on or before a certain future date.

iii. Equity derivatives
These instruments give an investor an opportunity to buy a stock benchmarked to an index at a specified date for a certain price.

iv. Foreign exchange derivatives
These are binding contractual obligations to buy or sell a certain amount of foreign currency at a pre-agreed date of exchange on a certain date in future.

v. Commodity derivatives
The earliest forms of derivatives developed around commodities. These are agreements pursuant to which a party agrees to buy or sell a specified amount of commodity, for example gold, at a predetermined price at a specified date in the future.

Other categories include:
vi. Swaps
vii. Interest rate derivatives
viii. Credit Derivatives, for example Credit Default Swaps, among others.
Derivatives in the course of their development, uptake and usage were mostly traded over-the-counter (OTC). Here contracts are concluded on the basis of a gentleman's agreement. The ideal running through here is 'your word against mine'. These types of agreements are however prone to defaults. In the West, the setting up and institutionalisation of Derivatives Exchanges took shape in the 1990s.

The following are some of the advantages of trading through derivative exchanges:

i. Transparency
Information is available to all parties despite their size and influence in the market. Regulators demand disclosure of information from the pertinent parties.

ii. Better price discovery
Investors get access to a wide variety of bid and ask prices at an exchange. Derivative exchanges also assist in the discovery of the true underlying price of an asset based on demand and supply in the underlying market.

iii. Enforcement of contracts
Investors are required for certain types of products such as futures to deposit collateral so as to facilitate the performance of obligations under the contracts. For futures this collateral is known as a performance bond.

iv. Real time trading
Most derivative exchanges use the Automated Trading System (ATS) which facilitates quick, remote/off-the-floor trading for investors

v. Consumer protection
Exchanges are subject to regulatory mechanisms by both the proprietor(s) and the state-sanctioned regulator. This includes, disclosure requirements, need to obtain licences, maintenance of an investor welfare/ compensation fund, among others.

vi. Exchanges have relatively low transaction costs

PLAYERS IN A DERIVATIVES MARKET

These are the various stakeholders that are key to the optimal operation of an exchange. They include:

i. Hedgers

These are institutions or natural investors who have a position in the underlying commodity. They use futures to keep in check the risk that is associated with drastic price changes or other market phenomenon.

ii. Individual traders

These are usually small scale professional or amateur investors in the exchange. They are seen as 'speculators' and have benefitted from the introduction of electronic trading which has boosted access to information.

iii. Portfolio managers

Portfolio managers offer professional management services to mutual funds or unit trusts as well as other types of exchange-traded funds and are also investors herein on behalf of the facility they oversee.

iv. Hedge funds

These are similar to mutual funds only that they use resources under their portfolio in a more aggressive and risk receptive manner to maximize returns.

v. Proprietors

These are the corporative entities that own and manage the day-to-day activities of the exchange. They employ a self regulation mechanism to establish rules on various issues such as membership requirements, transaction fees, disciplinary actions, among others.

THE REGULATOR

The presence of a regulatory mechanism is critical for the optimal functioning of any given exchange. There are usually two aspects of regulation; Public Regulation and a Self regulatory stance. The latter is undertaken by the proprietor of the exchange, with close supervision from the independent regulator while the former is by a state-sanctioned and in most instances independent regulatory authority.

Different jurisdictions across the globe use various approaches in relation to the question of regulation. For instance in the United States of America, the Securities Exchange Commission oversees the Capital market including the players therein such as Brokers, Investment advisers, credit ratings agencies, et.al. The Commodity Futures Exchange Commission on the other hand oversees the derivatives markets including, swaps dealers, futures commission merchants, commodity pool merchants, derivative contracts on interest rates, stock indexes, foreign currency, among others.

In the United Kingdom, the Financial Conduct Authority oversees derivatives but not the underlying market. These derivatives include futures, contracts for difference, options amongst others. There is a bit of overlap between the authority's mandate and the Markets in Financial Instruments Directive as enacted by the European Commission. The Financial Services Authority is the overall overseer of the financial services sector in the United Kingdom.

South Africa has a substantially developed and grounded derivatives market. It is one of the most formal on the continent. The Financial Services Board of South Africa (FSB) is the overall state sanctioned regulator. Both the Johannesburg Stock Exchange and the Bond Exchange of South Africa are licensed exchanges trading in derivatives. They are supervised by the FSB. The Kenyan Capital Markets Authority has been looking to establish a derivatives exchange in Kenya largely mirrored on expertise and structures borrowed from South Africa and other emerging markets exchanges.

