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# **Recurrent Chronicles of Environmental Injustice in the Northern Frontier Districts (NFDs) and the Kenyan Coast**

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Melissa Mungai\*\*\***

## **ABSTRACT**

The NFD and the Ten-Mile Kenyan Coastal strip, two regions different in many ways yet, at independence, sharing two relatively similar tests. The former, faced with an irredentist drive while the later having an uncertain legal position. To these two regions, the past half-century has been one of exclusion, dominance and expropriation. Environmentally unjust laws, policies and practices that have colonial origins have imposed disproportionate burdens on the communities inhabiting these two areas leaving them poor and neglected. These trends continue to subsist with the numerous development projects that have been initiated in the two areas. The intensification of development activities within these two areas continue to pose challenges as it has exacerbated environmental injustice in these two areas. It therefore becomes imperative that measures are adopted to address the environmental injustices that have metamorphosed since colonial times.

ABSTRACT.....	19
INTRODUCTION.....	20
I. ENVIRONMENTAL JUSTICE .....	22
II. HISTORICIZING ENVIRONMENTAL INJUSTICES AT THE KENYAN COAST AND THE NFD .....	25
III. THE LAMU PORT SOUTHERN SUDAN ETHIOPIA TRANSPORT (LAPSSSET) PROJECT.....	29
IV. ENVIRONMENTAL CONCERNS: LAND HOLDING, USE AND ENVIRONMENTAL DEGRADATION.....	31

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A. Land Questions .....	31
B. Environmental degradation .....	34
V. LAND LEASES AND ENVIRONMENTAL INJUSTICE IN TANA RIVER COUNTY .....	35
VI. ENVIRONMENTAL CONCERNS .....	40
VII. OPPORTUNITIES AND WAY FORWARD .....	41
CONCLUSION .....	43
SELECT BIBLIOGRAPHY .....	43

## INTRODUCTION

“In a world, if we want security, let us give security; if we want life, let us give life; if we want opportunities, let us provide opportunities”

- Pope Francis’s speech to U.S Congress on 24 September 2015

The colonial legacy in Kenya had certain perverse implications which continue to subsist to date. This legacy has been perpetuated by subsequent independence governments which have not done much to resolve certain underlying grievances that communities have had especially in the Northern Frontier Districts (NFD) and at the Kenyan coast. This notwithstanding, numerous development projects have been initiated within these two areas and these have been associated with numerous other challenges that continue to emerge. These development projects inevitably result to certain environmental benefits and costs and it is important that these are shared by all stakeholders involved in these activities (Kameri-Mbote and Cullet 1996: 2).<sup>1</sup> However, communities in these areas continue to bear the brunt of numerous incidences of environmental injustices. This arises from the fact that the two areas have historically been sidelined from the development agenda and have borne disproportionate environmental burdens that have arisen from these projects.

To these communities, the development projects are viewed with suspicion as these communities have become used to tiered development that has been perpetuated for more than 50 years of the country’s self-rule.<sup>2</sup> This has further been exacerbated by the fact that a majority of these communities have been excluded from participating in making decisions on these projects. This includes decisions that may have adverse effects on their lives. All these are concomitant to the fact that a majority of communities in these areas usually have weak land tenure and this encourages the prevalence of development-induced displacements and lack of public consultation when these projects are inceptioned. Displacements that result from development activities have other negative consequences which include; landlessness, loss of access to common property,

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1. Environmental Justice: Rights and Means to a Healthy Environmental for All, SPECIAL BRIEFING NO. 7, (Econ. & Soc. Res. Ctr., Swindon, U.K.), Nov. 2001.

2. World Summit on Social Development, Copenhagen Declaration, ¶ 6, U.N. DOC A/CONF.166/9 (April 19, 1995).

homelessness, joblessness, food insecurity, social marginalization, increased morbidity, and social disarticulation.<sup>3</sup>

It becomes apparent that these burdens are borne most by local communities occupying areas where these development activities occur. This has therefore necessitated calls for the adoption of practices that are environmentally just. Consequently, in order to ensure environmental justice, it is imperative that everyone is guaranteed the right to access environmental resources.<sup>4</sup> Economic activities therefore ought to ensure that they uphold the requirements on sustainability. The Copenhagen Declaration thus highlights this and it indicates in paragraph 6 that;

“Equitable social development that recognizes empowering the poor to utilize environmental resources sustainably is a necessary foundation for sustainable development. We also recognize that broad-based and sustainable economic growth in the context of sustainable development is necessary to sustain social development and social justice.”<sup>5</sup>

Despite the numerous environmental injustices that have been faced by the inhabitants of these two areas, there exist opportunities that can be used to ensure that development activities in these areas result to benefits and burdens which are equitably shared among all stakeholders. At the international level, several legal instruments exist which strive to put local communities at the heart of development activities. Locally, the adoption of a devolved system of governance also offers key opportunities for ensuring that communities are not subjected to inordinate harm by the development activities. Further, judicial entities that have been established provide an effective platform for communities to vindicate the claims that they may be having.

The paper in the subsequent sections proceeds in four parts. Firstly, the paper examines the concept of environmental justice with focus on the various definitions that have been extended to this term. Subsequently, the authors historicize the environmental injustices that have in the past been visited upon the inhabitants of the NFD and the Kenyan coast. In this regard, the section examines the manner in which these concerns have been dealt with in the past and the effectiveness of the past approaches. The paper then proceeds by reviewing current manifestations of environmental injustice within these two areas with particular focus on certain development projects that are being undertaken at the Kenyan coast and the NFD. Lastly, the paper offers certain plausible solutions that can be pursued to provide redress to the environmental injustices faced within the two areas.

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3. Environmental Management and Coordination Act (1999) Cap. 387 (Kenya).

4. Moving Towards Collaborative and Constructive Problem-Solving, 1998 ENV'T JUSTICE BIENNIAL REP., (Env't Protection Agency, D.C.), June 1999 at 1.1.

5. L. Amede Obioa, Symbolic Episodes in the Quest for Environmental Justice, 21 HUMAN RIGHTS QUARTERLY 477, 477 (1991).

I.  
ENVIRONMENTAL JUSTICE

In many areas, a realization has set in on the need to ensure that while development activities benefit the country generally, they should also strive to ensure environmental justice to those that are to be affected by the activities. In this regard, there is need to ensure that environmental benefits and costs are shared equitably among all stakeholders involved in the development process. It is important to note that the Environmental Management and Coordination Act, 1999 defines environment to include ‘the physical factors of the surroundings of human beings including land, water, atmosphere, climate, sound, odor, taste, the biological factors of animals and plants and the social factors of aesthetics and includes both the natural and built environment’.<sup>6</sup> In this regard therefore, benefits accruing from the exploitation of environmental resources should be shared with local communities. It also follows that exploitation of these resources should not have adverse effects on local communities and in any case, these burdens are to be equitably shared among all stakeholders.

The past decade has seen the rise of environmental justice as a tool to address environmental challenges. This has come upon realization of the fact that environmental vulnerability is prevalent in many parts of the world especially among the global poor. Various studies have sought to define environmental justice and from this, different definitions emerge. According to the EPA in the USA;

The goal of environmental justice is to ensure that all people, regardless of race, national origin or income, are protected from disproportionate impacts of environmental hazards. To be classified as an environmental justice community, residents must be a minority and/or low income group; excluded from the environmental policy setting and/or decision-making process; subject to a disproportionate impact from one or more environmental hazards; and experience a disparate implementation of environmental regulations, requirements, practices and activities in their communities.<sup>7</sup>

From this definition, it is clear that environmental justice strives to attain a people-centric approach on environmental issues. This approach seeks to challenge a process of development that does not ensure that environmental costs and benefits are equitably shared among all citizens.<sup>8</sup> This is aimed at tilting the

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6. KARIUKI MUIGUA ET AL., NATURAL RESOURCES AND ENVIRONMENTAL JUSTICE IN KENYA (2015).

