9 The emergence of environmental courts and tribunals in Africa: Kenya's environment and land court as a case study

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1 Introduction

The delivery of justice leans on access to justice, which depends on the institutional infrastructure, procedure, and statutory legislative framework for effective implementation. Principle 9 of the Principles of Environmental Justice affirms the right of victims of environmental injustice to receive full compensation and reparations for damages and quality healthcare. However, protecting the rights recognised in the Principles of Environmental Justice requires a sound governance system that institutionalises a robust legal mechanism for enforcing the environmental rule of law. Ibrahim Thiaw, Deputy Executive Director of the United Nations Environmental Programme, said 'sound governance and enforcement of the environmental rule of law are crucial to delivering the 2030 Agenda for Sustainable Development and the Paris Agreement'.[1] His statement reiterates the need for establishing specialised legal and judicial infrastructure for the seamless access and effective delivery of environmental justice. Not many countries have established special judicial infrastructure for the environment. The development of environmental law within the international and national spheres has played a vital role in the emergence of Environmental Courts and Tribunals (ECT). The recent momentum behind the global increase of ECT seems to have occurred based on the emergence of Principle 10 of the 1992 Rio Declaration, which recognises the importance of environmental justice as well as environmental democracy and governance in the achievement of sustainable development, which cannot be attained through the regular courts. The impact of ECT in guaranteeing access to justice on environmental matters cannot be overemphasised. It is interesting to discover that the continent of Africa has also contributed robustly to this development through the Environmental and Land Court in Kenya, which is currently the most structured and developed ECT in Africa.

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1 G Pring & C Pring *Environmental courts & tribunals: A guide for policymakers* (2016).

The impact of climate change, global warming, and biodiversity loss on the environment is evident and constitutes a massive threat to present and future generations.[2] These environmental cataclysts were traced to several human activities. The awareness of the impact of these human activities on the environment orchestrated the enactment of several environmental laws and legislation across the globe. Enforcing these environmental laws and legislation became a quagmire in several countries, particularly the developing ones. Several civil societies, NGOs, and individuals seeking to protect the environment and victims of environmental pollution and degradation had to go through court.[3] Unfortunately, the judicial system in operation in several countries has several challenges in handling these environmental matters. Some of these challenges are understanding environmental technicalities, the strict rule of evidence, long delays, case backlogs, poor case management, narrow definitions of plaintiff standing (*locus standi*), high cost and economic risks of litigation, inconsistent decisions, intimidation, and corruption, to mention but a few.

In some cases, litigants have even instituted suits outside their countries due to these factors.[4] In tackling these difficulties, several countries established environmental courts and tribunals (ECT) to guarantee environmental democracy, access to justice on environmental matters, and proper enforcement of environmental laws and legislation.[5] According to Brian Preston,

> the judiciary has a role to play in interpreting, explaining, and enforcing laws and regulations. Increasingly, it is recognised that a court with special expertise in environmental matters is best placed to achieve sustainable development.[6]

Specialisation is not seen as an end but rather a means to an end. It is envisaged that a specialist court could more ably deliver consistency in decision-making, decrease delays (through its understanding of the characteristics of environmental disputes), and facilitate the development

2 See the Intergovernmental Panel on Climate Change Report 'Climate change 2022: Impacts, adaptation and vulnerability' produced by the Working Group II as contribution to the IPCC 6th Assessment Report https://www.ipcc.ch/report/ar6/wg2/ (assessed 4 March 23).

3 C Warnock 'Reconceptualising specialist environment courts and tribunals' (2017) 37 *Legal Studies* 391.

4 *Okpabi v Royal Dutch Shell Plc* [2018] EWCA Civ 191.

5 R Guidone 'Environmental courts and tribunals: An introduction to national experiences, lessons learned and good practice examples special courts' Forever Sabah, Legal Innovation Working Paper 1 (2016).

6 B Preston 'Benefits of judicial specialisation in environmental law: The Land and Environment Court of New South Wales as a case study' (2012) 29 *Pace Environmental Law Review* 398.

of environmental laws, policies, and principles.[7] Furthermore, according to Elizabeth Fisher, an ECT is needed because it offers a practical solution to the lingering problems resulting from the emergence of environmental law, which leads to a wide array of complex legal disputes.[8]

The first ECT on record was the ECT in New South Wales, Australia, and New Zealand, which came into the limelight in the early 1980s.[9] Since the emergence of the ECT, its rapid spread across the globe has been one of the most dramatic developments in modern environmental law.[10] Several ECTs emerged at the start of the millennium; however, today, ECT is springing out from every nook and cranny of the world.[11] There is ECT in several global legal systems, from developed to developing countries.[12] This development is indisputably due to several apparent reasons, such as:

(a) the development of environmental laws and principles both at the international and national levels;
(b) the linkage between the environment, human rights, and the right to a healthy environment;
(c) the attendant concerns about climate change and how to mitigate its effects on man;
(d) the public opinion and outcry on the reformation and development of the judicial system to accommodate environmental matters.[13]

Despite this emerging trend at the national and sub-national levels, it must be noted that there is no international ECT. This article will focus on the ECT in Kenya, its legal frameworks, contributions, and challenges.

