

**UNIVERSITY OF NAIROBI**

**SCHOOL OF LAW**

**THE ROLE OF THE ENVIRONMENT AND LAND COURT IN ENFORCING  
ENVIRONMENTAL LAW: A CRITICAL ANALYSIS OF THE ENVIRONMENTAL  
CASELOAD**

**A THESIS SUBMITTED IN PARTIAL FULFILMENT OF THE REQUIREMENTS FOR  
THE AWARD OF DEGREE OF MASTER OF LAWS**

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**NOVEMBER**

**2018**

## DECLARATION

### DECLARATION BY THE STUDENT

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I hereby certify that this research was undertaken under my supervision and submitted for examination with my approval as university supervisor.

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## **ACKNOWLEDGMENT**

I wish to express my sincere gratitude to my supervisor, Dr. CollinsOdote, without whose guidance the quality, form, and content in which this work has been presented would not have been possible.

I thank my entire family for the great support they accorded me during this study.

## **DEDICATION**

I dedicate this work to my wife, Praxidice, my children and parents.

## ABBRIEVATIONS

ADR	Alternative Dispute Resolution
CEJAD	Centre for Environmental Justice and Development.
CKRC	Constitutional of Kenya Review Commission.
COE	Committee of Experts
CoK	Constitution of Kenya
CUC	Court Users Committee
EC	Environment Court
ECT	Environment Court and Tribunal
ELC	Environment and Land Court
ELRC	Employment and Labour Relations Court
EMCA	Environmental Management and Coordination Act
ILEG	Institute for Law and Environmental Governance
NCLR	National Council for Law Reporting
NECC	National Environment Complaints Committee
NEMA	National Environment Management Authority
NET	National Environment Tribunal
NGO	Non-Governmental Organizations
NSW LEC	New South Wales Land and Environment Court

PCC	Public Complaints Committee
PIL	Public Interest Litigation
PMD	Performance Management Directorate.
PMMC	Performance Management and Measuring Committee
PMMU	Performance Management and Measuring Understanding.
PSC	Parliamentary Select Committee
UNEP	United Nations Environmental Programme

## LIST OF CASES

1. *Addax (K) Limited versus National Environmental Management Authority and the Mastermind Tobacco Limited, Civil Appeals No 81 of 2013 and 1 of 2014, In the Environment and Land Court in Nairobi.*
2. *Joseph K. Nderitu & 23 others v Attorney General & 2 others, Constitutional Petition No. 29 of 2012, In the High Court at Nakuru [2014] eKLR.*
3. *Ken Kasinga vs David Kiplagat & 5 Others, Petition No. 50 of 2013, In the Environment and Land Court at Nakuru ELC (unreported).*
4. *Kenneth Kiplagat Kimaiyo and 3 others vs County Government of Elgeyo Marakwet and two Others. Petition No. 18 of 2015, In the Environment and Land Court of Kenya at Eldoret.*
5. *Koome Mwambia and another vs Deshun Properties Company Limited and 4 others ELC Petition No. 1433 of 2013, Environment and Land Court at Nairobi.*
6. *Law Society of Kenya Nairobi Branch v Malindi Law Society & 6 Others, Nairobi Civil Appeal No. 287 of 2016, [2017] eKLR.*
7. *Malindi Law Society v Attorney General & 4 others, Malindi High Court Constitutional Petition No. 3 of 2016, [2016] eKLR.*
8. *Mohammed Said vs. County Council of Nandi, EL&C Petition No. 2 of 2013, ELC Court at Nakuru [2013] eKLR.*
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Government of Kenya, *High Court (Organization and Administration) Act No. 7 of 2015* (Government Printers 2015).

Government of Kenya, *National Environment Policy 2013* (Government Printers 2013).

### International

UNGA, *Convention on Access to Information, Public Participation and Access to Justice in Environmental Matters*, (opened for Signature 25 June 1998, 2161 UNTS 447, entered into force 30 October 2001. <https://www.unece.org/fileadmin/DAM/env/pp/documents/cep43e.pdf> accessed 13 October 2017.

UNGA, *Rio Declaration on Environment and Development*, 31 ILM 974 (1992) <http://www.jus.uio.no/lm/environmental.development.rio.declaration.1992/portrait.a4.pdf> accessed 13 October 2017.

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## **ABSTRACT**

The establishment of the Environment and Land Court (ELC) in Kenya is novel. The ELC has dual jurisdiction to hear and determine land and environment matters. Since it was established in the year 2012, there is no published data on the number of environmental matters that have been handled by the court as compared to land. The research carried out by individuals and institutions indicates that the court has handled fewer environmental cases as compared to land cases. Caseload grants a court an opportunity to settle disputes, develop the related law and jurisprudence. Based on this, this study sought to determine the environmental caseload and the jurisprudence emanating from the ELC since it was established. It further sought to determine the factors contributing to environmental caseload in the ELC and to provide recommendations on how to improve the environmental caseload in the court.

In order to meet the objectives of the study, both qualitative and quantitative research methods were employed. The research population was the ELC judges, the ELC Deputy Registrars and the Court Users (legal practitioners, environmental civil society representatives, government officials, and the public). Structured questionnaires and interviews were used as a method of data collection. Due to the distribution of the ELC across the counties, the questionnaires were sent via email to all the 33 ELC Judges and the 26 DRs. Only 16 ELC judges, 9 ELC DRs and 19 Court users responded.

The findings of this study indicate that indeed, there is no public statistical information from the judiciary or the ELC distinguishing environmental matters from land. However, analysis of the data collected from the field and the NCLR shows that very few environmental matters have been filed in the ELC as compared to land. Despite the fewer environmental matters, the ELC has continued to develop the law and jurisprudence on environmental issues such as environmental

rights, *locus standi* and the application of international environmental law and principles. The Environmental caseload in the ELC is highly attributed to lack of public awareness and recognition of the ELC as the appropriate institution to solve environmental matters; its accessibility; public apathy on environmental issues; limited public interest litigation; lack of knowledge on what constitutes environmental issues; lack of knowledge on constitutional provisions on the environment; court filing fees, amongst others. This study, therefore, recommends the need to enhance public awareness of the ELC's role in environmental adjudication and the need for a policy direction from the judiciary requiring that environmental matters be distinguished from land matters at the filing stage. The study further recommends for the abolition of court filing fees in environmental matters; fast-tracking of environmental cases; streamlining the jurisdiction of the court, amongst others.

# CHAPTER ONE

## 1.0 INTRODUCTION

### 1.1 Background

Kaniaru, describes the 2010 Constitution of Kenya (CoK), as a green constitution which is ‘green in respects unknown previously in the country’s laws’ and that it strengthens the environmental process and access to environmental justice.<sup>1</sup>Indoing so,it is expected that it will enhance environmental litigation.Indeed, one of the novel features of the CoK towards environmental protection and enforcement of environmental lawis the requirement that Parliament should establish a court with the status of the High Court with dual jurisdiction to handle both land and environmental matters.<sup>2</sup>Following the promulgation of the CoK, the Environment and Land Court (ELC) was established in 2011 under Section 4 of the ELC Act.<sup>3</sup>In the year 2012, judges of the ELC were appointed by the President, spurring its operationalization.<sup>4</sup>So far, 26 ELCs have been established countrywide in 26counties.<sup>5</sup>

Before establishing a specialized environmental court and tribunal (ECT), it is advisable that a country should calculate the current environmental caseload and predict the future environmental caseload to sustain its functionality,<sup>6</sup> enforcement of environmental law and

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<sup>1</sup>Donald Kaniaru, ‘Launching a New Environmental Court: Challenges and Opportunities’ (2012) 29 (2), Pace Environmental Law Review 626, 628.

<sup>2</sup>CoK 2010, Art 162 (2) (b).

<sup>3</sup>Article 162 (2) (b) of the CoK and ELC Act, s 13.

<sup>4</sup>Kenya Law, ‘Gazette Notice’ <[http://kenyalaw.org/kenya\\_gazette/gazette/volume/NjM-/Vol.CXIV-No.95](http://kenyalaw.org/kenya_gazette/gazette/volume/NjM-/Vol.CXIV-No.95)> accessed 12 October 2017.

<sup>5</sup>This is in accordance with the data available at the Kenya Law Website, <<http://kenyalaw.org/kl/index.php?id=7866>> accessed 24 December 2017.

<sup>6</sup>In addressing the debate on whether to establish an EC in the US in 1973, the US Justice Department Task Force carried out a study to determine the feasibility of an EC. The US Justice Department Task Force in 1973 recommended that a specialized EC was not feasible and argued that there was no identifiable body of environmental cases warranting the establishment of an environmental court. Based on its findings, the US did not establish a specialized EC and granted the general courts the jurisdiction to determine environmental matters and disputes relating to environment management.



development of environmental jurisprudence.<sup>7</sup> In some scenarios, specialized ECs have been established then closed due to lack of sufficient environmental caseload.<sup>8</sup> This happened in Austria, China, Finland, and Hungary, where ECTs were legally authorized, established and then closed due to lack of sufficient caseload, political will, resources and opposition.<sup>9</sup> Before we come to this situation, the need to determine environmental caseload, the factors contributing to environmental caseload and how to address the same is vital and ripe.

During the ‘*Colloquium on Integrating Environmental Law Training into Judicial Curricula in Africa*’ held in February 2017 in South Africa, Ochieng indicated that more than 60% of the cases before the Kenyan courts are related to land and environment.<sup>10</sup> However, studies undertaken on its functioning indicate that the ELC has not handled numerous environmental cases as it was expected because ‘most of the cases concern land.’<sup>11</sup> The 2013 Land Development and Governance Institute’s (LDGI) report indicates that while 69% of the respondents filed their cases in the ELC, most of the cases related to land matters.<sup>12</sup>

Odote has argued that in Kenya, land forms the basis of the livelihood for people and in this regard, most of the cases before the ELC will likely relate to land.<sup>13</sup> According to Okong’o,

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<sup>7</sup> George Pring and Cathreen Pring, *Environmental Courts and Tribunals: Guide for Policy Makers* (UNEP 2016) 68.

<sup>8</sup> In Mexico, the Federal Law on Environmental Liability in 2013 had authorized the judiciary either to appoint specialized environmental judges or give the existing federal judges jurisdiction to hear and determine environmental matters. In 2015, the judiciary, while granting the federal judges the jurisdiction on environmental matters, argued that there was insufficient caseload to justify the creation of a specialized EC.

<sup>9</sup> Pring and Pring (n 7) 64.

<sup>10</sup> UN, ‘Environmental Governance’ <http://www.unep.org/environmentalgovernance/colloquium-integrating-environmental-law-training-judicial-curricula-africa> accessed 9 October 2017.

<sup>11</sup> Samson Okong’o, ‘Environmental Adjudication in Kenya: A Reflection on the Jurisdiction of the Environment and Land Court’ (A presentation made at the Symposium on Environmental Adjudication in the 21st Century held in Auckland New Zealand on 11<sup>th</sup> April 2017) <<http://environmental-adjudication.org/assets/Uploads/General/Okongo-PPT2.pdf>> accessed 8 October 2017; Norah A Otieno, *Appraising Specialized Environmental Courts in the Attainment of Environmental Justice: Kenyan Experience* (Master’s Degree, Centre for Advanced Studies in Environmental Law and Policy University of Nairobi 2014).

<sup>12</sup> LDGI, *An Assessment of the Performance of the Environmental & Land Court* (16th Scorecard Report 2014).

<sup>13</sup> Collins Odote, ‘Kenya: The New Environment and Land Court’ (2013) 4, *IUCN Academy of Environmental Law E Journal* 171.

most of the cases filed in the ELC are land matters because, the establishment of the ELC was informed by the numerous land conflicts and due to the close relationship land use and tenure have with environmental sustainability, environmental matters found their way in the ELC.<sup>14</sup> Further, the ELC does not enjoy exclusive jurisdiction, which is likely to lead to forum shopping.<sup>15</sup> Statutorily established dispute resolution mechanisms such as NET hear and determine environmental disputes arising from the decisions of NEMA. The magistrate's courts, limited by their pecuniary jurisdiction, can hear and determine environmental disputes.<sup>16</sup> Public apathy on environmental matters coupled with fewer ELCs stations across the country hindering accessibility is likely to affect environmental litigation.<sup>17</sup>

While the findings emanating from studies on environmental caseload indicate that few environmental matters have been filed in the ELC, there is no public statistical data from the judiciary or the ELCs on environmental caseload. The National Council for Law Reporting (NCLR) has also not publicly provided information regarding the number of judgments on the environment and land emanating from the ELC.<sup>18</sup> Yet, the centrality of sufficient caseload to the functioning of the specialized ECs is fundamental to its functioning in enforcing the environmental law, jurisprudence and environmental management. Odote, notes that in exercising its role in enforcing environmental law, the ELC is expected to develop a sound jurisprudence on environment and land matters and 'deliver effective justice by avoiding the pitfalls of non-

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<sup>14</sup> Okong'o (n11) 9.

<sup>15</sup> Ibid.

<sup>16</sup> *Malindi Law Society v Attorney General & 4 others, Malindi High Court Constitutional Petition No. 3 of 2016, [2016] eKLR and the Law Society of Kenya Nairobi Branch v Malindi Law Society & 6 Others Nairobi Civil Appeal No. 287 of 2016.*

<sup>17</sup> Brian J Preston, 'Benefits of Judicial Specialization in Environmental Law: The Land and Environment Court of New South Wales as a Case Study' (2012) 29(2) *Pace Environmental Law Review* 396.

<sup>18</sup> The National Environment and Management Authority (NEMA) has partnered with the NCLR and the National Environmental Tribunal (NET) to avail to the public all the judgments on environmental law in soft available on its website. See NEMA, 'Environmental Cases' <[https://www.nema.go.ke/index.php?option=com\\_content&view=article&id=36&Itemid=178](https://www.nema.go.ke/index.php?option=com_content&view=article&id=36&Itemid=178)> accessed 24 November 2017.

specialized courts in the manner they handle environmental and land issues affecting development and future sustainability' through their judgments.<sup>19</sup> This can only be realized if the ELC is granted the opportunity through filing of environmental cases.

For the ELC to continue functioning effectively, it will be dependent on it being presented with sufficient cases, effective litigation of the said cases and the ELC's ability to appreciate and determine the matters effectively. Yet, the low environmental caseload in the ELC is not a new phenomenon. For a long period of time, before the enactment of the CoK, several bottlenecks in the environment governance regime hindered environmental litigation.<sup>20</sup> Firstly, the laws on environment were scattered across various sectors making environmental regulation and litigation difficult.<sup>21</sup> Secondly, the enforcement of environmental matters was 'strictly a private affair that was of less concern to the main branches of public law'.<sup>22</sup> Thirdly, the legislative framework then vested the enforcement of environmental matters in public officials who were reluctant to act. Finally, the courts applied the restrictive approach of standing in cases involving environmental matters where a litigant had to prove personal interest.<sup>23</sup>

The enactment of the 1999 Environmental Management and Coordination Act (EMCA) and the CoK in 2010 put in place a new, progressive and internationally accepted regime in environmental governance. The CoK did away with the requirement to demonstrate *locus standi* before a party can file a suit alleging violation of the right to a clean and healthy environment. Any person can now approach the Court on grounds of public interest without

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<sup>19</sup>Pring and Pring (n 7) p 17.

<sup>20</sup> ACTS-UNEP, *The Making of a Framework Environment Law in Kenya* (ACTS-UNEP 2001).

<sup>21</sup> Aketch Migai, 'Land, the Environment and the Courts in Kenya' (Background Paper for the Environment and Land Law Reports 2006).

<sup>22</sup> Joel Kimutai Bosek, 'Implementing Environmental Rights in Kenya's New Constitutional Order: Prospects and Potential Challenges' (2014) 14 African Human Rights Law Journal 489, 490.

<sup>23</sup> *Wangari Maathai v Kenya Times Media Trust Limited* (1989) 1 KLR; *Nairobi Golf Hotels (Kenya) Ltd v Pelican Engineering and Construction Co Ltd* HCCC 706 of 1997.

demonstrating that they have incurred loss or any damage.<sup>24</sup> The CoK elevated substantive environmental rights which had earlier been recognized under EMCA, to a constitutional status.<sup>25</sup>The CoK further envisages a number of rights whose enforcement is geared towards environmental protection.<sup>26</sup>Further, the application of international environmental law and principles, as recognized under Article 2(5) and (6) of the CoK, has a direct effect on the Kenyan domestic legal order. International treaties and conventions relating to environmental law and management can now be invoked by litigants and applied by the court.<sup>27</sup>

Despite the constitutional and statutory provisions on environmental protection that would have triggered a floodgate of environmental cases, most of the cases filed in the ELC concern land. It is based on this background that this study, through determining the environmental caseload at the ELC since it was established, interrogates the factors that influence environmental caseload. The study analyses the judgments emanating from the ELC to determine the role of the court in enforcing environmental law, developing environmental jurisprudence and ensuring environmental sustainability through adjudication. The study seeks to provide recommendations that would enhance environmental litigation and strengthen the functionality of the ELC in environmental governance.

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<sup>24</sup> Article 70(3) stipulates that, ‘an applicant does not have to demonstrate that any person has incurred loss or suffered injury’.

<sup>25</sup> Article 42 of the CoK, protects the right of every person to a clean and healthy environment.

<sup>26</sup> Article 43 of the CoK provides for the right to reasonable standards of sanitation; and to clean and safe water in adequate quantities which are related to environmental protection. The rights to access to justice; fair administrative action; rights of minorities and marginalized groups in environmental governance; access to information; right to life are also related to environmental protection. The CoK also requires that formalities relating to commencement of suits in respect of human rights violation to be kept to the minimum and if necessary, informal documentation be entertained by the court. No filing fees is to be charged for commencing such proceedings.

<sup>27</sup> For instance, the Rio Declaration on Environment and Development (Rio Declaration) sets out a number of principles which have further been codified under Section 18 of the Environment and Land Court Act (ELC Act) and Section 5 of EMCA.

## **1.2 Statement of Problem**

The ability of the ELC to interpret, develop and enforce environmental law, develop environmental jurisprudence and enhance environmental justice will be dependent on the court being presented with sufficient cases and these cases being litigated upon effectively. Although so far, there is no public statistical information on purely environmental matters filed in the ELC, recent studies carried out by Otieno, Okong'o and the LGDI, have indicated that indeed, the ELC has low environmental cases as compared to land. If this continues, then the ELC will miss out on the opportunity to effectively enhance environmental governance as was expected when it was established. The ELC will not be in a position to develop environmental law and jurisprudence. Further, in the presence of environmental degradation in the country, when people fail to file cases in the court, then it denies the court the opportunity to protect and preserve the environment. This calls for the need to determine the caseload on the environment, determine the factors contributing to the said caseload and suggest measures to enhance caseload in the ELC.

## **1.3 Justification of the Study**

The ELC is a new court and is expected to develop environmental law and jurisprudence. However, it can only play this fundamental role if it has sufficient caseload. This study is justified as it seeks to interrogate, through interviews and administering of questionnaires to key stakeholders in the environmental governance, why the ELC has handled very few environmental cases since it was established by finding out the factors contributing to the low environmental caseload. The expected outcome is to determine how environmental litigation can be enhanced at the ELC by addressing the challenges facing the court.

This study will be relevant to the judiciary, the judges, environmental scholars, legal practitioners, civil society, court users and environmental litigants as it will provide a

comprehensive understanding of the role of the ELC in enforcing environmental law, the factors contributing to the low caseload in environmental matters and how those factors can be addressed by all the players in the field of environmental law and governance.

#### **1.4 Objectives**

The main objective of this study is to determine the factors contributing to the number of environmental cases at the ELC and how it impacts on the operationalization and functionality of the ELC in developing environmental law and jurisprudence.

In order to achieve the main objective, this study seeks to determine the following specific objectives:

- a) To determine the number of environmental cases that the ELC has handled so far.
- b) To interrogate the jurisprudence emanating from the ELC.
- c) To interrogate the factors that contribute to the number of environmental cases adjudicated in the ELC.
- d) To assess the level of satisfaction with the ELC in enforcement of environmental law and environmental management.
- e) To suggest measures to enhance caseload on environment.

#### **1.5 Research Questions**

This study seeks to answer the following key research questions:

1. How many environmental cases have been handled in the ELC since it was established?
2. What is the environmental jurisprudence emanating from the ELC?
3. What are the factors contributing to the number of environmental cases filed in the ELC?

4. What is the level of satisfaction with the ELC in enforcement of environmental law and environmental management?
5. What mechanisms should be put in place to enhance the caseload on environment in the ELC?

## **1.6 Theoretical Framework**

This study will be underpinned on the theory of environmental justice. The theory on environmental justice emanates from the theory of justice. John Rawls, in his book, *A Theory of Justice*, was the greatest contributor to the political and legal theories and represents the focal point of liberal justice theory.<sup>28</sup> Rawls disregarded utilitarianism as an unsatisfactory means by which to measure justice.<sup>29</sup> According to Rawls, the best measure of justice is distributive justice where everyone would have the same political rights regardless of their status. The conception of justice, according to Rawls, demands: maximization of liberty, subject only to such constraints as are essential for the protection of liberty itself; equality for all, both in the basic liberties of social life and also in the distribution of other social goods; and fair equality of opportunity and the elimination of all inequalities based on both birth or wealth.<sup>30</sup>

People approach the court in order to access justice and settle disputes. Environmental disputes are no exception. The essence of establishing specialized ECs is to develop jurisprudence on substantive justice, principles of procedural justice, distributive justice and restorative justice.<sup>31</sup> In doing so, the EC is in a position to enforce environmental law.<sup>32</sup>

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<sup>28</sup> John P Rawls, *Theory of Justice* (Harvard University Press 1971).

<sup>29</sup> MDA Freeman, *Lloyd's Introduction to Jurisprudence* (8<sup>th</sup> edn, Sweet & Maxwell 2008).

<sup>30</sup> *Ibid.*

<sup>31</sup> Patricia Kamari-Mbote and Philippe Cullet, 'Environmental Justice and Sustainable Development: Integrating Local Communities in Environmental Management' (IELRC Working Paper 1996).

<sup>32</sup> Aleksey Pavlovich Anisimov and Anatoly Yakovlev Ryzhenkov, 'Environmental Courts in Russia: To Be or Not Be?' (2013) 47(3), *Journal of International Lawyer* 441;

As a result of the role of the court in enforcing environmental law, calls for environmental justice have grown globally.<sup>33</sup> The origin of the concept of environmental justice is attributed to the recognition of the existence of inequality in the distribution of environmental bad.<sup>34</sup> This ultimately led to social inequality as some communities experienced more environmental risks than the others. Whilst liberal theory of justice as expounded by Rawls focuses mainly on distributive justice,<sup>35</sup> environmental justice does not define justice as distribution of environmental goods only, but involves recognition and participation.<sup>36</sup> It involves and focuses broadly on equity and fairness in the distribution of environmental resources. Environmental justice theorists call for environmental policies that involve community participation in decision making.<sup>37</sup> The theory of environmental justice goes beyond the role of states and individuals. It recognizes the role of communities in sustainable development.<sup>38</sup>

Schlosberg<sup>39</sup> posits that due to the existence of three notions of justice in environment, it presents evidence of plural yet unified theory and practice of justice.<sup>40</sup> Young,<sup>41</sup> on the other hand, argues that distributive notion of justice focuses on inequality without recognizing social, economic and political differences. Justice requires attention to both distributive and recognition. Lack of recognition inflicts harm to the image of both the individual and community.<sup>42</sup> Fraser,

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<sup>33</sup> Sarah Wilks (ed), *Seeking Environmental Justice* (Amsterdam Press 2008).