7. U.S. Environmental Protection Agency, Office of Environmental Justice, 2000. In Africa, environmental justice mostly entails the right to have access to, use and control over natural resources by communities. See Obiora, L., ‘Symbolic Episodes in the Quest for Environmental Justice’, 21 (1991) Human Rights Quarterly 477. Kariuki Muigua *et al* define environmental Justice as the struggle to rein in and subject corporate and bureaucratic decision-making and relevant market processes to democratic scrutiny and accountability. See Kariuki Muigua *et al*, *Natural Resources and Environmental Justice in Kenya* (Glenwood Publishers 2015).

8. Kameri-Mbote, *supra* note 1.

skewed balance that has historically existed where communities bear disproportionate burdens when development activities are established. Notably, communities have in the past witnessed instances of development-induced displacements, environmental pollution and degradation and these have fundamentally transformed their livelihoods. These instances are clear manifestations of environmental injustice. Environmental injustice takes place where some people or communities bear environmental burdens disproportionately or have less opportunity to participate in environmental decision-making processes.<sup>9</sup>

Development-induced displacements constitute one of the most prevalent manifestations of environmental injustice. In many areas, development activities usually lead to the displacement of people from their lands to pave way for certain projects. Communities in many cases are usually forced to abandon their residence, pasture lands, cultural and religious sites and this usually has the implication of radically transforming the behaviors of these communities. Displacements arising from development activities can be categorized as either voluntary or involuntary. The distinction between these two forms of development is however usually blurred and it has been argued that most, if not all, displacements are usually involuntary.<sup>10</sup> Voluntary displacements are based on resettlement plans and social consensus, monitored and implemented on the basis of principles of law while on the other hand; involuntary displacements are often unplanned, carried out under conditions of conflict, leading to mass violation of human rights.<sup>11</sup>

Where these displacements occur, questions on land ownership are abound. This is particularly perverse in areas where individuals have insecure tenure. In these areas, authorities oftentimes forcefully evict communities from their lands without offering compensation or alternative land for their settlement. What results from this is a buildup of social tensions and in certain cases communities have been seen to forcefully demonstrate against the authorities acquiring land.<sup>12</sup> All this occurs notwithstanding the fact that safeguards have been established under various legal regimes to protect such groups from forceful acquisition of their lands and where such happens, it is usually imperative that just compensation is paid to the persons to be affected.<sup>13</sup> These safeguards have been established on the premise that burdens created by development activities are to be equitably shared.

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9. KRISTIN SHRADER-FRECHETTE, *ENVIRONMENTAL JUSTICE: CREATING EQUALITY, RECLAIMING DEMOCRACY* (2002).

10. See Bogumil Terminski, *Mining-Induced Displacement and Resettlement: Social Problem and Human Rights Issue (A Global Perspective)* (August 10, 2012). Available at SSRN: <https://ssrn.com/abstract=2028490>.

11. *Id.*

12. Alon Mwesigwa, *UGANDA Farmers Take on Palm Oil Giants Over Land Grab Claims*, *THE GUARDIAN* Mar. 3, 2015, <http://www.theguardian.com/global-development/2015/mar/03/ugadan-farmers-take-on-palm-oil=giants-over-land-grab-claims>.

13. See ELLEN F. PAUL, *PROPERTY RIGHTS AND EMINENT DOMAIN* (1987).

Environmental degradation concerns have also arisen in many places where development projects have been initiated. These concerns have manifested themselves in various forms. Concerns have arisen in relation to destruction of ecological resources like biodiversity, forest resources, freshwater resources, mangroves and coral reefs. Competing demands for land by these development activities have resulted in the disruption of the economies of communities whose livelihoods have been affected and radically transformed.<sup>14</sup> In Nigeria, activities by oil companies have been blamed for the numerous environmental concerns that have arisen and in effect the livelihoods of communities continue to be negatively affected.<sup>15</sup> This is notwithstanding the fact that when these development projects are initiated, governments and multinational companies are usually the biggest beneficiaries. Communities are therefore forced to the periphery and left to wallow in poverty while also bearing the brunt of environmental degradation.

Many communities have also been forced to adopt new livelihoods as a result of the establishment of the numerous development projects on their lands. It is notable that in many areas where the development projects have been initiated, communities practise traditional activities such as pastoralism and other agricultural activities. Development projects usually disrupt the livelihoods of the inhabitants of these areas and this has been witnessed in newly gazette protected areas or potential irrigation sites.<sup>16</sup> Communities are therefore usually faced with radical transformations in their lifestyles and in numerous cases left without alternative sources of income. These transformations also usually have a negative impact on the cultures of these communities who may be forced to adopt new practices which they may find challenging to conform to.

For environmental justice to be achieved, certain basic principles have to be adhered to: an unequal burden of protection of the environment ought not be borne by any particular group, especially not the vulnerable populations; benefits of environmental protection should be equally available to all; there should be transparency and opportunity for meaningful public participation in decision-making; everyone ought to have access to effective remedies for violations of environmental rights and laws should be applied fairly; and a level of environmental protection adequate to sustain human health and well-being, and ecosystem equilibrium should be achieved and maintained.<sup>17</sup>

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14. Food & Agric. Org. of the United Nations (FAO), Policy Paper: Natural Resources Management and the Environment in Small Island Developing States, (2014).

15. Michael Ogwezzy, Human Rights Implications of Shell's Activities in Nigeria: Revisiting the Case of the Ogoni Community, 19(2) JOURNAL OF THE HUMAN RIGHTS AND PEACE CENTRE (HURIPEC) 351, (2013).

16. See AYALEW GEBRE, PASTORALISM UNDER PRESSURE: LAND ALIENATION AND PASTORAL TRANSFORMATION AMONG THE KARRAYU OF EASTERN ETHIOPIA, 1941 TO THE PRESENT (2001).

17. One Species, One Planet: Environmental Justice and Sustainable Development, FINAL PAPER, (Ctr. For Intl Env't Law, D.C.), 5, Oct. 2002).

It is important to note that the ideologies informing environmental justice borrow heavily from the dictates of sustainable development. In this regard, both environmental justice and sustainable development advocate the importance of integrating policies relating to social justice, environmental protection, and economic development.<sup>18</sup> The two concepts also put humankind at the center of development and examine the likely impacts that development activities may have on humankind. It is therefore apparent that the two concepts have a symbiotic relationship and can be adopted and pursued in tandem.<sup>19</sup> The attainment of sustainable development is therefore intricately dependent on ensuring that development projects result in environmental justice. It therefore becomes imperative that development activities are conducted in a manner that upholds the rule of law and ensures access to justice by those seeking to vindicate their rights. The Rio Declaration goes a long way in identifying certain elements that are germane for promoting environmental justice these are; access to information; public participation and access to justice in environmental matters.<sup>20</sup>

The foregoing discussions have highlighted on the importance of ensuring that environmental justice is guaranteed in the course of development. It is however notable that past development projects that have been undertaken particularly at the Kenyan coast and in the NFD have failed to take account of the importance of ensuring environmental justice. The following section thus provides a history of the environmental injustices that have been occasioned on the inhabitants of these two areas.

## II.

### HISTORICIZING ENVIRONMENTAL INJUSTICES AT THE KENYAN COAST AND THE NFD

Prior to the introduction of colonial rule in Kenya, communities inhabited various areas of the country and held land on the basis of certain socially defined arrangements. The introduction of colonial rule in the country disrupted the social, economic and political situations that existed among these communities and this saw the imposition of western property ideologies. What followed was the subjugation of African property regimes which were considered to be inferior to the western property models that were established by the colonial government.<sup>21</sup> Dispossession was particularly witnessed in pastoralist areas where communities moved from one area to another in search of pasture.