THE KENYAN SETTING

There emerged from the early 2000s amongst stakeholders in the financial industry, including the regulator, on the need for a derivatives trading platform.

This was one of a number of reforms seen as due to the sector. There was a consequent reorganisation of the Nairobi Stock Exchange into four main segments, one of which is the Futures and Options Market Segment. Its operationalisation however did not take off. The benefits that the industry would draw from such a platform include, increased liquidity in the market, a wider variety of investment products, increased foreign direct investment, ability to redress cyclical fluctuations of commodity and asset prices and creation of new employment opportunities in the financial sector. It is on this premise that the Nairobi Stock Exchange in 2011 changed its name to Nairobi Securities Exchange – a reflection of its strategic plan to evolve into a full service securities exchange including offering services related to derivatives.

Some of the reasons fronted as challenges hindering the setting up of the platform are, low level investor sophistication, lack of commodities on a large scale, inadequate liquidity, among others.

In Kenya, the Capital Markets Authority Act, set up pursuant to the Capital Markets Act, CAP 485A Laws of Kenya is the principal, state-sanctioned, independent regulator of Securities. This includes all matters related to derivatives in the jurisdiction. On the 4th of March 2016, The Cabinet Secretary for National Treasury through legal notice no. 37 enacted the Capital Markets (Derivatives Markets) Regulations, 2015. The secondary legislation has principles relating to various aspects of a derivatives market, including but not limited to, Licensing requirements and duties of a derivatives exchange and a clearing house, licensing of derivatives brokers, Inspection powers of the authority and Market offences.

There are a number of issues that need to taken into account for the development, functioning, actualisation and optimal operation of a derivatives market in Kenya.

These include the following:

1. Consumer Protection Department
There is need for the establishment of a department of this nature with its mandate specifically pegged to the Derivatives market. The department should, inter alia, monitor compliance with consumer welfare themed principles under the Capital Markets (Derivatives Markets) Regulations, 2015 (hereinafter 'regulations'), handle investor complaints, as well as prescribe sanctions.

2. Real Time Trading Platform
This will facilitate quick and secure divestiture and access to information by all investors, regardless of capacity or size.

3. Tax incentives
There is a need to make sure tax-basedincentives are fronted to investors. For instance, they should be allowed to deduct losses incurred in the computation of their taxable income and tax payable.

4. Consumer/ Market Outreach programmes
Various demographics should receive various levels of training on the existence, operation and investment avenues available.

5. Risk management policy and periodic action plans
Stakeholders such as exchanges, and brokers should be required to enact the policy and raise awareness on it to their employees. The regulations at Section 29 require a derivatives exchange to constitute a risk management committee to formulate a risk management policy.

6. Pilot project

The derivatives exchange should implement the trading platform in bits so as to reduce confusion, and also as to ensure ease of uptake by the investor.

7. Price/ Position limits

The regulations require that an application for a contract for listing at the exchange should include position limits, at the derivatives broker and client level. The authority should have input in relation to the setting of overall exchange price limits especially when there is aggressive volatility.

8. Suspension of trading

The authority should also have power to suspend trading in situations of systemic contagion or excessive volatility.

9. Storage facilities and standards of commodities

The authority should assist investors develop capacity in relation to the storage of commodities, say after harvest. It should also develop standard documents to be used in derivative based transactions in relation the stored products, for instance, maize and wheat.

10. Volatility

The authority should have the capacity to monitor volatility in the market. It should also provide a classification of market contracts, to the derivatives exchange and brokers. For instance, contracts can be classified, Very liquid, Liquid and Illiquid.

CONCLUSION

In October 2015, The Capital Markets Authority approved the Nairobi Securities Exchange's application for operation a derivatives market. In January 2016, the Securities Exchange signed up six lenders as clearing banks for the prospective derivatives market. The bourse in April 2016, further delayed launch of the platform stating it needed to deepen knowledge among participants and create public awareness. It appears the exchange is treading cautiously in relation to the launch. It is hoped if and when the same materialises there will be a robust institutional structure and control mechanisms in place for optimal operation of the derivatives exchange.

THE USE OF COURT-ANNEXED ARBITRATION IN ADDRESSING STUDENTS` UNREST IN KENYA

ABSTRACT

This paper discusses whether the growing cases of student unrest in high school can be solved by the use of arbitration. Central to this discussion is the causes and challenges these unrest have and whether arbitration will be effective in settling these disputes.

