

BOOK REVIEW

ENVIRONMENTAL GOVERNANCE IN KENYA: IMPLEMENTING THE FRAMEWORK LAW

*Charles O. Okidi, Patricia Kameri-Mbote and
Migai Akech, Eds.*

*East African Educational Publisher, Ltd. 2008
554 pages*

*Reviewed by Hannah Cochrane**

With the realization of the Environmental Management and Co-ordination Act, 1999 (the EMCA), Kenya joined the forty-two countries that have implemented national environmental governance structures. *Environmental Governance in Kenya: Implementing the Framework Law*, edited by Charles Okidi, Patricia Kameri-Mbote and Migai Akech, is the authoritative text on the EMCA. It brings together in a seamless collaboration, thirteen distinguished scholars, advocates and practitioners to discuss Kenya's efforts to harmonize its current environmental conservation and management regime with the EMCA.¹ Prior to 1999, Kenya did not have a cohesive environmental law system, but instead a piecemeal coordination of policies and laws remnant of its colonial past. The EMCA sought to remedy this by "provid[ing] for the establishment of an appropriate legal and institutional framework for the management of the environment in Kenya," while recognizing that the coordination of the current

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1. ENVIRONMENTAL GOVERNANCE IN KENYA: IMPLEMENTING THE FRAMEWORK LAW (Charles Okidi, Patricia Kameri-Mbote & Migai Akech eds., 2008).

sectoral and functional laws already on the books would lead to better environmental management.²

The book is divided into three parts and to a certain extent each builds upon the previous. Part I lays a foundation for the reader with four introductory chapters on environmental law and management, the origin of environmental common law and the intersection of criminal and environmental law. The introduction makes the primer easily understandable for readers without an extensive legal or environmental background. Providing a full overview of the various influences on the development of environmental law, the book draws on English and American common law including classic cases like *Rylands v. Fletcher*,³ as well as traces the roots of international environmental law. It also offers examples from around the world of the emerging right to a healthy environment, which the EMCA incorporates into Kenyan law in section 3 which provides that “every person in Kenya is entitled to a clean and healthy environment and has the duty to safeguard and enhance the environment.”⁴

Part II offers an excellent overview of the current laws in the agrarian, forestry, land use and land tenure, wildlife, water and sanitation systems, mineral resources, energy, genetic resources and coastal management sectors, and surveys the extent to which these laws are congruent with the framework law.⁵ Under section 148 of EMCA:

[A]ny written law, in force immediately before the coming into force of this Act, relating to the management of the environment shall have effect subject to modification as may be necessary to give effect to this Act, and where the provisions of any such law conflict with any provisions of the Act, the provisions of the Act shall prevail.⁶

Therefore, all municipal environmental laws need to be reviewed for compatibility and harmonized with the EMCA. For

2. The Environmental Management and Co-ordination Act (EMCA), No. 8 (1999), KENYA GAZETTE SUPPLEMENT No. 3 Pmbl.

3. [1868] 3 L .R.E. & I. App. 330 (H.L.) The famous House of Lords case where the common law doctrine of strict liability was developed.

4. EMCA § 3.

5. Part II, ENVIRONMENTAL GOVERNANCE IN KENYA, *supra* note 1.

6. EMCA § 148.

example, all land tenure laws on the books must be revised to promote sustainable environmental management as required by the EMCA. This requires not just repealing inconsistent laws, but also creating a comprehensive land use and zoning program to streamline the remaining laws. Each chapter discusses the extent to which harmonization has occurred. Finally, Part III focuses on the larger environment around Kenya with an inquiry into environmental laws across the region and as they apply to the East African Community.

While the book is thorough in breadth, several substantive issues that are briefly mentioned could have been examined more deeply. For example, *locus standi*, the right to bring an action or to be heard by a given forum, is mentioned throughout various discussions.⁷ Prior to the implementation of the EMCA, *locus standi* was a major barrier to environmental justice for the Kenyan public.⁸ In order to be heard, there had to be a showing that the person had a direct personal interest in the matter, usually established by demonstrating harm or damage to property.⁹ This often precluded public interest litigation from being successful.¹⁰ A key accomplishment of the framework law was the lessening of the burdensome standard of proving *locus standi*.¹¹ Section 3(3) of the Act provides that “any person who alleges that his or her entitlement to a clean and healthy environment is being or is likely to be contravened may apply to the High Court for redress.”¹² This creates an express right to standing without having to show a right or interest directly violated beyond a threat to a clean and healthy environment. Creating this right to standing should provide the public with better access to redress and slowly build

7. BLACK'S LAW DICTIONARY 960 (8th ed. 2004); ENVIRONMENTAL GOVERNANCE IN KENYA, *supra* note 1, at 160 *passim*.

8. The well-known case of *Wangari Maathai v. Kenya Times Media Trust Ltd.*, (Civil Case No. 5403 [High Court of Kenya at Nairobi, Dec. 11, 1989]) exemplifies the barriers to redress by a judiciary when it narrowly applies standing rules in the case of public interest litigation.