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18. *Id.* at 4.

19. *Id.* at 6.

20. U.N. Conference on Environment and Development, Rio Declaration on Environment and Development, U.D. Doc A/CONF. 151/26/Rev. 1 (Vol. 1), principle 10 (Aug. 12, 1992).

21. See HWO Okoth-Ogendo, 'The Tragic African Commons: A Century of Expropriation, Suppression and Subversion' [2002] CIEL/LEAT/WRI/IASCP.



To the Kenyan coast, dispossession is firstly traceable to the introduction of foreign settlement in the area and particularly the arrival of Arabs who forcefully acquired land that was held communally and used by the communities in the area. The practice of slave trade, which the Arabs were deeply involved in, is said to have resulted in the fleeing of many Africans from their homelands for fear of being captured and sold as slaves and the Arabs took advantage of this to occupy land that was previously held by Africans.<sup>22</sup> This is a clear indication of early manifestation of instances of dispossession which was furthered by the arrival of the British settlers.

The dispossessions initiated by the Arabs were further worsened with the arrival of the British colonial settlers in the country. The activities at the Kenyan coastal strip were particularly perilous as they revealed the intentions of the British settlers. To this end, the coastal strip was considered to be a strip of land extending ten miles inland along the coast from the then Tanganyika to Kipini and including the islands of the Lamu Archipelago.<sup>23</sup> Through an agreement signed between the British colonialists and the Sultan of Zanzibar in 1895, the British were allowed to extend their administration to this area. This agreement formed the basis of acquisition of land in this area by the British settlers. It has however been argued that the agreements between the British colonialists and the Zanzibar government did not grant legal rights to the British over the land in these areas.<sup>24</sup> The British however went ahead to expropriate the land in this area notwithstanding the fact that there existed claims by local communities on the land.

Subsequently, the colonial government in 1908 enacted the Land Titles Ordinance which required that anyone laying claim over land within the ten-mile coastal strip was to lodge their claims for the same. The application of this Ordinance was however skewed and was not favorable to African communities inhabiting these areas and according to the report of a Parliament Select Committee, as restated by the *Njonjo Commission Report*, a majority of natives made no claims as required by the Ordinance and this is attributable to the following reasons.<sup>25</sup>

Firstly, the inhabitants of the ten-mile coastal strip where the Ordinance was applicable had no knowledge of the existence of the Ordinance and even if they did, they had no understanding of the provisions of the Ordinance. Secondly, the Ordinance had no relevance in the African context as it introduced the

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22. Report of the Truth., Justice and Reconciliation Commission (2013) Government Printer, 170.

23. Colonial Office, 'Report of the Kenya Coastal Strip Conference, 1962' Cmnd. 1701.

24. Yash P Ghai and WB McAuslan, *Public Law and Political Change in Kenya: A Study of the Legal Framework of Government from Colonial Times to the Present* (Oxford University Press 1971) 14. See also Report of the Kenya Coastal Strip Conference, 1962 Cmnd. 1701.

25. See Report of the Commission of Inquiry into the Land Law System of Kenya on Principles of a National Land Policy Framework Constitutional Position of Land and New Institutional Framework for Land Administration *Government Printer 2002*

concept of private ownership which was alien to Africans. Thirdly, the colonial government was primarily biased against Africans and could not be trusted with making laws that were friendly to Africans. Fourthly, the investigations to ascertain claims by Africans were done by Mazrui Arabs who had been incorporated within the colonial administrative structures and acted in the interest of the colonial administration. Fifthly, the time limit prescribed for launching of claims by Africans was very limited hence making it difficult for Africans to lay claims. Lastly, the Ordinance introduced foreign conceptions of land such as the doctrine of fixtures which was alien to Africans and which Africans could not relate to.<sup>26</sup>

These trends had numerous implications on land ownership within the Kenyan coast as numerous persons were rendered squatters within these areas to pave way for European and Arab occupation.<sup>27</sup> Squatter settlements that were established were subsequently faced with numerous challenges including many instances of environmental degradation and overuse of the resources found on land. According to Smith, the biggest losers in the agreement between the British and the Sultan and the subsequent granting of a protectorate status to the British over the ten-mile coastal strip, otherwise known as *Mwambao*, were African communities.<sup>28</sup> These communities were forced to live in deplorable conditions as the land they could occupy was now limited notwithstanding the fact that the population in these areas increased substantially. In this regard, Okoth-Ogendo also notes that;

Nearly all of them (the settlement schemes established by the colonial settlers for the displaced African communities) were highly unsuitable for human occupation, being riddled, for example with dangerous game, tsetse fly. . . Little attempt was made to render such land habitable prior to the settlement of human population. Many of the original settlers moved out soon after being brought there, while others were ejected, allegedly for failure to comply with the rules of proper management. . . Little attempt was also made to deal with any claim to lands earmarked for settlement that neighbouring residents might have had before people were moved into them.<sup>29</sup>

The physical environment of these communities was radically transformed and this had implications on the socioeconomic lives of these communities. Subsequently, the Arab and European settlers continued to derive benefits from the land within these areas while African communities languished in poverty

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26. Ibid

27. See Karuti Kanyinga, 'Struggles of Access to Land. The 'Squatter Question' in Coastal Kenya' (1998) CDR Working Paper 98.7

28. Smith, L.D. 'An Overview of Agricultural Development Policy', in J. Heyer (ed), *Agricultural Development in Kenya* (Oxford University Press, 1976).

29. Okoth-Ogendo, 'African Land Tenure Reform' in J. Heyer (ed), *Agricultural Development in Kenya* (Oxford University Press, 1976).

since they could no longer access land to practise their economic activities.<sup>30</sup> The injustices visited on the inhabitants of have led to constant calls for cessation by the inhabitants of these areas and this is evident from the proceedings of the Regional Boundaries Commission in 1962.<sup>31</sup> These calls have further extended to independent Kenya where the emergence of such secessionist groups like the Mombasa Republican Council (MRC) has been witnessed.

On the other hand, the NFD also faced several environmental concerns that are traceable to the introduction of colonial rule in the country. It is apparent that the main rationale that informed the inclusion of the NFD to the Kenyan territory was so that the area could serve as a buffer zone between Ethiopia and Somaliland as well as protect their economic aspirations in the Central Kenyan “White Highlands” and the newly constructed East African Railway.<sup>32</sup> Much attention was therefore not accorded to these regions and in this regard, the pastoralist lifestyles of the inhabitants of these areas were subsumed by other agricultural activities that were introduced by the colonial government.<sup>33</sup>

The disruption of the economic activities of these communities had certain negative implications which continue to affect these communities to date. These challenges have seen the communities rise up against the government in many instances. The colonial government responded to these protest by use of force and this furthered the distrust that the communities had against the administrative authorities.<sup>34</sup> Failure by the government to address the pertinent issues in these areas has led to perennial poverty within these areas as the livelihood of these communities was disrupted by colonial activities. These challenges subsisted upon the gaining of independence by Kenya as the government of the day did not look into the root causes of these challenges.<sup>35</sup>

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30. Karuti Kanyinga, ‘Re-Distribution from above: The Politics of Land Rights and Squatting in Coastal Kenya’ Research Report No. 115 available at <http://nai.diva-portal.org/smash/get/diva2:271584/FULLTEXT01> accessed on 16th September 2015.

31. See Report of the Regional Boundaries Commission, Cmnd. 1899. See also Report of the Kenya Land Commission Report, September 1933.

