



DUTY TO PROTECT, OBLIGATION TO REDRESS

The Legal Issues Arising From the Solai Dam Tragedy



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ARISING LEGAL ISSUES IN THE SOLAI DAM TRAGEDY

1.1 Introduction

This brief discusses the numerous legal safeguards for the Solai Dam tragedy victims. Sources include; journals, published books, periodicals, reports, Hansards and working papers. It further refers to Human Rights Based approaches to Natural Resources Management.

1.2 Contextual Analysis

One of the Patel Dam in Solai, Nakuru County, broke down its banks on Wednesday 9th May 2018 and caused displacement, wanton destruction of property and loss of lives. The Solai Dam tragedy can be attributed to the bursting of the walls of a manmade dam due to the seasonal heavy rains, lack of an efficient monitoring mechanisms by the relevant regulatory bodies and a lack of clear early warning system in order to minimize or even avert such a tragedy in the first place.

Idyllically such a large scale investment should be compliant with all set guidelines within the strict ambit of relevant legal thresholds because of the potential risk it poses in case of a breach.

“The dam that broke its banks and flooded areas downstream in Solai, Nakuru County, is one of the seven illegal ones in Patel Coffee Estates Ltd. For the last one year, we have been trying to engage the company on how to legalize the dams but they have been reluctant. The law requires that any private dam going beyond five meters high needs to be regularized by the authority.” - Simon Wang’ombe, the regional manager for the Rift Valley, WARMA.

Refer to “Killer dam is illegal, says water management official” - Daily Nation (Thursday, May 10 2018)

More than 150 people have been killed and 300,000 displaced in Kenya, where the damage runs into millions of dollars.¹ However the statement made by the President when he paid a visit to the Solai Dam tragedy victims states that the tragedy “left 48 people dead, at least 5000 displaced and property worth hundreds of thousand

¹ Burst dam at Kenyan rose farm lacked permits, police investigate – Reuters (May 12, 2018. Available at: <https://af.reuters.com/article/topNews/idAFKCN1ID070-OZATP>

destroyed”.² The Senate committee on Security, Defence and Foreign relations also undertook a fact finding mission and indorsed that Mansukh Patel the owner of the Patel dam should be held culpable. The committee also recommended that the Water Resources Management Authority-WARMA should be disbanded for negligence.

1.3 ARISING LEGAL CONCERNS

The Solai Dam tragedy brings to the fore copious legal issues that should be addressed if such disasters are to be averted in future. Emerging legal concerns that need urgent redress include:

1.3.1 PROTECTION AND ASSISTANCE OF DISPLACED PERSONS.

The presidential statement indicated that an estimated five thousand persons were displaced during the unfortunate tragedy. So far, the displaced persons had sought shelter at the Solai High School awaiting for further support from the relevant duty bearers.



According to the United Nations Guiding Principles on Internal Displacement (1996), “Internally displaced persons (IDPs) are persons or a group of persons who have been forced or obliged to flee or to leave their homes of habitual residence, in particular as a result of or in order to avoid effects of armed conflict, situation of generalized violence, violations of human rights or natural or human-made disasters, and who have not crossed an internationally recognized State border”³

International Law⁴ places the responsibility of supporting the IDPs squarely on the Governments of the states

² Solai Nakuru – 16th May 2018 available at : <http://www.president.go.ke/2018/05/16/president-kenya-leads-nation-in-mourning-solai-dam-tragedy-victims/>

³ <https://www.rckkenya.org/internally-displaced-persons/>

⁴ Article 2 (5) (6)

where internally displaced persons are found that have the primary responsibility for their assistance and protection.

1.3.1.1 Constitutional Analysis of the Rights of Internally Displaced Persons.

The Kenyan Constitution provides for universal rights, which are also corroborated in the Great Lakes Protocol on the Protection and Assistance to Internally Displaced Persons, and the United Nations Guiding Principles on Internal Displacement. Article 2 (5) (6) of the CoK, 2010 also provides that ratified International Conventions are part of the Kenyan laws. This provision provides an access to Justice Avenue for the affected persons while underscoring the robust international legislative and policy framework. Article 10 of the CoK, 2010, speaks to the National Values that should guide service delivery in Kenya. These ideals should be considered in the various interventions that will be offered to the IDPS at Solai.

I. Access to Justice for the Solai Dam IDPs.

Article 19, 22, 27 and 28 of the CoK, 2010 should be read together in this instance, as they provide a myriad of rights for the Solai Dam IDPs. All these articles speak to the progressive legal safeguards under our robust Bill of Rights chapter. These articles also provide a framework that anchors social and economic rights. The Government must ensure that any legal actions undertaken by the affected IDPs should not be encumbered by arising suit charges or technicalities in their pursuit of justice⁵. A 3rd party ⁶can also go to go to court on behalf of affected IDPs to bring the fore any disregard or breach of any Constitutional rights⁷ that the IDPs are entitled to. These articles also speak to equality before the law⁸ Every Kenyan has a right to equal protection, IDPs should be equally enjoy the various protections under the law like any other citizen in Kenyan.

Courts are empowered to award appropriate relief, including compensation to IDPS. Article 28 of the CoK, 2010, further provides for the right to have the inherent dignity, the IDPs should be respected, supported and protected. No displaced person should be subjected to any assault either physically, psychologically or morally. Kenyan authorities must protect IDPs against rape, torture, degrading treatment, sexual exploitation and forced labor of children because of prevailing circumstances. IDPs should also be protected against murder, arbitrary incarcerations⁹ and enforced disappearances. The

⁵ Article 22 (3) of the CoK, 2010.