<sup>34</sup> David Schlosberg, 'Theorizing Environmental Justice: The Expanding Sphere of a Discourse' (2013) 22(1), *Journal of Environmental Politics* 37.

<sup>35</sup> John P Rawls, *Theory of Justice* (Harvard University Press 1971).

<sup>36</sup> Robert D Bullard (ed), *The Quest for Environmental Justice: Human Rights and the Politics of Pollution* (Counterpoint 2005).

<sup>37</sup> Gordon Walker, *Environmental Justice: Concepts, Evidence and Practice* (Routledge 2012).

<sup>38</sup> Patricia Kameri-Mbote and Philippe Cullet, 'Environmental Justice and Sustainable Development: Integrating Local Communities in Environmental Management' (IELRC Working Paper 1996).

<sup>39</sup> Schlosberg (n 34).

<sup>40</sup> Ibid.

<sup>41</sup> Iris Marion Young, *Justice and the Politics of Difference*, Princeton (Princeton University Press 1990).

<sup>42</sup> ibid at 23.



further recognizes that distributive and recognition notion of justice is not enough, and that political structures must allow people to participate in the decision making.<sup>43</sup>

The notion of environmental justice as a theory of justice shall be key in this study and shall provide a basis for adjudication of environmental rights. The essence of establishing the ELC is to enhance environmental justice by settling environmental disputes. It is expected that in enforcing environmental law, the court is in a position to enhance environmental justice through the application and interpretation of the law. This can only be done through its judgments. In Kenya, the ELC does not have the power to institute court proceedings on its own motion. Even in the presence of environmental degradation and violation of environmental law, the ELC has to wait for the public to institute court proceedings. When people fail to institute environmental proceedings in the ELC, they deny it the opportunity to enforce environmental law and justice. This theory will be key in explaining the role of the ELC in enforcing environmental law.

## **1.7 Research Methodology**

Quantitative research method was relevant in determining the number of environmental cases that the ELC has been able to determine since it was established. Qualitative research method, on the other hand, was key in determining the factors influencing the low environmental caseload at the ELC and the challenges hindering sufficient caseload. Qualitative research method was also employed in discussing and analyzing the judgments that have emanated from the ELC since it was established. The essence of analyzing the judgments emanating from the court was to interrogate the role of the ELC in enforcing and developing environmental law.

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<sup>43</sup> Nancy Fraser, 'Social Justice in the Age of Identity Politics: Redistribution, Recognition, and Participation' in *The Tanner Lectures on Human Values* (Vol 19 University of Utah Press 1998).

In order to meet the objective of this study, a descriptive survey research design was used in determining why there is low environmental caseload at the ELC. A descriptive survey research design employs both a quantitative and qualitative research methods. It seeks to find out and asks the question ‘what is?’ It was applicable in this study because the study focuses on finding out why there are few environmental matters in the ELC, the impact of the low caseload on the operationalization of the ELC and how to deal with them.

The site of the study was the ELC in Kenya. However, due to the fact that the ELC Stations are distributed across 26 counties in Kenya, and due to time limitation and resources, the researcher visited the ELCs in Nyeri, Nairobi, Nakuru, Kajiado and Kerugoya. These courts were chosen because of their proximity to Nairobi where the researcher resides. The said stations, except Kajiado, were also among the first 16 ELC to be established in 2012.

The target population were the stakeholders in environmental governance who included ELC judges, the ELC DRs, legal practitioners, environmental civil society representatives, government officials and the members of the public. Government officials who were interviewed included representatives of NEMA. Environmental civil society representatives were drawn from the Institute for Law and Environmental Governance (ILEG) and Centre for Environmental Justice and Development (CEJAD). The number of individuals who are likely to file environmental cases at the ELC are scattered across the country, thus making it difficult to identify specific individuals to be interviewed. Mugenda and Mugenda provide that a lot of money, time and personnel will be required to locate and select a representative sample.<sup>44</sup> In order to avert this scenario, a researcher will be required to draw samples from an accessible population. Whereas

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<sup>44</sup> Olive M Mugenda and Abel G Mugenda, *Research Methods: Quantitative and Qualitative Approaches* (ACTS Press 2003)9.

this study would have wished to interrogate the entire public, due to time and financial constraints, the study drew individual members of the public from the ELC Stations visited in Nyeri, Nairobi, Nakuru, Kajiado and Kerugoya. Only the people who attended the ELC stations on the days the researcher visited the selected five stations were interviewed. This study is therefore limited to the accessible population.

The sampling technique adopted in this study is purposive sampling. Purposive sampling technique is a selective method where a researcher chose the population of the study based on the characteristics and objectives of the study. It is a non-probability sample whose objective is to select a sample that can be assumed to be the representative of the population. The ELC Judges, the ELC DRs and the ELC court users are involved daily in the ELC proceedings. That is why they were purposively selected to meet the objectives of the study. Court users in this context refer to the individual litigants in the ELC, government agencies, civil society and environmental legal practitioners.

The sources of data were both primary and secondary. Primary data involves the collection of firsthand information from key respondents involved in adjudication, litigation, and enforcement of laws governing the topic under study. Primary data also involve the reading and analysis of case law and legislation governing environmental law. The purpose of primary sources is to use the data collected as a basis for analyzing the situation under study and come up with the appropriate position and policy recommendations with regard to the subject.

The study adopted both the structured questionnaires and interview schedules as data collection methods. The questionnaires sought for detailed information and the respondents were given adequate time to understand the questions. Due to the distribution of the ELC across the counties, the questionnaires were sent via email to all the 33 ELC Judges and the 26 DRs. Only 16

ELC judges, 9 ELC DRs and 19 Court users responded to the questionnaires and interviews. Most of the individuals attending the ELC were reluctant in being interviewed, but the few that accepted to be interviewed reiterated that they had filed land cases in the ELC and that is what had made them attend court on the days of the interview.

Secondary data involved the reading and analysis of policy papers and publications of different institutions charged with policy formulation or the actual implementation of environmental law. It also included the analysis of reports made by official bodies established by the government of Kenya and international bodies such as UNEP to inquire into the situation under study as well as any other data with a government department, agency or other credible organizations that have conducted an inquiry into the situation. The secondary data collection technique entailed going through the relevant books, articles, journals, conference papers and information from the internet on enforcement of environmental law. In analyzing both the quantitative and qualitative data, this study used the SPSS software and excel. The data was then presented descriptively using bar graphs and pie charts and critically analyzed.

## 1.8 Literature Review

### 1.81 The role of the specialized environmental courts in enforcing environmental law

Most of the literature available on the functioning of the ECTs is limited to developed countries and fails to address the potential challenges of the ECTs in Africa.<sup>45</sup> Mulkey,<sup>46</sup> underscores that judges have a key role as law makers to influence law making through the decisions they make. The role of the Court, therefore, is to judicially interpret, review and implement the applicable law (this includes the constitutionality of the law), administrative orders, regulations, permits, licenses, and environmental legal requirements. However, she posits that judicial enforcement of environmental law is informed by well-drafted laws that are clear and certain, setting out clear enforcement mechanisms. However, such a judiciary must be independent, impartial, capable and credible. This increases public confidence and trust in the Court triggering environmental litigation. Whereas her paper focuses on the role of judges in environmental law enforcement, this study focuses on how such a role can be enhanced through sufficient caseload from a Kenyan perspective.

Warnock,<sup>47</sup> argues that despite the novel legal nature of specialist ECTs, the literature available is promotional in nature and has failed to address the potential challenges of legitimacy and governance endangered by these institutions. He recommends the need to make a legal sense of specialized adjudicatory bodies to foster legal integrity and normative legitimacy by addressing the adjudicatory challenges. To illustrate his argument, he examines the challenges created by

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<sup>45</sup> Gitanjali Nain Gill, 'Environmental Justice in India: The National Green Tribunal and Expert Members' (2016) 5 TEL 175; Richard Macrory, 'The Long and Winding Road—Towards an Environmental Court in England and Wales' (2013) 25 JEL 371.

<sup>46</sup> Marcia E Mulkey, 'Judges and Other Lawmakers: Critical Contributions to Environmental Law Enforcement' (2004) 1, *Journal of Sustainable Development and Policy* 1.

<sup>47</sup> Ceri Warnock, 'Reconceptualizing Specialist Environment Courts and Tribunals' (2017) 37, *Journal of Legal Studies* 1.

NSW Court. In this study, the researcher recognizes that sufficient environmental caseload can be enhanced when the public recognize the EC as a legal and appropriate forum for solving environmental disputes. In doing so, sufficient environmental caseload will be critical in enhancing environmental law and developing jurisprudence.

Minchun and Bao,<sup>48</sup> explore the status, challenges, and responses of specialized environmental courts in China. The authors argue that despite the increase in the number of environmental courts in China, these courts face a number of challenges and dilemma including issues bordering on legality, low caseload and lack of independent procedure. This has affected the legitimacy of the courts. The authors attribute this to barriers in legislation, rareness of environmental cases thus affecting the sustainability of the courts and lack of judicial independence as China has a centralized political system. In order to address these challenges, the authors recommend the need to establish an organizational structure of environmental courts, which will abide by the fundamental principles rooted in law and a comprehensive and centralized jurisdiction. They also provide for the need to establish a database of environmental experts to assist judges who are legally trained but technically inadequate in environmental matters in decision making. This article focuses on China, whereas this study focuses on Kenya. However, the article brings out the potential challenges that China's environmental courts have faced and it enriches this study which focuses on the Kenyan experience.

Preston has written extensively on ECTs.<sup>49</sup> He discusses the characteristics of successful ECTs such as status and authority; independence, impartiality, and autonomy; comprehensive and

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<sup>48</sup> Zhang Minchun and Zhang Bao 'Specialized Environmental Courts in China: Status Quo, Challenges and Responses' (2012) 30 J En Nat Res L 361.

<sup>49</sup> Brian J Preston, 'Public Enforcement of Environmental Laws in Australia' (1991) 6, Journal of Environmental Law and Litigation 43; Brian J Preston, 'The Land and Environmental Court of New South Wales: Moving towards a Multi-door Courthouse' (2008) 19, ADRJ 72.

centralized jurisdiction; and environmental judges and members who are literate and competent in environmental matters.<sup>50</sup> On the issue of environmental caseload, the author argues that it can be enhanced when there is comprehensive and centralized jurisdiction to avoid forum shopping; and when the EC is independent both politically and judicially; has judges who possess environmental knowledge; and the court enjoys public recognition as the appropriate and legitimate court to solve environmental disputes. Whilst this article provides a practical overview, there is no reference to any court in Africa. The article informs this study.

Pring and Pring, have written extensively on specialized environmental courts and tribunals.<sup>51</sup> In their book, *Greening Justice: Creating and Improving Environmental Courts and Tribunals*,<sup>52</sup> they explore the issue of access to environmental justice through specialized ECTs. They argue that the geographic area of the ECT should be broad enough to generate sufficient caseload to support it. An ECT will require sufficient caseload to warrant the time and expense. In establishing a stand-alone EC, the authors argue that the number of cases anticipated should be a great determinant.<sup>53</sup> The case volume of an ECT will be determined by a number of factors including: type of forum; legal jurisdictions; court level; geographic area; economic conditions; development policy; environmental laws; rule of standing; enforcement; public awareness; accessibility; and barriers.<sup>54</sup> This book was published in 2009 and enriches this study. At the time of its publishing, no African country had in place a specialized environmental court. Kenya now has the ELC, which was established in 2010.

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<sup>50</sup> *ibid.*

<sup>51</sup> George Pring and Cathreen Pring, 'Environmental Courts and Tribunals' in Michael Faure (ed), *Elgar Encyclopedia of Environmental Law* (Edward Elgar Publishers 2016) 452-464; George Pring and Cathreen Pring, 'Increase in Environmental Courts and Tribunals Prompts New Global Institute' (2010) 3(1), *Journal of Court Innovation* 1.

<sup>52</sup> Pring and Pring (n.7).

<sup>53</sup> *ibid* p 31.

<sup>54</sup> *ibid.*

Pring and Pring,<sup>55</sup> provide that the increase in the establishment of ECTs has probed the establishment of the International Judicial Institute for Environmental Adjudication (IJIEA) as a global forum where information on access to environmental justice can be shared among the various stakeholders.<sup>56</sup> The authors have argued that the sudden upsurge in ECTS has been as a result of increased environmental problems; increased public awareness; the urge to enforce the substantive environment law at the national and international level; the limitations of the general courts; public interest litigation; and emergence of leaders calling for ECTs in order to address the traditional challenges that have befallen the general courts.

Pring and Pring, in their latest book, *Environmental Courts and Tribunals: Guide for Policy Makers*,<sup>57</sup> provide a detailed guide to policymakers in establishing and improving the existing ECTs. On the issue of caseload, the authors argue that there is need to predict future environmental caseload before establishing an independent ECT.<sup>58</sup> This book informs this study in determining whether anticipated caseload was taken into consideration when making the decision to establish the ELC and granting it the jurisdiction to hear and determine environmental matters.

### **1.83 Enforcement of Environmental law in Kenya**

A book titled, *Environmental Governance in Kenya: Implementing the Framework Law*,<sup>59</sup> discusses the implementation of environmental law under the EMCA. This book, which brings together thirteen contributors, discusses Kenya's efforts in harmonizing its law on environmental conservation under the EMCA. The book, though comprehensive, was written in the year 2008

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<sup>55</sup> Pring and Pring 2010 (n 51).

<sup>56</sup> International Judicial Institute for Environmental Adjudication <<http://www.law.pace.edu/international-judicial-institute-environmental-adjudication-ijiea>> accessed 17 October 2017.

<sup>57</sup> Pring and Pring 2016 (n 7).

<sup>58</sup> *ibid* p 61.

<sup>59</sup> Charles Okidi, Patricia Kamere Mbote and Migai Aketch, *Environmental Governance in Kenya: Implementing the Framework Law* (East African Publishers Ltd 2008).



before the enactment of the CoK which established the ELC. It is, however, key in enriching this study as it is thorough in breath. It informs the historical development of environmental law in Kenya.

Bosek,<sup>60</sup> discusses the enforcement of the right to a clean and healthy environment under the Kenyan new constitutional order. In this article, Bosek delves into the implementation of environmental rights, the challenges and the way forward. He provides that the independent Kenyan Constitution did not provide for environmental rights and relied heavily on the common law principle of *locus standi* to stifle environmental litigation. The enactment of EMCA was seen as a step towards the facilitation of environmental governance as it consolidated power and responsibility in environmental management; provided for sound management and utilization of natural resources; and harmonized protection of human rights.<sup>61</sup> While the author briefly discusses the ELC, he limits this to enforcement of environmental rights. In the implementation of environmental rights, the author identifies overlapping jurisdiction, lack of political will, administrative bureaucracy, lack of capacity and competence in environmental matters as the main bottlenecks. This study, while recognizing the role that the ELC will play in informing similar courts in Africa, provides a comparative study with environmental courts in other developed countries.

Odote,<sup>62</sup> has written extensively on environmental law in Kenya. His writings have focused on public interest litigation in environmental law in Kenya and will be key in enriching

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<sup>60</sup> Bosek (n 22).

<sup>61</sup> A Angwenyi, 'An Overview of the of the Environmental Management and Coordination Act 'in Collins Okidi, Patricia Kameri Mbote and Migai Aketch, *Environmental Governance in Kenya: Implementing the Framework Law* (East African Publishers Ltd 2008) 143.

<sup>62</sup>Collins Odote and FA Away, *Traditional Mechanisms of Conflict Management* (Legal Education Foundation 2002); Collins Odote and Mo Makoloo, 'African Initiatives for Public Participation in Environmental Management' in C Bruch (ed), *The New "Public": Globalization of Public Participation* (Environmental Law Institute 2002).

this study.<sup>63</sup> In his article, *Kenya: The New Environment and Land Court*,<sup>64</sup> Odote provides that one of the most problematic issues facing the ELC is jurisdiction. If the issue of jurisdiction is not determined, then the ELC, which already has fewer number of cases relating to environment law, will be clogged and will not be able to develop jurisprudence in this area. He argues that if the ELC has exclusive jurisdiction to handle land cases, it would lead to backlog. He provides that there is a likelihood of overlapping jurisdiction between the ELC and the High Court, which, if not addressed, would lead to forum shopping. He provides that the ELC has jurisdiction to hear and determine matters relating to Article 42, 69 and 70 of the CoK. The High Court, on the other hand, has jurisdiction to hear, interpret and determine constitutional issues. Another issue he raises is whether the ELC has jurisdiction to hear and determine criminal cases under the EMCA. These issues, as discussed by Odote, are what this study seeks to address and how they affect environmental caseload at the ELC.

Sang,<sup>65</sup> discusses public interest litigation in environmental law in Kenya under the CoK, thus providing greater insights which will inform this study. While the author describes the ELC, he does not delve into the functioning of the ELC and how it will facilitate and enhance public interest litigation thus increasing environmental caseload which is the ambit of this study.

Otieno,<sup>66</sup> discusses the role of the ELC in attainment of environmental justice. She assesses the jurisprudence emerging from the ELC and the challenges facing the Court in the dispensation of justice. In her findings, she indicates that although the government has established ELCs in 16

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<sup>63</sup> Benson Ochieng', Collins Odote, 'Challenges and Prospects for Public Interest Environmental Litigation in Kenya (Institute for Law and Environmental Governance 2007).

<sup>64</sup> Odote (n 13).

<sup>65</sup> Brian Sang, 'Tending Towards Greater Eco-Protection in Kenya: Public Interest Environmental Litigation and Its Prospects within the New Constitutional Order' (2013) 57(1), *Journal of African Law* 29.

<sup>66</sup> Otieno Nora, 'Appraising specialized Environmental Courts in the Attainment of Environmental justice: Kenyan experience', (Masters Degree, Centre for Advanced Studies in Environmental Law and Policy, University of Nairobi, 2014)

counties, not all litigants file their claims in the ELCs. In addition, she states that very few cases of purely environmental nature were filed at the ELC. She attributes this to the lack of public awareness and recognition of the court. She recommends for the need of the ELC to have exclusive jurisdiction on environment and land matters as conceptualized under the CoK; and the need to establish the ELCs across the 47 counties to enhance access to justice. The author conducted this study in 2014, two years after the establishment of the ELC.

Kaniaru articulates the challenges and opportunities that the establishment of the ELC would present.<sup>67</sup> He identified the challenges that the ELC would face upon its operationalization. First was the ability of the ELC to develop environmental law and jurisprudence in Kenya. Second, is the determination of the jurisdiction by the ELC. He argues that the Kenyan land tenure system and laws date back to 1900 or earlier, and how the ELC will interpret such laws in accordance with the new constitutional dispensation would remain fundamental. The author proposed the need for the ELC to learn from the New South Wales Land and Environment Court and the New Zealand Environment Court. He also proposed the need to revise the High Court Rules of Procedure before applying them to the ELC. The third challenge that the author anticipated was how the ELC would streamline and reevaluate the role of the judiciary, the other courts and judicial tribunals dealing with environmental issues. He argued that in almost every statute in Kenya, there is an established tribunal, a committee, board and, other appellate mechanism.

The fourth challenge the author foresaw was how the cases already at the High Court would be moved to the ELC in view of the already backlog of cases. He proposes that during the initial operation of the ELC, it should cooperate with the High Court. Alternatively, the High Court and

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<sup>67</sup>Donald Kaniaru, 'Environmental Courts and Tribunals: The Case of Kenya' (2012) 29, Pace Environmental Law Review 566.

the ELC should establish a joint supervision of the lower courts through registrars, principals and other judges to establish ‘orderly fashion in sister courts.’<sup>68</sup> In a nutshell, the author provides that these challenges would offer the ELC an opportunity to review these issues and borrow from the older courts. This article is a presentation that the author made during the Judges Global Symposium and before the enactment of the ELC Act and the operationalization of the ELC. Now that the ELC is in place, this study, informed by the issues raised by the author, will analyze the environmental legal framework. It will also, through interviews with key respondents such as environmental scholars, judicial officers, legal practitioners and civil society, determine whether these issues have been addressed.

Kaniaru,<sup>69</sup> in his article, *Launching a New Environmental Court: Challenges and Opportunities*, argues that the establishment of the courts deriving from the Constitution of a particular country makes it superior while the tribunals established by the statutes are subordinate to such Courts. He provides that courts operate formally whereas tribunals operate informally without regard to technicalities. In the paper, the author argued that African judiciary is not as active as it is in Asia, Pacific, Latin America and the Caribbean which have established independent and superior courts. At the time of writing the article, the ELC was not operational. This study delves into how the ELC has been able to carry out its mandate within the period of its existence by analyzing the case laws. This study not only builds on the available literature on the ELC, but interrogates why there are fewer environmental cases and how the situation can be improved.

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<sup>68</sup> *ibid* at p 13.

<sup>69</sup> Kaniaru (n 1).

## **1.9 Chapter Breakdown**

This study consists of five chapters.

The first chapter introduces the topic under study. It provides the background, the problem statement, justification, objectives, research questions, theoretical framework, research methodology and literature review.

The second chapter provides an in-depth understanding of the ELC and what informed its establishment. In doing so, it conceptualizes the establishment of the ELC as a specialized EC with reference to the debate against and for the establishment of environmental courts at the global level which has triggered the establishment of the ECs across the world. The chapter analyzes the policy considerations that informed the establishment of the ELC and granting it with dual jurisdiction to deal and determine land and environmental matters. The chapter also focuses on the structure and composition of the ELC and relate the same to the enforcement of environmental law.

The third chapter seeks to interrogate the cases that the ELC has handled so far since it was established. It focuses on the environmental caseload before the ELC and how the ELC has adjudicated environmental matters and its role in enforcing environmental law and jurisprudence.

The fourth chapter recognizes the crucial role that environmental caseload plays in the enforcement of environmental law. Using the data collected from the field, the chapter analyzes the factors contributing to the number of environmental cases and its impact on the functioning of the ELC in the enforcement of environmental law.

The fifth chapter provides the findings, conclusions, and recommendations of the study.

## CHAPTER TWO

### 2.0 THE HISTORY AND STRUCTURE OF THE ENVIRONMENT AND LAND COURT IN KENYA

#### 2.1 The Justification of Specialized Environmental Courts

Court specialization is an effective tool in developing expertise and enhancing efficiency in the judicial system.<sup>1</sup> In most cases, court specialization is informed by the increase in litigation of complex lawsuits, the need to maintain a coherent body of law and division of labour to lessen caseload.<sup>2</sup>

Proponents of the specialized ECs argue that general courts lack the expertise to handle complex scientific and technical environmental issues.<sup>3</sup> Due to the number of cases a general court is required to handle, it can be marred with delay in decision making, high costs of litigation, corruption, forum shopping, lack of public information and trust.<sup>4</sup> A specialized EC is expected to enhance judicial system efficiency; legal system efficiency; uniformity in the application of the law; judicial expertise yielding high-quality decisions; and increased system flexibility.<sup>5</sup> The efficiency of an EC is evidenced by its ability to facilitate better, quality and innovative judgments leading to the development of environmental jurisprudence. Indeed, in the presence of complex climate change issues and the complexity in interpreting the international environmental principles

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<sup>1</sup> Lawrence Baum, *Specializing the Courts* (University of Chicago Press 2011); Lawrence Baum, 'Probing the Effects of Judicial Specialization' (2009) 58, *Duke Law Journal* 1667; Harold H Bruff, 'Specialized Courts in Administrative Law' (1991) 43(3), *Administrative Law Review* 329.