32. A.A. Castagno, ‘The Somali-Kenyan Controversy: Implications for the Future’, (1964) 2 *Journal of Modern African Studies*. It is notable from the proceedings of the Regional Boundaries Commission that numerous protests were made by the inhabitants of the NFD on their inclusion to Kenya. The Somali delegations that appeared before the Boundaries Commission were unanimous in their desire not to be included in any region of Kenya. All these delegations wished the Northern Frontier District to be joined with the Somali Republic.

33. Nyanjom (n 2) 50. Declining livestock stocks also forced communities to resort to violent means to acquire stocks. Banditry became prevalent in these areas as communities sought to improve their economic situations.

34. John Ringquist, ‘Bandit or Patriot: The Kenyan Shifta War 1963-1968’ 13 (2011) *Baltic Security and Defence Review*.

35. The Kenyatta government particularly failed to address the challenges as it resorted to the use of force to quash any dissidents. In opposing the irredentist drive by the Somali in the North Eastern province of Kenya, Kenyatta stated “Kenya will not allow any part of its territory to be dismembered and will defend her territorial integrity by every means” See John Howell, ‘An Analysis of Kenyan Foreign Policy’ 1 (1968) *The Journal of Modern African Studies*.

The setbacks faced by development projects that have subsequently been initiated by the post-independence governments are traceable to the history that has been discussed in this section. It is also important to note that environmental challenges are bound to recur based on the fact that the land issues faced in these areas have not been resolved. It is therefore noteworthy that there continue to be numerous environmental challenges witnessed in these two areas that will form the basis of the discussions in the following section.

The section reviews some of the development projects that have been initiated in these two areas with a view of establishing the environmental injustices that have been visited upon the communities living in these areas. The authors review the development projects in these areas with Amartya Sen's thinking in mind that development should improve all facets of people's lives, by enhancing their capacities to exploit their potentials, which enable them to enhance their entitlements.<sup>36</sup> The concern of these projects should therefore, not be narrowly viewed but what ought to be ensured is that the communities also benefit from the good brought about by these activities to ensure the sustainability of the projects.

### III.

#### THE LAMU PORT SOUTHERN SUDAN ETHIOPIA TRANSPORT (LAPSSSET) PROJECT

The Lamu Port Southern Sudan Ethiopia Transport (LAPSSSET) Project is a flagship project under the Vision 2030, the country's development blueprint.<sup>37</sup> The project aims at revolutionizing trade, transport and livelihoods of communities living along the corridor and to open up the generally marginalized northern corridor. Having been originally contemplated in 1975, the project was subsequently shelved for being too expensive.<sup>38</sup> Numerous difficulties have consequently been faced which necessitated the revamping of the project by three Eastern African countries.

Firstly, the challenges arising from the inefficiencies witnessed at the Mombasa harbour and the stiff competition with the port in Dar es Salaam and the expanded Tanga harbour necessitated the taking of steps to ensure that Kenya did not lose business to Tanzania.<sup>39</sup> This came upon realisation of the fact that poor infrastructure within these countries was a large impediment to growth and to other initiatives driven at regional integration. The LAPSSSET project is therefore said to encompass a sweeping infrastructure enhancements across the three countries, Kenya, South Sudan and Ethiopia, with future plans to extend

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36. Sen, A., *Development as Freedom* (New York, Anchor Books 1999).

37. See Kenya Vision 2030.

38. Nyanjom (n 2) 54.

39. Foard Copeland and Even Kvelland, 'LAPSSSET Transport Corridor: Transit and Oil Infrastructure in East Africa' CFC Monthly Report (September 2013).

the project into Uganda, Democratic Republic of Congo and even as far as Cameroon.<sup>40</sup>

What becomes apparent from this project is the fact that it is specifically designed to shift the focus of the mainstay economy to the formerly marginalized areas and this is especially apparent with the discovery of commercially viable deposits of oil and natural gas in these areas. Further, the project goes a long way in facilitating interconnection between the Eastern African countries and in effect facilitates regional integration. Being the country spearheading the project, the project will also bolster Kenya's position as a continental gateway and transport and logistics hub in the region to facilitate trade, promote regional economic integration and the interconnectivity between African countries.

The project consists of; a port to be constructed in Lamu which has thirty two deep sea berths at Manda Bay; standard gauge railway from Lamu to Isiolo, Isiolo to South Sudan and Uganda, Isiolo to Ethiopia and Nairobi to Isiolo; a number of highways are set to run from Lamu to Isiolo, Isiolo to Nadapal/Nakodok (South Sudan), Lokichar to Hoima (Uganda), and Isiolo to Moyale to Addis Ababa (Ethiopia); crude oil pipelines from Lamu to Isiolo to Nadapal/Nakodok (South Sudan), Lokichar/Hoima (Uganda) ; a product oil pipeline from Lamu to Isiolo to Moyale to Addis Ababa (Ethiopia); international airports at Lamu, Isiolo, and Lake Turkana; resort cities will be established at Lamu, Isiolo and Lake Turkana; further, a merchant oil refinery will also be put up at Lamu.<sup>41</sup>

As noted in the preceding sections, it is envisioned that the project will give rise to numerous benefits and further the region's development agenda. Key to this is the hope that the project will facilitate the opening up of such areas as Isiolo, Garissa and Marsabit which have historically been considered to be marginalised.<sup>42</sup> It is foreseen that, through foreign direct investment, the project will lead to the intensification of economic activities in the areas where the LAPSSET route is to pass as these areas have been identified to also have vast deposits of minerals and other natural resources. It has further been identified that the two most important elements of the LAPSSET project that will lead to numerous benefits on the populace are: the infrastructure corridor of five hundred meters wide where the road, railway, pipelines, power transmission and other projects will be carried out and the economic corridor of fifty kilometers on either side of the infrastructure corridor where industrial investment will be situated.<sup>43</sup>

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40. Ibid.

41. See 'LAPSSET Corridor and New Lamu Port Feasibility Study and Master Plans Report' available at [http://www.lapsset.go.ke/newsletters/Lapsset\\_Executive\\_Summary1.pdf](http://www.lapsset.go.ke/newsletters/Lapsset_Executive_Summary1.pdf).

42. See NEMA, *Environmental Impact Assessment Project Report for the Proposed Construction of the First Three Berths at the New Lamu Port and Associated Infrastructure* (NEMA 2012).

43. See 'LAPSSET Corridor and New Lamu Port Feasibility Study and Master Plans Report.'

Despite the innumerable benefits that can be associated with this project, challenges are bound to occur where a project of this nature has been undertaken. This is especially relevant keeping in mind the social realities in these areas. The sudden intensification of activities in these areas, which have historically witnessed armed insurgences as a result of systemic exclusion, is likely to disrupt the social dynamics that exist in these areas and this may have negative impacts on the projects initiated in the areas. Further, the establishment of these development activities may have the resultant effect of exacerbating marginalisation of the communities inhabiting these areas and this might have tragic consequences. The following section provides a succinct analysis of some of the challenges that have been faced or are likely to be encountered as a result of the undertaking of the LAPSSET project. What is evident is the fact that local communities are in many cases on the receiving end and will continue to bear disproportionate burdens as a result of the formulation of these development projects if proper measures are not adopted to prevent this.