⁶ Article 22 (3) € of the CoK, 2010.

⁷ Article 258 of the CoK, 2010.

⁸ Article 27 of the CoK, 2010.

⁹ Article 49 of the CoK, 2010.

affected persons also have right to fair administrative action, to have their issues addressed efficiently, lawful, expeditious, reasonable and procedurally.¹⁰The Patel Dam Victims in Solai have a right to be informed and access any information that concerns their plight. The local administration should ensure that any intervention is well disseminated and understood¹¹

II. Fulfillment of Socio-Economic Rights

Right to adequate housing¹² is also entrenched in the Constitution, the IDPs have a right to accessible, affordable and adequate housing and to rational standards of sanitation.¹³ This right includes: secure tenure issues, protection against forced evictions, accessible social services¹⁴ and infrastructure, e.g. lighting, heating, energy for cooking, affordable housing costs. The habitats should be located near to other elementary services (schools or health care services¹⁵) and employment options. Distinct emphasis should be put on vulnerable groups, cultural identity consideration¹⁶ and adequate safety standards for the house.

The IDPs are also entitled to the highest attainable standard of health, which includes the right to health care services, including reproductive health care¹⁷. This also includes: access to essential medical services, functional health care service and non-denial of emergency treatment. Access to psychosocial support should also be considered after such a traumatizing experience. No IDP should be denied emergency medical treatment.¹⁸



¹⁰ Art 48 -50 of the CoK, 2010.

¹¹ Art 35 - 37 of the CoK, 2010

¹² Article 43 of the CoK, 2010

¹³ Article 43 (1) (b) of the CoK, 2010

¹⁴ Article 43 (1) (c) of the CoK, 2010

¹⁵ Article 43 (1) (a) Every person has the right--(a) to the highest attainable standard of health, which includes the right to health care services, including reproductive health care;

¹⁶ Article 11 of the CoK, 2010

¹⁷ Article 43 (1) (a) of the CoK, 2010

¹⁸ Article 43 (2) of the CoK, 2010

The Government is required to provide appropriate social security¹⁹ to persons who are unable to support themselves and their dependents, including authorities issuing all necessary documents such as: passports, ID-cards, birth- and marriage certificate to the IDPS when the need arises. Education should also be made affordable and very accessible for the displaced persons as they seek to get back on their feet. The Government should ensure that even IDPS access free primary and secondary education for their children just like any other child in normal circumstances. The aspect of equal education of women and girls and inclusion of (ethnic, linguistic, religious, and cultural) minorities should be accentuated.

According to the CoK, 2010, every person has the right to freely seek opportunities for employment and to participate in economic activities. This includes: access to jobs, right to minimum social security guarantees, fair salary, protection from exploitation and non-discrimination.²⁰ As the Solai Dam victims recover and try to pick up their lives again, the government should ensure that they are not discriminated against when seeking employment. The IDPs are also entitled to freedom of movement and residence²¹. They should be let to choose their residence and even move freely in or out of holding sites or settlements. They ought not to be forced to return to the danger zones and should be protected against forcible return or settlement in any place where their life, safety, liberty and health would be at danger.

III. *Right to family reunification.*

There are possibilities that the affected families might have lost contact with loved during the tragic melee when the Dam burst its banks. The CoK, 2010 recognizes the family unit as a vital component of the society which should be respected, protected and supported.²² To that extent, the government should pull out all the stops towards family reunification and put in place initiatives to protect them from separation. The Solai Dam IDPs also have a right to know the fate and whereabouts of their missing kith and Kin. They should also be allowed access to the grave sites of their departed loved ones.

¹⁹ Article 43 (1) (e) of the CoK ,2010

²⁰ Article 27 (3) of the CoK ,2010

²¹ Article 39 of the CoK ,2010

²² Article 45 (1); the family is the natural and fundamental unit of society and the necessary basis of social order, and shall enjoy the recognition and protection of the State.

IV. *Right to Property*

The Constitution of Kenya protects the right to own property (including private or public property), with only one exception of property; land which was illegally or irregularly acquired. Article 40, of the CoK, speaks to the rights to Property (Possession), every person has the right to acquire and to own property. In cases where property was destroyed by the unfortunate event, the Government should value and compensate the affected persons. This right includes the right to peaceful enjoyment of property, the right not to be deprived of property (land, houses) and possession. In the Solai dam tragedy, there were Land owners, whose Land was too degraded to a point where it cannot be productive any more. The Government should ensure that such persons are fully compensated. We also have a group of affected persons who had land but they did not have documented rights to their Land. The government through the initial profiling should address this issue comprehensively and in consultation of the affected persons. In Solai there were also people who had businesses, Houses, crops, livestock and other valuables that were destroyed when the displacement took place. The Government²³ in consultation with the affected families should seek for a durable solutions. In this instance durable solutions have to be “Processes to support a durable solutions should be inclusive and involve, on the basis of full equality, all parts of the displaced population, including women, children (in accordance with their age and level of maturity), persons with special needs and persons who are potentially marginalized”²⁴ A durable solution is achieved when internally displaced persons no longer have any specific assistance and protection needs that are linked to their displacement and can enjoy their human rights without discrimination on account of their displacement.²⁵

The residents heard an “explosion” at around 7:30 pm before water gushed out sweeping away hundreds of homes and property in the neighborhood. As a result, John lost his grandmother and cousin and could not trace his other cousin (Wanjiru’s) whereabouts. John further claimed that their agricultural land was swept away. The public amenities affected were: Solai Nyakenywa Primary and a Private Medical Dispensary. The students schooling at Jamhuri Primary School, Solai Nyakinywa Primary, Akuiris and Ruiru Secondary School could not go to schools since they were closed temporarily. It is reported that most of the resident of the village (energy) and especially residents working in the Patel farm informed him of the cracks and leakage in the dam and its potential to break its banks.