7 *Okpabi* (n 4) 403.

8 E Fisher et al *Environmental law: Text, cases & materials* (2013) 396.

9 B Preston 'Operating an environment court: The experience of the Land and Environment Court of New South Wales' (2008).

10 Robinson (n 2) 363.

11 M Barker 'Imagining the future: Planning and environment courts and tribunals in the 21st century' Paper presented at the Australasian Conference of Planning and Environment Courts and Tribunals, Quay West Resort, Bunker Bay http://www.fedcourt.gov.au/digital-law-library/judges-speeches/justice-barker/barker-j-20120830 (accessed 15 April 2021).

12 Preston (n 6) 396-440; U Bjällås 'Experiences of Sweden's environmental courts' (2010) 3 *Journal of Court Innovation* 177; M Wright 'The Vermont Environmental Court' (2010) 3 *Journal of Court Innovation* 201.

13 Preston (n 6) 396-440.

2 Role of ECT in assuring access to justice on environmental matters

Since the emergence of the ECT, there has been an enormous improvement in how environmental cases are resolved.[14] ECT provides a forum where adjudicators with a background in environmental law and some knowledge of essential scientific principles are prepared to hear those kinds of cases. When ECT hears environmental matters and cases, it is believed that such issues and cases are efficiently managed, resulting in quicker decisions than when mismatched with a plethora of cases in the general court. Two primary drivers exist for this reasoning: the docket in an ECT is not filled with various other cases that increase the waiting times, and the expert decision-makers allow the cases to be heard more quickly, dealing with them more efficiently.[15] Furthermore, the courts are adequately equipped to deal with environmental issues, and, as such, less time is spent educating them on the complex evidence presented in proceedings.[16] Unlike a general court, where judges may not be environmentally knowledgeable and therefore may not appreciate environmental matters and their urgencies, ECT judges and decision-makers are expected to have an expansive knowledge of the environment. Sequel to this, they are aware of which environmental matters to prioritise and decide on hearing the urgent ones before hearing others.

To guarantee access to justice on environmental matters, which is the primary rationale for establishing ECT, the Court adopts flexible procedural and evidentiary rules due to the peculiarity of environmental matters.[17] Flexible procedural and evidentiary rules, such as broadened *locus standi*, alternative dispute resolution (ADR), expert witness, issue integration, remedy integration, and a plethora of public-interest initiatives, empower the Court to solve problems and allow a multi-faceted conflict resolution.[18] The cost of prosecuting a case, delays, and *locus standi* are three main barriers to accessing justice on environmental matters that have discouraged most litigants from approaching the Court. ECT helps mitigate the costs and expenses incurred by litigants due to several ECT interventions, subsidies, and efficiencies, such as waivers of

14 Barker (n 11).

15 R Macrory *Regulation, enforcement and governance in Environmental law* 2nd ed (2014) 13-16.

16 G Pring & C Pring 'Environmental courts and tribunals' in L Paddock et al (eds) *Decision making in environmental law* (2016).

17 Preston (n 6) 386.

18 G Walker *Environmental justice: Concepts, evidence and politics* (2012) 256.

fees and damages.[19] Also, ECT tends to emphasise *locus standi* instead of sustainability. Therefore, the public, environmental NGOs, and concerned individuals can institute actions before the ECT and involve public interest litigation and class actions.[20] According to Prings and Prings, more than half of the existing ECTs use one form of ADR.[21] The use of ADR by ECTs has been one reason for their efficiency and has helped most ECTs reduce costs by settling and eliminating lengthy litigation.[22] Due to the flexibility of the ECT, judges and decision-makers are allowed to decide matters and apply new principles of international environmental law and natural justice rather than the existing laws. ECT can also be empowered to investigate environmental issues on its initiative even when they have not been brought before it. Before introducing these initiatives, the public is encouraged to participate in environmental disputes, thereby allowing for a 'community-based problem-solving mechanism', reinforcing one of the critical pillars of accessing environmental justice.

In most places where ECT is established, public confidence in environmental litigation has been discovered to be greater than where the general courts handle environmental matters.[23] It must be noted that having a special court for the environment does not, by itself, guarantee or assure that any of these initiatives will be prevalent or occur automatically. However, those creating such ECT should endeavour to include these initiatives to enable such ECT not to be conventional and typical of traditional judicial institutions.[24]

3 ECT in Africa

About 46 countries in Africa[25] have incorporated environmental protection and rights provisions into their constitutions, which puts Africa ahead of other continents in the number of countries that have included such

19 D Amirante 'Environmental courts in comparative perspective: Preliminary reflections on the National Green Tribunal of India' (2012) 29 *Pace Environmental Law Review* 440.

20 DC Smith 'Environmental courts and tribunals: Changing environmental and natural resources law around the globe' (2018) 36 *Journal of Energy & Natural Resources Law* 137.