INTRODUCTION

Students` unrest is any form of disruptive behavior that interferes with the smooth running of an educational institution . This is mainly due to antagonistic interactions between teachers and student. There has been an increase in the number of school unrests in the recent years, with the common causes being lack of learning resources, food, high handedness, peer influence and lack of communication between the administration and the students . Various measures have been taken by the government to try and reduce the unrests and try to solve the issues complained of by the students , but in spite of this, the nature of the unrests have been worse. This forms a basis of this study in trying to establish whether the use of arbitration where a neutral party is involved, can help in reducing or better yet, doing away with students unrests.

ARBITRATION AS A MEANS OF SETTLING DISPUTES.

The Arbitration Act, 1995 defines arbitration as any arbitration whether or not administered by a permanent arbitral institution . The process of arbitration is a private consensual agreement where parties in dispute agree to present their grievances to a third party for settlement . The Charter of the United Nations provides for the mechanisms that parties to a dispute can resort to . It provides that "the parties to any dispute shall, first of all seek a solution by negotiation, enquiry, mediation, conciliation, arbitration, judicial settlement, resort to regional agencies or arrangements, or other peaceful means of their own choice." The Constitution of Kenya provides principles that guide courts and tribunals in exercising judicial authority. On the principles is the promotion of alternative forms of dispute resolution including reconciliation, mediation, arbitration and traditional dispute resolution mechanisms. To echo this, Justice Visram in Alfred WekesaSambu& Others v. Mohammed Hatimy& Others observed:

"Where members of an organization have chosen, by virtue of their very membership, to settle their disputes through arbitration, I see absolutely no reason why the courts should interfere in that process. It is not in the public interest.... The courts

should encourage as far as possible settlement of disputes outside of the court process. Arbitration is one of the several methods of alternate dispute resolution and is certainly less expensive, expeditious, informal and less intimidating than the formal court system. This court will certainly encourage the use of alternate dispute resolution where it is appropriate to do so."

Arbitral awards are final and binding upon the parties . It also allows the parties a right to appeal but only on questions of law . It is equivalent to judgments of a court of law and is recognized as such .

ADVANTAGES AND DISADVANTAGES OF ARBITRATION.

Alternate Dispute Resolution, herein ADR, has been hailed severally to have advantages over litigation. Arbitration as an ADR mechanism can be seen to have several benefits. Firstly, arbitration is a consensual process and as such the parties retain significant control over the conduct of the proceedings. Being a consensual process, the parties can choose the manner in which the dispute will be heard , the appointment of the arbitral tribunal , the seat of arbitration , the language of the arbitral process . Another advantage is that arbitration is considered less expensive than litigation. This is due to a number of factors, firstly is the process of arbitration is generally regarded as semi-formal and thus does not restrict itself to the strict procedural rules and technicalities associated with courts . Arbitration, unlike litigation, usually operate within specified timeframe . Unlike litigation, arbitration has limited grounds for appeal . This makes arbitration faster than litigation due to the fact that matters in court can drag for years. Court litigation allows parties to appeal on a wider range of grounds and occasionally several times to the Supreme Court . Arbitration is considered flexible in nature as the parties agree on the time frame within which pleadings are to be filed or amended . Court processes on the other hand are fixed as per the Civil Procedure Rules. Pleadings may also take different forms such as letters and what are often referred to as statements of case . Parties may also appoint arbitrators that have specific expertise in the nature of their dispute. This is however not the case for litigation, where the court system lacks expert judges and therefore the parties may have a presiding judge who lack specific knowledge of their industry .

Although arbitration has some advantages as a method of settling disputes over litigation, it has a few disadvantages as well. One is that it can be expensive due to the fact that parties have to pay the arbitrator`s time, the fee of the arbitration forum, as well as all the normal litigation fees and related costs . There might also be lack of compliance with the arbitral award on the part of the parties unlike the court judgment which is usually back with sanctions .

COURT SANCTIONED ARBITRATION.

One of the fundamental principles of arbitration is the non-intervention by court in arbitral proceedings .there are however instance where intervention by the court is allowed by the law. For instance the court has the jurisdiction to issue interim orders such as an injunction at the instance of either party . The court can also intervene at the option of the parties to appoint arbitrators . There is also the competence of the High court to determine any question arising in the event of termination of the mandate of the arbitral tribunal . The High court also has the jurisdiction to hear an application challenging decisions of the arbitral tribunal on preliminary questions . The High court can also assist in taking of evidence if an application to that effect is made by the arbitral tribunal or either part y with countenance of the tribunal .

Under the laws of Kenya, there are two type of arbitration proceedings, one of them being arbitration conducted under the supervision of the court under the Civil Procedure Act , herein CPA. Section 59 of the CPA as elaborated by Order 46 of the Civil Procedure Code affirms the court`s wider supervisory role in the arbitration proceedings in the general course of civil litigation.