John, a resident at Solai and student at Akuisi Secondary School,

²³ According to the IDP act, the Government is the main duty bearer in instances of Internal Displacement

²⁴ IASC Framework on Durable Solutions For Internally Displaced Persons available at; <http://www.unhcr.org/50f94cd49.pdf>

²⁵ Ibid

1.3.1.2 *The Prevention, Protection and Assistance to Internally Displaced Persons and Affected Communities Act (No. 56 of 2012)*

The Prevention, Protection and Assistance to Internally Displaced Persons and Affected Communities Act (No. 56 of 2012) popularly known as the IDP Act, makes provisions for the protection and assistance to internally displaced persons and affected communities. This Act further gives effect to the Great Lakes Protocol on the Protection and Assistance to Internally Displaced Persons, and the United Nations Guiding Principles on Internal Displacement and for connected purposes.²⁶The Act ²⁷ provides that internal displacement can be attributed to a) Conflict including politically instigated violence and resource-based conflicts, b) Natural or man-made disasters (such as fire, floods, landslides and drought) and c) Violations of human rights causing arbitrary displacement (such as development induced displacement and reforestation)²⁸

It has been the norm for the Internally Displaced Persons (IDPs) to experience a myriad of challenges, which include ; deplorable living conditions , lost property & livelihoods, crowding in the initial holding sites, health, sanitation and environmental problems, lack of social amenities and absence of durable solutions. According to the Act²⁹, the Government should ensure that IDPs are supported by being given assistance and protection needs of IDPs especially communities with distinct reliance and attachment to their lands and the vulnerable who include; women, children, the disabled, the elderly and persons with special needs. In developing durable solutions, the act³⁰ underscores the essence of implementing a consensual arrangement, between the Government, affected persons and various CSOs.

The Act stipulates that the Government should have in place a preparedness and mitigation strategy for emergency disasters and ensuing internal displacement and mitigate its consequences. The Displaced should also protected and assisted in every way possible in a durable manner Government shall ensure assistance and protect needs of IDPs especially: i) communities with special dependency and attachment to their lands and ii) women, children, the disabled, the elderly and persons with . The Government shall protect people against arbitrary displacement. Arbitrary displacement is prohibited

²⁶ The Prevention, Protection and Assistance to Internally Displaced Persons and Affected Communities Act (No. 56 of 2012)

²⁷ Ibid

²⁸<https://www.rckkenya.org/internally-displaced-persons/>

²⁹ The Prevention, Protection and Assistance to Internally Displaced Persons and Affected Communities Act (No. 56 of 2012)

³⁰ Ibid

and is a punishable offence. Displacement and relocation for development must be lawful and justified by compelling and overriding public interests.³¹

In terms of managing IDP issues the Act stipulates that the National Government is responsible for directorial implementation of the Act. County Governments are also in charge for some aspects of the administrative implementation in accordance with their functions and powers in the Constitution. The Government, through the Cabinet Secretary may delegate duties and responsibilities to the National Consultative Coordination Committee³² (NCCC) on IDPs. The NCCC is a liaison between Government Departments, the United Nations, non-State actors, the Secretariat of the International Conference of the Great Lakes Region, and where appropriate the African Union (AU). The Committee should also determine and establish procedures and channels of engagement and cooperation. It is also tasked to coordinate prevention and preparedness efforts, protection and assistance to IDPs and host communities until a durable and sustainable solutions is found. In terms of reliable profiling of affected persons.

NCCC is also responsible with ensuring that the registration of all IDPs in order to maintain a national data-base. The Committee should also raise awareness, sensitize, facilitate and coordinate training and education on internal displacement and means of prevention, protection and assistance and also advise the Cabinet Secretary on the exercise of his or her powers and functions. The NCCC should ensure that the Solai Dam Victims are supported and protected in all ways possible. The law should be enforced and follow up mechanisms put in place to ensure that the IDPS are able to get back on their feet again.