<sup>2</sup> Ellen R Jordan, 'Specialized Courts: A Choice?' (1981) 76, *NW UL Review* 745.

<sup>3</sup> Andrew Harding, *Access to Environmental Justice: A Comparative Study* (Martinus Nijhoff 2007).

<sup>4</sup> *Ibid.*

<sup>5</sup> Markus B Zimmer, 'Overview of Specialized Courts' <<http://www.iaca.ws/files/LWB-SpecializedCourts.pdf>> accessed 10 November 2017.

and conventions, the need for a specialized EC staffed with judges with expertise in environmental matters is not only inevitable but imperative. This is key in enhancing environmental sustainability.

On the other hand, critics of specialized ECs have argued that a general court is in a better position to adjudicate environment matters due to its exposure to a wide range of legal and complex issues.<sup>6</sup> The general courts, it has been argued, are usually accustomed to dealing with complex issues of facts and law and evaluating expert evidence in fields which they are not familiar with.<sup>7</sup> However, one cannot dispute the fact that a judge with a general understanding of the law will have a hard time adjudicating complex environmental cases which involve scientific and technical issues. This is likely to lead to delays or ineffective decision making which might not take into consideration the peculiar characteristics of environmental issues, thus occasioning more harm to the environment and its consumers. Furthermore, due to the acknowledgment that environmental litigation involves a number of mixed legal issues, critics of specialized ECs posit that this in itself defies the need for expertise.<sup>8</sup> They argue that environmental litigation is based on policy considerations and not on the basis of substantive technical data or scientific knowledge.<sup>9</sup>

The arguments raised by the critics of ECs cannot be underestimated in deciding on whether to establish an EC or not. However, these arguments, and especially those poised by the US Taskforce in 1973, occurred when environmental awareness was low and environmental issues were not a priority in most countries.<sup>10</sup> However, with the increased environmental degradation at the global and national level and the need for the use and protection of transboundary natural

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<sup>6</sup> D Murphy, 'Does the World Need a New International Environmental Court?' (2000) 32(3), *George Washington International Law and Economics* 333.

<sup>7</sup> Grant P Thompson, *Courts and Water: The Role of Judicial Process* (Environmental Law Institute 1972).

<sup>8</sup> Rachael E Stern, *Environmental Litigation in China: A Study in Political Ambivalence* (Cambridge University Press, 2013) 119.

<sup>9</sup> *Ibid.*

<sup>10</sup> SC Whitney, 'The Case for Creating a Special Environmental Court System: A Further Comment' (1973) 15, *William and Mary Law Review* 33.

resources, coupled with complex environmental laws and principles, the need to have specific judges possessing expertise in environmental issues who can effectively adjudicate environmental issues before them must be interrogated.

The arguments against the establishment of the ECs have not precluded the establishment of the ECs in some countries.<sup>11</sup> Australia is one of the earliest regions in the world to establish specialized ECs. The main ECs in Australia are: the New South Wales (NSW court);<sup>12</sup> Environment Court of New Zealand (New Zealand Court);<sup>13</sup> and the Queensland Planning and Environment Court (Queensland Court).<sup>14</sup> In the US, the Vermont Environmental Court (Vermont Court) was established in 1990 while the Hawaii Environmental Court was established in 2014.<sup>15</sup> China,<sup>16</sup> Philippine,<sup>17</sup> Sweden,<sup>18</sup> and India have also established specialized ECs.<sup>19</sup> In Africa, Kenya is the first country to establish an EC at the national level by entrenching it in its Constitution in the year 2010.

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<sup>11</sup>Paul L Stein, 'A Specialist Environmental Court: An Australian Experience' in David Robinson and John Dunkley (eds), *Public Interest Perspectives in Environmental Law* (1995); Brian J Preston, 'Public Enforcement of Environmental Laws in Australia' (1991) 6, *Journal of Environmental Law and Litigation* 43.

<sup>12</sup> Paul L Stein, 'The Role of the New South Wales Land and Environment Court in the Emergence of Public Interest Law' (1996) 13, *Environmental Planning Law Journal* 179.

<sup>13</sup> George Pring and Catherine Pring, *A Practitioners Guide to the Land and Environment Court on NSW* (3<sup>rd</sup> edn, NSW Young Lawyers Environmental Law Committee 2009) 21.

<sup>14</sup> Bret C Birdsong, 'Adjudicating Sustainability: New Zealand Environmental Court' (2002) 29, *Ecology Law Quarterly* 1.

<sup>15</sup> Merideth Wright, 'The Vermont Environmental Court' (2010) 3(1), *Journal of Court Innovation* 201; Hawaii State Judiciary, 'Hawaii State Judiciary Launches New Environmental Court' <[http://www.courts.state.hi.us/news\\_and\\_reports/press\\_releases/2015/06/environmental\\_court\\_launches](http://www.courts.state.hi.us/news_and_reports/press_releases/2015/06/environmental_court_launches)> accessed 31 October 2017.

<sup>16</sup> Alex L Wang, 'Environmental Courts and Public Interest Litigation in China' (2010) 43 (6), *Journal of Chinese Law and Government* 4; Jin Zining, 'Environmental Impact Assessment Law in China's Courts: A Study of 107 Judicial Decisions' (2015) 55, *Environmental Impact Assessment Review* 35; Zang Minchun and Zang Bao, 'Specialized Environmental Courts in China: Status Quo, Challenges and Responses' (2012) 30(4), *Journal of Energy and Natural Resource Law* 361.

<sup>17</sup> Rodrigo V Cosico, *Philippine in Environmental Laws: An Overview and Assessment* (Central Book Supply Incorporation 2012); Hilario G Davide and Sara Vinson, 'Green Courts Initiative in Philippine' (2010) 3(1), *Journal of Court Innovation* 121.

<sup>18</sup> Ulf Bjällås, 'Experiences of Sweden's Environmental Courts' (2010) 3 (1), *Journal of Court Innovation* 177.

<sup>19</sup> Ria Guidone, 'Environmental Courts and Tribunals: An Introduction to National Experiences, Lessons Learned and Good Practice Examples Special Courts' (Forever Shabah, Legal Innovation Working Paper No1 2016).



## 2.2 The Historical Development of the Environment and Land Court in Kenya

Kenya inherited the colonial environmental governance system when it attained independence in 1963, which was characterized by environmental regulation and governance. During this period, the general courts continued to hear and determine the few environmental matters that were filed. After many years, the EMCA was enacted to provide for a coordinated legal and institutional framework in environmental governance; entrenched the international environmental principles including the principle of sustainable development;<sup>20</sup> entrenched the right to a clean and healthy environment;<sup>21</sup> removed the strict rule of *locus standi*<sup>22</sup>; and introduced the requirement for the preparation of the environment impact assessment reports for all development projects.<sup>23</sup> The Act also established the National Environment Tribunal (NET)<sup>24</sup>, a specialized tribunal, to hear and determine environmental disputes.

Mumma, notes that unlike general courts which are typically slow, costly and complex, specialized tribunals are designed to be 'more accessible to the public and are therefore less expensive, less complex, and speedier because the rules allow them a discretion and flexibility in due process.'<sup>25</sup> The establishment of the NET should be applauded because, for the first time, environmental expertise in hearing environmental disputes was recognized as a fundamental requirement. EMCA recognized that to effectively adjudicate disputes of environmental nature, expertise in environmental governance was required.

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<sup>20</sup> EMCA 1999, s 3(5).

<sup>21</sup> EMCA 1999, s 3.

<sup>22</sup> Ibid, s 3(4)

<sup>23</sup> Ibid, s 58

<sup>24</sup> Ibid, s 125

<sup>25</sup> Albert Mumma, 'The Role of Administrative Dispute Resolution Institutions and Process in Sustainable Land Use Management: The Case of the National Environment Tribunal and the Public Complaints Committee of Kenya' in Nathalie J Chalifour, Patricia Kamere Mbote, Lin Heng Lye and John R Nolon (eds), *Land Use Law for Sustainable Development* (Cambridge University Press 2006) 253.

Although the establishment of the NET was a positive step in enforcing environmental law and enhancing environmental sustainability, the jurisdiction of NET was specific and limited to instances stipulated under Section 129(1) of the EMCA. The courts of general jurisdiction, therefore, continued to hear and determine all other environmental disputes falling outside the purview of Section 129(1) of EMCA. According to Preston, due to the jurisdictional limitations of the NET, the Kenyan government curtailed the ability of the NET to make a holistic contribution to environmental governance.<sup>26</sup>

Due to the jurisdictional limitations of NET in handling environmental disputes, the need to establish a court to handle land and environmental matters was revisited during the Kenyan Constitutional review process.<sup>27</sup> In 2003, the Commission of Inquiry into the Illegal/Irregular Allocation of Public Land (Ndung'u Commission) had recommended for the establishment of a Land Titles Tribunal to handle the large number of land cases filed in the general courts.<sup>28</sup> In recommending for the establishment of the Land Titles Tribunal, it was the Commission's view that a specialized tribunal to handle land cases would lead to expeditious resolution of land disputes. However, instead of establishing the Land Titles Tribunal as recommended by the Ndung'u Commission, the judiciary established the Environment and Land Court Division, as a division of the High Court, through Gazette Notice No. 301 of 2007. However, the Division was only set up in Nairobi and Mombasa.<sup>29</sup> In the other regions, land and environment matters continued to be heard by courts of general jurisdiction in accordance with the provisions of the

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<sup>26</sup>Brian J Preston, 'Characteristics of Successful Environmental Courts and Tribunals' (2014) 26 *Journal of Environmental Law* 365, 377.

<sup>27</sup> CKRC, *The People's Choice* (Report of the CKRC 2002).

<sup>28</sup>Government of Kenya, *Report of the Inquiry into the Illegal/Irregular Allocation of Land* (Government Printers 2004); Joseph Kieyah, 'Ndung'u Report on Land Grabbing: Legal and Economic Analysis' (IDS 2010).

<sup>29</sup>Samuel Ongwen Okuro, 'The Land Question in Kenya: The Place of Land Tribunals in the Land Reforms in Kombewa Division' (A Paper Presented at the Codesria Tenth General Assembly Kampala Uganda 8th -12th December 2002).

Civil Procedure Act. The establishment of the Environment and Land Division in the High Court in Nairobi and Mombasa was informed by the increased number of land cases and the need to hear and determine them expeditiously.

Although the Environment and Land Division was supposed to be a specialized court, there was no condition requiring that the judges hearing and determining environment and land matters possess professional knowledge and expertise in the subject matter. In the absence of a criteria of how the judges who were to be posted in the Division were to be identified, the specialty that was to be achieved in the Division was watered down. As a result of the limitations of the Environment and Land Court Division of the High Court, the need for a specialized court to handle disputes relating to both land and environmental matters was inevitable. It is on that basis that the Committee of Experts (CoE) which harmonized the 2010 CoK recommended for the establishment of specialized courts in the Harmonized Draft Constitution, including the ELC, with the status of the High Court, to hear and determine matters relating to the environment and land.<sup>30</sup> When the harmonized 2010 CoK was presented in Parliament, the Parliamentary Select Committee (PSC) on Constitutional Review proposed the need for Parliament to solely determine the status, authority and jurisdiction of the specialized courts under Section 200(2) of the Harmonized Draft Constitution. In response, the CoE rejected PSC's proposal on the specialized courts under Section 200(2) and in doing so, retained the provision in the Harmonized Draft Constitution. The status and authority of the ELC as proposed by the CoE was retained in the CoK.

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<sup>30</sup> Government of Kenya, *Harmonized Draft Constitution of Kenya* (Committee of Experts on Constitutional Review 2009) s 200.

The ELC was operationalized in 2012 when the JSC appointed 15 judges in October 2012.<sup>31</sup> So far, the judiciary has established 26 ELCs in 26 Counties across the country as indicated below. The court has a total of 34 ELC Judges.<sup>32</sup>

**Table 2. 1: ELC Distribution in Kenya**

	<b>ELC Station</b>	<b>County</b>	<b>Counties without ELC</b>	<b>NO. OF JUDGES PER ELC STATION</b>
1. Nairobi	1. Milimani	1. Nairobi		5
2. Coast	1. Mombasa 2. Malindi	1. Mombasa 2. Kilifi	1. Kwale 2. Tana River 3. Lamu	3 (2 in Mombasa and 1 in Malindi).
3. Eastern	1. Embu 2. Machakos 3. Meru 4. Chuka 5. Makueni	1. Embu 2. Machakos 3. Meru 4. Tharaka- Nithi 5. Makueni	1. Isiolo	5 (Each ELC has 1 judge).
4. Rift Valley	1. Nakuru 2. Eldoret 3. Narok 4. Kitale	1. Nakuru 2. Uasin Gishu 3. Narok	1. Turkana 2. West Pokot 3. Samburu	8 (Nakuru and Eldoret ELCs have 2 judges per station, while the rest have 1 judge each.

<sup>31</sup> Kenya Law, 'Gazette Notice' <[http://kenyalaw.org/kenya\\_gazette/gazette/volume/NjM-/Vol.CXIV-No.95](http://kenyalaw.org/kenya_gazette/gazette/volume/NjM-/Vol.CXIV-No.95)> accessed 12 October 2017.

<sup>32</sup>Government of Kenya, *Sustaining Judiciary Transformation (SJT): A Service Delivery Agenda 2017-2021* (The Judiciary 2017).

	5. Kajiado 6. Kericho	4. Trans Nzoia 5. Kajiado 6. Kericho	4. Elgeyo Marakwet 5. Nandi 6. Baringo 7. Bomet 8. Laikipia	
5. Central	1. Nyeri 2. Kerugoya 3. Murang'a 4. Nyandarua 5. Thika	1. Nyeri 2. Kirinyaga 3. Murang'a 4. Nyandarua 5. Kiambu		5 (One judge per station).
6. Nyanza	1. Kisumu 2. Kisii 3. Migori	1. Kisumu 2. Kisii 3. Migori	1. Siaya 2. Homabay 3. Nyamira	3 (1 Judge per station).
7. Western	1. Kakamega 2. Bungoma 3. Busia	1. Kakamega 2. Bungoma 3. Busia	1. Vihiga	3 (1 Judge per station).
8. North Eastern	1. Garissa	1. Garissa	1. Wajir 2. Mandera 3. Marsabit	1
	<b>TOTAL ELC:26</b>	<b>TOTAL:26</b>	<b>TOTAL:21</b>	<b>TOTAL: 33 JUDGES</b>

Source: Author, 2018.

The above data indicate that 26 counties in Kenya have the ELC and in most cases, every court has only one judge. Nairobi has five judges while Mombasa, Nakuru and Eldoret have two judges each. The other 22 ELCs have one judge per station.

In addition to the 33 judges sitting in the ELC, there is one ELC judge who is stationed at the Judicial Training Institute, making the total number of the current ELC judges to be 34. This number of Judges is low considering that for the litigants to access the courts, there must be judges stationed in areas that are not too far from where they live or where the impugned environmental harm occurs. The consequences of such a low number of judges in the ELC is that people will not see the need of filing environmental disputes either due to the distance that they have to cover to access the nearest ELC or the expenses involved in accessing the court.

### **2.3 The Structure and Operationalization of the Environment and Land Court in Kenya.**

The ELC and the ELRC are courts of superior record with the status of the High Court. To emphasize that the ELC and the ELRC are superior courts, Article 169 (1) d) of the CoK allows a subordinate court to be established by an Act of Parliament. However, the Article specifically provides that these courts will not include the ELC and ELRC. Although the High Court has unlimited original jurisdiction in criminal and civil matters, Article 169 (5) (b) of the Constitution prohibits it from dealing with any dispute reserved for the ELC and ELRC. Unlike the other specialized courts whose status and authority is determined by an Act of Parliament, the ELC has being granted the status of the High Court and entrenched in the CoK. This status and authority of the court was meant to create confidence and trust amongst the public with the anticipation that environmental litigation will lead to the sustainability of the environment.

Since its establishment, the relationship of the ELC and the magistrate courts over environment and land matters has been a concern to the litigants and legal practitioners. The relationship between these two courts was litigated upon in the case of *Malindi Law Society v Attorney General & 4 others*<sup>33</sup> and *Law Society of Kenya Nairobi Branch v Malindi Law Society & 6 Others*<sup>34</sup> where the Court was called upon to determine whether magistrates can hear and determine environment and land cases. The High Court held that the magistrates' court had no jurisdiction to handle disputes relating to land and environment. However, on appeal, the Court of Appeal held that the magistrate courts can hear and determine land and environment matters as a court of first instance and that the ELC does not have exclusive jurisdiction to hear such matters.

In the case of *Mohammed Said vs. County Council of Nandi*,<sup>35</sup> the court was categorical that where a constitutional petition on environment was filed, the High Court, subject to Article 165(5), is precluded from hearing and determining such a petition. Section 13(3) of the ELC Act has sought to clear the ambiguity on the role of the ELC and the High Court in hearing and determining constitutional petitions by providing that the court is not precluded from determining disputes relating to a clean and healthy environment under Articles 42, 69 and 70 of the CoK. Indeed, considering that the High Court is precluded by the Constitution from hearing matters reserved for the ELC, it follows that it cannot hear any constitutional petition relating to land and environment.

The initial ELC Act establishing the ELC had a provision requiring that the ELC be headed by a Principal Judge. The Statute Law (Miscellaneous Amendments) Act of 2012,<sup>36</sup> made fundamental changes to the ELC Act. It deleted the position of a Principal Judge and replaced it

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<sup>33</sup> *Constitutional Petition No. 3 of 2016, High Court at Malindi [2016] eKLR.*

<sup>34</sup> *Civil Appeal No. 287 of 2016, Court of Appeal at Nairobi [2017] eKLR.*

<sup>35</sup> *EL&C Petition No. 2 of 2013, ELC Court at Nakuru [2013] eKLR.*

<sup>36</sup> Government of Kenya, *Statute Law (Miscellaneous Amendments) Act, No. 12 of 2012* (Government Printers 2012).

with a Presiding Judge.<sup>37</sup> These amendments should not be regarded as miscellaneous or minor but substantial and should have never been contained in the Statute Law (Miscellaneous Amendments) Act in the first place.<sup>38</sup> The amendments should have followed a legislative process including public participation.

Deleting the position of the Principal Judge and replacing it with that of a Presiding Judge means that the ELC is likely to be treated as a division of the High Court rather than a court with the same status as the High Court.<sup>39</sup> In the order of seniority of judges, the Principal Judge ranks higher than the Presiding Judge. Indeed, that is the recognized hierarchy in the High Court where it has one elected Principal Judge and Presiding Judges in all the stations appointed by the CJ. To the contrary, and due to the amendment that was made to the ELC Act, the ELC has one elected Presiding Judge. All the other ELC judges, other than reporting to the Presiding Judge who is based in Nairobi, are under the supervisory role of the Presiding Judges of the High Court in their respective stations.

Considering that the two courts are of the same status, the initial provision of the ELC Act which required the Court to have a Principal Judge should not have been amended, more so without public participation. The amendments to the Act missed an important point: that the CoK contemplates the ELC to be a distinct court with the status of the High Court and that the ELC is not a division or a station of any other court. Given the role the ELC plays in settling land and environmental disputes, and being a distinct court, the ELC should have an elected Principal Judge and Presiding Judges in all the stations where the court is situated. This will ultimately reflect the

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<sup>37</sup> Ibid p. 45.

<sup>38</sup> Martin Mukangu, 'Abuse of the Statute Law Miscellaneous Amendments' <<https://www.nation.co.ke/oped/opinion/Abuse-of-the-Statute-Law-Miscellaneous-Amendments/440808-2937410-pm75o8/index.html>> accessed 30 March 2018.

<sup>39</sup> Article 162 (2) of the CoK



spirit of the CoK in enhancing the status and authority of the ELC as a superior court and enhance environmental governance.

The specialization of judges in land and environment matters is an important selection criterion. It should be noted that even though the former Environment and Land Division established in the High Court sought to enhance specialization in land and environment matters, there was no requirement that judges presiding over the said matters should possess expertise in environment and land law. The ELC Act recognizes this gap and requires that, in addition to qualifications of judges as contemplated under Article 166(2) of the CoK, judges of the ELC must possess academic qualifications and professional experience in land and environment matters.<sup>40</sup>

To enhance the independence of the ELC, the tenure of the judges in the court is protected.<sup>41</sup> However, Section 8 (d) of the ELC Act became a controversial provision in the early days of the establishment of the ELC as it provided that a judge of the ELC can be transferred to the High Court or the ELRC. Considering that the ELC, ELRC and the High Court are distinct courts, it cannot be said that judges of the High Court are the same as judges of the ELC and ELRC. If such a conclusion was to be made, then it will defeat the logic of the ELC Act requiring that the judges of the ELC should possess more than ten years professional experience and academic qualifications in environment or land matters. A judge who does not possess such qualification cannot sit in the ELC court.

In discharging its functions, the ELC is bound by the Civil Procedure Act, the Civil Procedure Rules and the rules of evidence.<sup>42</sup> Before the 2012 amendments to the ELC Act, the ELC was not

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<sup>40</sup> ELC Act, 2011, s 7.

<sup>41</sup> CoK 2010, Art 167 & 168.

<sup>42</sup> ELC Act, s 19.

bound by the Civil Procedure Act, the Rules of Civil Procedure and the rules of evidence in the Evidence Act. The ELC was not supposed to conduct its proceedings like a normal court. Instead, it was supposed to come up with its own rules of procedures. The impact of the 2012 amendments was that they re-introduced the cumbersome procedures that are found in the Civil Procedure Act and Rules and the strict rules of evidence, which has ultimately led to few people filing environmental cases in the ELC and increased delays in hearing those matters.

## **2.4 Chapter Conclusion**

The establishment of the ELC in Kenya is a great step towards environmental governance. However, its operationalization and functionality will be dependent on its institutional independence as provided for in the Constitution. For the court to succeed in its role of enforcing environmental law, it ought to have a Principal Judge and Presiding Judges in all the stations. The geographical presence of the court should be expanded to cover all the 47 counties. More judges should also be employed to expedite the hearing of the matters filed in the ELC. Considering that environmental matters are supposed to be heard expeditiously, the court should formulate simple rules of procedure to enable unrepresented litigantsto access the court with ease.