#### IV.

#### ENVIRONMENTAL CONCERNS: LAND HOLDING, USE AND ENVIRONMENTAL DEGRADATION

The history of landholding in Kenya has been riddled with numerous challenges whose historical origins cannot be wished away. Within the NFD and the Kenyan coast, these challenges have particularly been grave as the government has over time failed to address their origins. It is apt to note that these two areas remain to be the key focal point of the LAPSSET project and are likely to be affected by the project in many ways. In this regard, numerous challenges have already been witnessed in relation to land holding, the use of land and the manner in which the environmental resources in the area are to be utilized. As summarized by one observer; “the real challenge. . .is how to realize LAPSSET’s transformative prospect in terms of regional integration, wealth and opportunities while safeguarding the environment, and the rights and the livelihoods of those whose lands the project will cross”<sup>44</sup> These challenges, if unresolved, are likely to derail the completion of the projects and to the economy in general.

#### A. *Land Questions*

The development projects within the LAPSSET corridor inevitably require land. With this in mind, the LAPSSET Corridor Development Authority appointed a surveying consultant to complete surveying to facilitate setting apart of land for roads, oil pipelines and railways, the consultant was further mandated with the preparation of land acquisition plans to facilitate securing of corridor

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44. See Irin, ‘Lapsset project raises issues of land’ *Daily Nation* October 20, 2013.

land.<sup>45</sup> What naturally flowed from this is the fact that the need for land may inevitably lead to the displacement of persons and communities from their lands. This has further been complicated by the fact that the survey conducted had not preceded the ground breaking and in this regard, the views of the communities with regard to land were not been taken into account. This is clearly a major recipe for chaos as a majority of the communities in these areas are unaware of the fact that the government has the power to compulsorily acquire land for such development purposes.

Continued procrastinations with regard to addressing land issues faced in these areas is likely to hamper the progress of the project as judicial challenges on acquisitions of land by the government are likely to take a long time to resolve and hence impact adversely on the projects. Challenges are also bound to occur where the government pays compensation which is considered to be inadequate by the various communities.<sup>46</sup> It is noteworthy that to these communities, the value of the land they hold is not usually limited to their economic values but have certain personhood values. To these communities, land forms the basis on which the rational and harmonious development of their personalities originates.<sup>47</sup> Monetary compensation based on the market value of land does not therefore fit in well with these communities. Margaret Radin also propounds that in certain instances, people “possess certain objects that they feel are almost part of themselves and are closely bound up with their personhood because they are part of the way we constitute ourselves as continuing personal entities in the world”<sup>48</sup>

Despite the importance that has been attached to the need to follow the requisite procedures when acquiring land, the government has repeatedly been accused of laxity in following the requisite procedures and has in this regard constantly exerted undue pressure on communities and in this regard the elements of fear, desperation and threats are evidently apparent. Fears by the communities have further been exacerbated by the failure of the government to

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45. See The Presidency, ‘LAPSSET Corridor Development Authority: Brief on Status of LAPSSET Corridor Projects’ [http://lapsset.go.ke/newsletters/BRIEF\\_ON\\_LAPSSET.pdf](http://lapsset.go.ke/newsletters/BRIEF_ON_LAPSSET.pdf) accessed 24th September 2015

46. Numerous cases on compensation have been decided in Kenya and these have especially been seen in relation to the acquisition of land for the construction of infrastructure. In *John Gitonga Gachuhi & 4 Others v Commissioner of Lands and 5 others* Petition 584 of 2012 the court held that the petitioners, whose land had been compulsorily acquired for the purpose of the construction of the Nairobi southern bypass, were entitled to compensation from the government. It has further been held that compulsory acquisition of land by the government has to occur in a manner that is lawful and that follows the established procedures. In *Isaac Gathungu Wanjohi and another v Attorney General and others*, Nairobi Petition No. 154 of 2011 it was held that “Article 40(3) of the Constitution protects a person from deprivation of property by the state unless the deprivation is for a public purpose or in the public interest and is carried out in accordance with the Constitution or an Act of Parliament and prompt payment in full of just compensation. This is achieved through following the procedure set out in the Land Acquisition Act”.

47. See generally Lobhouse L, *The Historical Evolution of Property, in Fact and in Idea* (Cambridge University Press, 1994)

48. M.J. Radin, ‘Property and Personhood’, 34 (1982) *Stanford Law Review* 957-959

enact a law on community land, and the politics around this.<sup>49</sup> Communities are therefore left at a perilous situation as a result of the weak legal regime that exists to ensure the protection of their right to own land within their various localities. To these communities, the future is bleak as there are uncertainties with regard to the protection of their property rights to land.

Interference with the land rights of the inhabitants of these areas has further resulted in other numerous challenges which are attributable to the changed lifestyles of the communities within the areas where the development projects have been initiated. It is notable that a majority of the communities within the LAPSSET Corridor are pastoralist in nature and are usually in need of vast quantities of land in order to sustain their livelihoods. Construction of infrastructure on land used by the communities to graze their animals eventually forces the communities to change their lifestyles and adopt new practices because of the reduced land sizes. The taking up of land for the construction of the various developmental projects within the LAPSSET corridor has led to the loss of livestock feeding grounds, watering points among others.

Land grabbing is another phenomenon that is prevalent within the areas where the LAPSSET project is to be undertaken. Land grabbing continues unabated partly as a result of the ambiguity over land ownership in the areas where the projects are to be undertaken. Recent trends have also seen the intensification of land transactions within these areas and this has especially been witnessed in Lamu County. Companies like Lamu Port Agency and Lamu Prime Land and Plots Agency have been said to be offering diverse pieces of land for sale with ready title deeds.<sup>50</sup> In Lamu, there has been an upsurge of sale of land with the most affected areas being Mashunduanu and Kililana. The intensification of activities around these two areas results from the fact that it is expected that a coal plant is to be constructed and it has been noted that a majority of persons who have recently bought land are foreigners and multinational companies.<sup>51</sup>

Acquisition of land in these areas has further occurred without taking consideration of the need to ensure that land governance and related transactions occur in a transparent manner in order to avert future conflicts. It is apt to note that in cases where such acquisitions occur, it is usually of paramount importance that land governance institutions gain social consensus rather than being controlled by certain interest groups.<sup>52</sup> The consequent likelihood of the intensification of these activities is that indigenous inhabitants of Lamu who have not been socialised into land market dealings will find themselves landless either

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49. See 'The LAPSSET project; a blessing or a curse to villagers in Momdica Location, Garissa County' available at <http://www.hakijamii.com/index.php/8-hakijamii/52-the-lapsset-project-a-blessing-or-a-curse-to-villagers-in-modica-location-garissa-county> accessed 24th September 2015

50. See <http://www.lamuportagency.com/> accessed 25<sup>th</sup> September 2015

51. Cheti Praxides, 'Illegal Land Sales Soar around Lapsset' *The Star* 1<sup>st</sup> April 2015.

52. See Klaus Deininger *et al*, *The Land Governance Assessment Framework* (The World Bank, 2012) 32.



because they missed out on the allocations of title deeds issued by the president or they will receive title deeds but sell their land through ignorance of the finality of the transactions.<sup>53</sup> The expected population increases in the area is also likely to aggravate the challenges faced in relation to land holding in these areas as increased populations translate to increased demands for land. It therefore becomes imperative that safeguards are established to ensure that the development activities happening in these areas do not lead to the intensification of conflicts and dispossessions among communities.

### B. Environmental degradation

The magnanimous nature of the LAPSSET project undeniably means that there are likely to be instances of environmental degradation. This is particularly based on the observation that some of the key projects under LAPSSET are set to be established in areas of critical ecological value which are under threat of destruction. Kreutzmann associates such likely consequences with the tragedy of the commons.<sup>54</sup> Kenya and the entire East Africa region are set to greatly benefit from the LAPSSET project but this comes at a price. It therefore becomes imperative that a clear balance is struck between the needs for development and ensuring that the activities do not have deleterious effects on the environment.