9. ENVIRONMENTAL GOVERNANCE IN KENYA, *supra* note 1, at 161.

10. See *Wangari Maathai v. Kenya Times Media Trust Ltd.*, *supra* note 8, (denying standing to private citizen to suit for violations to the environment where the general public is affected); *Wangari Maathai v. City Council of Nairobi*, (Civil Case No. 72 [High Court of Kenya at Nairobi, Mar. 17, 1994]) (denying standing to public interest plaintiffs challenging the transfer of development of municipal land).

11. S. Amos Wako, *Foreword* to ENVIRONMENTAL GOVERNANCE IN KENYA, *supra* note 1, at iii.

12. EMCA § 3(3).

accountability and responsibility for the environment. However, there is no discussion about whether the liberalized *locus standi* has created more public participation since the implementation of the EMCA a decade ago. Likewise, although the author mentions the importance of public participation and its absence historically, there is no discussion about how to increase it in Kenya. Public participation is crucial to the success of the framework law and discussion of the progress being made in local communities would have been helpful in terms of “best practices” for other practitioners reading the book.¹³

The chapter on wildlife management delves into colonialism, a major historical influence on Kenya’s law. A review of Kenya’s long history of game management explores how colonialism created some of the deficiencies among Kenya’s sectoral laws. The author shows how the paternalistic game management policies instituted during the colonial period hindered the initial advances made in conservation.¹⁴ While early restrictions on game management tightly controlled hunting, allowances were made for settlers to kill animals destroying crops. However these allowances were not extended to natives. Instead, native Kenyans were forced to rely on game wardens to protect their crops. Today, attempts to take into account communities’ needs while still promoting sustainable management of wildlife resources have not yet struck a feasible balance. The author suggests this may be the result of the state’s failure to institute innovative policies such as enlisting community involvement through equitable sharing of benefits, strengthening the sanctions for poaching or creating a compensation fund for destruction to farm lands by wild game.¹⁵ Due to the complexity of the colonial experience, a more complete exploration of its historical influence on Kenya’s law may have also been instructive since the impact is still felt in the wildlife, land use

13. For a long time, pollution was seen as a by-product of industry and thus foreign investment. The assumption was that environmental degradation was only of concern in the big cities where industry was located. This assumption, and a lack of knowledge on the part of the community damaged by the pollution, contributed to environmental pollution without recourse for many years. See Evanson Chenge Kamau, *Environmental Law and Self-Management by Industries in Kenya*, 17 J. ENVTL. L. 229, 238-39 (2005).

14. The first conservation efforts resulted in the 1900 Convention which called for the reduction of hunting and establishment of national parks and reserves for the protection of wildlife. Wildlife hunting has been banned in Kenya since 1977. However after the 1977 ban, the Kenya Wildlife Service reported as much of 90% of its black rhino population has been depleted due to poaching.

15. ENVIRONMENTAL GOVERNANCE IN KENYA, *supra* note 1, at 304.

and other sectors of law. However, with the book already containing over 500 pages, not everything could be included without making it unwieldy in both weight and content.

Most chapters in the book explore the designated topics in impartial tones, discussing the current state of affairs, harmonization efforts and possible recommendations. The chapter on water and sanitation, however, stands apart for its fairly critical tone. By highlighting serious deficiencies in the current state of the law with respect to water and sanitation, this chapter underscores the urgency of the matter.¹⁶ The Water Act of 2002, enacted only several years after the EMCA, was supposed to harmonize Kenya's water management with the EMCA. However, it carries the same deficiencies as the previous regime, including the lack of clear responsibility among the various agencies and the continued concentration of power within executive authorities. These are the very shortcomings the EMCA sought to remedy. The author states in no uncertain terms, "the policy objective of integrated management of water resources is unlikely to be realized given the many deficiencies of the new Water Act."¹⁷ The chapter on water and sanitation illustrates the monumental task Kenya faces in harmonization of all areas of environmental law, not just the sector explored in this chapter.

This book, a definitive survey of the current landscape of Kenya's environmental law, is an excellent starting point for legislators and policymakers who are responsible for harmonizing the law. With the collective knowledge and experience of thirteen authors, *Environmental Governance in Kenya: Implementing the Framework Law*, is sure to propel Kenya's law forward. The book's stated objectives as set forth in the introduction are to present the current status of Kenya's environmental law; provide Kenyan lawmakers with reasoned recommendations for harmonization; facilitate speedy revision of the current status; create an environmental text for teaching and research at all levels and show the relation between Kenya's framework law and environmental laws of East Africa.¹⁸ Certainly, these objectives have been met.

16. Chapter Thirteen is written by Migai Akech, also an editor of the book.

17. ENVIRONMENTAL GOVERNANCE IN KENYA, *supra* note 1, at 323.

18. *Introduction* to ENVIRONMENTAL GOVERNANCE IN KENYA: IMPLEMENTING THE FRAMEWORK LAW, *supra* note 1, at xx.