## CHAPTER THREE

### 3.0 THE ENVIRONMENTAL CASELOAD AND THE JURISPRUDENCE IN THE ENVIRONMENT AND LAND COURT: 2012-2017.

#### 3.1 Environmental Caseload in the Environment and Land Court (ELC), 2012-2017.

During a Symposium on Environmental Adjudication in the 21st Century held in Auckland, New Zealand, on 11th April 2017, Justice Samson Okong'o noted that:

*The court is not handling as many environmental cases as was expected. Most of the cases concern land. The main contributing factor is lack of interest on the part of the public on issues concerning environmental conservation... ELC is expected to develop rich jurisprudence to enable Kenyans realize the rights to clean and healthy environment conferred by Article 42 of the Constitution and social economic rights such as a right to clean and safe water, and a right to reasonable standards of sanitation which are conferred by Article 43 of the Constitution. The court is also expected to give meaning to environmental obligations and duties imposed on the government and the public under the Constitution and EMCA.... access to justice, capacity to sue, implementation of environmental obligations arising from international law, application of the principles of environmental law and the forms of remedies being awarded by the court.*<sup>1</sup>

The remarks by Justice Okong'o in 2017, five years since the ELC was operationalized, evokes critical questions on the functionality and operationalization of the ELC as regards the

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<sup>1</sup> Samson Okong'o, 'Environmental Adjudication in Kenya: A Reflection on the Jurisdiction of the Environment and Land Court' (A presentation made at the Symposium on Environmental Adjudication in the 21st Century held in Auckland New Zealand on 11th April 2017) <<http://environmental-adjudication.org/assets/Uploads/General/Okongo-PPT2.pdf>> accessed 8 October 2017.

enforcement of environmental law and the hearing and determination of environmental disputes.<sup>2</sup> Kenyans, in anchoring the ELC in the CoK to hear and determine environmental matters, had high expectations that the ELC would indeed play a critical role in environmental governance and conservation.<sup>3</sup> If caseload was a factor in considering the establishment of the ELC, then it was largely informed by the high caseload of land cases in Kenya.<sup>4</sup>

Statistical data on the court caseload is critical for policymaking decisions and tracking of the court's progress.<sup>5</sup> Environmental caseload is not an exception. The institutionalization of performance management in the judiciary commenced with the launch of a report titled "*Institutionalizing performance Management in the Judiciary*" which was launched on 15<sup>th</sup> April 2015.<sup>6</sup> The Report paved the way for the signing of the first cycle of Performance Management and Measurement Understanding (PMMU) by all the judicial officers, through their representatives, indicating their performance obligations, for the year 2015/2016, with the second circle being signed between July 2016 and June, 2017.<sup>7</sup>

Every year, in the *State of the Judiciary and the Administration of Justice Reports*, the judiciary provides its progress report and in doing so, provides information on the caseload in the courts. The judiciary recognizes caseload as a quantitative measure of determining access to

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<sup>2</sup> Nicholas A Robinson, 'Ensuring Access to Justice through Environmental Courts' (2012) 29, *Pace Environmental Law Review* 363.

<sup>3</sup> Collins Odote, 'Kenya: The New Environment and Land Court' (2013) 4, *IUCN Academy of Environmental Law E Journal* 171.

<sup>4</sup> CKRC, *Report of the Constitution of Kenya Review Commission* (Volume 1, Main Report 2003) 254 <[http://katibainstitute.org/Archives/images/VOLUME%20I%20-%20Main%20Report%20\\_Orange%20Book\\_.pdf](http://katibainstitute.org/Archives/images/VOLUME%20I%20-%20Main%20Report%20_Orange%20Book_.pdf)> accessed 31 May 2018.

<sup>5</sup> Andreas Lienhard and Daniel Kettiger, 'Research on the Caseload Management of Courts: Methodological Questions' (2011) 7(1) *Utrecht Law Review* 1.

<sup>6</sup> Government of Kenya, *The Judiciary: Institutionalizing Performance Management and Measurement in the Judiciary* (Report by Performance Management and Measurement Steering Committee, Judiciary April 2015).

<sup>7</sup> Government of Kenya, *The Judiciary: Performance Management and Measurement Understanding Evaluation Report*, (Judiciary 2016/2017).

justice.<sup>8</sup>It is through caseload that one can determine the number of cases filed, the pending cases and the case backlog. This informs policy decision making such as the number of courts to establish, the allocation of judges in those courts and putting in place measures to enhance access to justice.<sup>9</sup>While the judiciary continues to publish information on caseload, when it comes to the ELC, the data does not distinguish between environment and land matters.<sup>10</sup>All the cases are coded as ELC matters, ELC Miscellaneous and ELC Appeals.<sup>11</sup> With this type of categorization, there is no public data on the number of environment cases filed in the ELC to track environmental caseload.

In the absence of data from the judiciary on environmental caseload, this study administered questionnaires to the Judges of the ELC and the Deputy Registrars (DRs) to find out if they had data on the number of environmental cases that have been handled by the ELCs. According to the data collected from the ELC DRs, most of the cases filed in the ELC concern land. The Milimani ELC DR indicated that less than 1% of the cases filed in the ELC concerned environment.<sup>12</sup>The Bungoma ELC DR noted that, out of the 1270 cases filed in her registry, only about nine were of environmental nature.<sup>13</sup>In Nakuru ELC, out of the 2284 cases filed so far, approximately 16 were of environmental nature.<sup>14</sup> It is only those three DRs that were able to approximate the number of filed cases that were purely environmental in nature but did not have in place the statistical information to refer to. The remaining DRs could not identify or

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<sup>8</sup> Government of Kenya, *State of the Judiciary and Administration of Justice Report 2016/2017* (Judiciary 2017)23

<sup>9</sup> Ibid.

<sup>10</sup> Ibid p 44.

<sup>11</sup> Ibid.

<sup>12</sup> Respondent 19, Isabella N Barasa, ELC Deputy Registrar, ELC Nairobi (ELC Nairobi, Questionnaire filled on 6 April 2018).

<sup>13</sup> Respondent 18, ELC Deputy Registrar, ELC Bungoma (ELC Bungoma, Questionnaire filled on 11 April 2018).

<sup>14</sup> Respondent 25, Interview with the ELC Deputy Registrar, ELC Nakuru (ELC Nakuru, 7 February 2018).

approximate the number of environmental matters filed in the ELC in their stations.<sup>15</sup> They argued that during filing of cases at the registry, environmental matters are not distinguished from land matters and:

*...ordinarily the filing system in the Land and Environment Registry does not distinguish between environment and land cases. They are categorized as Judicial Review, Appeals, ELC cases, ELC Petitions, ELC Miscellaneous application.*<sup>16</sup>

Most of the judges who were interviewed indicated that they had adjudicated very few environmental cases. One of the judges stated that out of the 200 cases he had handled in a year, only five were environmental in nature.<sup>17</sup> Another Judge stated that despite handling more than 600 cases, none of them concerned the environment.<sup>18</sup> In some cases, the judges could not precisely provide the number of environmental cases they have handled on the ground that it was difficult to categorize environmental matters because all cases were coded as ELC.<sup>19</sup> It is therefore clear that even where judges indicate that they have handled fewer environmental cases, there is lack of data on environmental cases filed and handled in the ELC stations. This is informed by the lack of a filing system that distinguishes between land and environment matters. Whereas a majority of the ELC judges indicated that it is easy to categorize environmental issues based on the nature of

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<sup>15</sup> Respondent 17, ELC Deputy Registrar, ELC Kisumu (ELC Kisumu, Questionnaire filled on 23rd April 2018); Respondent 20, ELC Deputy Registrar, ELC Kisumu (ELC Kisumu, Questionnaire filled on 23rd April 2018).<sup>20</sup>, Respondent 21, Martin, ELC Deputy Registrar, ELC Kisumu (ELC Kisumu, Questionnaire filled on 4 April 2018); Respondent 23, Interview with M Kasera, ELC Deputy Registrar, ELC Kajiado (ELC Kajiado, 14 March 2018); and Respondent 24; Interview with Eric Otieno, ELC Deputy Registrar, ELC Kirinyaga (ELC Kirinyaga, 28 February 2018).

<sup>16</sup> Respondent 19 (n 13).

<sup>17</sup> Respondent 13 has handled almost 1200 cases, only 20 were environmental matters. Respondent 13; Hon. Judge Bernard Eboso, ELC Judge, ELC Nairobi (ELC Nairobi, Questionnaire filled on 23 April 2018).

<sup>18</sup> Respondent 4; Hon. Justice A Kaniaru, ELC Judge, ELC Busia (ELC Busia, Questionnaire filled on 26 March 2018).

<sup>19</sup> Respondent 3; Hon. Lady Justice Lucy N Mbugua, ELC Judge, ELC Meru, (ELC Meru, Questionnaire filled on 9 April 2018); Respondent 12; Interview with Hon. Lady Justice Christine Ochieng, ELC Judge, ELC Kajiado (ELC Kajiado, 15 March 2018).

the dispute and the law, the judge in ELC Eldoret posited that in some cases, the matters raise cross-cutting between land and environment thus making it difficult to distinguish between the two.<sup>20</sup>This is a very fundamental observation because most of the time, land and environmental issues are related. This commonality between land and environmental disputes may pose a challenge in the categorization of environmental matters *vis a vis* land matters.

On the question of categorization of land and environment cases, Kenya can draw lessons from other countries which have adopted specialized ECs. For example, in determining the environment and land cases, the NSW LEC classifies the matters that come before it, making it easy to distinguish the matters that are purely environmental and land.<sup>21</sup>The NSW LEC registry further compiles information on the caseload that the court has handled on each type of class. At a click of a button, a person litigating an environmental issue can easily determine the class of their dispute by visiting the court's website, making a call or sending an email to the court.

### **3.2 Environmental Jurisprudence Emanating from the Environment and Land Court**

As noted above, there is no statistical data from the ELC Registries on the number of environmental cases that the ELC has handled so far. However, the data collected indicates that even in the absence of statistical data on environmental cases, the ELC has handled very few environmental cases as compared to land matters. So far, according to the data obtained from the NCLR, the ELC has adjudicated land and environment matters as represented in the table below.

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<sup>20</sup>Respondent 2, Hon. Justice Millicent Odeny, ELC Judge, ELC Eldoret (ELC Eldoret, Questionnaire filled).

<sup>21</sup>NSW LEC, 'Type of Cases' <[http://www.lec.justice.nsw.gov.au/Pages/types\\_of\\_disputes/types\\_of\\_disputes.aspx](http://www.lec.justice.nsw.gov.au/Pages/types_of_disputes/types_of_disputes.aspx)> accessed 30 June 2018.

**Table 3. 1: The Environment and land matters adjudicated by the ELC between 2013 and 2017.**

ENVIRONMENT & LAND COURT

AUDIT OF ENVIRONMENTAL JUDGMENTS AND RULINGS VIS-A-VIS LAND

2013

Land (Judgments and Rulings)	Environmental Judgments/Rulings	Environment & Land Judgments/Rulings
1840 (99.20%)	10 (0.53%).	5 (0.27%)

2014

Land	Environment	Environment & Land
1190 (99.91%)	11 (0.91%).	2 (0.17%).

2015

Land	Environment	Environment & Land
1752 (99.21%)	6 (0.34%)	8 (0.45%).

2016

Land	Environment	Environment & Land
2227 (99.24%)	6 (0.27%).	11 (0.75%).



## 2017

Land	Environment	Environment & Land
2467 (99.08%)	15 (0.6%).	8 (0.32%).

Source: NCLR, 2018.

Despite the fewer number of judgments in respect to environmental matters arising from the ELC, this study sought to analyze those judgments with the objective of determining the role of the ELC in developing the law and jurisprudence on environment in addition to settling environmental disputes.

### a. **2013**

The data from the NCLR for the year 2013 indicates that only one judgment pertaining to the environment emanated from the ELC in the case of *Republic V Lake Victoria South Water Services Board and 2 others*.<sup>22</sup> In this case, the ELC was called upon to determine whether the Migori Water Supply and Sanitation project undertaken by Lake Victoria South Water Services Board was illegal and in breach of the CoK 2010, the EMCA and other statutes dealing with the regulation and management of water resources in Kenya.

The community's objection to the project was on the ground that it would lead to lack of water points for some local communities on whose land the pipes would be laid. Some of the members of the local communities had not been compensated for the use of their land for laying pipes and water tanks and that the EIA Study report was full of lies and did not reflect the actual position on the ground. The court held that although it recognized that developments must be economically viable, the failure by the Defendants to obtain an EIA License was in contravention of the law.

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<sup>22</sup>*Misc. Civil. Appl. No. 47 of 2012, In the ELC at Kisii.*

The Court affirmed that public participation by those likely to be affected by the development projects that have a social and environmental impact is mandatory. Based on the EIA Study Report on the social and environment impact, the court held that the right of the members of the community to a clean and healthy environment was under threat.

On the issue of whether to grant a prohibitory injunction, the ELC interrogated in detail the principle of sustainable development which requires the balancing of economic development vis a vis environmental sustainability. The Court ordered the Defendant do suspend the project until it obtains all the authorizations and engage the public. The judgment emphasized the need for public participation before an EAI Report can be approved by NEMA. This case gave the ELC the opportunity to interrogate and develop jurisprudence on the need of complying with environmental law in development projects, such as obtaining NEMA approvals, EIA licenses and public participation. The decision, therefore, sends a clear message that compliance with environmental law is mandatory in development projects.

**b. 2014**

In the year 2014, the data provided by NCLR shows that only two judgments on environment emanated from the ELC. The first judgment is the case of *Addax (K) Limited versus National Environmental Management Authority and the Mastermind Tobacco Limited*,<sup>23</sup> which was an appeal from the decision of NET. The ELC has appellate jurisdiction over subordinates' courts and tribunals in respect of matters falling under its jurisdiction.<sup>24</sup> In this case, NEMA had issued an EIA license to the Appellant to commence the Liquefied Petroleum Gas Storage and Distribution Project on L.R 12715/604 Syokimau, Machakos. Eight months later, the 2nd

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<sup>23</sup> *Civil Appeals No 81 of 2013 and 1 of 2014, In the Environment and Land Court in Nairobi.*

<sup>24</sup> ELC Act, 2011, s 13(4).

Respondent filed an appeal to NET requesting that the EIA license be set aside. The ELC held that Section 129(2) of the EMCA and Rule 4(2) of the NET Rules are clear that an appeal to NET must be made not later than 60 days after a decision is made or served, which the 2nd Respondent had not adhered to. Secondly, it was the ELC's view that the 2<sup>nd</sup> Respondent's evidence was not new evidence that would have warranted a review of the Tribunal's ruling because the evidence was not in existence as at the time the Tribunal delivered its ruling. This case gave the ELC the opportunity to state in clear terms that appeals in environmental disputes should be filed within the prescribed time.

The second judgment delivered by the ELC in 2014 arose in the case of *Koome Mwambia and another vs Deshun Properties Company Limited and 4 others*.<sup>25</sup> In this case, the Applicant contended that the Respondent's action of developing 82 flats in an estate zoned for single dwelling was inconsistent with Section 58 of the EMCA, Section 30, 31 and 32 of the Physical Planning Act and Section 56 of the Urban Areas and Cities Act, 2011. In addition, it was argued that the construction of the flats infringed on the Petitioner's right to a clean and healthy environment because the project had adverse environmental impacts such as air pollution, sound pollution, solid waste, oil leaks and other polluting agents which would strain the waste management of the estate.<sup>26</sup>

This case, although recorded as an environmental matter, also raised the issue of land ownership by non-citizens in accordance with Article 65 of the CoK which the ELC was called upon to address. This case raises the question of cross-cutting issues in adjudication of environmental matters by specialized ECs which can affect the categorization of the cases into

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<sup>25</sup>ELC Petition No. 1433 of 2013, *Environment and Land Court at Nairobi*.

<sup>26</sup> Page 5.

environment and land. The Court, in invoking Article 65 of the CoK, held that the 1st Respondent had a right to own property in Kenya pursuant to Article 40 but subject to Article 65 of the CoK.

On the question regarding demolition of the property, the ELC agreed with the Petitioners that there was need to obtain permission from the local authorities before carrying out demolitions of buildings. The court further observed that there was no need of filing a constitutional petition and invoking the jurisdiction of the ELC when there was another dispute resolution mechanism provided for in the Physical Planning Act. On the allegation by the Petitioners that they were not given a chance to raise their objections to the intended development on the suit property, the ELC found that the respondent had published in a newspaper of wide circulation its intention of undertaking the said developments and the proposed change of user from a single dwelling unit to multiple dwelling (town houses) which was sufficient.

The role of the ELC *vis a vis* the other statutory dispute resolution mechanism was addressed in this matter. The Court also had an opportunity to interrogate the principle of public participation in environmental protection, which is not only provided for under EMCA, the Physical Planning Act and the County Government Act, but also in the CoK.<sup>27</sup> It is, therefore, a critical principle that must be observed at all times in environmental protection and conservation.

### **c. 2015**

In the year 2015, the data from the NCLR indicates that no judgment on the environment emanated from the ELC.

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<sup>27</sup> Article 10 and 69 of the CoK

#### **d. 2016**

In this year, five judgments on environment were delivered by the ELC. The case of *Moffat Kamau & 9 others v Aelous Kenya Limited & 9 others [2016] eKLR*,<sup>28</sup> was a constitutional petition alleging the violation of the right to a clean and healthy environment and the right to property. The petition was based on the development of a wind park in Kinangop Area. Initially, an EIA license was obtained by the developers on a portion of land for the production of 30MW. However, the project was later up scaled to produce 50MW and then 60MW thus requiring additional turbines. The project was then moved to a larger area due to the additional turbines. The ELC was asked to interrogate whether a fresh EIA was required due to the said changes.

This case, although identified as an environmental case, raised cross-cutting issues. While the EMCA provides for variation of an EIA license, the question of contention was whether a new EIA Report should have been submitted to NEMA before a variation license could be issued. It was the holding of the court that ‘NEMA must require a new EIA where the situation that has arisen may lead to a suspension, revocation, or cancellation of the license issued’ in accordance with Regulation 28 of the EIA Regulation.<sup>29</sup> Although there is no provision in law stating what would amount to change in a project to invoke the cancellation of an EIA license, the court held that, ‘it is nowhere in the statute, but in my view, a project may be deemed to have substantially been changed or been modified where some of the matters listed in Regulation 18 of the EIA Regulations exist’.<sup>30</sup> It was the view of the court that the project in question had undergone a substantial change and a variation of the EIA license required a fresh EIA.

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<sup>28</sup> *Constitutional Petition No.13 of 2015, In the Environment and Land Court of Kenya at Nakuru [2016] ECLR (Wind Farm Project Case).*

<sup>29</sup> Para 83 (Emphasis added).

<sup>30</sup> Para 85.

In this decision, it is clear that the ELC played its role in the development of the law. Presented with a scenario where the law has no specific provision regarding whether a new EIA Study Report is required before an EIA variation license is issued, the ELC, while, invoking Regulation 28 of the EIA Regulations, was clear that where there is substantial change that goes to the gist of the project, it should be deemed as a new project which requires a new EIA license, meaning that a fresh EIA must be carried out.

On the question regarding the violation of the right to a clean and healthy environment, the ELC, while relying on the case of *Ken Kasinga vs David Kiplagat & 5 Others*,<sup>31</sup> held that where there is non-compliance of the procedure for protecting the environment, then ‘an assumption ought to be drawn that the project is one that violates the right to a clean and healthy environment, or at the very least, is one that has potential to harm the environment.’ Further, ‘this presumption can only be rebutted if the proper procedure is followed and where the end result is that the project has been given a clean bill of health or its benefits are found to far outweigh the adverse effects to the environment’.<sup>32</sup> This is a great step towards protecting the right to a clean and healthy environment. In this case, the ELC further developed the jurisprudence on the issue of *locus standi* in the enforcement of the right to a clean and healthy environment. The court held that ‘it is not necessary for a person who presents a case touching on the right to a clean and healthy environment to demonstrate that he is directly affected by any project or that he stands to suffer personal loss or injury’.<sup>33</sup> The ELC also affirmed the principle of sustainable development when it held that all projects must be implemented in accordance with the environmental law of the land.<sup>34</sup>

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<sup>31</sup>*Petition No. 50 of 2013, In the Environment and Land Court at Nakuru ELC (unreported) para 73.*

<sup>32</sup>*Wind Farm Project Case*, n 29

<sup>33</sup> *Ibid* para 93.

<sup>34</sup> Para 95.

The second case was *Republic vs Senior Resident Magistrate's Court Ndhiwa & another; Ex parte Sajalendu Maiti [2016] eKLR*.<sup>35</sup> The Ex Parte Applicant in this matter had been charged by NEMA with the offense of failing to comply with a restoration order. The applicant sought to have the criminal proceedings in the Senior Resident Magistrate quashed. The ELC found that indeed NEMA had acted within its mandate by initiating an investigation, issuing the restoration order and lodging criminal charges against the Ex Parte Applicant. In this decision, it can be concluded that the enforcement of environmental law involves many institutions and stakeholders. The ELC recognized the role of the NEMA in ensuring compliance of environmental law through the granting of restoration orders.

In the third case, *Kenneth Kiplagat Kimaiyo and 3 others vs County Government of Elgeyo Marakwet and two Others*,<sup>36</sup> the ELC was called upon to determine whether the decision to convert part of Kamariny stadium into the Governor's official residence was made with sufficient public participation as required by the Constitution of Kenya 2010. The court held that the Respondents had failed to tender evidence to show that indeed they complied with Section 59 of the EMCA and Section 87 of the County Government Act; that the public participation that had been carried out was on the budget process and not on the project of building the Governor's house and that there was no public participation. The principle of public participation was therefore affirmed by the court.

The fourth case, *V/D Berg Roses and Another vs The Attorney General and 2 Others*,<sup>37</sup> emanates from the ELC at Nakuru. The case was premised on the constitutionality of the Environmental Management (Lake Naivasha Management Plan) Order through Gazette Legal

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<sup>35</sup>ELC Miscellaneous Application No.3 of 2016, In the Environment and Land Court at Kisumu.

<sup>36</sup>Petition No. 18 of 2015, In the Environment and Land Court of Kenya at Eldoret.

<sup>37</sup>Petition 23 of 2012, In the Environment and Land Court of Kenya at Nakuru.

Notice No. 108 of 2004, specifically the paragraphs dealing with Habitat Management and Nature Conservation of the Lake Zone. It was argued by the Respondents that the Petitioners should have filed the dispute in the NET. The ELC, while reiterating the jurisdiction of the NET under Section of 129 of EMCA, held that the impugned order did not emanate from the decision of NEMA, thus ousting the jurisdiction of NET.

In interrogating whether prohibiting agricultural activities within a riparian land on Lake Naivasha was a violation of the Petitioner's right to own property, the court took the view that Lake Naivasha, been a riparian area, is an ecologically sensitive area under the Ramsar Convention which Kenya had ratified. The ELC found nothing unconstitutional about the Order and held that the Order conformed with not only the CoK, but also with the Ramsar Convention. This is a jurisprudential judgment which reiterates the need to protect ecologically sensitive areas such as riparian areas.

The fifth case, *Joseph K. Nderitu & 23 others v Attorney General & 2 others*<sup>38</sup> involved the change of user of land from single dwelling unit to development of flats. It was the Petitioners' contention that their objection to the change of user was never considered and heard. The Petitioners asked the ELC to consider the principle of sustainable development and the precautionary principle. The ELC identified five issues for determination: whether the ELC had jurisdiction to entertain the Petition; whether the Petitioners had *locus standi*; whether a proper EIA was conducted; whether the process of planning approval was lawfully adhered; and whether there was a violation of the Petitioners' constitutional rights.