The Lamu archipelago is particularly under threat due to the massive construction works that are to be carried out in the area, this is notwithstanding the fact that various initiatives have been undertaken to protect these areas that are considered to be a UNESCO World Heritage Centre. It is proposed that the Lamu port is to occupy 1,000 acres and three berths will be constructed at Manda Bay. The project activities in the construction of the port include dredging, reclamation, access road and rail construction at the coastline at Manda Bay.<sup>55</sup> In this regard, an environmental impact assessment study was undertaken to determine the likely adverse impacts of the project and to propose mitigation measures to eliminate or reduce the magnitude of these impacts. The study aimed to; examine in detail likely adverse environmental and social impacts directly and/ or indirectly attributable to the projects; appropriate mitigation measures for the identified and associated impacts; prepare a hazard and sensitivity areas mapping in the project locality; establish environmental and associated baselines for future monitoring purposes.<sup>56</sup>

It was established by the EIA that the construction of the port is likely to have negative impacts on the marine environment especially on the mangrove

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53. See Kazungu, K.W. *et al*, 'A week later, villagers in Coast sell their land' *Daily Nation* September 13 2013.

54. Kreutzmann, H. 'The Tragedy of responsibility in high Asia: Modernizing traditional pastoral practices and preserving modernist worldviews' 3 *Pastoralism* 7.

55. NEMA, *Environmental Impact Assessment Project Report for the Proposed Construction of the First Three Berths at the New Lamu Port and Associated Infrastructure* (NEMA 2012).

56. *Ibid*.

habitats. In this regard, construction of the port will interfere with the manner in which water in the area circulates and this has possible effects on the marine life in the Lamu archipelago. It has further been noted that increased ship traffic poses a threat with regard to oil spills which may occur during cargo transfer or bunkering.<sup>57</sup> Dredging and construction activities are also likely to impact negatively on fisheries. It is especially notable that dredging activities will affect coral reef conservation in areas like Iweni Conservation. Disruption of fisheries will impact greatly on the livelihoods of the communities who have traditionally practised fishing. A majority of the inhabitants of the Lamu draw their income from the tourism activities that take place.<sup>58</sup> Construction of the port is likely to degrade the tourist attraction areas hence reduce the number of visitors to the area. This will inevitably affect the livelihood of local communities who draw income from tourism activities. It is notable that the destruction of ancient burial sites and mosque ruins has already taken place due to the clearing and stripping for the port access road at Kililana.<sup>59</sup>

It is apt to point out that despite the EIA conducted for the construction of the port, local communities continue to have several grievances with regard to the likely impacts of the project as they continue to bear the brunt of these activities. Notably, it is argued that the EIA lacked an efficient methodology thus the study was done in great haste, with many steps being overlooked during the obtaining of baseline information on the environmental status of the region.<sup>60</sup> It is also worth highlighting that the EIA report clearly describes the potential negative impacts of the project but it fails to clearly outline the measures to be undertaken to mitigate these challenges. Remarkably, the Lamu ecology is widely recognized as one of the richest along the entire coast of East Africa and the intricate ecosystem has gained global recognition. It therefore becomes important that the preservation and conservation of this ecosystem is safeguarded in order to support present and future generations.

## V.

### LAND LEASES AND ENVIRONMENTAL INJUSTICE IN TANA RIVER COUNTY

Increased population growth coupled with increased demand for food has seen the intensification of agricultural activities in areas that have traditionally been perceived to be arid and unproductive. The increase of these activities has come upon an awareness that measures ought to be taken to improve food security. Demands for biofuels coupled with the diminishing supplies of non-renewables and increased oil prices has led to a paradigm shift in policymaking

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57. Ibid 168.

58. The Lamu Cultural Festival attracts many people and local communities draw massive benefits from such activities.

59. Study for LAPSSSET Corridor FS & Lamu Port MP & DD Report.

60. See 'Save Lamu community association response to EIA on Lamu' available at: <https://www.savelamu.org/>.

as governments seek to move away from traditional energy sources in order to meet the constant demands for energy.<sup>61</sup> In order to meet the demand for these activities, governments used to resort to granting land leases to persons who sought to carry out such activities. The role of the State in granting these leases cannot be underplayed and studies indicate that a number of African States have not done much to protect land held by communities from the ‘grab’ that has been occasioned, on the contrary, the state is usually a willing player in fostering these grabs by multinationals and local elites.<sup>62</sup> Such occurrences come against the backdrop of the fact that these States have traditionally marginalized the areas which have seen the intensification of these activities and this is a show of the continuation of the discriminatory practices.

Irrigation has been adopted in many parts of Africa in order to ensure the increase of agricultural production. Large-scale irrigation schemes have however been dominated by multinationals that have been granted leases by governments. Despite the prospects that irrigation activities have for these regions, numerous setbacks have been associated with the projects as oftentimes, communities lose out on their lands and also certain important resources like pasture and water points. Tana River County has been one of the biggest casualties of the increased agricultural activities and the associated numerous challenges. This section discusses some of the land leases that have been granted in the Tana Basin and the closely-tied environmental injustices that have been visited upon its inhabitants. It is fitting to note at this early stage that there exists a clear nexus between environmental injustices in this region and the perennial violence that have recurred in the Tana Basin. This was evident during the colonial times and in independent Kenya.

The Tana Delta has been the center of a number of conflicts among communities in search of pasture land and water points and those practising farming. The County is named after River Tana, the longest river in Kenya, and is home to approximately 230,000 people.<sup>63</sup> The epicentre of the countless conflicts that have occurred between the farmers and pastoralists has been access to land and related resources like water. This arises from the fact that the delta provides critical pastures for cattle for the Orma pastoralists while also supporting small-scale crop cultivation by the Pokomo farmers and other communities who also practise agriculture.<sup>64</sup> While Pokomo Bantus are settled farmers, the Orma and the Wardei are nomadic pastoralists and both of them derive their livelihoods from the Tana River. Their respective farming and pastoralism lifestyles are well-defined and every so often in competition. This

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61. Lorenzo Cotula *et al*, *Land grab or development opportunity? Agricultural investment and international land deals in Africa* (IIED/FAO/IFAD 2009).

62. Ruth Hall *et al* ‘The Contexts & Consequences of Africa’s Land Rush’ in Ruth Hall *et al* (eds), *Africa’s Land Rush: Rural Livelihoods and Agrarian Change* (PLAAS, 2015).

63. KNBS, *Statistical Abstract 2014* (KNBS 2014).

64. Abdirizak Arale Nunow, ‘The Dynamics of Land Deals in the Tana Delta, Kenya’ Paper presented at the International Conference on Global Land Grabbing 6-8 April 2011.

has created periodic conflicts between these two groups, particularly during the dry seasons. These clashes are said to occur whenever the pastoralists try to access the river to water their livestock because the Pokomo farmers have occupied the entire river banks, leaving no space or access corridors for the pastoralists to access the river water.<sup>65</sup> A large percentage of the inhabitants of the delta are also said to have insecure tenure as most of the land is held communally and there are no proper safeguards to protect this category of land.<sup>66</sup> This has made the land in the county prone to being grabbed by powerful individuals who may take advantage of ignorance of the communities. Insecure tenure has also been the source of skirmishes between the agricultural communities and the pastoralists as oftentimes the agricultural communities insist on individualization of landholding which is an alien concept to the pastoralist communities.<sup>67</sup>

Many leases have been granted to persons to practise agriculture within the County with a majority being granted to multinationals. The Gulf States, which are usually food insecure but have vast deposits of oil, are said to be the biggest beneficiaries.<sup>68</sup> The granting of leases to multinational companies has oftentimes been shrouded in secrecy and this excludes community members from making key decisions that may affect their lives. One such occurrence was seen in 2008 when President Kibaki is said to have leased 40, 000 ha of high potential land in Tana River delta to the Government of Qatar for the production of horticultural products for Qatar. The details of this agreement are scanty and a majority of the public are not even aware of the existence of such an arrangement.<sup>69</sup> This has been pointed out by the media and one such newspaper article indicated that “the current dispute over the alienation of more than 100,000 acres of prime land in the Tana delta is just one example of the presidential opaqueness that continues to cost Kenya dearly. The issue here is not legal, but economic, political and moral”.<sup>70</sup>

Other multinationals which seek to benefit from the land leases in the Tana delta include; G4 Industry, a British company that is proposing to grow castor and sunflower on 28,911 ha in the delta, a project that is likely to displace over 500 households; Bedford Inc, a Canadian company that seeks to acquire over 90,000ha of land for the cultivation of biofuel crops including jatropha; Jatropha Kenya Ltd, a subsidiary of an Italian company, has leased 50,000 ha for the purpose of growing jatropha for biofuel extraction and Tiomin mining, a

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65. See Faith Muiruri, ‘Investors in Tana River derail Community Land Rights’ (*Special newspaper for the Conference on Community Land Law*) June 2013.