STUDENTS` UNRESTS CASE IN KENYA

Secondary school strikes is not a new phenomenon, it dates back to the 20th century with the first strike was reported in Maseno School . Strikes in schools have been on an increase since then which resulted in the establishment of a taskforce by the Ministry of Education in 2001, mandated to look into the discipline in secondary schools . Various causes have been attributed to the increase in

unrests in secondary schools, including the fear mock exams, insufficient learning resources, high handedness, pressure from other schools taking part in strikes .Some students also cited lack of entertainment in other schools, lack of communication betweenstudents and the principal, poor facilities like laboratories and libraries, and poor management as part of the reasons for the strikes. In trying to find solutions to the strikes, various methods have been employed such as enhancing communication between teachers and students, organizing frequent `Barazas` between the school administration and students to air out their grievances, establishment of an effective guidance and counselling in schools . These methods however do not seem to be effective with the most recent unrests being in July 2016 where schools were torched as others were forced to shut down . Several students were arrested with claims from the Cabinet Secretary for Education, Fred Matiang`i announcing that juvenile offenders suspected of committing arson in schools to be treated like ordinary criminals by police officers . This approach can be seen to be an infringement against the right given under the constitution of Kenya on the right to Education . This right creates a responsibility on the government and the parents to ensure that it is realized and as such greater care should be taken when dealing with issues such as students' unrests. There is need to use mechanisms that will ensure the grievances of both the students and the teachers are met as well as promote and ensure the rights of the students are upheld. One of this mechanism is the use court assisted arbitration which involves the court referring the matter in dispute to an arbitrator . The court fixes the timeframe for the arbitration process and for making an award. The use of arbitration mandated by the court ensures that the parties to the arbitration process abide by the terms of the award given since failure to do so attracts sanctions. Arbitration ensures the protection of the rights of the parties as well as promotion of fair hearing. Article 50 of the Constitution of Kenya provides that every person has the right to have any dispute that can be resolved by the application of law decided in a fair and public hearing before a court, of if appropriate, another independent and impartial tribunal or body. Arbitration also provides for equal treatment of parties and a fair and reasonable opportunity to present their cases . Arbitration ensures that disputes are solved faster without undue regard to technicalities. In the case of Sadrudin Kurji &another v. Shalimar Limited & 2 others , the Court held that:

"...arbitration process as provided for by the Arbitration Act is intended to facilitate a quicker method of settling disputes without undue regard to technicalities. This however, does not mean that the courts will stand and watch helplessly where cardinal rules of natural justice are being breached by the process of Arbitration. Hence, in exceptional cases in which the rules are not adhered to, the courts will be perfectly entitled to set in correct obvious errors."

Under a court-annexed arbitration, a court has the power to modify or correct an award under Rule 14 of the Civil Procedure Rules if it's imperfect or contains an obvious error, if a part of the award is upon a matter not referred to arbitration or if it contains a clerical mistake or error from an accident slip or omission.

Arbitration as discussed earlier in the paper is a faster means of settling disputes, it is expeditious and cost effective. The parties also have the freedom to choose the law that will govern their relationship, it is also a private matter and avoids the hostility that at times come with litigation. Using arbitration annexed by the court will ensure that the wrangles and causes of the unrests in schools are solved within a short time to enable the normal running of schools to carry on. It also provides an avenue for both the students and the teachers to air out their grievances to a neutral third party without going through the arduous process that litigation bears.

CONCLUSION

The increasing number of unrests in secondary schools can be curbed by using arbitration to settle the disputes that exist between teacher, students and any other party that might be involved. Arbitration ensures the rights of the parties are respected and access to justice is promoted as envisaged in article 48 of the Constitution of Kenya. It is essential that the causes of the students` unrests are addressed quickly to prevent further unrests and destruction of properties. One such option, as discussed in the paper is the adoption of arbitration by courts which will in turn provide for the promotion of access to justice, strengthening the Rule of Law and addressing and resolving conflict, and essential for human security

RIGHT TO INCLUSIVE EDUCATION FOR CHILDREN WITH DISABILITIES

Otieno Joyce Oriedi***

I. INTRODUCTION

The Convention on the Rights of Persons with Disabilities (CRPD) defines Persons with Disabilities (PWD) as personswith long-term physical, mental, intellectual or sensory impairments, which in interaction with various barriers may hinder their full and effective participation in society on an equal basis with others. Inclusive education (IE) seeks to eliminate exclusion in access to education that is a consequence of negative attitudes and a lack of response to diversity. It involves systemic reform embodying changes and modifications in content, teaching methods, approaches, structures and strategies in education to overcome barriers. Itassumes that human differences are normal and that learning must be accordingly adapted to meet the needs, and not the other way round.