1.3.2 ENVIRONMENTAL GOVERNANCE ISSUES.

“Environmental Governance is the means by which society determines and acts on goals and priorities related to the management of natural resources. This includes the rules, both formal and informal, that govern human behavior in decision-making processes as well as the decisions themselves. Appropriate legal frameworks on the global, regional, national and local level are a prerequisite for good environmental governance”³³ As Kenyans come to terms with the Solai Dam catastrophe, it’s not clear what actions were

³¹ The Prevention, Protection And Assistance To Internally Displaced Persons And Affected Communities Act, 2012 (IDP Act)

³² Independent body under Government Department responsible for IDP

³³ Environmental Law by International Union for Conservation of Nature (IUCN), Available at : <https://www.iucn.org/theme/environmental-law/our-work/governance-and-meas>

being taken to avert this disaster considering that the weakening of the dam's walls, was a process thus this tragedy raises pertinent questions like:

- a) Did the regulatory governmental agencies fail to enforce relevant laws, policies and regulations leading to an avertible tragedy?
- b) How were the decisions on how to manage water as a natural resource made before the tragedy, were such decisions made to enhance good environmental governance? Was there public participation?
- c) As much as NEMA started to issue environmental impact assessment certificates only after June 2003, when EMCA³⁴ was operationalized, What mechanisms have been put in place to ensure the reliability of the standards of dams built before then?
- d) How does NEMA ensure that there is adherence to the Law even when a proponent has not applied for a license, or after a license has been approved but the project has infirmities?
- e) "Nema does inspection only by invitation,"³⁵ Is there a reliable monitoring mechanism for regulating dam projects or other large scale projects for that matter?
- f) This tragedy has also exposed a gap in the law, which stipulates that NEMA³⁶ can scrutinize certain investments like, dams only after the investor has applied for a license. What happens if a proponent starts to operate without a license or surpasses the scope of the approved license, does NEMA have capacity to reign in such rogue proponents?



³⁴ Environmental Management and Coordination Act-EMCA (1999),

³⁵ NEMA's communications officer, Mr. Evans Nyabuto, said.

³⁶ National Environment management Authority

1.3.2.1 Constitutional safeguards in regards to Environmental Governance.

Every Kenyan has a right to fully enjoy all the legal safeguards stipulated in our Constitution, 2010. Article 42 of constitution states that, “Every person has the right to a clean and healthy environment, which includes the right – (a) to have the environment protected for the benefit of present and future generations through legislative and other measures, particularly those contemplated in Article 69; and (b) to have obligations relating to the environment fulfilled under Article 70. The IDPs in Solai have a right to live in a safe clean and an environment free from danger or harm caused by that tragedy. Was the Government through various regulatory agencies, unable to put in place reliable monitoring mechanisms?

1.3.2.2 Constitutional Enforcement of environmental rights

The right to seek legal redress is also guaranteed under s. 3(3) of the Environmental Management and Coordination Act. The State should ensure that communities play a key role in these efforts and thus, there is need to align these laws with the current Constitution³⁷ Article 70 (a, b, f, g, h) of the CoK, 2010, speaks to the enforcement of environmental rights it provides that the Government should ensure sustainable exploitation, utilization, management and conservation of the environment and natural resources. It should also ensure that there is equitable sharing of the accruing benefits from the environment and also to establish systems of environmental impact assessment, environmental audit and monitoring of the environment. Did the government adhere to this provision as the Solai Dam was disintegrating eventually collapsing and killing Kenyans?

Article 70 (g) further states that the Government should “eliminate processes and activities that are likely to endanger the environment” clearly this article was blatantly ignored resulting to untold misery. 70 (2)³⁸ stipulates that “Every person has a duty to cooperate with State organs and other persons to protect and conserve the environment and ensure ecologically sustainable development and use of natural resources”. The Government failed to protect her citizens causing death, displacement and destruction of property. Article 70 (1) also provides that if a person alleges that a right to a clean and healthy environment recognized and protected under Article 42 has been, is being or is likely to be, denied, violated, infringed or threatened, the person may apply to a court for

³⁷ Implementing Constitutional Provisions on Natural Resources and Environmental Management in Kenya by Dr. Kariuki Muigua

³⁸ CoK, 2010,

redress in addition to any other legal remedies that are available in respect to the same matter.³⁹

1.3.2.3 The Environmental Management and Coordination Act (EMCA), 1999

The Environmental Management and Coordination Act (EMCA), 1999, is the framework law on environmental management and conservation. EMCA establishes among others the following institutions; National Environment Management Authority, Public Complaints Committee, National Environment Tribunal, National Environment Action Plan Committees, and County Environment Committees.⁴⁰ In this instance, since it's clear that it was a process before the Dam burst its banks, what roles did the County Environment Committees undertake to avert this tragedy?

The National Environment Management Authority (NEMA) was established as the principal instrument of government charged with the implementation of all policies relating to the environment, and to exercise general supervision and coordination over all matters relating to the environment. In consultation with the lead agencies, NEMA is empowered to develop regulations, prescribe measures and standards and, issue guidelines for the management and conservation of natural resources and the environment. The Act provides for environmental protection through; a) Environmental impact assessment b) Environmental audit and monitoring and c) Environmental restoration orders, conservation orders, and easements⁴¹ Sections 68 and 69 EMCA require that all ongoing projects be subjected to annual environmental audits as further expounded in Regulation 35 (1) and (2) of Legal Notice 101 of June 2003. With such clear cut mandates, NEMA, should come out clearly and give guidance on the way forward in regards to the other Patel Dams and to other such investments country wide to avert such tragedies from ever taking place again. It would be pertinent to find out if Environmental audits exist which reflect the true status of the Solai Dam investment and if they can be made public as provided for in Article 35 of the CoK, 2010.