21 Pring & Pring (n 16) 11.

22 Guidone (n 5) 31.

23 Pring & Pring (n 16).

24 Pring & Pring (n 1) 15.

25 Algeria, Angola, Benin, Burkina Faso, Burundi, Cameroon, Cape Verde, Central African Republic, Chad, Comoros, Cote d'Ivoire, Congo (Brazzaville), Congo (Democratic Republic), Egypt, Equatorial Guinea, Eritrea, Ethiopia, Gabon, Gambia, Ghana, Guinea, Kenya, Lesotho, Madagascar, Malawi, Mali, Mauritania, Morocco, Mozambique, Namibia, Niger, Nigeria, Rwanda, Sao Tome and Principe, Senegal, Seychelles, Somalia, South Africa, South Sudan, Sudan, Swaziland, Tanzania, Togo, Uganda, Zambia and Zimbabwe.

provisions. Several African countries have also enacted legislation, laws, and ratified treaties on the environment. However, implementing them has been challenging due to a lack of political will, human resources, and a well-structured judicial system. General courts hear most of the environmental matters on the continent,[26] and most of these cases were eventually struck out for lack of jurisdiction.[27]

In tackling these difficulties, several countries have employed different approaches[28] ranging from environmental education, training of judicial officers, judicial restructuring, relaxing the law of evidence, establishing ECT, and a host of others. In Zambia, the doctrine of *locus standi* in environmental cases has been relaxed. A court may not award adverse costs unless it finds that the litigation was not in the public interest.[29] South Africa has expanded the *locus standi* on environmental matters beyond the *locus standi* in other areas of the law. Also, the disincentive of facing adverse costs, should the litigation be unsuccessful, has been ameliorated.[30] Several African countries, such as Ghana,[31] South Africa, Zambia,[32] and Kenya have also established organisations that fight for the interests of citizens whose environmental rights have been or may have been violated.[33] Others, such as Egypt,[34] Gambia,[35] Mauritius,[36] Nigeria,[37]

26 Amirante (n 19).

27 *Centre for Oil Pollution Watch v NNPC* (2013) 15 NWLR (pt 1378) at 556.

28 Ghana, Malawi, Sierra Leone, Kenya, Tanzania and Zambia.

29 List of Environmental Adjudicatory Bodies and Legal Authorities https://law.pace.edu/sites/default/files/IJIEA/primary_sources/List_of_Resources_from_Various_Environmental_Courts_and_Tribunals.pdf (accessed 13 June 2021).

30 E Couzens *Enforcement of environmental law: Good practices from Africa, Central Asia, ASEAN Countries and China* (2014) 22 https://wedocs.unep.org/bitstream/handle/20.500.11822/9968/enforcement-environmental-laws.pdf?sequence=1&isAllowed=y (accessed 13 June 2021).

31 Ghana Environmental Protection Agency.

32 Zambian Environmental Management Authority.

33 Couzens (n 30).

34 Egypt has Environmental Courts called El Mahkamt El Beaeyah established by Environment Act of Egypt, 1994 (amended by Law 9 of 2009). The Environmental Courts have jurisdiction over civil and criminal violations of environmental laws. They were created to adjudicate crimes causing the pollution of the Nile River. The environmental court system is a three-tiered system, with first instance, intermediate, and final appellate courts.

35 Gambia has an Environmental Court which specialises in offences against the anti-littering regulations.

36 Mauritius has an environmental Court called Environmental and Land Use Appeal Tribunal. The tribunal was established by section 3 of the Environmental and Land Use Appeal Tribunal Act 2012.

37 There are about 12 environmental courts in the 36 states of Nigeria. These courts are established to handle matters regarding sanitation and people who failed to clean their environment; they are an inferior Court. There is no environmental court at the national level. The most recent environmental court established is the Lagos

Tanzania,[38] Liberia,[39] Kenya, Malawi,[40] and South Africa, have also taken bold steps to guarantee access to justice on environmental matters for their citizens by creating environmental courts or tribunals.[41] It must be noted that Kenya has the most developed, structured, and documented ECT in Africa.

4 Environmental courts and tribunals in Kenya

Kenya is rich in natural resources, offering an ambitious development scope. Unfortunately, Kenya's rich resource capacity has been over-extracted in the past, leaving a vast gap in law-making, policymaking, and civil dialogue. However, with the onset of the new Constitution in 2010, things began to change for the better.[42] Recently, Kenya has established one of the most reformed and developed legal systems in Africa. The enactment of the right to a healthy environment in the Kenyan Constitution (Constitution) attests to this fact. The environmental revolution in Kenya started in 1999 when the Kenyan parliament passed the Environmental Management and Coordination Act (EMCA). The EMCA was promulgated to provide an overall legislative framework for environmental matters. Section 148 of the EMCA states that:

> any written law, in force immediately before the coming into force of the Act, relating to the management of the environment shall have effect, subject to the modification as may be necessary to give effect to this Act and where

State Environmental Court, and it was established by the Lagos State Environmental Management and Protection Law 2017. The court also operates as a mobile court.

38 Tanzania established an Environmental Appeals Tribunal pursuant to section 204 of the Environmental Management Act, 2004. The tribunal was established to ensure the compliance of the provision of the Act as well as the decision of the Minister on Environmental Impact Access.