It is thus important to clarify the differences in the meanings of exclusion, integration, and segregation. Exclusion occurs where students are denied or prevented access to education either directly or indirectly. Segregationis educating persons with disabilities in separate environments that are specialized to cater for their specific needs, in isolation from students without disabilities. For integration, Children with Disabilities (herein referred to as CWD) are allowed to learn in ordinary schools as long as they can adjust to the system there.

II. RATIONALE FOR PROTECTION OF THE RIGHT TO IE

Universal primary education can only be achieved if extended to

individuals with special needs in a state.IE achieves social equity and is a constituent element of lifelong learning. The Salamanca Conference , in its conclusion, acknowledged that special needs education has to form part of an overall educational strategy and of new social and economic policies, which calls for major reforms in ordinary schools. It affirmed that inclusive educationis the most effective means of combating discriminatory attitudes, creating welcoming communities, building an inclusive society and achieving education for all. Moreover, it provides an effective education formajority children and improves the efficiency and cost-effectiveness of the entire education system.

UNESCO gives three justifications. Firstly,is an educational justification aimed at educating all students through developing ways of teaching that respond to individual differences thus benefit all children. Secondly, is a social justification informed by the ability to change attitudes toward diversity by educating all children together. Thirdly, is the economic justificationthat it is cheaper to establish and maintain schools that educate all children together than to set up a complex system of different types of schools specializing in different groups of children.

Susie Miles in his article 'Enabling Inclusive Education: Challenges and Dilemmas' posits that unless diversity is welcomed, and relationships consciously nurtured, there will be little change in the educational experience of disabled and other marginalized children. Denial of IE makes CWD unable to participate fully and effectively in a free society. They lack access to development of their personality, talents and creativity as well as their mental, physical and communicational abilities to the fullest potential . Removing barriers focuses on the full and effective participation, accessibility, attendance and achievement of all students. It ensures access and progress of high quality formal and informal education without discrimination. It entails an in-depth transformation of education systems in legislation, policy, and the mechanisms for financing, administration, design, delivery and monitoring of education.

III. THE LEGAL FRAMEWORK OF THE RIGHT TO IE

Article 24 CRPD envisions an inclusive education system at all levels and lifelong learning. The objectives stipulated are: the full development of human potential and sense of dignity and self-worth, and the strengthening of respect for human rights, fundamental freedoms and human diversity; the development of PWD personality, talents and creativity, as well as their mental and physical abilities, to their fullest potential; and enabling PWD participate effectively in a free society. Article 24(2) calls for non-exclusion of PWD in the general education system ; access to inclusive, quality and free primary and secondary education on an equal basis with others in their community ; reasonable accommodation ; support to facilitate effective education and individualized support measures in environments that maximize academic and social development, consistent with the goal of full inclusion . Article 24(3) calls for adoption of appropriate measures that help PWD learn life and social development skills to facilitate their full and equal participation in education and as members of the community. Sub-article 4 gives measures to be adopted such as promotion of PWD to enter the teaching profession to contribute to breaking down barriers and serve as important role models.

Sub-articlefive calls for states to ensure PWD access to general tertiary education, vocational training, adult education and lifelong learning without discrimination and on an equal basis with others.