1.3.3 GOVERNANCE OF WATER RESOURCES

“Water governance refers to the political, social, economic and administrative systems in place that influence water’s use and management. Essentially, who gets what water,

³⁹ Implementing Constitutional Provisions on Natural Resources and Environmental Management in Kenya by Dr. Kariuki Muigua

⁴⁰ https://www.nema.go.ke/index.php?option=com_content&view=article&id=24&Itemid=163

⁴¹ https://www.nema.go.ke/index.php?option=com_content&view=article&id=24&Itemid=163

when and how, and who has the right to water and related services, and their benefits”⁴². With regard to the user water rights, the Water Act 2016 provides that every person has the right to access water resources, whose administration is the function of the national government as stipulated in the Fourth Schedule to the Constitution.⁴³ Section 63 thereof also provides that every person in Kenya has the right to clean and safe water in adequate quantities and to reasonable standards of sanitation which is further espoused in Article 43 of the Constitution. Were the residents of Solai allowed to enjoy their constitutional right in regard to access of clean water and be able to participate in the management of the Rivers that were illegally blocked so as to provide water for the Pater Dams?

The Water Act 2016 , provides for the management, conservation, use and control of water resources and for the acquisition and regulation of rights to use water; to provide for the regulation and management of water supply and sewerage services; to repeal the Water Act (Cap. 372) and certain provisions of the Local Government Act; and for related purposes .⁴⁴ The Water act, 2016 provides for the formation of Water Resource Users Associations (WRUA) around all water sources which includes rivers and lakes. The Act⁴⁵ stipulates that for a WRUA to be considered for a registration by the Authority, it should be legally registered, have a constitution conducive to collaborative management of the water resources of a particular resource and which promotes public participation, conflict mitigation, gender mainstreaming and environmental sustainability.

“Patel has approximately 8 dam in the area and the said dams have blocked the main river in the area. The specific dam that burst blocked the natural water course of River Robai as it did not have an outlet. As such, residents would not access water for their basic needs and opted to collect their water from other alternatives like neighboring dam. During my lifetime as a resident in energy Solai, I have never seen a river flowing”.

Witness account

According to Solai area residents, their right to access water was blatantly disregarded. They contend that they were never given an opportunity to have a say over the Water governance issues in their area. When the Dam was almost bursting its banks they claim that they even made reports to different duty bearers to no avail.

⁴² Water Governance Facility. Available at : <http://watergovernance.org/governance/what-is-water-governance/>

⁴³ S. 9, No.43 of 2016, Laws of Kenya.

⁴⁴ Water Act (Chapter 372)

⁴⁵ Ibid

Section 72 of the Act⁴⁶, gives WASREB the mandate of licensing Water Services Boards. The License is therefore a statutory requirement which gives the Water Services Boards (WSBs) the power to provide water services.⁴⁷ As tool for regulating the sector, the License sets out the conditions and targets of performance WSBs should to ensure quality in service provisions.⁴⁸⁴⁹ After issuing a license, WASREB should engage companies or other legal entities as agents to be known as Water Service Providers (WSPs) in accordance with the standards set by the Regulator in the Corporate Governance guideline⁵⁰

"The location of the dams still pose a great danger to the remaining population on the lower grounds. Experts have warned that one of the dams has questionable structural integrity and should be emptied to avert further disasters," Kinyanjui confirmed

Government drains two more dams at Patel's farm to avert possible tragedy (Standard Digital) available at: <https://www.standardmedia.co.ke/article/2001280017/government-drains-two-more-dams-at-patel-s-farm-to-avert-possible-tragedy>

“The strength of the dam might have been compromised after the water levels rose to the brim where the walls are thinnest. “Water, like other liquids, exerts a lot of lateral pressure wherever it is contained, so it will always be pushing outward. It is clear that the bearing capacity of soil making the earth walls was compromised before it all crumbled.” Earth dams, are built by excavating on the path of a river then piling lumps of soil to build the walls around a reservoir, which would arrest rain or run-off water. The blockage, also known as the bank, should be strengthened by compacting soil. In the Solai case, the Patel dams harvest from the nearby seasonal Solai River, whose volumes have sharply increased with the sustained rainfall. Since the walls are simply made by piling additional layers, the piles tend to be wider at the base and thinner as the dam grows taller. But when the dam fills up and water begins overflowing, the thin brim is quickly compromised to give way, spilling over at the lowest point. The entire weight of water is then exerted at this point to forcefully tear the wall all the way down. A properly built dam should have a spillway that is below the highest point of the wall, to evacuate excess water during flooding.

Felix Gatumba, a structural engineer working in Kitui,

⁴⁶ Ibid

⁴⁷ Ibid

⁴⁸ Ibid.

⁴⁹ <https://wasreb.go.ke/the-license/>

⁵⁰ Water Act, 2016.

1.3.4 RIGHT TO PARTICIPATION FOR THE SOLAI DAM VICTIMS

“In public participation, the ‘public’ refers to ‘people with an interest in or are likely be affected, by a decision made, either positively or negatively’. It should be noted that inclusion of everyone takes into consideration gender related issues”⁵¹. Participation is the process through which stakeholders’ input and share control over development initiatives, decisions and resources which affect them (Odhiambo and Taifa, Page 8 of 48 2009). Gardiner (1995) and Okello , Oenga and Chege (2008) further define it as a process whereby stakeholders influence policy formulation, alternative designs, investment choices and management decisions affecting their communities.