66. FIAN, ‘Land Grabbing in Kenya and Mozambique: A Report on two research missions and a human rights analysis of land grabbing’ 2010 FIAN.

67. *Ibid* 19.

68. Abdirizak (n 63) 11.

69. FIAN (n 64)19.

70. See *Daily Nation* 2<sup>nd</sup> January 2009.

Canadian company, which has proposed the extraction of titanium from the sand dunes of the Tana delta.<sup>71</sup>

The scramble for land in Tana delta has invited other players such as government parastatals, corporations and private persons who seek to get a share of the spoils. It is notable that in this regard, large tracts of land within the delta and adjacent districts have been set aside for large industrial scale farming, bio-fuel production and for mining.<sup>72</sup> Mumias Sugar Company, a state run corporation, and the state-run Tana Athi River Development Authority (TARDA) made proposals for the establishment of a 20,000 hectares irrigated sugarcane farm within the Tana Delta.<sup>73</sup> The project is set to greatly affect the landholding dynamics as it is expected to affect local communities whose grazing lands are likely to be converted into sugarcane plantations.

The Galana/Kulalu irrigation scheme is the other irrigation project that has been undertaken by the government in Tana River County. The launch of this project is said to be in line with the dictates of Vision 2030, the country's development blueprint, where it is expected that agricultural development in the country is to be strengthened through irrigation.<sup>74</sup> The establishment of the scheme dates back to 1968 under the name Galana Game and Trading Company.<sup>75</sup> The project was acquired in 1989 by the government through Agricultural Development Corporation (ADC) where its main role changed to providing a buffer zone between national parks in the area, especially the Tsavo East National Park and local communities.

The Government of Kenya recently signed a deal with the Israeli government where it sought to put the land in the Galana/Kulalu area to productive use. The project seeks to put a total of 1,020,103 acres of land to use and this shall be done in the following manner; beef and game ranching is allocated 49,085 acres, green areas 198,653 acres, horticulture 42, 817 acres, orchards 74,646 acres, sugarcane 177,136 acres, maize 93,540 acres, fish farming 9,577 acres, dairy 4,703 acres, apiculture 4,611 acres and agro-processing 5,334 acres.<sup>76</sup> It is clear from the foregoing that the project is set to take up vast portions of land based on the other several activities that are linked with the project.

It is clear that numerous benefits are likely to arise from projects like the Galana/Kulalu irrigation project. In this regard, the project will probably improve

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71. See Pauline Makutsa, 'Land Grab in Kenya: Implications for Small-holder Farmers' available at [http://www.sfoap.net/fileadmin/user\\_upload/sfoap/KB/docs/Report%20of%20Land%20Grab%20in%20Kenya.pdf](http://www.sfoap.net/fileadmin/user_upload/sfoap/KB/docs/Report%20of%20Land%20Grab%20in%20Kenya.pdf) accessed 1<sup>st</sup> October 2015.

72. Abdirizak (n 63) 15.

73. FIAN (n 64) 20.

74. See Kenya Vision 2030.

75. See <http://www.nib.or.ke/research-centre/86-irrigation/139-galana-kulalu-food-security-project.html> accessed 1st October 2015.

76. See <http://www.nib.or.ke/research-centre/84-nib/127-galana-kulalu-ranchirrigation-project-green-revolution.html> accessed 1st October 2015

livelihoods, food security and economic growth in Kenya. Corporate Social Responsibility initiatives that will be undertaken in the course of the project include the rehabilitation of a number of water pans that aid local communities in a number of ways.<sup>77</sup> The project also entails the construction of infrastructural activities which are set to benefit the local communities. Local communities are also set to benefit from employment opportunities that may arise from the projects.

Several negative consequences have also been attached to the project with the local communities bearing the greatest brunt of these challenges. One main limitation is the displacement of communities to pave way for the establishment of farmlands. Notably, the Tana delta generally exhibits insecure tenure as a large percentage of the land within the county is held under the customary regime. Customary tenure has been seen to be structurally and situationally vulnerable and this is in relation to the administrative structures that have been established under this property regime and the perception that other people have over this form of property arrangement.<sup>78</sup> The structural weaknesses that have been attributed to the customary property arrangements have seen the fragmentation of communal ownership hence the perception that has been painted is that this form of property arrangement cannot stand the test of time. The establishment of these agricultural projects is therefore likely to ignite the injustices that have been visited on communities holding land under the customary regime. Communities are likely to lose land that they have traditionally used as pasture land and also for the practice of other activities.

The establishment of these agricultural projects is also prone to interfere with the grazing corridors of communities that have traditionally practiced pastoralism. This may bring communities pastoralist communities like the Oromo and Orma to conflict with the agricultural communities like the Pokomo and Giriama. Further, the massive irrigation projects that have been undertaken are likely to affect water flow and the general levels of water in River Tana. It is likely that the irrigation schemes will be given precedence over the water needs of the communities. This poses challenges to these communities who have traditionally used the river to water their animals. What follows from this is the fact that these communities may stand to lose their cattle as a result of the reduced grazing lands and water points and this is a clear recipe for chaos among the communities. Ironically, the reduced grazing lands as a result of the establishment of irrigation projects are a threat to food security to the pastoralist communities. Irrigation projects in Tana River County aggravate the marginalization that has been visited on these communities.

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77. See <http://www.nib.or.ke/research-centre/86-irrigation/139-galana-kulalu-food-security-project.html> accessed 1st October 2015

78. Adam Leach, 'Land Reform and Socio-Economic Change in Kenya,' in *ESSAYS ON LAND LAW: THE REFORM DEBATE IN KENYA* (Smokin Wanjala ed., 2000).

## VI. ENVIRONMENTAL CONCERNS

The foregoing discussions clearly evidence the fact that the Tana region supports a wide range of land uses which are always competing. It is also notable that the Tana delta is characterized with biodiversity and various initiatives have been undertaken to ensure the conservation of the biodiversity.<sup>79</sup> Large scale agriculture within the delta poses a threat to biodiversity in the area. This is notwithstanding the importance that biodiversity plays and the need for environmental conservation initiatives to also take consideration of the importance of conserving biodiversity. Depletion of biodiversity has been linked to increased poverty.<sup>80</sup> It is upon this realization that the conservation of biodiversity has become an important public policy issue at the national, regional and international levels.<sup>81</sup>

Increased agricultural activities within Tana River County lead to increased stress on the ecosystem hence depletion of the available resources. It is apt to note that this always pose a challenge to a majority of the global population which usually rely on biological diversity to meet their nutritional needs. Large scale agriculture becomes a challenge to biodiversity where monoculture is adopted and this leads to the diminishing of the resilience that crops have and hence leading to poor yields. Where large scale farms are established, environmental concerns are bound to occur where there is overuse of chemicals on farms which may in certain cases negatively affect the farms and may lead to pollution of water bodies.<sup>82</sup> This is likely to have negative effects on the health of communities that rely on the water from the river.