39 In 2002, Liberia created a two-tiered environmental court, namely the Environmental Administrative Court and the Environmental Court of Appeal via an Act creating the Environment Protection Agency of the Republic of Liberia 2002. However, little information can be found on the activities of the court and decisions taken by the court.

40 Malawi established an Environmental Appeals Tribunal which was created to handle EIA appeals, which was established by section 69 of the Environmental Management Act of 1996.

41 South Africa established two environmental courts, the Hermanus Specialised Environmental Court (2003-2005) and a District Environmental Court in Port Elizabeth (2004-2009). The environmental courts were opened to combat abalone poaching and came into existence after the government formed a policy based on the Territorial User Rights Fishery (TURF) policy. The two specialised courts are no longer in existence.

42 M Taka & JA Northey 'Civil society and spaces for natural resource governance in Kenya' (2020) 41 *Third World Quarterly* 1740.

> the provisions of any such law conflict with any provisions of this Act, the provisions of this Act shall prevail.[43]

In addition, sections 31 and 125 of the EMCA created two institutions: the Public Complaints Committee (PCC) and the National Environment Tribunal (NET). The government established these institutions to complement the courts in resolving environmental issues and disputes.

In 2010, the Kenyan government amended its Constitution, and due to the amendment, the courts, PCC, and NET ceased to handle matters relating to the environment due to the creation of the Environment and Land Court (ELC) under Article 162(2)(b) of the amended Constitution. Article 162(2)(b) of the Constitution directed the parliament to establish a court that is empowered to preside over issues concerning 'the environment and the use and occupation of and title to land'. The Constitution stated that the ELC should be a superior court of record with the same status as the High Court. Sequel to establishing the ELC by the Constitution, the Environment and Land Court Act (ELCA)[44] was enacted on August 30, 2011. The ELCA was enacted to provide the jurisdiction, structure, and operations of the ELC. Section 13 of the ELCA elaborates on the jurisdictional issue by defining the courts' intervention areas. Section 13(1) of the ELCA gives the Court original and appellate jurisdiction. Section 13(2) of the ELCA further states that the Court has jurisdiction to hear and determine disputes relating to environmental planning and protection, trade, climate issues, land use planning, title, tenure, boundaries, rates, rents, valuations, mining, minerals, and other natural resources, compulsory acquisition of land, land administration and management, public, private and community land and contracts, choses in action or other instruments granting any enforceable interests in land, and any other dispute relating to the environment and land.

According to Section 18 of the ELCA, the ELC is guided by the general principles of environmental management, including sustainable development,[45] public participation,[46] international cooperation, intra-generational equity, the polluter pays principle;[47] the precautionary

43 Section 148 of Environmental Management and Co-ordination Act, (EMCA), Cap 387 Laws of Kenya.

44 Environment and Land Court Act, Cap 12A, Laws of Kenya, 2012; Act 19 of 2011.

45 *Republic v Board of Directors Lake Victoria South Water Services Board; Ex parte Orot* [2015] eKLR, Miscellaneous Civil Application 8 of 2015; *Milimani Splendor Management Limited v National Environment Management Authority* [2019] eKLR, ELC Petition 61 of 2018.

46 *Kibicho v County Government of Nakuru* [2016] eKLR, ELC Petition 13 of 2016.

47 *Kenya Association of Manufacturers v Cabinet Secretary, Ministry of Environment and Natural Resources* [2018] eKLR, ELC Petition 32 of 2017.

principle;[48] and the socio-cultural principles traditionally applied by communities to manage the environment in Kenya. Also, the courts must apply the constitutional principles governing land policy, national values, principles of governance, principles of public service, and principles of judicial authority. According to Section 20 of the ELCA, the ELC is also required to promote ADR mechanisms. This is important due to the reliance on ADR by many communities to resolve environmental matters.[49] Furthermore, the ELC is expected to develop a rich jurisprudence to enable Kenyans to realise the rights to a clean and healthy environment conferred by Article 42 of the Constitution and socio-economic rights such as a right to clean and safe water and a right to reasonable standards of sanitation, which are granted by article 43 of the Constitution.[50] The Court is expected to give meaning to environmental obligations and duties imposed on the government and the public under the Constitution and ELCA.

5 Laudable ELC decisions

In many cases, the ELC has proven its unique position to ensure access to justice on environmental matters over traditional courts. The following court decisions illustrate the court's crucial contributions of the Court to environmental adjudication.

The Court in *County Government of Migori v Registered Trustees of Catholic Diocese of Homabay*[51] stated that the strict rule of *locus standi* had been relaxed to enable the public to access justice and not shut the public out because of *locus standi*. In this case, the plaintiff instituted an action in the ELC to challenge the allocation of public land, which was alleged to be irregular. The respondents, responding to the petition, challenged the petition on the grounds of *locus standi*, stating that the plaintiff had no right to institute the action before the Court. In response to the objection brought by the respondent, the Court stated that Article 22(1) of the Constitution gives rights to everyone, and this enables them to institute an action in court claiming that a right or fundamental freedom in the

48 *Mungania v District Land Adjudication and Settlement Officer Tharaka District* [2018] eKLR, ELC Petition 5 of 2017.