Public participation creates a balance between governing for the people, and governing by the people. The concept emphasizes on the need to enhance further inclusion and meaningful participation of citizenry in the process of decision making within governance structures.⁵² The imperative for citizen participation is also drawn from their

“The residents started complaining of the cracks and leakage in 2016 but the owner of the farm did not take them seriously. Instead, he resulted to mounting heaps of soil whenever the water levels would rise and the cracks deepened. He would order the employees to fill up Lorries with soil and heap the soil on walls that had cracks on them. The tragedy that has occurred was foreseeable and could have been arrested had Patel listened to the residents”.

Witness account

statutory duty to pay taxes for service delivery⁵³. Whilst there is a strong impetus towards conducting public participation, there is a gap between the provisions in the legal framework and actual practice on the ground. There are also different views of what constitutes effective participation.⁵⁴

As the government seeks to engage the affected persons in Solai, Article 70 (d) which provides that the Government

should “encourage public participation in the management, protection and conservation of the environment;” should be considered. There is need to increase allocation of financial resources to facilitate robust public engagements forums, consequently scaling awareness programmes and increase number of stakeholders sensitized.

⁵¹ The place of public participation in Kenya by Wanga Obora available at; https://www.academia.edu/5171151/THE_PLACE_OF_PUBLIC_PARTICIPATION_IN_KENYA

⁵² Public participation: Kenya’s best weapon against graft and poor governance available at : https://tikenya.org/wp-content/uploads/2017/08/2013_Adili135_Participation.pdf

⁵³ Policy proposals on citizen participation in devolved governance in Kenya available at : https://www.tisa.or.ke/images/uploads/Policy_Recommendations_on_Citizen_Participation-TISA_2011.pdf

⁵⁴ Public Participation Key to Kenya’s Devolution, available at; <http://www.worldbank.org/en/news/feature/2015/04/30/public-participation-central-to-kenyas-ambitious-devolution>.

Henceforth all actions being initiated towards a durable solutions should ensure that the affected families are aware and are in agreement. Public Participation is espoused in the CoK, 2010. "Article 1 emphasizes that all sovereign power belongs to the people while Article 10 of the Constitution of Kenya, 2010 sets out democracy and participation of the people and inclusiveness as some of the national values and principles of governance in Kenya. "⁵⁵In line with promoting Citizen Participation, there is need to ensure that there is effective communication mechanisms. Article 35 speaks to Access to information. It provides that "Every citizen has the right of access to: (a) information held by the State; and (b) information held by another person and required for the exercise or protection of any right or fundamental freedom. Article 35 (2) further provides that 'Every person has the right to the correction or deletion of untrue or misleading information that affects the person. 35 (3) The State shall publish and publicize any important information affecting the nation.

"The public should be invested with decision making power and influence, such as having citizen representatives on boards that oversee local public service delivery and the citizens may participate through local associations, social movements and campaigns."⁵⁶ The Solai Dam IDPs should be empowered enough to be able to engage with decisions that affect them.



The above figure represents an ideal public participation process that would ensure that that all stakeholders are heard and effectively engaged. Image credits: International Institute for Legislative Affairs⁵⁷

⁵⁵ Towards Meaningful Public Participation in Natural Resource Management in Kenya by Kariuki Muigua.

Available at :

<http://www.kmco.co.ke/attachments/article/126/TOWARDS%20MEANINGFUL%20PUBLIC%20PARTICIPATION%20IN%20NATURAL%20RESOURCE%20MANAGEMENT%20IN%20KENYA.pdf>

⁵⁶ Ibid

⁵⁷ <https://ilakenya.org/what-about-public-participation-where-are-we/>

RECOMMENDATIONS

Domesticated National, Regional and International instruments by the IDPs Act, 2012, stipulate that the “Government shall bear the primary duty and responsibility for...preventing and protecting her citizens from internal displacement, preparing for it and mitigating its consequences”.⁵⁸ Further, all public bodies of government are obligated to assist internally displaced persons throughout the Republic and to create conditions that are conducive to and provide durable and sustainable solutions for internally displaced persons.

This part of the Report summarizes the issues under consideration and the succinct recommendations.

1. Effective Environmental Governance mechanisms should be put in place.

While the Government has the primary role of formulating and enforcing of governance mechanisms, there is need to include the active involvement of other non-state actors, access to information, accountability and transparency are also crucial aspects for improved environmental management. The important governance role of the public and other actors should be appreciated. Protection of the environment should be made a priority in the Solai area considering that there are other dams who non one is commenting about their conditions.

Recommendations.

- a) Environmental management should be mainstreamed into development plans like the CIDPs⁵⁹ and funds allocated for the same.
- b) There should effective coordination, integration and coherence in the Environment Governance sector. There should a deliberate efforts to improve and promote coordinated and all-inclusive approaches to effectively integrate policy and institutional areas and a multitude of stakeholders.
- c) Enhanced Community Participation around environmental issues - All members of the community should be given a space to have a voice, or through appropriate institutions representing their interests, in decision-making and implementation of policies and programs that affect them. Such broad involvement should be built on freedom of association and speech.
- d) Governance agencies should be supported in every way to undertake their mandates from National to County level. Capacity and competency gaps amongst the staff at

⁵⁸ Section 4 of the IDPs Act

⁵⁹ County Integrated Development Plans

the relevant Government agencies should be addressed effectively so as to ensure that such authorities undertake their mandates well.