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<sup>38</sup>*Constitution Petition No. 29 of 2012, In the High Court at Nakuru [2014] eKLR.*



The Respondents disputed the jurisdiction of the ELC and argued that the Petitioners ought to have channeled their complaint to the Liaison Committees established under the Physical Planning Act. The ELC held that indeed it was the appropriate forum for the Petitioners to seek redress. On the question regarding *locus standi*, the ELC reiterated the provisions of Article 70 of the CoK and Section 3 of EMCA which do not require a person to demonstrate any personal injury before filing a suit for the enforcement of environmental rights.<sup>39</sup> It is clear from this decision that the issue of standing in environmental matters is now settled.

**e. 2017**

The data from the NCLR for the year 2017 indicates that only four judgments pertaining to environmental matters emanated from the ELC. The *African Centre for Right and Governance (ACRAG) and 3 others vs Municipal Council of Naivasha*<sup>40</sup> was a case concerning the operation of a dumpsite in Naivasha. The Petitioners argued that the operation of the dumpsite on the suit property was a threat to the resident's right to a clean and healthy environment. The court found that there was no evidence to show that the Respondent had procured a license from NEMA to operate the dumpsite. Further, there was no evidence of an EIA having been undertaken. The ELC held that indeed, the right to a clean and healthy environment had been violated as a result of the illegal operation of the dumpsite.

This is one of the cases that sought to develop the law and jurisprudence on waste disposal, which is a global problem. Whereas the court found in favour of the Petitioners, it declined to issue the orders of prohibitory injunction as sought because there was no other alternative dumpsite. Instead, the ELC ordered the Respondent to take immediate steps and engage personnel to collect

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<sup>39</sup> Ibid Para 34.

<sup>40</sup> *Petition No. 50 of 2012, In the Environment and Land Court of Kenya at Nakuru.*

all the plastic bags and ensure ‘that plastic bags will continue being put aside for incineration or other forms of destruction so that the area is not prone to them.’<sup>41</sup> The court further ordered the Respondent to apply for the requisite license from NEMA and for NEMA to ensure that an EIA is undertaken.

In the case of *Safaricom Staff Pension Scheme Registered Trustees v Erdemann Property Limited & 5 others*,<sup>42</sup> the Petitioners argued that the right to property under Article 40 of the CoK was violated by the construction of a sewer line along Quarry Road and Old Mombasa Road by the Respondents. They argued that the construction of the sewer line along Quarry Road also infringed on their right to a clean and healthy environment in contravention of Article 42 as read with Articles 69 and 70 of the Constitution.<sup>43</sup> The court held that indeed the Petition raised environmental issues and in that regard, the Petitioners did not need to show personal interest or injury for them to have *a locus standi*. On the issue of public participation in environmental decision making, the evidence before the ELC showed that although an EIA was undertaken, there was no evidence that the Petitioners were consulted despite the fact that ‘they already owned apartments along Quarry Road.’<sup>44</sup> In allowing the Petition, the court stated that public participation in development is critical and ordered for the review of the project to take into consideration the objections raised by the public.

In this matter, *West Kenya Sugar Company Limited Vs Busia Sugar Industries Ltd and 2 Others*,<sup>45</sup> the Petitioners averred that Busia Sugar Industries was granted an EIA license by NEMA

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<sup>41</sup> Ibid Para 43.

<sup>42</sup> *Petition No. 4 of 2017, In the Environment and Land Court at Machakos [2017] eKLR.* .

<sup>43</sup> Ibid para 10.

<sup>44</sup> Ibid para 110.

<sup>45</sup> *Bungoma Petition No. 6 of 2016, In the Environment and Land Court of Kenya at Bungoma.*

to operate a sugar milling industry without undertaking an EIA contrary to Section 58 of the EMCA. In opposing the Petition, Busia Sugar Industries averred that NET was the appropriate organ to resolve the dispute and that the ELC lacked the jurisdiction to entertain the claim. In affirming its jurisdiction, the court held that the case was a constitutional Petition of which NET lacked jurisdiction. The ELC found that indeed the 1st Respondent had not procured the EIA license and ordered it to stop its activities, and only resume after complying with the law.

### **3.3 Chapter Conclusion**

Indeed, there are fewer environmental matters that have been handled by the ELC as compared to land. This is evidenced by the data collected from the ELC judges, the DRs and the NCLR. There is need for policy direction requiring the ELC to distinguish between land and environment matters at the stage of filing cases. Despite the fewer environmental judgments emanating from the ELC (less than 1% of the total judgments), the ELC has continued to develop environmental jurisprudence on key environmental issues such as: the rule of standing; public participation in environmental matters; jurisdiction of the ELC; and the application of international environmental law and principles. If given more opportunities through environmental litigation, the ELC will play a greater role in protecting the environment through judicial pronouncements.

## **CHAPTER FOUR**

### **4.0 FACTORS INFLUENCING THE ENVIRONMENTAL CASELOAD IN THE ENVIRONMENT AND LAND COURT AND ITS IMPACT ON THE OPERATIONALIZATION OF THE COURT.**

#### **4.1 Factors influencing the environmental caseload in the ELC**

In the previous subtopics, we have seen that the ELC has heard and determined fewer environmental cases as compared to land matters. Despite the few environmental cases that the ELC has heard and determined, it is clear from the judgments that the ELC has made judicial pronouncements that seek to develop the law on environment and jurisprudence. In order to continue developing environmental law and jurisprudence, the ELC requires to be presented with more environmental cases. Environmental caseload is very vital in enhancing the role of the ELC. This study sought to find out the factors that influence the fewer number of environmental cases filed in the ELC, as compared to land matters and how it affects the role of the ELC in determining environmental disputes and developing environmental jurisprudence.

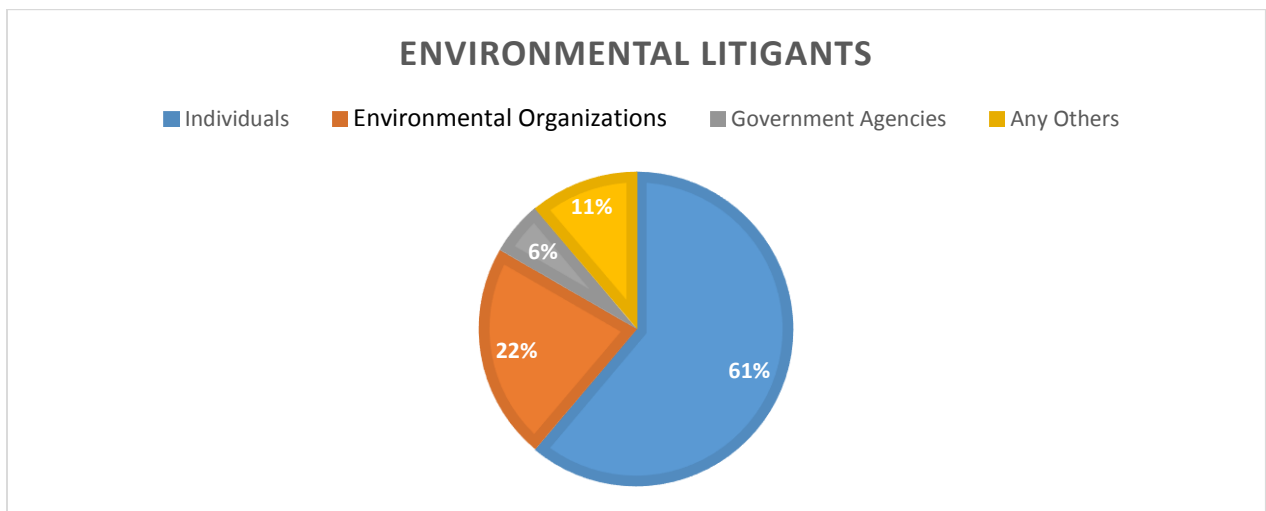
#### **A. Public awareness and the recognition of the ELC as the appropriate forum to settle environmental matters.**

The establishment of a specialized EC is an important step in enhancing environmental protection. However, public awareness of the specialized EC and its recognition as the appropriate forum of settling environmental matters is critical. It creates public confidence and trust amongst environmental stakeholders and the community at large, which in turn fosters litigation. Public awareness in itself alone is not sufficient. The public must also be convinced that the specialized EC is the appropriate forum to settle environmental issues. In Kenya, there are a number of

institutions clothed with the mandate to settle environmental disputes such as NEMA, NET, County Governments and other statutory dispute resolution mechanisms which a litigant must exhaust before invoking the jurisdiction of the ELC. In the presence of these institutions, the need for the public to recognize the ELC as the appropriate and legal forum to settle environmental disputes is very fundamental in determining the number of cases that are filed in the ELC.

In order to determine if there was public awareness of the existence of the ELC, this study sought to find out from the ELC Judges who the majority of the litigants are.

**Figure 4. 1: Environmental litigants**



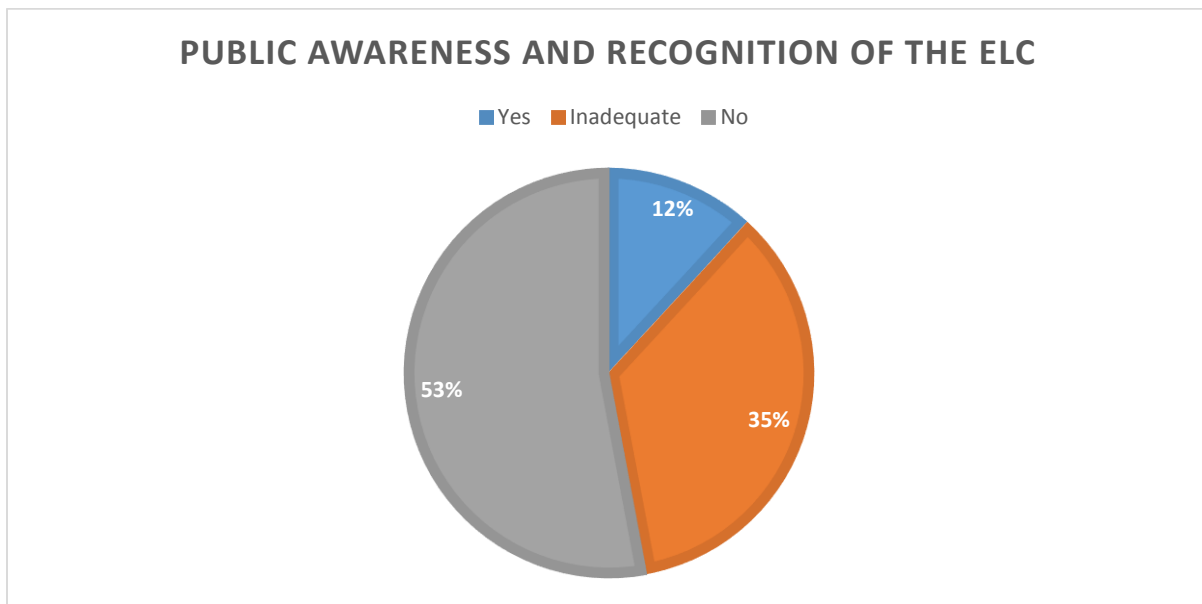
The majority of the judges indicated that most of those who had filed land and environmental matters in the ELC were individuals (61%), followed by environmental organizations (22%), government agencies (6%) and others (11%). “Others” included resident associations<sup>1</sup>and communities<sup>2</sup>.This was surprising because one would have expected

<sup>1</sup> Respondent No. 13, Hon. Judge Bernard Eboso, ELC Judge, ELC Nairobi (ELC Nairobi, Questionnaire filled on 23 April 2018).

<sup>2</sup> Respondent 3, Hon. Lady Justice Lucy N Mbugua, ELC Judge ELC Meru, (ELC Meru, Questionnaire filled on 9 April 2018)

environmental agencies (civil society) to be at the forefront in environmental litigation, especially in matters pertaining to public interest litigation, because they not only possess knowledge on environmental issues, but because in most cases, they have funding to enhance environmental protection. Most of the environmental issues that occur in Kenya are public related which should be brought to the attention of the ELC by public-spirited individuals or organizations. One of the Judges noted that the major reason why very few environmental matters have been filed in the ELC is due to the lack of interest from the public on environmental matters.<sup>3</sup>

**Figure 4. 2: Public Awareness and Recognition of the ELC**



On the issue of public awareness and recognition of the ELC as a court to resolve environmental issues, the majority of the respondents opined that there is no public awareness (53%). Even where the court exists, public awareness was very inadequate (35%) calling for the

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<sup>3</sup>Samson Okong'o, 'Environmental Adjudication in Kenya: A Reflection on the Jurisdiction of the Environment and Land Court' (A presentation made at the Symposium on Environmental Adjudication in the 21st Century held in Auckland New Zealand on 11th April 2017) <<http://environmental-adjudication.org/assets/Uploads/General/Okongo-PPT2.pdf>> accessed 8 October 2017.

need to enhance public awareness on the role of the ELC in solving environmental matters. One of the judges provided that sometimes, environmental matters are first filed in the High Court before being referred to the ELC.<sup>4</sup> Some judges provided that most of the litigants are more concerned with land issues; that they view the ELC as a land court and that some cannot distinguish between the role of NEMA, NET and the ELC.<sup>5</sup> This disparity among the members of the public on the role of the ELC in matters pertaining to environmental governance calls for the need to create more public awareness on the role of all institutions involved in environmental governance, conservation and enforcement.

Even where there is awareness of the role of the ELC as an environmental court, most ‘people do not approach the ELC as environmental disputes affect a large public and it is not easy to mobilize people to litigate on such.’<sup>6</sup> Environmental cases ordinarily would be public interest cases and individuals have no particular interest unless the infringement directly affects them’.<sup>7</sup> The entrenchment of public interest litigation and the removal of the strict rule of standing in environmental matters in the CoK was meant to increase environmental litigation.<sup>8</sup> Most people do not understand or know of the existence of their right to a clean and healthy environment and that if it is violated, they can enforce the same in the ELC.<sup>9</sup> This calls for the need for more public

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<sup>4</sup> Respondent 16, Interview with Hon. Judge at the ELC Nakuru, ELC Judge, ELC Nakuru (ELC Nakuru, 31 January 2018).

<sup>5</sup> Respondent 4, Hon. Justice A Kaniaru, ELC Judge, ELC Busia (ELC Busia, Questionnaire filled on 26 March 2018).

<sup>6</sup> Respondent 10, Hon. Justice Elijah Obaga, ELC Judge, ELC Nairobi (ELC Nairobi, Questionnaire filled on 8 May 2018).

<sup>7</sup> Respondent 7, Hon. Justice Charles Mutungi, ELC Judge, ELC Kisii (ELC Kisii, Questionnaire filled on 15 February 2018).

<sup>8</sup> Article 70 of the CoK provides for the enforcement of environmental rights. Article 70 (3) provides that for the purpose of the Article 70, an applicant does not have to demonstrate that any person has incurred loss or suffered injury

<sup>9</sup> Respondent 5, Hon Lady Justice Kossy Bor, ELC Judge, ELC Nairobi (ELC Nairobi, Questionnaire filled on 21 May 2018).

awareness of this right, and on the requirement that one does not need to have suffered injury to apply to the ELC for the enforcement of the right to a clean and healthy environment.

However, 2 out of the 16 ELC judges who responded provided that indeed there was public awareness and the recognition of the ELC as an appropriate forum to enforce environmental matters.<sup>10</sup> The other respondent argued that ‘the ELC is now over 5 years old, and that there is no indication that the litigants with environmental grievances are not aware of the existence of ELC as a forum for adjudicating environmental disputes’.<sup>11</sup>

**a. Whether the ELC is the appropriate and legal forum to settle environmental disputes.**

The study also sought to find out whether the ELC is recognized as an appropriate forum to settle environmental disputes and enforce environmental law in view of the various institutions in Kenya clothed with the same mandate. The majority of the respondents agreed that the ELC, NEMA, NET and County Governments are the most appropriate institutions to handle environmental disputes. However, NEMA was mentioned more times than the ELC. It was clear from the study that there is more public awareness of the existence of NEMA and NET and their appropriateness to deal with environmental disputes than the ELC. This calls for the need to devolve NEMA and NET offices to the county level to make them more accessible to people.<sup>12</sup> The County government, the Ministry for environment, the magistrate’s court and other statutory institutions were also recognized as the appropriate and legal forums to resolve environmental disputes. In view of these findings, there is a need to sensitize people on the role of each institution.

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<sup>10</sup> Respondent 14, Interview with Hon. Lady Justice Lucy Waithaka, ELC Judge, ELC Nyeri (ELC Nyeri, 14 February 2018).

<sup>11</sup> Respondent 1, Hon. Justice Samson Okong’o, ELC Judge, ELC Nairobi (ELC Nairobi, Questionnaire filled on 29 March 2018).

<sup>12</sup> Respondent 36, Phone interview with Mr. Muchira, Advocate of the High Court of Kenya (Kerugoya, 28 February 2018).



The jurisdiction of the ELC as set out under Section 13 of the ELC Act does not preclude other dispute resolution bodies to hear and determine environmental disputes. The study sought to find out if the ELC should be the only legal forum to hear and determine such disputes. One of the legal officers at NEMA noted that the ELC and NEMA should be the only appropriate institutions to entertain environmental disputes.<sup>13</sup> However, it was his view that the ELC is the best appropriate forum to handle environmental disputes while NEMA is best placed in enforcing environmental governance.<sup>14</sup> According to another respondent,<sup>15</sup> the ELC should not be the only institution to hear environmental disputes and that the:

*...disputes should be handled by different institutions at different levels in an escalating manner: NEMA and its Committees; National Environment Tribunal; the ELC. This is because the disputes are far from a wide range of activities or decisions.<sup>16</sup>*

The establishment of other statutory bodies, such as NET, to hear and determine environmental disputes is geared towards settling disputes efficiently. A lawyer working with an environmental civil society observed that NET and the magistrates' courts also play a key role in settling environmental disputes.<sup>17</sup> However, he was of the view that NET's jurisdiction should only be limited to reviewing the decisions of environmental management institutions such as NEMA.<sup>18</sup> One of the practicing advocate on the other hand provided that environmental tribunals and committees have members who possess environmental expertise who can assist in

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<sup>13</sup> Respondent 29, Interview with Mr. Edward Wabwoto, Senior Legal Officer NEMA (Kajiado, 19 February 2018).

<sup>14</sup> Ibid.

<sup>15</sup> Respondent 30, Interview with Mr. Paul Munyao, Advocate of the High Court of Kenya (Mombasa, Questionnaire filled on 14 February 2018).

<sup>16</sup> Ibid p 2.

<sup>17</sup> Respondent 28, Opondo Gerphas Keyah, Advocate of the High Court of Kenya (Nairobi, Questionnaire filled on 30 March 2018).

<sup>18</sup> Ibid.

investigating and researching on environmental issues.<sup>19</sup> In addition to the ELC, Respondent 34 was of the view that mediators and council of elders play a great role in environmental disputes and that they have their spheres of influence.<sup>20</sup> Indeed, traditional dispute resolution mechanisms, if well adopted, can be effective in solving environmental disputes.<sup>21</sup>

It is not in doubt that indeed, the ELC is not the only appropriate and legal forum to hear and determine environmental matters although it should be the court of last resort.<sup>22</sup> There are other institutions established in the law such as NEMA, the County governments and the NET whose jurisdiction can be invoked to resolve environmental disputes. What is required is to enhance public awareness on which institution is appropriate for which dispute. For instance, the public need to understand when to invoke the jurisdiction of the NET and ELC so that they don't waste time filing an environmental case in the ELC just to be referred back to the NET. The magistrate courts are also clothed with jurisdiction to hear and determine environmental matters limited to their pecuniary jurisdiction.<sup>23</sup> One of the respondents, while agreeing that the ELC is not the only appropriate and legal forum noted that:

*The Constitution provides for alternative disputes and not all environmental disputes are criminal in nature. Others are civil. Other forums include national environment complaints committees, NEMA and NET.*<sup>24</sup>

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<sup>19</sup> Respondent 27, Peter Munge, Advocate of the High Court of Kenya (Nairobi Questionnaire filled on 29 March 2018).

<sup>20</sup> Anonymous, Advocate of the High Court of Kenya (Nakuru, 7 February 2017).

<sup>21</sup> Article 159 (2) (c) of the CoK provides that in exercising judicial authority, the courts and tribunals shall be guided by, inter alia, alternative forms of dispute resolution including traditional dispute resolution mechanism.

<sup>22</sup> Respondent 39, Interview with Richard O Otieno, Criminologist (Nakuru, 7 February 2017).

<sup>23</sup> Respondent 32, Cecilia Muthoni Gichohi, Advocate of the High Court of Kenya (Nyeri, 14 February 2018).

<sup>24</sup> Respondent 37, Interview with Godfrey Wafula, County Director Environment Kajiado (Kajiado, 22 March 2018).

The court process sometimes takes time, and the nature of environmental matters may require a quick resolution method. That is why ADR and traditional mechanisms have been constitutionally and statutorily recognized as alternative dispute resolution mechanisms in environmental issues.<sup>25</sup> While the ELC is not the only appropriate and legal forum to resolve environmental disputes, the ELC has an appellate jurisdiction upon which any litigant who is not satisfied with the decisions of the other forums, including the magistrates courts, can appeal to.<sup>26</sup> What is required is for the public to be educated on the jurisdiction of the ELC and when to invoke the said jurisdiction.

**b. Whether the court users have ever filed environmental matters in the ELC.**

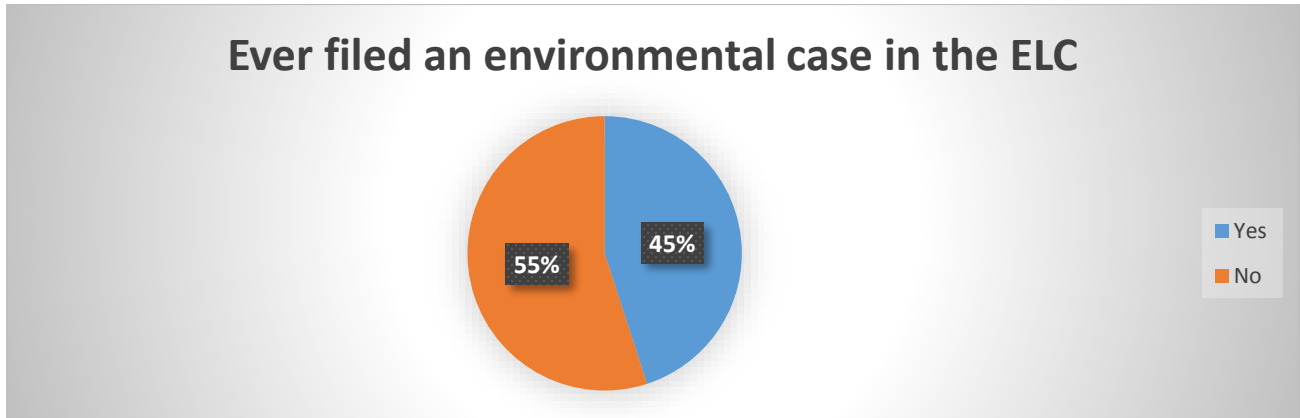
As noted earlier, most of the cases filed in the ELC involve land. With the existence of various institutions which the litigants identified as the alternative appropriate and legal fora in resolving environmental disputes, this study sought to find out from the court users whether they had ever filed an environmental matter in the ELC. As this study sought to seek information from the Court users who attended the ELC on the particular day the researcher visited the ELC in Nairobi, Kerugoya, Nyeri, Kajiado and Nakuru, the issue of whether the respondents knew of the existence of the ELC was out of question. I say so because the court users who were in court on those particular days were aware of the existence of the ELC.