49 *Republic v Cabinet Secretary for Petroleum & Mining; Ex parte Kapchok (Suing on his behalf and on behalf of the Citizens of West Pokot County); County Government of West Pokot & another (Interested Parties)* [2019] eKLR, ELC Judicial Review 3 of 2019; *Ng'ang'a v Director General National Environment Management Authority* [2020] eKLR, ELC Case 117 of 2019.

50 *Adega v Kibos Sugar and Allied Industries Limited ; Kenya Union of Sugar Plantation And Allied Workers (Interested Party)* [2019] eKLR, ELC Petition 8 of 2018.

51 *County Government of Migori v Registered Trustees of Catholic Diocese of Homabay* [2015] eKLR, ELC Petition 36 of 2014.

Bill of Rights has been denied, violated, infringed upon, or threatened. The Court also clarified that this constitutional right is not only for those who are directly affected or whose interest in the right is said to be denied, violated, infringed, or threatened that can institute an action before the Court for relief but also for other persons who may institute cases in the interest of others or the public interest.[52]

The Court in *Fadhila S Ali v National Housing Corporation*,[53] held that Order 40 Rule 1 of the Kenyan Civil Procedure Rules, which requires the plaintiff to file an undertaking as to damages before the Court gives an injunction order, was not applicable in cases for the enforcement of a right to a clean and healthy environment. The Court further stated that there is no need for the plaintiff to institute an action on an environmental issue to provide an undertaking as to the damages; it says that the plaintiff has sufficient interest and could not be prevented from enforcing the rights conferred by the Constitution. In addition, the Court stated that complying with the provision of Order 40 of the Civil Procedure Rule would defeat the intent of justice because if the plaintiff is expected to meet up with the said requirement before the injunction is granted and cannot meet up afterwards, which results in the injunction being refused, the respondent will continue with the alleged actions, which might turn out to affect the environment negatively.

In *Republic v Board of Directors Lake Victoria South Water Services Board*,[54] the respondents intended to start a water supply and sanitation project in a town, with water sourced from a river in another town close to the applicants' home. The applicants sought an order to prohibit the project as it would cause a water shortage in their home and town. The Court examined the principles of sustainable development extensively, determined that it was essential to balance economic development and environmental sustainability, and decided that the project would not defeat the general public's interest. However, the Court discovered that the project was illegal because it lacked the requisite environmental impact assessment and other necessary approvals. As a result, the Court did not stop the project permanently but suspended it and directed the

52 *Kurer & Heir (suing on their behalf and on behalf of aggrieved residents of Watamu within Kilifi County) v County Government of Kilifi* [2018] eKLR, ELC Petition 23 of 2016; *Ndubi & another v Gerishon Gatobu Mbui* [2018] eKLR, ELC Succession Cause 720 of 2013; *County Government of Meru & another v District Land Adjudication and Settlement Officer Tigania East Sub-County & 18 others* [2018] eKLR, ELC Petition 23 of 2017.

53 *Ali v National Housing Corporation* [2012] eKLR, ELC Case 5 of 2012.

54 *Republic v Board of Directors Lake Victoria South Water Services Board; Ex parte Orot* [2015] eKLR, Miscellaneous Civil Application 8 of 2015; *Milimani Splendor Management Limited v National Environment Management Authority* [2019] eKLR, ELC Petition 61 of 2018.

respondents to conduct the environmental impact assessment and comply with all other required procedures within a reasonable time.

Another important case was *Friends of Lake Turkana Trust v The AG*.[55] In this case, the Kenyan government entered into a Memorandum of Understanding (MOU) with the Ethiopian government to purchase 500 Megawatts (MW) of electricity from the Gibe III dam, a USD800 million grid connection between Ethiopia and Kenya. The Gibe III dam was built on the Omo River, flowing from Ethiopia into Lake Turkana in Kenya. The petitioners raised environmental concerns and a violation of human rights regarding the Gibe III dam. They stated in their petition that the Kenyan government, by entering into the MOU with the Ethiopian government without conducting any EIA, violated the constitutional rights of the people living around Lake Turkana who would be affected by the project. The petitioners claimed their right to access information had been breached under Article 35 of the Constitution. In responding to the petition, the government argued that although the Gibe III dam could pose an environmental threat to Lake Turkana, the Kenyan government did not have control over the construction of the Gibe III dam since it is situated outside its territory. It is a project embarked on by the Ethiopian government. They further argued that the court has no jurisdiction over the petition since the subject matter is not situated within the jurisdiction of the court. The Court stated that although the subject matter, which is the construction of the dam, is not within the country and the fact that the alleged violations arose in a transboundary context did not, on its own, limit the Court's jurisdiction. The Court further stated that the parties before the Court were all Kenyan entities, and the Court has jurisdiction over the parties. The Court held that the MOU violated the petitioner's fundamental rights under the Constitution of Kenya. Based on the above rationale, the Court granted the petitioners' prayers. It issued an order of mandamus, directing the Kenyan government to provide the details of the MOU entered into with the Ethiopian government, and also issued an order directing the Kenyan government to make sure that it takes all necessary steps to manage, utilize and conserve all natural resources around Lake Turkana in any engagement it enters into with the Ethiopian government. However, concerning the obligation of the state to carry out an EIA study of the project, the Court held that it does not have the jurisdiction to direct the Ethiopian government to carry out such EIA since the project is strictly within Ethiopian territory and Kenyan courts were not the appropriate forum to determine what obligations existed in this regard.