- e) The law requires that during the EIA process, a proponent should consult with NEMA and the Community at large to seek the views of persons who may be affected by the through posters, newspapers and radio. The proponent is also required to hold public meetings with the affected parties and communities to incorporate their views. NEMA⁶⁰ should consistently ensure that participatory mechanisms are fully undertaken in their inspectorate function. For instance in the cases of undertaking EIAs⁶¹ since they are part of the project development process and are usually done at the initial stages of the project development. EIAs It is a decision making tool and should guide whether a project should be implemented, abandoned or modified prior to implementation. Additionally, NEMA should ensure that all key environmental assessment documents and monthly monitoring reports are freely available to the public.⁶²
- f) There has been questions on the validity of self-undertaken EIAs, are there possibilities that since the proponent pays the professional commissioned to do it, “ the “ He who pays the piper , determines the tune ” situation arise, consequently having an EIA report that pleases the Proponent but does not reflect facts on the ground. NEMA should moot a mechanism that ensures that self-audits or commissioned audits are reliable and reflect the true position of a project before issuing licenses.
- g) In terms of Water Governance, WASREB should ensure that the various local level public engagement mechanisms should be invigorated and made effective.

2. Protection and assistance to IDPs

Adherence to relevant legislative frameworks when addressing the Solai Dam Tragedy. These legislative frameworks include: the United Nations Guiding Principles on Internal Displacement; the Great Lakes Protocol on Protection and Assistance to Internally Displaced Persons, both of which are domesticated by the IDPs Act, the National IDPs Policy, of course the Constitution of Kenya, 2010.

⁶⁰ The National Environment Management Authority (NEMA) is established under the Environmental Management and Coordination Act (EMCA) No. 8 of 1999, as the principal instrument of government in the implementation of all policies relating to the environment.

⁶¹ Environmental Impact Assessment (EIA) is a critical examination of the effects of a project on the environment. An EIA identifies both negative and positive impacts of any development activity or project, how it affects people, their property and the environment. EIA also identifies measures to mitigate the negative impacts, while maximizing on the positive ones. EIA is basically a preventive process. It seeks to minimize adverse impacts on the environment and reduces risks.

⁶² Article 35 of the CoK, 2010.

The United Nations Guiding Principles on Internal Displacement which address the specific needs of IDPs worldwide, identifies rights and guarantee for the protection of people in all phases of displacement while the Great Lakes Protocol on Protection and Assistance to Internally Displaced Persons provides for a comprehensive legal framework which ensures legal protection by Member States on the safety and needs of IDPs.

The IDPs Act has 'domesticated' these two international instruments. The Constitution of Kenya is clear on anti-discrimination, and guarantees rights and freedoms including equality of all persons before the law. It would be sad if the Government as the major duty bearer and custodian of the Constitution, acts in contravention of the bill of rights and other provisions of the Constitution. The government should also spearhead sensitization and interpretation of the IDPs Act, 2012, especially at local level while hastening the decentralization of the National Consultative Coordination Committee (NCCC) to bring assistance closer to the people.

According to the IDPs Act, the National Government should put into place measures for assistance and protection needs of IDPs with particular regard to displaced communities with a special dependency on and attachment to their lands. Further, and perhaps more urgent, is the protection of the needs of women, children, persons with disabilities, and the elderly and other persons with special needs. Additionally in formulating programmes for assistance and protection under this section, the Act provides that the government should ensure that consultation is made with the IDPs.

Recommendations

a) IDPs Profiling

The government through the local leadership should ensure proper profiling of IDPs is done to ensure that only the genuine affected persons are supported and protected during this trying time. The IDPs Act provides that the Cabinet Secretary may, upon recommendation by the NCCC prescribe the process and criteria for vetting of internally displaced persons to establish their authenticity; and, provide for the prior administrative steps in the vetting of the IDPs. The government should come up with a means to authenticate the genuine IDPs so as not to leave them out in the compensation process. The relevant ministries should, in collaboration with the County Governments, religious organizations, and other non-State actors, be able to consolidate their lists of IDPs or altogether so as to ensure that it's comprehensive.

b) Durable Solutions

As articulated in principle 28 of the Guiding Principles on Internal Displacement, IDPs have a right to a durable solution and often need assistance in their efforts. Guiding Principles 28-30 set out the rights of IDPs to durable solutions, the responsibilities of national authorities, and the role of humanitarian and development actors to assist durable solutions. The government owes a duty to its citizens to ensure that they have a decent life. Through provision of adequate standards of living the government will ensure that IDPs have access to food, water proper sanitation and adequate shelter. For durable solutions to have merit the following factors have to be considered while developing sustainable interventions;⁶³

- a) Protection and security of the affected persons.
- (b) Freedom of movement,
- (c) Satisfactory standard of living without discrimination
- (d) Access to work and means of support
- (e) Restoration of housing, land and property
- (f) Access to documentation like IDs, Title deeds and academic certificates.
- (g) Family reunion and establishment of the location of any missing kin.
- (h) Equal involvement in community affairs; and
- (i) Access to justice without discrimination

c) Compensation within Stipulated Frameworks

Further, within the IDPs Act, when the government is developing and implementing interventions that would offer solutions to displacement problems, then the IDPs should be considered as key stakeholders and hence should participate in the mooting and implementation of these interventions. Previously, the government has been giving *ex-gratia* payments, purchasing land or even giving out building materials to the IDPs without any consultation with the affected persons. As a way forward, the government should strictly adhere to the provision of the requisite laws.