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<sup>25</sup> Article 159 (2) (c) of the CoK and section 20 (1) of the Environment and Land Court Act

<sup>26</sup> Section 13 (4) of the Environment and Land Court

**Figure 4. 3: Filing of environmental cases in the ELC**



More than half of the court users who responded (55%) stated that they have never filed an environmental matter in the ELC while 45% have filed. The county Director for Environment in Kajiado stated that previously, they had been filing environmental matters in the Magistrates Court in Kajiado.<sup>27</sup> Those who had filed environmental disputes in the ELC stated that the matters involved mainly the issuance of EIA license by NEMA.<sup>28</sup> A lawyer working in the civil society provided that he has prosecuted in the ELC a matter relating to the issuance of the EIA and participated in a class action against the government in relation to the SGR project.<sup>29</sup> Most of the respondents who indicated that they have filed environmental matters in the ELC were advocates representing their clients. A resident in Nakuru stated that although he had not filed an environmental case in the ELC individually, as a member of the community group in Shabab Ward, Nakuru County, they had petitioned the ELC to resolve the issue of poor sanitation in Nakuru occasioned by uncollected damage.<sup>30</sup>

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<sup>27</sup> Respondent 37 (n 24).

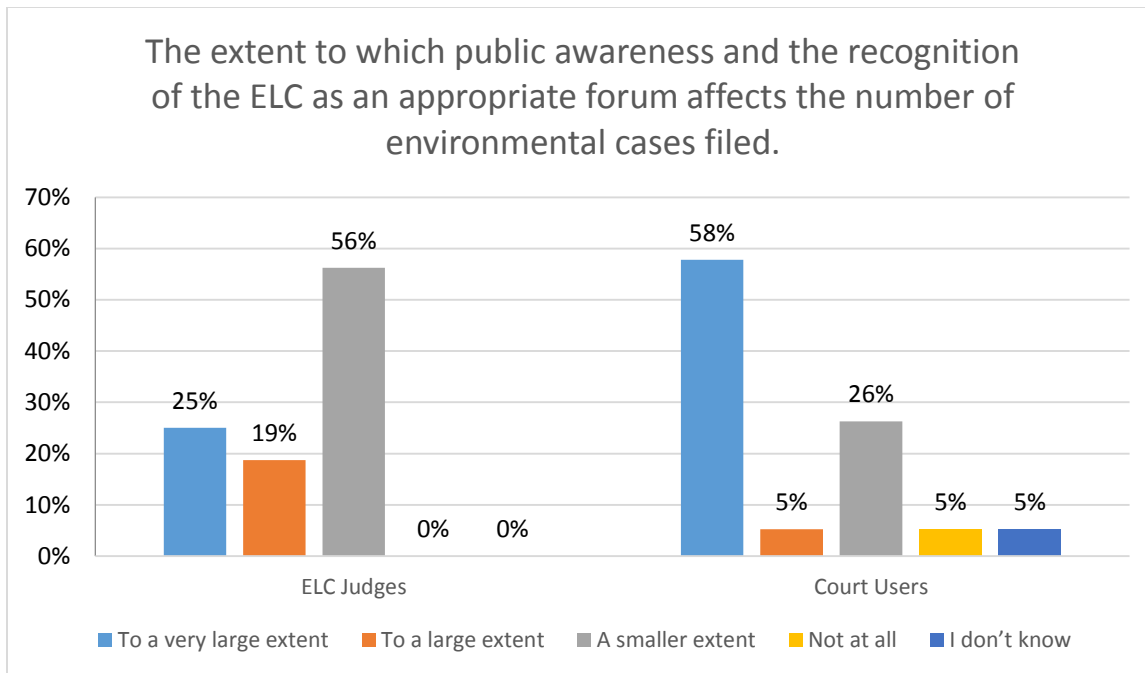
<sup>28</sup> Respondent 27 (n 19).

<sup>29</sup> Respondent 28 (n 17).

<sup>30</sup> Respondent 29, Interview with Mr. Edward Wabwoto, Senior Legal Officer NEMA (Kajiado, 19 February 2018).

- c. **The extent that public awareness and recognition of the ELC as the appropriate and legal forum to hear and determine environmental matters can enhance the number of cases filed and adjudicated in the ELC**

**Figure 4. 4: The extent to which public awareness and the recognition of the ELC as an appropriate forum affects the environmental caseload.**

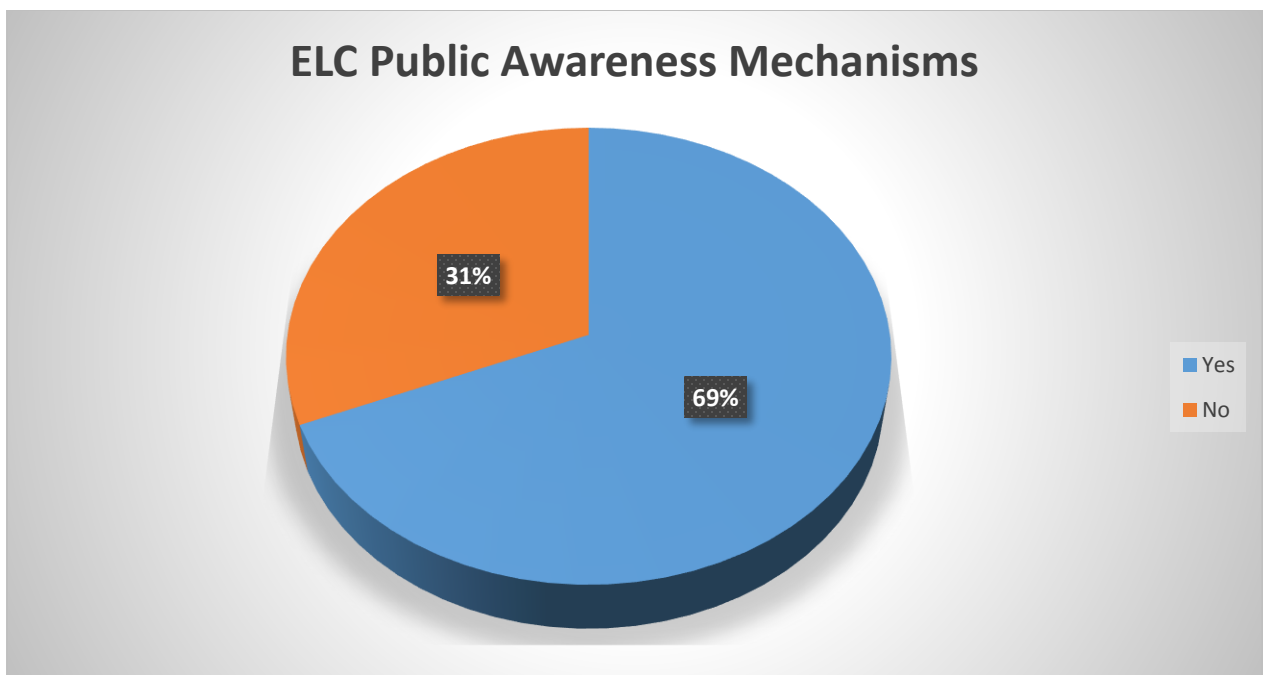


Both the ELC judges (100%) and the Court users (90%) agree that indeed public awareness and the recognition of the ELC as the appropriate and legal forum to settle environmental disputes will affect the environmental caseload. However, while the court users (58%) were of the view that such an impact is to a very large extent, the ELC judges (56%) opined that it would be to a very small extent. Whichever way, the conclusion is that public awareness of the ELC will surely impact on the number of environmental cases. This calls for the need to take public awareness of the ELC as a serious issue that need to be addressed immediately.

**d. The mechanisms that the ELC has put in place to enhance public awareness**

If public awareness and the recognition of the ELC as an appropriate forum to settle environmental disputes can influence environmental caseload, this study sought to find out from the ELC Judges and the DRs the mechanisms they have put in place to enhance environmental litigation.

**Figure 4. 5: ELC Public Awareness Mechanisms**

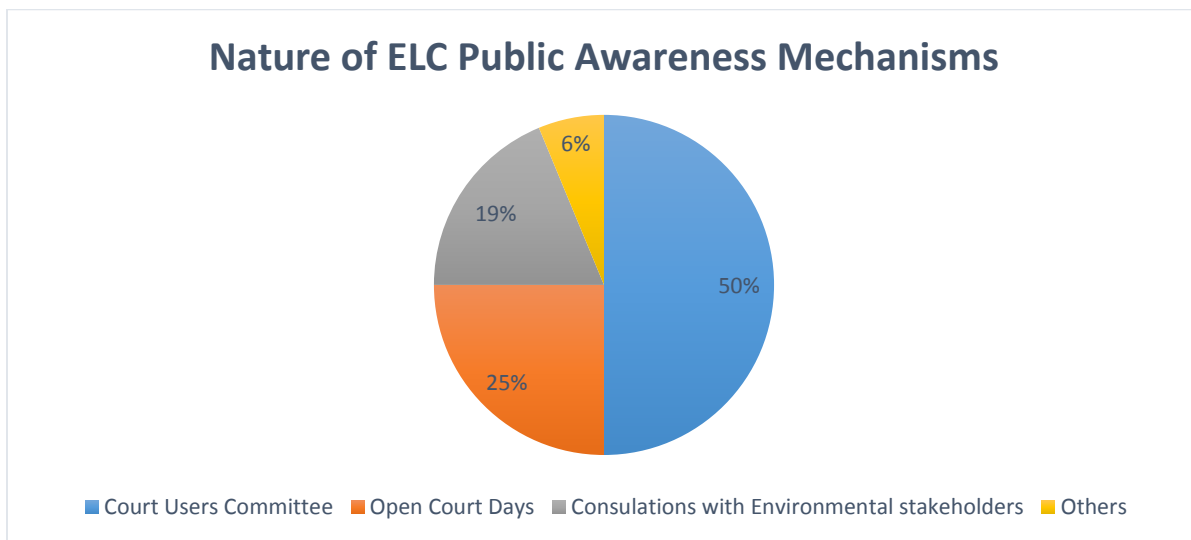


Most of the ELC across the country have put in place mechanisms to enhance public awareness on the role of the ELC in enhancing environmental protection (69%). This is a great step towards bringing to the attention of the court users of the existence of the ELC. However, a third of the respondents (31%) indicated that they are yet to put in place mechanisms that would create awareness on the role of the ELC in environmental litigation. According to those respondents, just like any other court, the ELC only waits for the litigants to file environmental

matters before it, and does not go out of its way to inform the members of the public about its existence.

The ELC has been in existence now for five years, and the absence of mechanisms to enhance public awareness of its existence derails the effectiveness of its operationalization.<sup>31</sup> However, some of the ELC that have not yet put in place public awareness programs anticipate to adopt the CUC and Court open days to inform the members of the public of the existence of the court and its role in environmental governance.<sup>32</sup> However, lack of adequate resources and capacity is an inhibiting factor in adopting appropriate public awareness measures. One of the respondents noted that the ELC is still treated as a mere appendage of the High Court thus inhibiting the ELC in adopting effective public awareness mechanisms.<sup>33</sup> The study further sought to find out the nature of the public awareness mechanisms that the ELC has put in place.

**Figure 4. 6: Nature of ELC Public Awareness Mechanisms**



<sup>31</sup> Respondent 7 (n 7).

<sup>32</sup> Respondent 6, Hon. Justice Yuvinalis Angima, ELC Judge, ELC Embu (ELC Embu, Questionnaire filled on 21 May 2018).

<sup>33</sup> Respondent 4 (n 5).

The majority of the ELC stations have adopted the Court Users Committee (CUC) and open court days strategies to enhance public awareness of the court (50%), with most of the ELC Stations favoring the open court days (25%) strategy. CUC are mechanisms adopted by courts across the country to bring together all the actors in the administration of justice including court users and all government agencies and stakeholders involved in addressing problems within a particular sector. CUCs have been applauded for enhancing public participation in a consultative manner.

Open Court days grant the ELC the opportunity to bring to the attention of the court users and the public at large the role of the ELC in addressing environmental violations.<sup>34</sup> The ELC usually uses this opportunity to ask the legal practitioners to offer pro-bono services to the public. While the open court days attract the members of the public, they are usually interested in land disputes. However, the forum should be an opportune time for the ELC to bring to the attention of the public about its jurisdiction regarding environmental issues. Consultations with appropriate environmental stakeholders such as NEMA has also been adopted. The ELC should collaborate with advocates and the civil society in coming up with public awareness weeks ‘where the public can be given pro-bono services and be informed of the role of the ELC’.<sup>35</sup>

## **B. Awareness on what constitutes environmental matters**

The public might be aware of the existence of the ELC and recognize it as the appropriate forum to hear and settle environmental issues. However, the public must at the same time possess the knowledge of what constitutes environmental issues and be in a position to recognize

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<sup>34</sup> Respondent 5 (n 9).

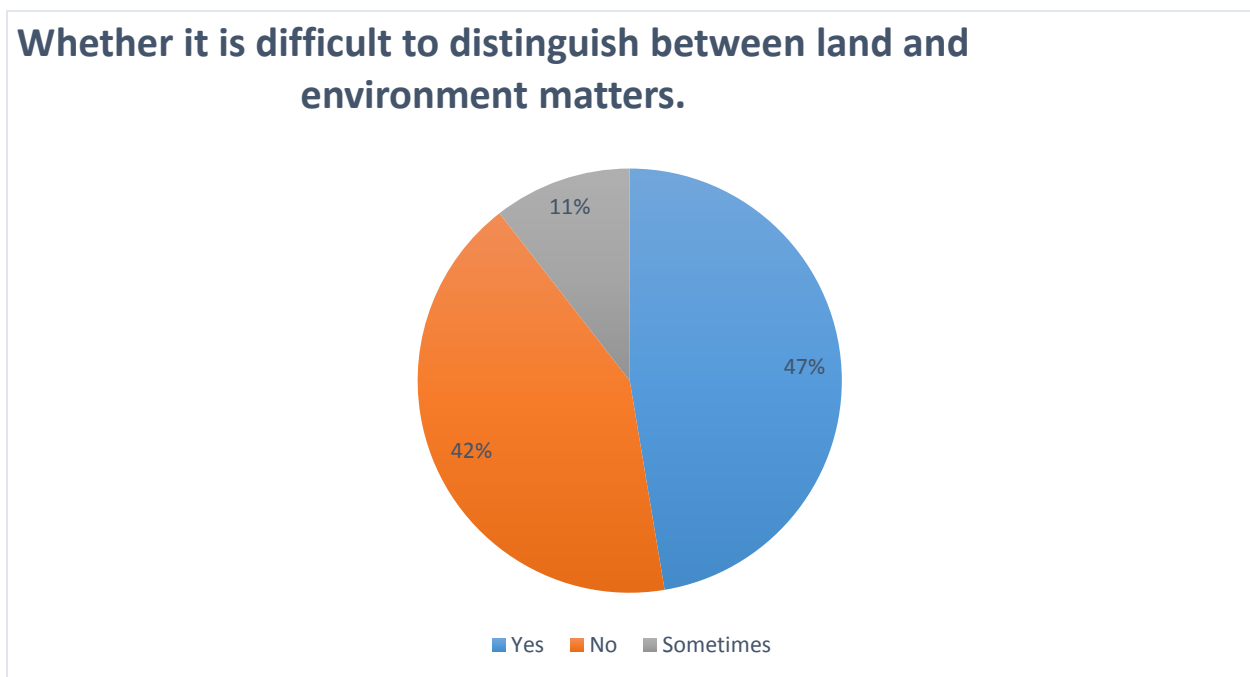
<sup>35</sup> Respondent 35, Interview with Maureen Litunda, Advocate of the High Court of Kenya and Legal Counsel at the Nakuru County Government (Nakuru, 7 February 2017).



environmental degradation for it to invoke the jurisdiction of the ELC. If the litigants do not understand what constitutes environmental matters at the onset, then they would not bring such matters to the attention of the ELC or any other institution that is involved in environmental dispute resolution. This study therefore sought to find out from the respondents whether they understood what constitutes environmental matters. This question was posed to the judges of the ELC who in their daily work, are required, not only to adjudicate on environmental matters, but also to possess knowledge and experience in environmental matters.

Generally, judges of the ELC showed an understanding of what constitutes environmental matters. Keeping in mind that the ELC judges are appointed on the premise that they possess expertise and knowledge in environmental matters, this study sought to find out from the court users whether they could distinguish between land and environmental matters and whether the distinction had an impact on the environmental disputes filed in the ELC.

**Figure 4. 7: Whether it is difficult to distinguish between land and environmental matters**



47% of the Court users agreed that indeed it is difficult to distinguish between land and environment matters because land forms the facet of the environment. The ownership and use of land entail the use of the environment, and its degradation will result into environmental degradation.<sup>36</sup> This close relationship between land use and environmental degradation calls for the need to create more public awareness on what constitutes environmental matters to enable the public identify them and seek the court's redress.<sup>37</sup>

On the other hand, 42% of the respondents were of the view that it is not difficult to distinguish between land and environment matters because land matters are mainly concerned with the possession and ownership of land whereas environmental matters are concerned with the well-being and/or usage of land.<sup>38</sup> Even though 'environmental degradation predominantly occur on land, environmental degradation may also affect air and water and thus distinguishable. Land matters are mostly concerned with ownership'.<sup>39</sup> There is therefore the need to create more public awareness on what constitutes environmental matters and to consider whether such a distinction can be made at the point of filing a matter in the ELC's registry.<sup>40</sup>

Critics of specialized ECs have argued that it is difficult to distinguish between environment and non-environment matters. This difficult in distinguishing the two phenomena may in the end affect the statistics of purely environmental cases that have been filed and determined by the ELC.

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<sup>36</sup> Respondent 30 (n 15).

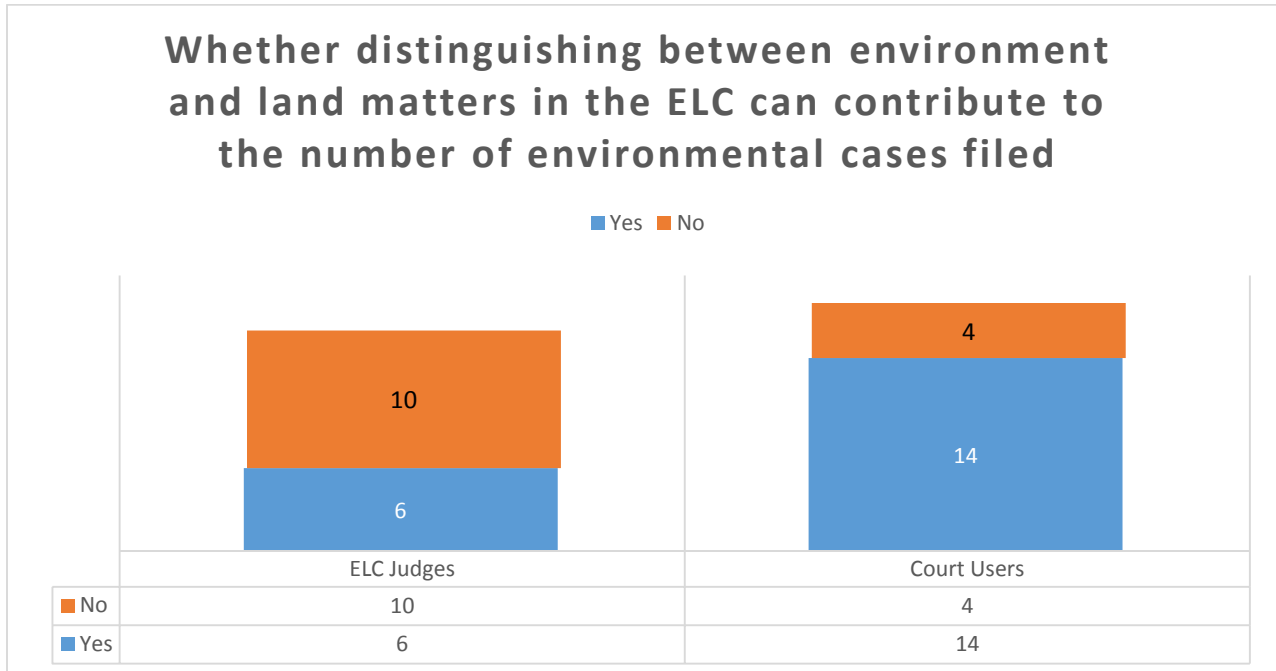
<sup>37</sup> Respondent 37 (n 24).

<sup>38</sup> Respondent 28 (n 17).

<sup>39</sup> Respondent 26, Interview with Henry Opondo, Advocate of the High Court of Kenya (Nakuru, 7 February 2018).

<sup>40</sup> Respondent 27 (n 19).

**Figure 4. 8: Whether distinguishing between environment and land matters in the ELC can contribute to the number of environmental cases filed**



The data indicates that the ELC judges and court users have different opinions on whether a distinction between land and environment matters can really have an effect on the number of environmental cases filed in the ELC. The majority of the judges reasoned that distinguishing between land and environment matters does not have a direct relationship with the number of environmental cases filed.<sup>41</sup> Rather, it will only help in computing the number of environmental matters filed in the ELC but will not in any way trigger environmental litigation.<sup>42</sup> This maybe true. However, if litigants are able to distinguish between what constitutes an environmental matter from a land matter, they will be in a better position to understand which matter to pursue. The

<sup>41</sup> Respondent 16 (n 4).

<sup>42</sup> Respondent 13 (n 1).

court and the litigants will also be able to know the turnaround of an environmental dispute vis a vis a land dispute.<sup>43</sup> This in effect will enhance public awareness of environmental matters.<sup>44</sup>

According to the ELC judges who supported the idea of distinguishing environmental matters from land at the time of filing such cases, they argued that this will increase specialization and will inform the public on what constitutes purely environmental matters. The end result of this arrangement is an environment conscious public which is in a position to distinguish between land and environment matters which in turn will enhance environmental litigation. One of the judges noted that distinguishing between land and environmental matters is very important because the genre of a case is very fundamental.<sup>45</sup>

The majority of the Court users who responded to this question were of the view that indeed, distinguishing between what constitutes land and environmental matters can contribute to the number of environmental matters filed in the ELC because it creates public awareness.<sup>46</sup> Due to lack of public awareness on what constitutes environmental matters amongst the litigants, an environmental legal practitioner noted that land matters are most pronounced in the ELC than environmental matters.<sup>47</sup> A legal officer at NEMA noted that such a distinction will increase not only environmental litigation, but it can help ‘in the sense that environmental matters can be handled separately and involve the engagement of more environmental experts’.<sup>48</sup> The Executive Director of ILEG argued that a water-tight criteria or guidance distinguishing between land and environmental matters filed in the ELC would help clarify and streamline the kind of cases coming

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<sup>43</sup> Respondent 15, Interview with Hon. Justice Boaz Oloo, ELC Judge, ELC Kirinyaga (ELC Kirinyaga, 28 February 2018).