55 *Friends of Lake Turkana Trust v Attorney General* [2014] EKLR, ELC Suit 825 of 2012.

Also, in *Kamotho Githinji v Resjos Enterprises Ltd,*[56] the petitioners instituted this case before the Court, challenging the road construction project embarked on by the respondent. The petitioners prayed the Court would stop the road construction next to their residence because the project commenced without carrying out an EIA and was illegal. Furthermore, the petitioners stated that the respondents' activities were against a clean and healthy environment; the respondents were alleged to be indiscriminately cutting down trees and providing the residents with sheds and fresh air. Also, the petitioners alleged that the respondents that failed to arrest the dust generated from the construction site, thereby causing ailments of various kinds to the petitioners. The Court ruled that, based on the facts before it, it is obvious that the respondents' activities had indeed violated the petitioner's right to a clean and healthy environment. However, the Court stated that the petitioners' ailments could not be linked directly to the respondents' activities. Since the petitioners had not provided any scientific proof to corroborate the fact that the ailments they allegedly suffered were because of the road project. In deciding this case, the Court used the precautionary principle and directed that the project be stopped until a properly conducted EIA was carried out to ensure that the petitioner's demand regarding the construction was being addressed to the Court's satisfaction.

In *Leboo v Director Kenya Forest Services*,[57] the ELC had to determine an injunctive application from the plaintiff who had complained about the defendants' illegal allocation to pre-qualified and unqualified saw millers to harvest timber and firewood materials from the Lembus forest. The application claimed that the allocation was done without conducting an EIA and with no involvement of the communities living around the forest as required by the Forest Participation in Sustainable Forest Management Rules and the Forest Act. The Court stated that the absence of public participation, the lack of inclusion of the local community, and proof showing that the trees were harvested sustainably are enough to make respondents liable. The Court, therefore, directed the respondents to restrain all harvesting activities in the Lembus Forest.

Also, in *Kamau v Aelous Kenya Limited*,[58] the Court chose ecological balance over development. In this case, the respondent was licensed to develop a 30-MW wind-energy farm which was later increased to 50 MW. The issue was that the increase was conducted without carrying out any EIA. The plaintiffs challenged the expansion because it violates

56 *Kamotho Githinji & 4 others (suing for and on behalf of aggrieved residents of Muthurwa Estate within Nairobi County) v Resjos Enterprises Ltd* [2016] eKLR, ELC Petition 228 of 2016.

57 *Leboo v Director Kenya Forest Services* [2013] eKLR, ELC Case 273 of 2013.

58 *Kamau v Aelous Kenya Limited* [2016] eKLR, Constitutional Petition 13 of 2015.

their right to a clean and healthy environment under Article 42(2) of the Constitution. The plaintiffs also argued that there should be a reasonable distance between the wind-energy farms and the residential premises. The counterarguments proposed by the defendants were that they intend to build wind-energy farms under the aegis of the Kenyan government and as a part of the green development initiative meant to benefit the Kenyan economy in its renewable energy usage over fossil fuels. The ELC held that changes in the size of the project warranted a new EIA to be conducted. It added that if EIA is not conducted, there will be a presumption that the environment is under threat. The Court also held that the environment could not be compromised even if development is green.

Also, in *African Centre for Rights and Governance (ACRAG) v Municipal Council of Naivasha*,[59] the Court enforced Article 42 of the Constitution. This case is based on a dumpsite in Naivasha. The plaintiff stated that the Municipal Council had failed in its constitutional duty to maintain proper sanitary services by allowing a dumpsite to operate without conducting any EIA. The ELC held that since the Council did not conduct EIA before operating the dumpsite, this amounted to dereliction of their constitutional duty. Therefore, the defendants had violated the plaintiff 's right to a clean and healthy environment. The ELC relied on Article 70(2) of the Constitution and directed the defendants to obtain the requisite licenses for the disposal of waste, to restore the dumping site to its original status within 90 days, and to order the National Environmental Management Authority of Kenya to ensure that EIA is thoroughly conducted for subsequent projects. The ELC followed this position in *Nyanjom v County Government of Kisumu*.[60]

6 Challenges of ELC

Despite the laudable developments, remarkable impacts, and landmark decisions emanating from the ELC, several challenges are bedevilling the Court. It is noteworthy to state that the criminal jurisdiction of the ELC is currently in contention since neither the Constitution nor the ELC Act confer a criminal jurisdiction on the Court. Although, the Court of Appeal held in *Karisa Chengo v Republic*[61] that the ELC does not have a criminal jurisdiction since the Constitution does not confer such jurisdiction on it. The position is still not clear, and it requires clarity. A decision of the Supreme Court will clarify whether the Court's jurisdiction extends

59 *African Centre for Rights and Governance (ACRAG) v Municipal Council of Naivasha* [2017] eKLR, Petition 50 of 2012.