IV. CHALLENGES TO IE FOR CWD

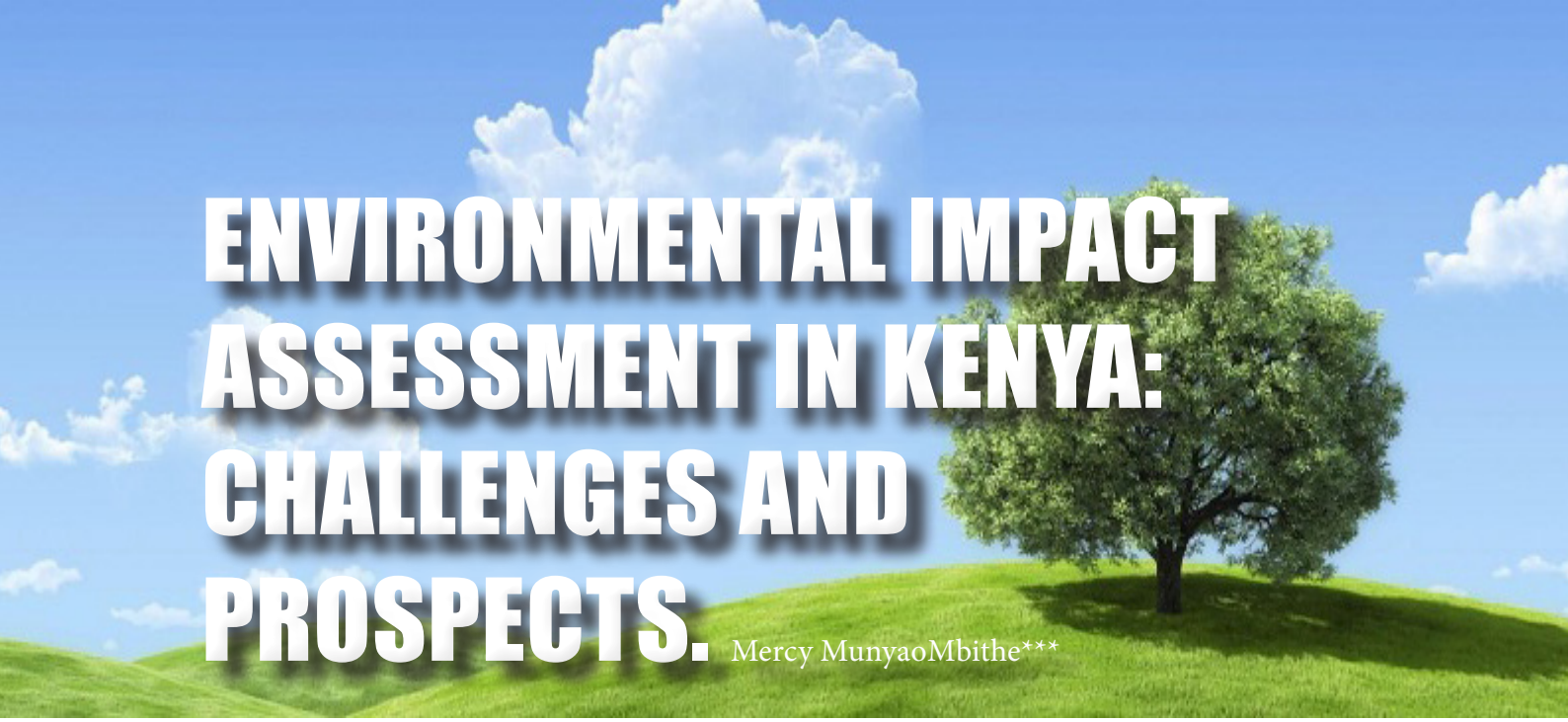
1. Attitudinal challenges such as stigma, cultural beliefs and discrimination
2. Inappropriate and inadequate funding mechanisms to provide incentives and reasonable accommodations for inclusion of CWD, inter-ministerial coordination, support and sustainability
3. Poverty
4. Poor quality of education
5. Inaccessibility of educational institutions and programmes
6. Lack of a comprehensive and appropriate laws and policies onIE
7. Inadequate tools and trained personnel for Identification and Assessment of CWD.
8. Inadequate physical infrastructure;
9. Inadequate trained personnel and inappropriate placement of special education teachers and support staff.
10. Inappropriate placement of CWD to individual education plans that inhibit development of their personalities, talents and communication to maximize their potentials .
11. Inadequate supervision and monitoring mechanisms for IE
12. Defilement of girls
13. Lack of public awareness on IE
14. 14. Poor access to health care and health information, access toreproductive health services; unaffordability of health services; health facilities and personnel
15. Inaccessibility or unaffordability of transport services
16. Lack of legal remedies and mechanisms to claim redress for violations.
17. Lack of disaggregated data and research, necessary for accountability and program development.

V. RECOMMENDATIONS

1. Comprehensive and coordinated legislation exclusively on implementation of IEfor PWD and supported by an education sector plan that covers.
2. Collection of appropriate disaggregated data to formulate policies, plans and programmes to fulfill their obligations under Article 24 CRPD.
3. Creation of public awareness
4. Development of universally designed inclusive curricula.
5. Introduction of independent, effective, accessible, transparent, safe and enforceable complaints mechanisms and legal remedies
6. Education and equipment of all teachers and support staff with the necessary core competencies and values to work in inclusive educational environments.
7. Transfer of resources in segregated schools to ordinary ones.

VI. CONCLUSION

In conclusion, we still have a lot to do in order to make IE a reality. It calls for corporation of all stakeholders and a political will. All states should meetthe minimum essential levels as affirmed by the Committee :elimination of discrimination in all aspects of education, provision of reasonable accommodation to ensure non-exclusion from inclusive education, and compulsory, free primary education available to all.