<sup>44</sup> Respondent 3 (n 2).

<sup>45</sup> Respondent 4 (n 5).

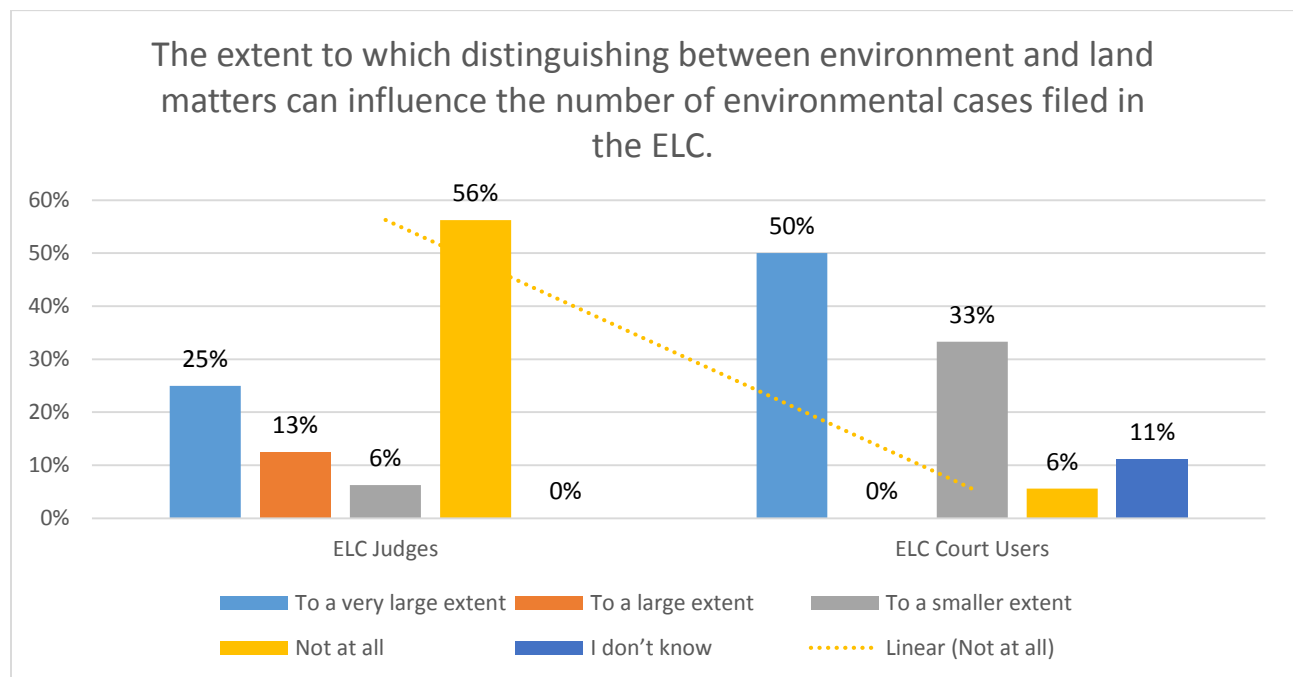
<sup>46</sup> Respondent 27 (n 19).

<sup>47</sup> Respondent 32 (n 23).

<sup>48</sup> Respondent 29 (n 30).

to the court and that this will contribute to the number of environmental cases.<sup>49</sup> On the other hand, some of the Court users argued that it would not make any difference if land matters were distinguished from environmental matters in the ELC.<sup>50</sup> The County Director for Environment in Kajiado opined that as currently constituted, the ELC has dual jurisdiction and that it is upon the ELC to distinguish between a land and environmental dispute.<sup>51</sup>

**Figure 4. 9: The extent to which distinguishing between environment and land matters can influence the number of environmental cases filed in the ELC.**



The above data indicates varied views between the ELC judges and the Court users on the extent to which distinguishing between environmental and land matters can contribute to the increase of environmental matters filed in the court. The majority (83%) of the Court users argue

<sup>49</sup> Respondent 45, Mr. Benson Owuor Ochieng, Advocate of the High Court of Kenya and the Executive Director Institute for Law and Environmental Governance (ILEG) (Nairobi, Questionnaire filled on 5 June 2018).

<sup>50</sup> Respondent 30 (n 15).

<sup>51</sup> Respondent 37 (n 24).

that indeed distinguishing between land and environment matters will have a direct impact on the number of cases brought before the ELC. Amongst those in agreement, 50% opine that indeed such a distinction can influence the number of environmental cases to a very large extent, while 33% agree that it will only be to a smaller extent. The majority of the judges (56%) on the other hand opine that indeed such a distinction will not at all affect the number of environment cases.

### **C. The impact of constitutional provisions on environment litigation and caseload.**

As noted throughout this study, the CoK 2010 was not only novel in establishing a specialized ELC to hear and determine land and environment matters. It was also novel in entrenching new constitutional provisions that aimed at enhancing environmental litigation and conservation. These novel constitutional provisions include:

- a) The establishment of the ELC as a specialized court with the jurisdiction to hear and determine environment and land disputes;<sup>52</sup>
- b) The elevation of the right to a clean and healthy environment from statutory level in the EMCA to a constitutional level under Article 42 of the CoK;
- c) The removal of the restrictive rule of standing and the entrenchment of Article 70(3) of the CoK which requires that in the enforcement of environmental rights, an applicant does not need to demonstrate that he has incurred loss or suffered any harm;
- d) The recognition of the direct application of international environmental treaties and conventions ratified by Kenya under Article 2(5) and (6) and;
- e) The provision of Article 69 of the CoK which lists the obligations of the State towards environmental conservation.

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<sup>52</sup> Article 162 (2) (b) of the CoK

The constitutional provisions on environmental protection are not limited to the above-mentioned provisions because the CoK is to be read as a whole document. In regard to the question of whether the said constitutional provisions can spur environmental litigation, this study sought to find out whether the ELC judges and the Court users were aware of the said provisions. The second question to the ELC judges and the court users was whether in their view, the environmental provisions anchored in the CoK can contribute to the increase in the number of environmental cases. Finally, the study sought to find out the extent to which the constitutional provisions on environment can contribute to the environmental caseload.

**a. Awareness of the environmental constitutional provisions.**

The ELC judges and environmental legal practitioners had a clear understanding and knowledge of the constitutional provisions that seek to enhance environmental litigation. However, the individual court users did not understand the specific provisions in the CoK that sought to protect the environment. Most of them were in the ELC to litigate land disputes and were represented by advocates. One of the judges noted that the recognition of public interest litigation in the CoK is very fundamental in environmental litigation ‘because even in cases where the affected citizens or persons are unable to file proceedings on their own behalf, a public spirited person may undertake public interest litigation on the matter’.<sup>53</sup> According to another judge, most cases have not been filed as a result of personal injury but on behalf of the public, a situation that could not have been possible under the previous constitutional regime.<sup>54</sup> Public Interest Litigation in environmental matters should therefore be encouraged.

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<sup>53</sup> Respondent 6 (n 32).

<sup>54</sup> Respondent 16 (n 4).

**b. Whether environmental provisions anchored in the CoK can contribute to the number of environmental cases.**

All the respondents agreed that indeed, the constitutional provisions on the environment had a positive impact on environmental caseload. One of the respondents applauded the Kenyan constitutional regime and argued that in comparison with other countries, Kenya has a robust and progressive legal regime for the protection of the environment, a situation that should trigger environmental litigation.<sup>55</sup> Lack of public awareness of constitutional provisions relating to the environment and lack of knowledge on environmental issues by non-lawyers was identified as a major impediment to environmental litigation in Kenya.<sup>56</sup> One of the respondents noted that due to media coverage of environmental issues such as the Mau Forest evictions, Kenyans had become aware of their constitutional rights.<sup>57</sup> However, there is need to enhance public awareness on the right of people to a clean and healthy environment, amongst other constitutional provisions, pertaining to the protection of the environment. The executive director of ILEG posited that indeed, environmental constitutional provisions have an impact on the number of environmental cases because:

*.... The mechanisms create opportunities for the public to take an active part in environmental matters and pursuit of the environmental rights. They also enhance potential for access to justice, which builds confidence in individuals and legal practitioners in the justice system.*<sup>58</sup>

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<sup>55</sup> Respondent 1 (n 11).

<sup>56</sup> Respondent 36 (n 12).

<sup>57</sup> Respondent 37 (n 24).

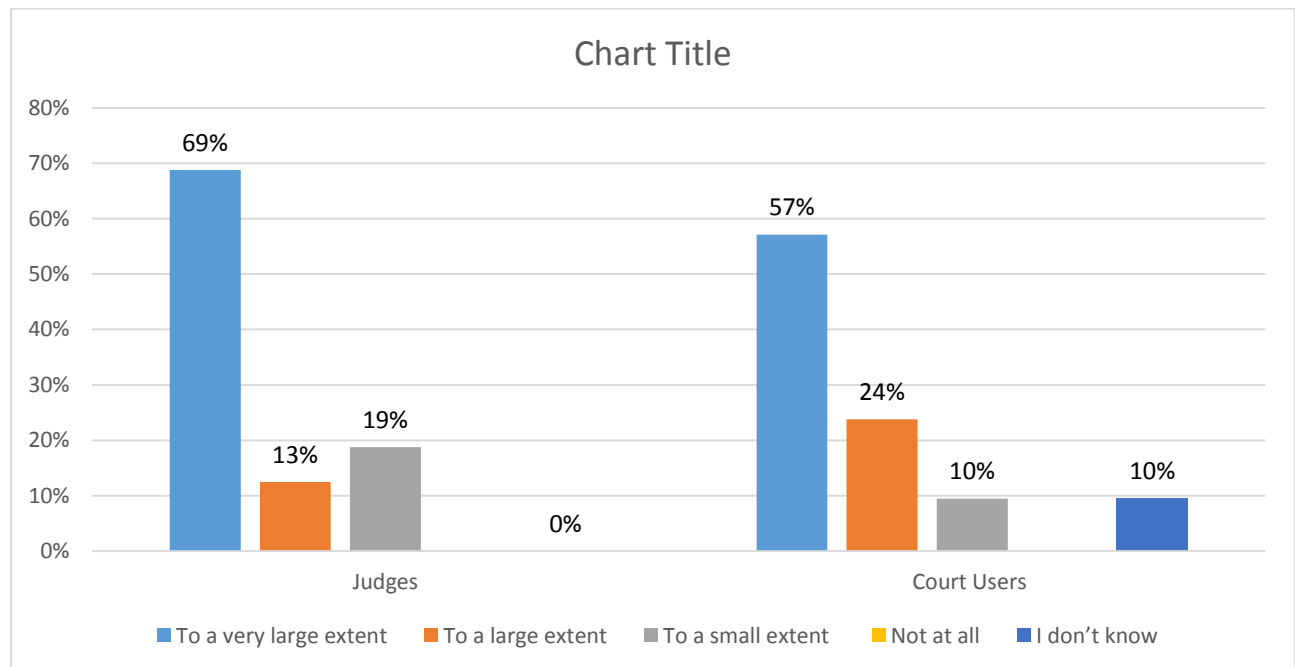
<sup>58</sup> Respondent 45 (n 49).



One of the Judges noted that people are more concerned about their bread and butter than environmental conservation.<sup>59</sup> Another Judge stated that Articles 69 and 70 of the Constitution are some of the Articles which enhance environmental litigation.<sup>60</sup>

The assertion by the ELC judges, environmental scholars, legal practitioners, government agencies and those working in the civil society that indeed there is need to create public awareness of the constitutional provisions addressing environmental governance was not supported by the respondents who did not fall in these categories. This was largely due to the lack of knowledge of the provisions of the Constitution. The study inquired into the extent to which the constitutional provisions on environment affect the environment caseload.

**Figure 4. 10: The extent to which the constitutional provisions on environment affect the environment caseload.**



<sup>59</sup> Respondent 15 (n 43)

<sup>60</sup> Respondent 10 (n 6).

Most of the judges and the Court users agreed that indeed the constitutional provisions on the environment have an impact on the environmental caseload. The impact of the constitutional provisions to the environmental caseload calls for the need of enhancing awareness of the constitutional provisions relating to environmental protection by training the public.

#### **D. Jurisdiction of the ELC**

The ELC is not the only institution in Kenya that handles and resolves all environmental disputes. However, the ELC has both the original and appellate jurisdiction to handle and resolve environmental disputes.<sup>61</sup> . The NET has limited jurisdiction<sup>62</sup> while NEMA is an enforcement organ. The magistrates' mandate on the other hand is limited by their pecuniary jurisdiction.<sup>63</sup> While the ELC is a specialized court, the issue of its jurisdiction has remained controversial. The operationalization of the ELC, and the workload in terms of environmental matters, will be guided by its jurisdiction.

##### **a. Whether the jurisdiction of the ELC is comprehensive and centralized.**

This study sought to determine the respondents' knowledge on the jurisdiction of the court, and whether the jurisdiction of the court was comprehensive and centralized. Other than the specific functions of the court stipulated under section 13 (1) of the Environment and Land Court Act, the ELC also has the supervisory and appellate jurisdiction over the decisions of the subordinate courts and tribunals in respect of matters falling within the jurisdiction of the Court. As noted by Preston, a successful EC is one which has comprehensive and centralized jurisdiction to make it a one-stop

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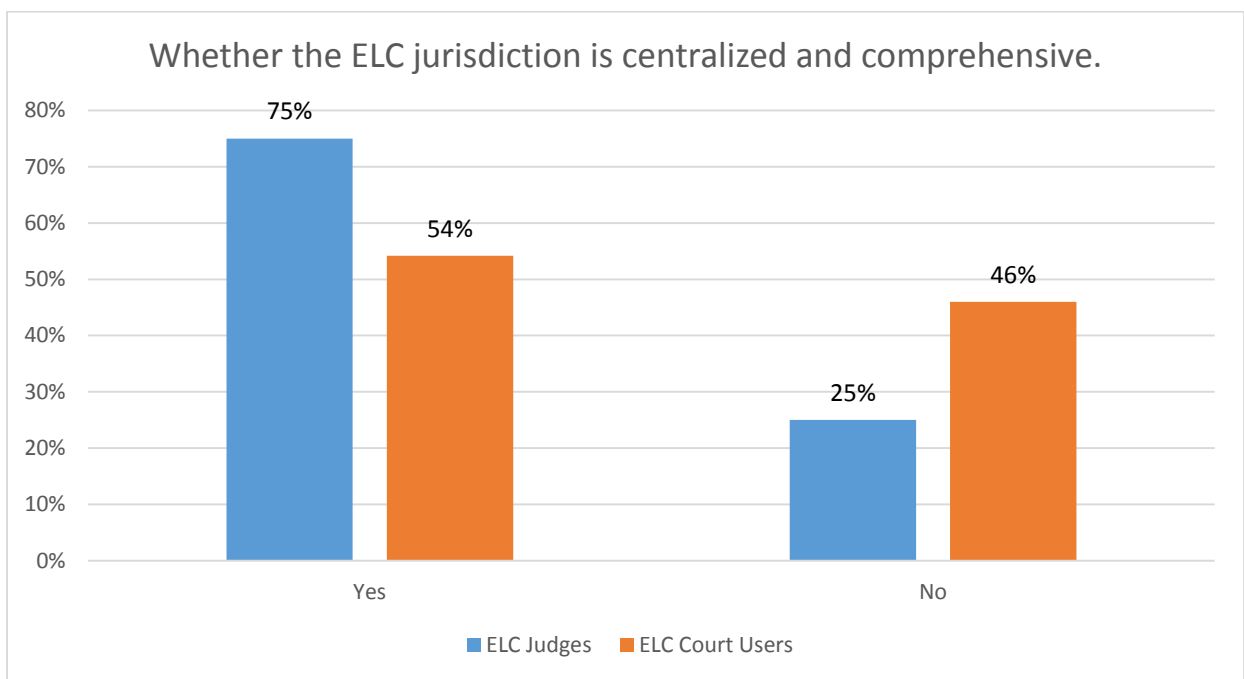
<sup>61</sup> Section 13 (1) of the Environment and Land Court Act

<sup>62</sup> Section 129 of EMCA

<sup>63</sup> Section 9 of the Magistrates' Courts Act

shop and avoid forum shopping.<sup>64</sup>The lack of a comprehensive and centralized jurisdiction is likely to reduce the number of cases filed in the court because litigants would not know which forum to approach thus denying the court the chance to adjudicate over environmental disputes and develop the law and jurisprudence. This study therefore sought to find out from the respondents their opinion on whether the ELC's jurisdiction is centralized and comprehensive.

**Figure 4. 11: Whether the ELC jurisdiction is centralized and comprehensive.**



The majority of the respondents (Judges 75 % and Court users 54 %) agreed that indeed the ELC has a comprehensive and centralized jurisdiction as stipulated in the CoK and the ELC Act. However, some of the respondents (Judges 25 % and Court users 46 %) were of a different opinion. One of the judges noted that despite the ELC having comprehensive jurisdiction:

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<sup>64</sup>Brian J Preston, 'Public Enforcement of Environmental Laws in Australia' (1991) 6, *Journal of Environmental Law and Litigation* 43; Brian J Preston, 'The Land and Environmental Court of New South Wales: Moving towards a Multi-door Courthouse' (2008) 19, *ADRJ* 72.

*...it requires further elaboration particularly with regard to grey areas such as judicial review in matters relating to environment and land and also in relation to supervisory mandate in regard to the mandate vested in magistrate courts and tribunals.*<sup>65</sup>

According to another judge, despite the ELC having jurisdiction to hear and determine environmental matters, the public solely perceive the ELC as a land court rather than both a land and environment court and that its comprehensive jurisdiction is rarely invoked.<sup>66</sup> Further, whereas it can be argued that the ELC has comprehensive jurisdiction with a wider geographical scope as stipulated in the legal framework, it does not have a centralized jurisdiction because it is not the only institution in Kenya that hears environmental disputes.<sup>67</sup> Another respondent noted that the jurisdiction of the ELC is not comprehensive because some matters touching on the environment, such as violation of the right to environment are handled in the High Court as human rights issues.<sup>68</sup> According to the respondent, there is no clear distinction between the jurisdiction of the ELC and the High Court when it comes to the enforcement of the constitutional provisions relating to the environment.<sup>69</sup> This jurisdictional confusion between the ELC and the High Court ultimately leads to forum shopping thus impacting on the environmental caseload and the development of jurisprudence by the court.

**b. The jurisdiction of the magistrate courts to hear and determine environmental matters.**

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<sup>65</sup> Respondent 13 (n 1).

<sup>66</sup> Respondent 7 ( n 7)

<sup>67</sup> Respondent 3 (n 2).

<sup>68</sup> Respondent 2, Hon. Justice Millicent Odeny, ELC Judge, ELC Eldoret (ELC Eldoret, Questionnaire filled)

<sup>69</sup> Ibid

The essence of establishing a specialized environmental court is to transfer environmental matters from a court of general jurisdiction to the specialized court. In 2016, the Court of Appeal in the case of *Law Society of Kenya Nairobi Branch v Malindi Law Society & 6 Others Nairobi Civil Appeal No. 287 of 2016*, held that the magistrates court can hear and determine environmental matters, limited by their pecuniary jurisdiction, as a court of first instance and that the ELC does not have exclusive jurisdiction to hear such matters. Whereas this decision was mainly informed by the high caseload of land matters, it affects the adjudication of environmental matters. In most cases, environmental matters cannot be valued in monetary terms. Indeed, other than the issue of pursuing damages, environmental degradation is not capable of being valued. In the absence of guidelines on how environmental matters should be valued, this is likely to pose a challenge when it comes to filing of environmental matters in the magistrate's courts. This study sought to find out the opinion of the respondents on the Court of Appeal's decision in the case of *Law Society of Kenya Nairobi Branch v Malindi Law Society & 6 Others* and how the decision would impact on the functioning of the ELC with regard to environmental litigation.

The respondents were of the view that the implication of the Court of Appeal's decision on the ELC is that the environmental caseload will reduce because most matters will be filed in the magistrate's court which are closer to the people.<sup>70</sup> One of the respondents noted as follows:

The impact will be that many litigants will file cases in the magistrates' courts near their locality. There are few judges and E & L courts therefore limiting the litigants from filing their cases. This is due to distance and expense.... With this ruling there will be more appeals by the litigants who are aggrieved by the decisions of the lower courts.<sup>71</sup>

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<sup>70</sup> Respondent 6 (n 32).

<sup>71</sup> Respondent 2 (n 67).

Another respondent opined that as a result of the involvement of the magistrate's court in environmental adjudication, there would be an increase in environmental litigation because the forum for filing such matters will be wide.<sup>72</sup> Another respondent pointed out that 'the number of environmental cases reaching the ELC will reduce since the ELC will now share the same work with the Magistrates Court'.<sup>73</sup> One of the judges summarized the impact of the decision of the Court of Appeal as follows: original matters filed at the ELC will reduce, especially claims that are of lower significance and value; appeals to the ELC from Magistrates Court will increase; and parties in areas that do not have ELC stations will be able to file cases of environmental nature before the magistrates courts.<sup>74</sup>

However, another judge had a different view. She pointed out that the low environmental caseload in Kenya is not as a result of the court that handles environmental matters but the attitude of Kenyans regarding the environment.<sup>75</sup> Even before the establishment of the ELC and when the general courts had jurisdiction to handle environmental matters, there was still low environmental caseload.<sup>76</sup> While the magistrate's court can hear and determine environmental matters in accordance with their pecuniary jurisdiction, the respondents were of the view that there is need for the enactment of a legislative framework to distinguish between matters that can be lodged in the ELC and in the subordinate courts. For instance, constitutional matters such as the right to a clean and healthy environment should only be handled by the ELC and not the magistrate courts.<sup>77</sup> The Executive Director at ILEG provided that the Court of Appeal's decision will only be

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<sup>72</sup> Respondent 3 (n 2).

<sup>73</sup> Respondent 1 (n 11).

<sup>74</sup> Respondent 30 (n 15).

<sup>75</sup> Respondent 14 (n 10).