60 *Nyanjom v County Government of Kisumu* [2020] eKLR, Environment and Land Petition 1 of 2018.

61 *Chengo v Republic* [2015] eKLR, Criminal Appeal 44, 45 and 76 of 2014.

to criminal cases or is limited to civil matters only. This is particularly crucial since the remedies under Section 13(7) of the ELCA seem only to contemplate civil remedies such as: injunctions,[62] prerogative orders,[63] damages,[64] compensation,[65] specific performance,[66] restitution,[67] declarations, and costs. The ELC in *Musomba v Raphael*[68] did not take over the criminal matter involved in this case. It insisted that the Court determine the land's ownership before the criminal trial could commence at the High Court. Therefore, a stay of proceeding for the criminal trial was issued for eighteen months to allow the ELC to determine the ownership of the land. Although it must be noted that once the land ownership is determined, the criminal proceeding may not proceed depending on whom the court declares to be the landowner. If the court decides that it is the accused person who owns that land, the criminal proceedings automatically come to an end since he cannot be charged with holding the parcel of land in a manner likely to cause a breach of peace, as the land belongs to him.

Another challenge faced by the ELC is the jurisdiction of the Court on disputes that have other legal issues and laws embedded in them, apart from environmental laws and land issues. In *Tasmac Limited v Marci & Nassau Limited,*[69] the ELC was faced with a dispute raising partly company law and land law. The court held it had jurisdiction because the case could not be severed. Similarly, in the case of *Abraham Gina Adams (suing as the administrator of the estate of the late Geoffrey Adams Ogwa) v James Ouma Natolio*,[70] the Court was faced with a similar situation in which the dispute concerned an alleged breach of contract and title to land. The Court developed a test to be applied when faced with a dispute, raising mixed issues other courts can deal with, referred to as the 'predominant purpose test'.[71]

62 *Okongo v K-Rep Bank Ltd* [2016] eKLR, ELC Case 25 of 2016.

63 *Republic v Director of Survey of Kenya; Kiambu Nyakinyua Farmers Co. Ltd (interested party); Elijah Njuguna Mutitu & 1697 others (proposed interested parties); Ex parte Ngigi & 30 others* [2020] eKLR, ELC Judicial Review 1 of 2019.

64 *Ng'ang'a v Director General National Environment Management Authority* [2020] eKLR, ELC Case 117 of 2019.

65 *National Land Commission v Afrison Export Import Limited* [2019] eKLR, ELC Reference 1 of 2018.

66 *Birir v Lelei* [2020] eKLR, ELC Case 67 of 2018.

67 *Kironjo v Maringa* [2020] eKLR, ELC Case 219 of 2014.

68 *Musomba v Raphael* [2015] eKLR, ELC Case 802 of 2015.

69 *Tasmac Limited v Marci & Nassau Limited* [2014] eKLR Miscelleanous Application 5 of 2013.

70 *Adams (suing as the administrator of the estate of the late Geofrey Adams Ogwa) v James Ouma Natolio* [2015] eKLR, ELC Case 70 of 2013.

71 S Okong'o 'Environmental adjudication in Kenya: A reflection on the jurisdiction of the Environment and Land Court' A presentation made at the Symposium on

Furthermore, looking at the cases filed before the Court, only a handful were strictly environmental matters. Two significant factors have contributed to this. Firstly, the lack of public awareness by victims of environmental degradation of their right to access justice on environmental matters. Several litigants who proceed to court are unaware of the ELC, which has occasioned the continuous filing of environmental disputes in the general courts, especially the High Court. Since the ELC has no power to institute matters *suo moto*, litigants will have to approach the Court to seek redress for environmental violations that have affected the number of environmental matters handled by the Court. Secondly, most cases filed before the Court have dealt with land issues. It is noteworthy to state that about 65 per cent of all civil cases filed in Kenya are based on land disputes and are expected to be handled by the ELC.[72] Due to this, the capacity of the ELC has been overstretched, and judges could not cope with the workload. Section 26 of the ELCA states that the ELC should be established based on the counties in Kenya. It is noteworthy that Article 6(1) and the First Schedule of the Constitution establishes 47 counties, which means that there should be 47 ELCs in Kenya. However, at the time of conducting this research, the number of ELC judges stands at 33. The ELC could not expand its capacity due to a lack of expertise and experience both at the bench and the bar, particularly on environmental law and infrastructural challenges. To mitigate these challenges, in 2015, the Kenyan Parliament enacted the Statute Law (Miscellaneous Amendments) Act that introduced new sections into the ELCA, which were sections 7(3), 8(d), 16(A)(1)(2), 26(3), and (4)(a)-(b). It also amended Section 150 of the Land Act and Sections 9(a)(b) and 10(6) of the Magistrates' Courts Act. Sequel to the amendments, the Chief Justice was empowered to transfer judges from the High Court and the Employment and Labour Relations Court (ELRC) to the ELC and vice versa. This amendment also empowers the Magistrates' Courts to entertain minor environmental and land disputes. The Court in *Mburu v Kimani Adam*[73] held that the basis for the amendment was to recognise and appreciate the jurisdiction of the subordinate courts, to hear and determine disputes, actions, and proceedings concerning land as empowered by the written law, and to validate the appellate jurisdiction of the ELC.