Forestlands within the areas where the agricultural projects have been established are also likely to suffer as it may become essential that these forests are cleared to pave way for farmlands. This has grave impacts on the communities which traditionally rely on these forests to draw their food and firewood. The destruction of the forests further means that the rainfall patterns is projected to be adversely affected to the detriment of the communities inhabiting these areas.

The foregoing discussions clearly evidence the fact that numerous injustices have historically recurred in the NFD and the Coastal strip. These injustices have resulted in the sidelining of the inhabitants of these two areas with the resultants effect being perennial conflicts within these two areas. Recent investments in

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79. Makutsa, *supra*, note 71 at 29.

80. William M. Adams et al, "Biodiversity Conservation and the Elimination of Poverty," in *POVERTY AND BIODIVERSITY CONSERVATION DILYS* (Roe and Joanna Elliot eds., 2010).

81. John Mugabe, 'Biodiversity and Sustainable Development in Africa' in *MANAGING BIODIVERSITY: NATIONAL SYSTEMS OF CONSERVATION AND INNOVATION IN AFRICA 5* (John Mugabe and Norman Clark eds., 1998).

82. See B. Chimwanza *et al*, "The Impact of Farming on River Banks on Water Quality of the Rivers" 2 *INTERNATIONAL JOURNAL OF SCIENCE AND TECHNOLOGY* (2006).

these areas have seen the evolution of these injustices and it communities inhabiting these areas continue to be marginalized from these development activities. It is apparent that development activities like the LAPSSET and the numerous agricultural projects in these areas continue to foster the marginalization of the inhabitants of these areas and this is a recipe for chaos among the communities in this region. It therefore becomes imperative that measures are taken to ensure that the benefits and the burdens arising from these projects are equitably distributed among the various stakeholders, including the communities. The following section proposed certain measures that ought to be undertaken to ensure that the development activities in these areas do not lead to the marginalisation of the inhabitants of the two regions and that the burdens associated with the activities are not overly borne by the communities.

## VII.

### OPPORTUNITIES AND WAY FORWARD

Several opportunities exist that may be used to ensure that inhabitants of the NFD and the Coastal strip are not overly burdened by the development activities carried out in these areas. These opportunities can further be explored to address the historic grievances that the inhabitants of these two areas have had and that have led to the recurrence of violence in the two areas. The enactment of the transformative Constitution of Kenya in 2010 heralded a new era as the Constitution stresses on the importance of ensuring social justice in all development activities in the country. The Constitution establishes yardsticks to be used before such projects that are likely to interfere with the livelihood of communities are initiated.

The Constitution in the preamble acknowledges that Kenyans are respectful to the environment and are determined to sustain it for the benefit of future generations. The Constitution further acknowledges that Kenyans are committed to nurturing and protecting the well-being of the individual, the family, communities and the nation. The right of every person in the country to acquire and own property has further been recognized under Article 40 of the Constitution. Safeguards have also been established to ensure that individuals are able to access a clean and healthy environment and this obligation also extends to protecting the environment for the benefit of future generations.<sup>83</sup>

The Constitution further establishes transformative provisions in relation to land that is held by communities. Community land is protected under Article 63 and this is key in protecting community land which is the most common type of holding in pastoralist areas. Opportunities for the protection of communal holdings will also be augmented with the enactment of the law on community land as envisioned in Article 63 (5) of the Constitution. It therefore becomes

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83. Constitution of Kenya, Art. 42.



imperative that the Parliament fast-tracks the process of formulation of this law to ensure the protection of claims of land by communities living in these areas.

Mechanisms also exist that seek to ensure the conservation and protection of ecological resources that are essential for the survival of communities. This has come upon realization of the important role that biodiversity plays and the fact that biodiversity within areas where the development activities are being conducted face constant threats. Realization of the importance of biodiversity has seen the adoption of pragmatic or preservationist approaches in the management.<sup>84</sup> Preservationists fear that the exploitation of these resources, if unchecked, could be overwhelmed by commercial interests leading to over-exploitation.<sup>85</sup> Pragmatic management of biodiversity argues for the utilization and exploitation of natural resources within reasonable limits.<sup>86</sup> Mechanisms for the conservation of biodiversity have therefore been established under the Constitution<sup>87</sup> and other international legal instruments.

The Biodiversity Convention is a key instrument that has established measures to ensure the protection of biodiversity resources and it especially established key provisions meant to ensure protection of biological resources held by communities. With regards to the protection of biodiversity, the Convention in Article 8 provides for the establishment of a system of protected areas where measures are to be undertaken to ensure the conservation of biodiversity. Article 10 further provides that the conservation of biodiversity is meant to ensure that future generations are able to draw benefits from these resources. It therefore becomes imperative that any development projects that are initiated in various parts of the country are able to ensure the protection of biodiversity in areas where the projects are initiated for the benefit of current and future generations.

Management of natural resources found within various localities can no longer be done without including local communities in the processes. This has come upon realization of the fact that exclusion of local communities oftentimes lead to the mismanagement of these resources which is usually a recipe for chaos. Inclusion of local communities in the management of resources aims *inter alia* at ensuring that communities shape environmental decisions while also ensuring that the communities benefit from the resources. Communities are therefore enabled to shape decisions that are likely to transform their livelihoods and in this regard inclusion of communities ensures acceptability of the development projects initiated within their localities. Public participation in public affairs at the national and county levels is therefore a national value and principle of governance that has been given precedence in Article 10 of the Constitution.

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84. PATRICIA KAMERI-MOBOTE, PROPERTY RIGHTS AND BIODIVERSITY MANAGEMENT IN KENYA (2002).

85. JOHN MCCORMICK, RECLAIMING PARADISE (1989).

86. Kameri-Mbote, *supra*, note 84, at 15.

87. See Art. 69 (1) (c).

It therefore becomes imperative that communities are given platforms to ventilate any underlying issues that they may have with regard to development projects such as the LAPSET and the agricultural projects undertaken in various parts of the Tana County. Where communities have grievances relating to such projects, the Constitution in Article 70 accords them the opportunity to access courts to enable them enforce their claims.

Access to justice has been outlined as one of the Sustainable Development Goals adopted by the United Nations in 2015.<sup>88</sup> The adoption of the Sustainable Development Goals (SDGs) has been necessitated by the shortfalls that have faced the Millennium Development Goals (MDGs) especially in relation to low income persons.<sup>89</sup> The adoption of SDGs is key in ensuring environmental sustainability and that the environment results to benefits that are to be shared by all in the society. In this regard, benefits and burdens accruing from the exploitation of environmental resources are to be shared equitably among all stakeholders.

#### CONCLUSION

This contribution succinctly discussed the historical origins of the environmental injustices within the NFD and the Kenyan coast. Particular emphasis has been given to such injustices that have manifested themselves in Lamu and Tana River counties. What becomes apparent is the fact that failure of successive regimes to address these injustices has led to the marginalisation of several groups of persons especially the communities within these two areas. We therefore submit that the numerous challenges witnessed in these two areas are as a result of the environmental injustices visited upon the inhabitants of these areas and failure of successive governments to craft a cohesive polity within these areas. It therefore becomes imperative that measures are undertaken to ensure that the safeguards established in the Constitution, national legislation and other international legal instruments are adopted to ensure that any grievances by communities are redressed.

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88. See United Nations Sustainable Development Summit 2015

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