ENVIRONMENTAL IMPACT ASSESSMENT IN KENYA: CHALLENGES AND PROSPECTS.

Mercy MunyaoMbithe***

Introduction

Environmental impact assessment hereinafter EIA is a procedure that assesses the probable effects of a proposed development or project to the environment taking into consideration the social, economic, cultural and health impacts as well . UNEP also defines it as a tool of environmental management which seeks to identify ecological and economic consequences of a proposed development before decision-making is done. Its objective is to have an early prediction of the likely adverse effects and find ways of minimizing them before the approval of a project. Therefore, it ensures sound environmental developments which contribute to sustainable development. This article seeks to provide a critique of the EIA process in Kenya, the challenges it faces and proposes ways in which it can improve for better management of the environment.

Legal and institutional framework of EIA in Kenya

The Constitution of Kenya now has provisions that lay a legal foundation for EIA in Kenya. It guarantees the right to a clean and healthy environment to every person and bestows an obligation upon the state to establish systems of environmental impact assessment, environmental audit and monitoring of the environment . The state is also required to encourage public participation in the management of the environment. Every person is mandated to cooperate with state organs and other individuals in protecting the environment and ensuring sustainable development .

Environmental Management and Co-ordination Act (EMCA) was enacted in 1999 with the aim of establishing an appropriate framework for managing the environment and other related matters. The Act requires the issuance of an EIA license before any of the projects listed in the second schedule is financed or even commenced . Projects subject to EIA include but not limited to; urban development, transportation, mining dams, rivers and water resource projects . Accordingly, the proponent of a project is set to conduct an EIA at his expense and prepare a report thereof . National Environmental Management Authority (NEMA) hereinafter 'authority,' being the institution mandated by the act to monitor EIA certifies and authorizes environmental experts who are required to take part in the EIA studies and reports . The authority is then required to publish the EIA study report in the Kenya Gazette and newspaper widely circulated in the area of the proposed project at least once in each of two successive weeks . The notice is supposed to contain a brief summary of the project, the location of the project, where to inspect the EIA study and the time limit within which oral or written comments by the public are submitted to NEMA. The comments are usually supposed to be presented within 90 days unless an extension is sought and granted by the authority .

The Environmental Impact Assessment and Audit Regulations provide an in-depth understanding of the EIA process. They insist on public participation whereby the proponent seeks the views of the affected persons and communities by holding at least three public meetings and publicizing it through notices, newspaper and the local radio stations .

According to Article 2[5] and 2[6], the general rules of international law as well as any treaty or convention ratified by Kenya shall form part of Kenyan law. The Rio declaration on environment and development provides a solid basis for EIA in international environmental law. Principle 17 of the Declaration requires that as a national instrument, EIA shall be carried out for any proposed projects likely to cause a significant impact on the environment . Additionally, Agenda 21 emphasizes on public participation of individuals, organizations and groups in EIA procedures . On the same note, it mandates states to analyze the environmental suitability of infrastructure in human settlements. In doing so, the state is to ensure that all the decisions are informed by EIA studies taking into account the ecological consequences as well . Further, the International Association of Impact Assessment [IAIA] outlines guidelines for conducting EIA studies The guidelines embody that EIA studies should; be done early enough before decision making, apply to all development projects likely to have adverse effects on the environment, involve communities and the public affected and adhere to international standards. Specifically, the association provides for social impact assessments and ways of managing the effects arising thereof .

Challenges facing EIA

It is evident that the failure to carry out an effective EIA study might jeopardize efforts to protect the environment. This section will critically examine the EIA process and the reasons causing its ineffectiveness herein below;

Subjectivity

The act mandates the proponent of a development project to undertake an EIA at his expense and subsequently submit a report to NEMA. These provisions present an avenue for the proponent to be subjective rather than objective. Subjectivity in this context means the ability to have the results of an EIA influenced by the norms and interests of one of the parties involved . This argument is based on the fact that, the law has entrusted the developer with a lot of responsibility forgetting that their primary interests in this proposed project are the economic benefits. Most tend to provide false information in the reports without going to the actual site for the study. The main motive is usually the money factor, and hence they are cautious of the huge cost likely to be incurred. Again, most proponents are keen on fulfilling the procedural requirements needed before a project is approved and an EIA license issued. It, therefore, becomes more of a compliance battle rather than one that takes into account the environmental consequences and other factors into account . What happens on the ground is that the proponents pay the lead experts handsomely who in return prepare positive EIA reports in their favor . This malpractice goes to the extent of using templates prepared in advance to do the analysis without conducting field work .