Clear profiling lists should be used as the basis for compensation consistent with facts and on the ground. As a sign of good faith, accountability and transparency the Government should release comprehensive profiling lists that it intends to use during the disbursing of *ex gratia* payments or in the carrying out compensation exercises for the Solai Dam Victims. These lists would assist the IDPs to vet themselves and also give a

The IDP Act, 2012.

clear perspective on the extent and scope of work done so far towards assisting and protecting the IDPs.

d) Resettlement of the Solai Dam IDPs.

According to the Constitution, the Bill of Rights is a Chapter of the Constitution used as a guide for social, economic and cultural policies in the country. In particular, Section 4 of the IDPs Act, provides for respect of their rights and freedoms. When responding to a situation of internal displacement, the Government and any other organization, body or individual shall respect the rights and freedoms of IDPs as it guaranteed in the Bill of Rights of the Constitution. Further reference can also be made to the 1998 United Nations Guiding Principles on Internal Displacement which address the specific needs of IDPs worldwide, they identify rights and guarantee for the protection of people in all phases of displacement. Additionally the Great Lakes Protocol on Protection and Assistance to Internally Displaced Persons ensures legal protection by Member States of the safety and needs of IDPs.

The communication channels or mechanisms between the National Government and the respective County Government of Nakuru should be clear and transparent to curtail information distortion and misrepresentation at local level. The effect of poor communication provides room for mischief and distrust on an ongoing matter.

Therefore:

- a) There should be improved communication mechanisms between the National and the County Governments to ease the addressing of Solai Victims IDP issues.
- b) The National Government, working together with County Governments, should speed up the resettlement of the Solai Dam IDPs to ensure they get proper housing. Also through resettlement, the affected persons will be able to have better lives and a sustainable means of livelihood instead of relying on food rations from the government and well-wishers.
- c) Additionally, the National Government should enhance coordination between the respective Cabinet Secretaries responsible for healthcare, medical services, water, sanitation, housing and devolution to ensure provision of these services (read, human rights) to the affected persons.
- d) The NCCC⁶⁴ decentralizes its services and expertise to Counties so as to ensure faster resettlement of the Solai Dam IDPs.

⁶⁴ National Consultation, Coordinating Committee established by IDP Act, 2012.

3. Access to Livelihood

The IDPs Act provides for the restructuring of the current existing national Humanitarian Fund. The Fund is to be used for meeting the capital and recurrent expenditure relating to the protection and assistance to IDPs and the provision of a durable solution to them as provided for in Sections 9 and 10 of the IDPs Act. Part of this assistance include: resettling IDPs in alternative settlement sites; replacement of their basic household effects; facilitating them to re-start their basic livelihoods; and, the reconstruction of destroyed basic housing and rehabilitation of community utilities and institutions.

Recommendation

IDPs who were previously self-reliant have lost their means of livelihood, property and loved ones. The government should have clear durable solutions to offer the Solai Dam IDPs and consider availing adequate credit facilities and start-up funds for those who would like to restart their businesses, which is in accordance with the existing Humanitarian Fund. The government should also strive to foster independence among the IDPs through enabling access to livelihood and hence eliminate their over-reliance on aid.

4. Education

The IDPs Act provides that the NCCC, should liaise with the government's department responsible for education, to integrate instruction on the causes, impact and consequences of internal displacement as well as on means of prevention, protection and assistance to IDPs in subjects taught in public and private schools.⁶⁵ This teaching stretches from early childhood education development centers to primary, secondary, and tertiary levels, including informal, non-formal and indigenous learning systems. The IDPs' children should not be discriminated upon when it comes to awarding of bursaries and other decentralized funds in favor of the locals. The lack of education and subsequently unemployment will result in to most IDPs youth succumbing to social vices, such as crime, drug abuse, violence, recruitment into illegal gangs and militias, prostitution and child labor which therefore, to an extent, negatively impact on the local and neighboring communities. Thus, it is only wise that IDPs are accorded a chance at education.

Recommendations

- a) The government through the Ministry of Education should ensure that there is ease of access to education by putting in place interventions to ensure IDPs' pupils get education by offsetting charges like purchase of school uniform and books. The

government should also ensure that the local administration awards bursaries and decentralized funds equitably and in a non-discriminatory manner. In the awarding of bursaries, IDPs should be given priority to access the funds as they are in more dire need.

- b) The government should also address the access to education, build better infrastructure in the relevant schools and employ more staff to deal with overcrowding in the few schools that are available.

Other Recommendations

5. Healthcare

The government through the Ministry of Health should strive to make healthcare affordable and accessible to IDPs. The IDPs should be offered subsidized medical care as most IDPs can barely afford even the nominal cost of healthcare in their current situation considering the tragedy they have gone through.

6. Psychosocial Support

The government and other non-State actors should provide the victims with psychosocial support for them to be able to deal with the trauma from their ordeals and move on with their lives. Some of them lost loved and have even become guardians to children orphaned by the tragedy, psychosocial support will go a long way in assisting them.

7. Access to Information

The Constitution guarantees the right to access of information, which is an entitlement to all citizens. IDPs should be given their right to access information especially information regarding them like the list of IDPs to be able to know who is in the list, who has been paid and who has not. This will foster transparency and accountability; indeed, this will be in accordance with the values and principles of governance as set out in law.

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