These amendments and developments were challenged in court in the case of *Law Society of Kenya Nairobi Branch v Malindi Law Society*.[74]

Environmental Adjudication in the 21st Century, Auckland, New Zealand on 11 April 2017.

72 As above.

73 *Mburu v Adam* [2016] eKLR, ELC Case 85 of 2015.

74 *Law Society of Kenya Nairobi Branch v Malindi Law Society* [2017] eKLR, Civil Appeal 287 of 2016.

The Court of Appeal, in this case, held that Section 2 of the Statute Law (Miscellaneous Amendments) Act 2015; Sections 7(3), 8(d) and 26(3) and (4) of the ELC Act; Sections 9(a) and (b) of the Magistrates' Court Act, 2015 which empowered the Chief Justice to transfer judges across the courts and gave jurisdiction to the Magistrates' Court to hear environmental and land cases, as unconstitutional, null, and void and the same provision was quashed. This decision affected a lot of environmental and land cases that initially commenced at the Magistrates' Courts due to the enactment of the statute. Similarly, several cases were transferred to the ELC, which was already clogged. It is, however, noteworthy to state that since the creation of the Court, the number of public interest litigations on environmental issues has increased, and the Court has enhanced access to justice in its area of specialisation. It has reduced the period of time for land and environmental cases to be heard and enhanced the environmental rule of law.

In general, the future looks bright for the ELC. The Court has been well received and is delivering on its constitutional mandate. The issue of the jurisdiction of the ELC is still fluid. It is hoped that the Supreme Court of Kenya, the country's highest court, will lay it to rest soon. As earlier stated, several cases filed before the Court were land cases but not environmental ones; this is mainly because the public is not aware and is not keenly interested in instituting environmental concerns or conservation actions. However, this attitude will change with proper citizen education on the environment and the involvement of environmental non-governmental organisations and activists. Therefore, stakeholders must enhance public awareness, citizen education, sensitization and reorientation on environmental matters, the right to a fair trial, and the role of the ELC. Promoting and supporting public interest litigation (PIL) in environmental matters is germane. A reduction or complete waiver of court filing fees on environmental issues is needed, as it is crucial to support PIL. This support helps many less privileged, poor, and uneducated victims of environmental degradation.

Since the ELC handles many land matters, it is recommended that it categorises environmental matters separately from land matters. This will help expedite actions on environmental matters when necessary and will also help the Court to know the number of environmental matters it handles. As a result of the overstretched ELC, it is crucial that more ELC judges be appointed to strengthen the current judges.

7 Conclusion

The sporadic increase in ECT creation in the past two decades clearly shows the vast displeasure and disappointment people have with the current legal system in resolving environmental disputes, which has necessitated the demand for improvements in access to justice on environmental matters globally. Research and studies have confirmed the importance, usefulness, and relevance of ECT in ensuring a healthy and clean environment is guaranteed for individuals. Research has equally shown that well-structured, well-equipped, and well-managed ECT improves access to justice on environmental matters by making quick, cost-effective, informed, and creative decisions that are not obtainable in ordinary courts. Several experts, including judges, legal practitioners, environmentalists, business analysts, politicians, and ecologists, have also viewed ECT as one of the best institutions established in this century.

The emergence of ECT in Kenya and its success have proven that it is possible to successfully establish ECT in Africa despite the challenges bedevilling several countries on the continent. The success of ECT in Kenya can be traced to the Court's legal framework, such as constitutional grapnel, the superior court of record status, a well-structured enabling statute, and, to a reasonable extent, a well-defined jurisdiction. Countries in Africa that do not have ECT and want to establish ECT should endeavour to put all these frameworks in place to ensure that the ECT they are creating is well-grounded, well-structured, and well-managed. There is an excellent possibility of creating a successful ECT if it is ensured that the ECT is made open, transparent, and involves all potential stakeholders. Furthermore, some African countries that currently have ECT but do not function effectively can also learn from the ECT in Kenya.

In conclusion, for an ECT to successfully achieve its purpose, stakeholders must recognise the need for adaptive management by continually monitoring its performance against the objectives it was set to achieve. They must always be ready to adjust their procedural and substantive goals and performance in response to such monitoring data. By doing so, the ECT will remain relevant and influential in meeting the environmental challenges of the present and future generations. As Gething observes,

an excellent organisation is one that is continually looking, learning, changing and improving towards the concept of excellence it has set for itself. Excellence is more of a journey than a static destination.[75]

75 M Gething 'A pathway to excellence for a court – Part 1: Defining the pathway' (2008) 17 *Journal of Judicial Administration* 237 at 242.

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