Public participation

An EIA is said to be effective whenever the public is adequately involved in the process, and their views incorporated in the final decision. Public participation requires meaningful consultations and communication with the affected communities and the entire public . It is intertwined with the right to access to information . Failure to have access to the necessary information concerning the proposed project limits the ability of the public from actively giving their views on the how the project will affect their social- economic lives. NEMA is required to publish the report in the Kenyan Gazette and a newspaper of wide circulation in the very least once in each of the two successive weeks. In as much as this provision means well in ensuring that the public is well informed this can be challenged. Most of these big development

projects take place in remote areas where the local community which is in dire need of this information cannot afford newspapers and are even illiterate . The language used by experts to write the reports is in most instances complex for the local communities to comprehend. Given that the EIA report is a public document available at a fee to the members of the public might be a hindrance to those that lack the capacity to pay.

Numerous lead agencies

There are so many organizations in the environment sector which are expected by law to coordinate efficiently during the EIA process. These are the land, forestry, water and wildlife sectors which are regulated by different authorities under various ministries. Despite the fact that NEMA is the overall institution that is mandated with overseeing the process, a conflict of interest arises among the sectors. For instance, the wildlife activists have rejected the passing of the standard gauge railway through the Nairobi national park. They are of the opinion that there will be disruption of the wildlife animals by getting too much into their space . Besides, the lack of a consolidated regulatory framework further hinders efficient implementation of the EIA process . Again, the comments given by these lead agencies are sometimes not taken into account by NEMA when making the final decision. non-inclusion and ignoring their contributions creates an attitude of opposition whenever asked by the authority to give comments.

Political interference

Large government projects, for instance, the Lamu Port and Southern Sudan-Ethiopia Transport Corridor [LAPSETT], the standard gauge railway and the Thika superhighway projects usually experience political pressure from the current government undertaking them. This interference tends to overlook the procedural as well as the substantive law that makes the state a duty bearer to some rights with regards to the environment. The government's argument is always that many job opportunities will be created leading to economic growth. Due to these, more often than not the EIA process is rarely taken, or its negative impacts are given the weight they need. Take for instance the launching of the LAPSETT project which was done in 2012 by the then president without an EIA study being done which approved it despite lacking the procedural requirements by law . Local communities in the area are opposed to this project. They assert that it will destroy their cultural heritage, their means of livelihood which is mainly fishing and they see it as a way of depriving them land rights all over again without adequate compensation . instead, the government seems to be ignoring all these social impacts.

Lack of capacity

NEMA has limited capacity to carry out its mandates efficiently hence a weak enforcement structure. The authority lacks monetary and human resources to cater for the huge demand of overseeing projects.It is not independent regarding getting its financial allocation from the exchequer but rather is placed under the Ministry which allocates minimal funds to it . With these limited funds, it becomes difficult to hire more staff to inspect the proposed projects independently. This, therefore, gives room to manipulation of false information by the project's proponents, political interference and encourages corruption to the few that are sent to the field .

Recommendations

The future of EIA in Kenya remains promising, and hence this section offers recommendations on the way forward as follows;

Improve the independence of NEMA. NEMA lacks both institutional and financial autonomy. There is a need for its status to be elevated to that of an independent commission under chapter 15 of the constitution. Further, deriving its fund directly from the consolidated fund unlike from the ministry's budget will give it more financial independence to hire more technical staff and minimize political interference.

Actualize public participation in EIA processes. Public participation should not only

be done but seen to be done. Dissemination of the necessary information and the writing of the reports should be in a simplified way that doesn't use legalese or environmentalist language that hinder the public from grasping the core contents of the project. The fee charged before accessing the EIA reports at NEMA has to be reduced to enable all Kenyans in need of the information access it on an equal basis.
An impartial body needs to be established by law to carry out the EIA study independently along with the proponents so as to avoid the subjectiveness witnessed over the years. This suggestion calls for increasing the financial capacity of NEMA.

Thereis a need to consolidate the various lead agencies involved in the EIA process. Creating a part - time committee with members from all the lead agencies that will review the EIA report at a go will enhance cooperation and reduce the time needed to send and receive their contributions.

Conclusion
From the foregoing discussion, it is discernible that the country has made significant steps in institutionalizing EIA. However, low public participation, weak enforcement mechanisms and lack of goodwill threaten its effectiveness. Embracing measures that rectify the above issues, i.e., by improving the independence of NEMA willdefinitely increase EIA's efficiency.

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