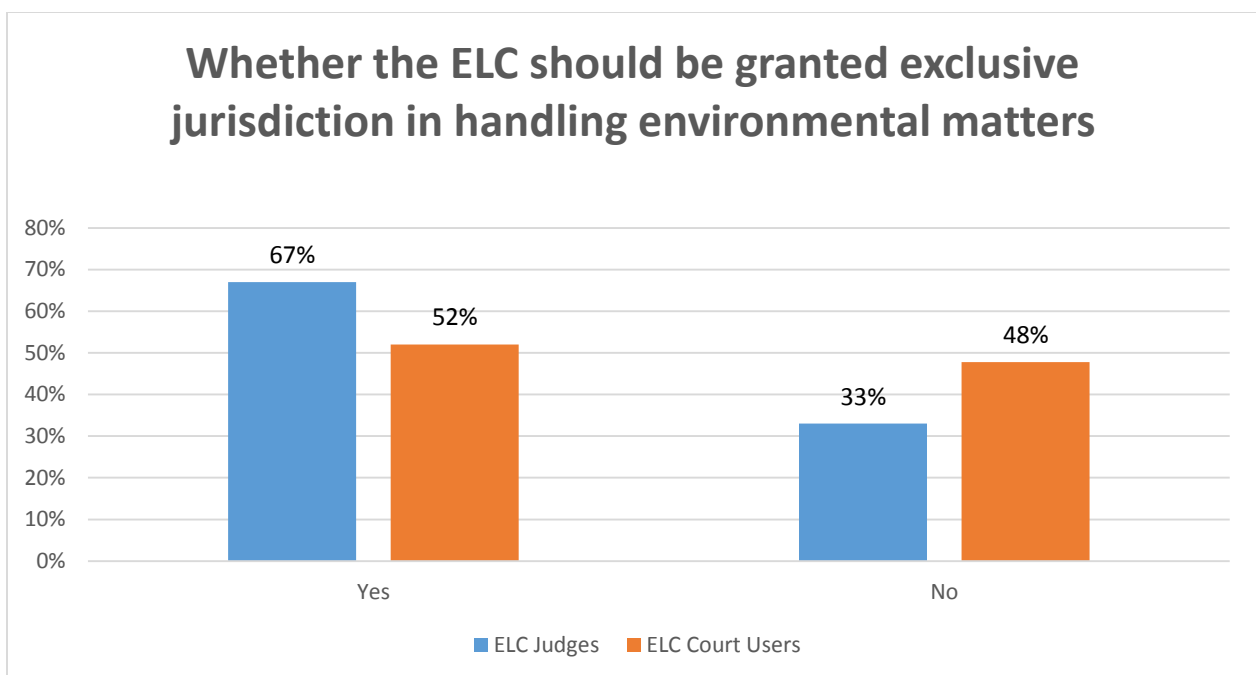
<sup>76</sup> Respondent 10 (n 6).

<sup>77</sup> Respondent 28 (n 17).

effective if there is a 'legislative backing as well as a clear criteria and guidance to determine how the specific cases would be filed within the court's system'.<sup>78</sup>

**c. Whether the ELC should be granted exclusive jurisdiction in handling environmental matters**

**Figure 4. 12: Whether the ELC should be granted exclusive jurisdiction in handling environmental matters**



As noted above, the majority of the respondents (Judges 67% and Court users 52%) strongly agreed that the ELC should not be granted exclusive jurisdiction to hear and determine environmental disputes. Instead of granting the ELC exclusive jurisdiction to hear and handle environmental matters, they opined that capacity building and public awareness need to be adopted

<sup>78</sup> Respondent 45 (n 49).

to change the attitude of Kenyans on public interest litigation.<sup>79</sup> Those who supported the argument that ELC should not be granted exclusive jurisdiction in environmental matters argued from a point of accessibility of the ELC by the litigants. They posited that as a result of having fewer ELC stations across the country, granting exclusive jurisdiction to the ELC would limit access to justice for litigants.<sup>80</sup> One of the respondents argued as follows:

...the ELC courts have not been established in all courts stations in Kenya. If exclusive jurisdiction is granted, it may deny some Kenyans the right to access justice under Article 48 of the Constitution, although such a move might increase the caseload at the ELC.<sup>81</sup>

Inaccessibility of a court due to distance not only increases the costs of litigation, but does not also motivate people to file matters in court.<sup>82</sup> Given the fact that most of the environmental matters are public related, inaccessibility of the ELC is likely to be a hindrance. This will ultimately affect the number of cases filed in the court and the jurisprudence emanating from the court. Despite a majority of the respondents holding the view that the ELC should not be granted exclusive jurisdiction to hear and determine environmental matters, 33% of the judges and 48% of the Court users had a different view. They argued that the ELC should be granted the exclusive jurisdiction in handling environmental matters at the level of a superior court because it gives the litigants a sense of finality.<sup>83</sup> Secondly, it was argued that it is the ELC judges who have experience and expertise in environmental matters.<sup>84</sup> Therefore, the ELC, while handling environmental matters, should be granted exclusive jurisdiction to enhance specialization, consistency and detail

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<sup>79</sup> Respondent 14 ( n 10)

<sup>80</sup> Respondent 2.

<sup>81</sup> Respondent 6 (n 32).

<sup>82</sup> Respondent 10 (n 6).

<sup>83</sup> Respondent 16 (n 4).

<sup>84</sup> Respondent 12, Interview with Hon. Lady Justice Christine Ochieng, ELC Judge, ELC Kajiado (ELC Kajiado, 15 March 2018).



analysis.<sup>85</sup>The respondents further posited that the lower courts lack the capacity to handle complex environmental matters. Another respondent pointed out that:

...the ELC was established as a specialized court. I support the view that it should have exclusive jurisdiction in environmental disputes. This will not however increase the number of environmental cases being filed at the ELC. As I have said repeatedly, the lower number of environmental cases being filed at the ELC has nothing to do with what the court is doing or not doing.<sup>86</sup>

It would be a good idea for the ELC to have exclusive jurisdiction in environmental matters.<sup>87</sup> The ELC should retain original jurisdiction. Judges of the ELC are appointed on the ground that they have experience and knowledge of more than ten years in land and environment issues. If complex cases on environment are filed in the magistrate's courts, it will affect the soundness of the decisions and jurisprudence pertaining to environmental governance. The shared jurisdiction will water down the justification of transferring matters from the courts of general jurisdiction to specialized ECs. In any event, there is no legislation setting the criteria of how environmental matters will be valued for the purpose of determining if indeed the magistrates have the pecuniary jurisdiction to handle them.

**d. Whether the jurisdiction of the ELC can influence environmental caseload**

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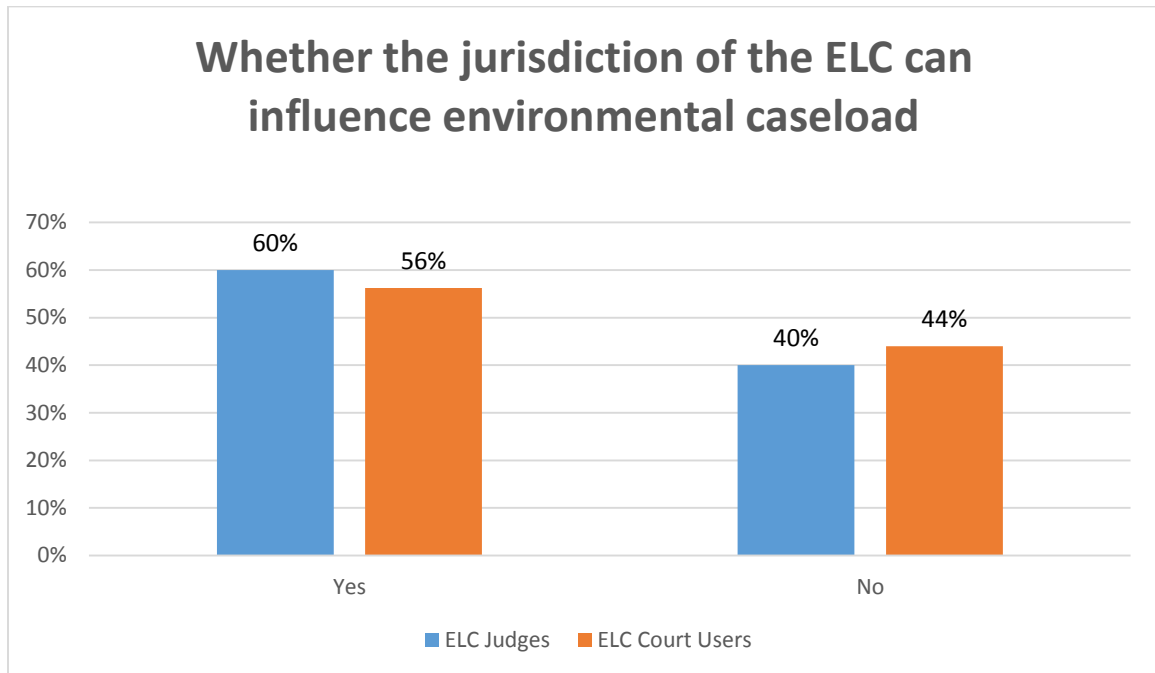
<sup>85</sup> Respondent 26 (n 39).

<sup>86</sup> Respondent 1 (n 11).

<sup>87</sup> Respondent 32 (n 23).

In order to answer the question on factors influencing environmental caseload, this study sought to find out from the respondents on whether the jurisdiction of the ELC, as it is now, can influence its environmental caseload.

**Figure 4. 13: Whether the jurisdiction of the ELC can influence environmental caseload**



As indicated above, the majority of court users (60% ELC Judges and 56% Court Users) agreed that granting the ELC exclusive jurisdiction will influence the environmental caseload. When the jurisdiction is comprehensive and centralized, the ELC becomes a one stop shop thus making it easier to file such cases. They argued that a centralized jurisdiction will make the court a one stop shop thus avoiding the issue of litigants from forum shopping. Where there is shared jurisdiction with the Magistrates court, it will reduce the number of the cases filed in the ELC.<sup>88</sup>

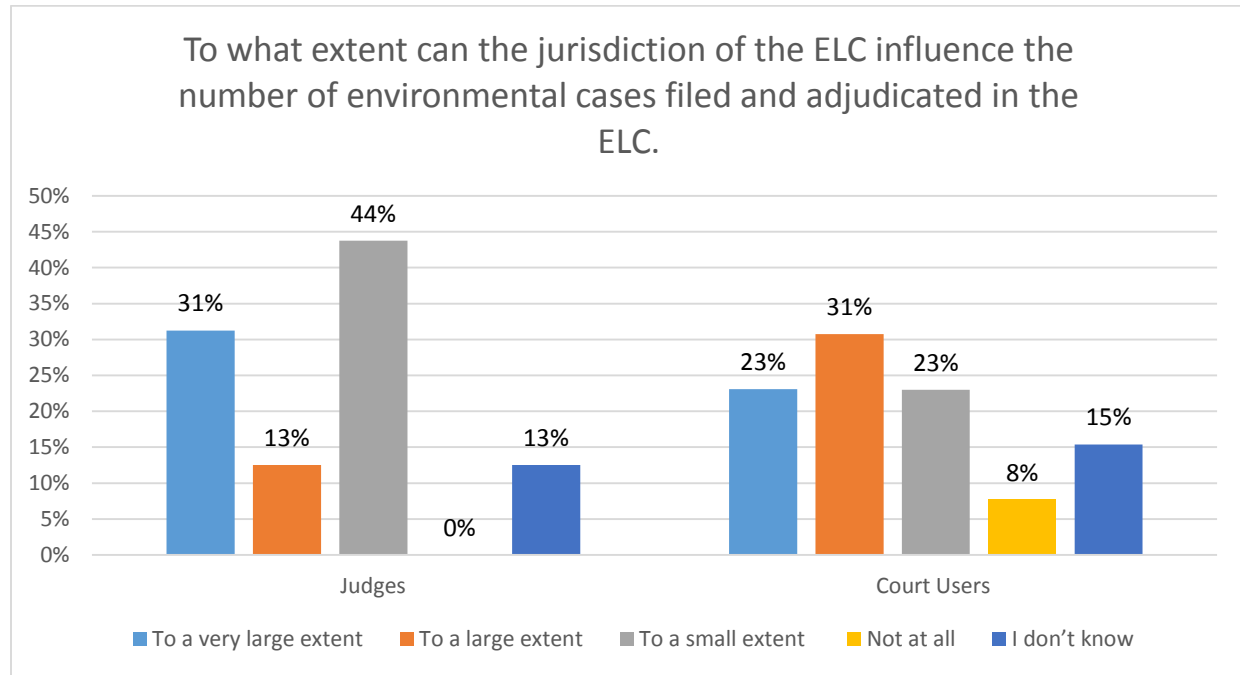
**e. To what extent can the jurisdiction of the ELC influence environmental caseload?**

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<sup>88</sup> Respondent 13

This study also sought to find out to what extent the jurisdiction of the ELC can influence the number of environmental cases filed and adjudicated in the ELC.

**Figure 4. 14: The extent to which jurisdiction of the ELC influence environmental caseload**



Majority of the respondents (87% ELC judges and 77% of Court users) were in agreement that indeed the jurisdiction of the ELC can influence the number of cases filed in the ELC. Majority of the judges were of the view that such an influence would be to a small extent. There is therefore the need to create more public awareness, not only on the jurisdiction of the ELC, but also on the existence of the various institutions involved in environmental dispute resolution.

#### **E. Other Factors that Contribute to the Number of Environmental Cases in the ELC**

In order to invoke more discussion on the factors that contribute to the number of environmental cases in the ELC, this study sought to find out from the judges who sit in the ELC and the court users of any other factors within their knowledge that affect environmental caseload

in the ELC. The data that was collected from all the judges of the ELC and the court users who responded are summarized below.

**a. Public attitude and apathy towards environmental issues and environmental litigation.**

In addition to the lack of adequate public awareness on environmental issues, public attitude and apathy towards environmental matters, even where they exist, is a great hindrance to environmental conservation. According to one of the judges, ‘Environmental matters by their very nature affect the wider public and essentially constitute public interest litigation. Individuals shun being involved in public interest matters’.<sup>89</sup> Due to the public nature of environmental matters, Kenyans are not inclined to pursue the infringement of the right to a clean and healthy environment where the infringement does not directly affect them. People are usually scared of going to court especially in matters that are political in nature, such as the current Mau Forest conservation dilemma. Due to the nature of environmental matters being public in nature, people have this attitude of waiting upon another person to file a suit.<sup>90</sup> There are few people or entities ‘willing to employ their resources in litigation without identifiable personal gain’.<sup>91</sup>

People have not prioritized environmental matters as they do with land matters. That is why majority of the cases filed in the ELC concern land. Most Kenyans are more concerned with matters of bread and butter, thus prioritizing land matters, which is a factor of production and a means of livelihood.<sup>92</sup> It was argued that the Kenyan public is not keen on public litigation where they are not beneficiaries and that the same public is not passionate about protecting their

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<sup>89</sup> Respondent 7 (n 7).

<sup>90</sup> Respondent 15 (n 43).

<sup>91</sup> Respondent 8, Hon. Justice SM Kibunja , ELC Judge, ELC Kisumu (ELC Kisumu, Questionnaire filled on 23 April 2018).

<sup>92</sup> Respondent 6 (n 32).

environment even when staring at a disaster in the face.<sup>93</sup>This kind of attitude can be cured through enhanced public awareness programs.

**b. Lack of adequate knowledge in environmental law**

The public lacks the knowledge on what constitutes environmental matters that can be addressed by the ELC. The public also lacks the knowledge on their role to protect and conserve the environment.<sup>94</sup> Most people may not be aware of the existence of the ELC, being a new court, or they may not have appreciated the transition and the systems of the courts that was created by the 2010 Constitution.

**c. High court fees and high costs of litigation**

Whereas the public is encouraged to make use of public interest litigation in environmental matters, this can turn out to be expensive as a result of the high costs of litigation. Court filing fees pose a great impediment in the filing of cases in the ELC. In the NET, as a result of most environmental matters being in the public interest, there is no requirement for paying the filing fees. Lack of resources amongst the public to litigate against companies involved in environmental degradation is a key factor contributing to the low caseload in the ELC.<sup>95</sup> There is therefore a need to waive court fees in environmental matters that are of public nature.

**d. Few ELC stations across the country**

The few ELC in the country affects accessibility of the court and is likely to hinder the public from instituting court proceedings due to lack of proximity of the court to the people.<sup>96</sup> This does

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<sup>93</sup> Respondent 14 (n 10).

<sup>94</sup> Respondent 5 (n 9).

<sup>95</sup> Respondent 15(n 43).

<sup>96</sup> Respondent 30 (n 15).

not only apply to the ELC alone but also to the various institutions involved in environmental governance.<sup>97</sup> One respondent noted that unlike the ELC which is distributed in 26 counties across the county, the NET has not been devolved, yet litigants not satisfied with decisions of NEMA are required by law to appeal to NET.<sup>98</sup> Inaccessibility of the ELC at the grassroots level therefore hinders litigants from filing environmental cases in the ELC.

**e. Length of time required to solve the disputes.**

Sometimes, the length of time required to solve environmental disputes takes a long time and the decision maybe be overtaken by events. The long periods that the ELC takes to resolve disputes is likely to lead to the lack of interest from the public in filing environmental disputes. Indeed, matters in the NET are likely to be disposed of quickly than those in the ELC and the public will prefer approaching NET. Yet, NET's jurisdiction is limited as compared to the ELC. Whereas this is true, it should be noted that currently, the ELC is already faced with a high caseload in land matters which is likely to affect the way environmental matters are disposed.

**f. Complex procedures for filing environmental matters in the ELC.**

The complex procedures in filing environmental matters in the ELC would require a litigant to procure the services of an advocate, thus making it a costly affair.<sup>99</sup> There is therefore a need for the ELC to simplify its procedures for the common person, especially in relation to matters pertaining to public interest litigation. One of the respondents working with an environmental NGO argued that:

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<sup>97</sup> Respondent 35 (n 35).

<sup>98</sup> Respondent 29 (n 30).

<sup>99</sup> Respondent 28 (n 17).

...the NET has a very simple procedure of bringing matters before it, i.e by simply filing a form. This is friendly to even lay people. However, in the ELC just like in the High Court, a litigant would usually need the services of a lawyer/advocate to draw and file pleadings. This can keep off litigants that may not afford a lawyer/advocate. Simplifying the procedures can increase the number of cases in the ELC.<sup>100</sup>

**g. Lack of public trust and confidence in the institutions mandated to enforce environmental issues.**

The institutions mandated to enforce environmental governance in the country lack the capacity, skills and efficient human resources to enforce environmental law.<sup>101</sup> Corruption, coupled with impunity by cartels, it was argued, is a factor that has affected the public confidence in those institutions.<sup>102</sup> Most of the environmental cases, especially those touching on environmental planning and development are ‘closed corrupting teams of different agencies’.<sup>103</sup> This observation must be looked into by all the players in the field of environmental management and governance holistically and be addressed with a view of making such institutions corruption free.

**4.2 The Impact of the Environmental Caseload on the Functioning and Operationalization of the ELC**

The ability of the ELC to develop environmental jurisprudence, law and enhance environmental protection through resolving environmental disputes is dependent on it being

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<sup>100</sup> Respondent 28 (n 17).

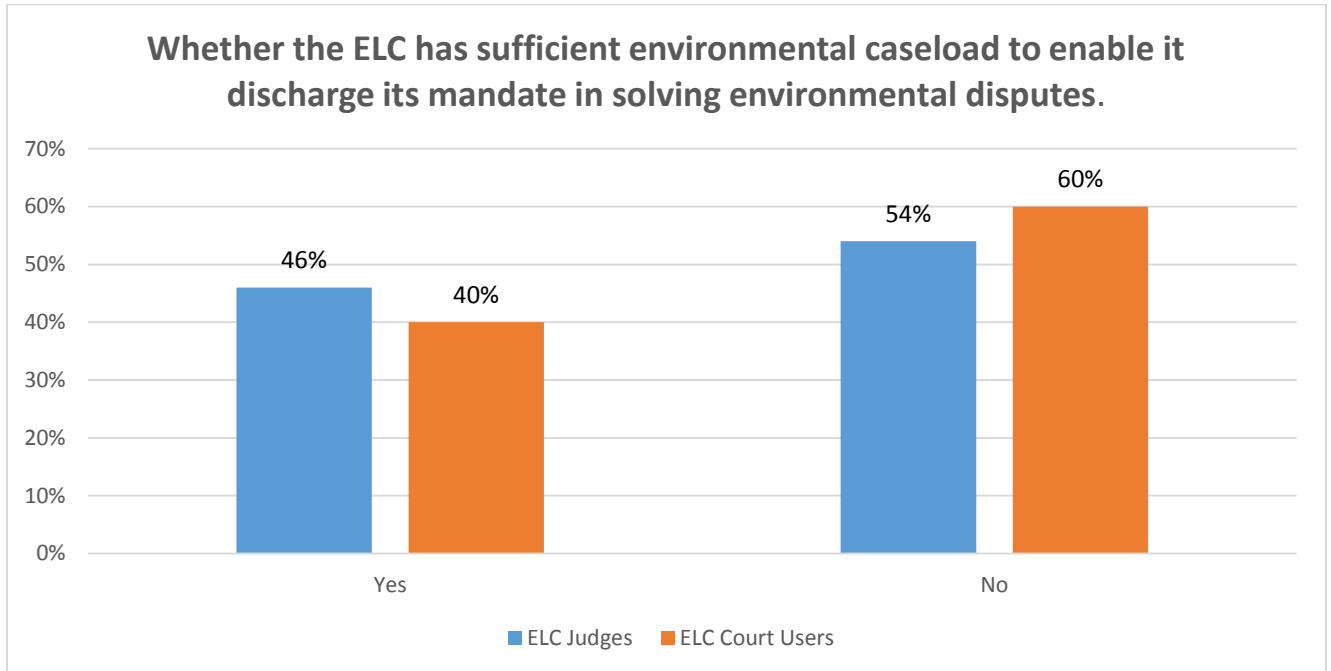
<sup>101</sup> Respondent 39, (n 22).

<sup>102</sup> Respondent 41, Interview Anonymous, Business Person (Nakuru, 7 February 2017).

<sup>103</sup> Respondent 27 (n 19).

presented with sufficient caseload. The respondents were required, in their view, to state whether the ELC has sufficient environmental caseload.

**Figure 4. 15: Whether the ELC has sufficient environmental caseload to enable it discharge its mandate in solving environmental disputes.**



Few of the respondents (judges 46% and 40% Court users) agreed that the environmental cases before the ELC are sufficient to enable it enforce environmental law and develop jurisprudence. They noted that even though there are fewer environmental matters filed in the ELC as compared to land matters, ‘this does not mean that there cannot be development of jurisprudence from them. However, if there are many disputes from many sectors of the environment, it will enhance environmental jurisprudence’.<sup>104</sup> The reality of the situation is that

<sup>104</sup> Respondent 10 (n 6).



the few number of environmental cases denies the ELC the opportunity to pronounce itself on the enforcement of environmental law.

The majority of the respondents (54% ELC Judges and 60 % Court Users) agreed with this study that there is need for more environmental cases to be filed in the ELC for the court to be effective in the enforcement of environmental law. Most of the cases filed in the ELC are related to land.<sup>105</sup>The Executive Director of ILEG opined that this is because the level of ‘public interest in environmental litigation in Kenya is still low in both quantitative and qualitative terms, undermining the jurisprudence of the ELC’.<sup>106</sup> Another respondent was of the view that the ELC as currently constituted is serving as a land court and that there is need for ‘a review of the ELC Act and the enactment of tailor made rules’.<sup>107</sup> The fewer number of environmental cases, unlike land matters, means that development of environmental jurisprudence by the ELC may take longer, thus denying the court the opportunity to effectively discharge its role in the enforcement of environmental law.

#### **a. Level of satisfaction with the role of the ELC in enforcing environmental law**

Even with the few environmental cases that have been filed in the ELC, this study sought to find out from the respondents if they are satisfied with the ELC in the enforcement of environmental law

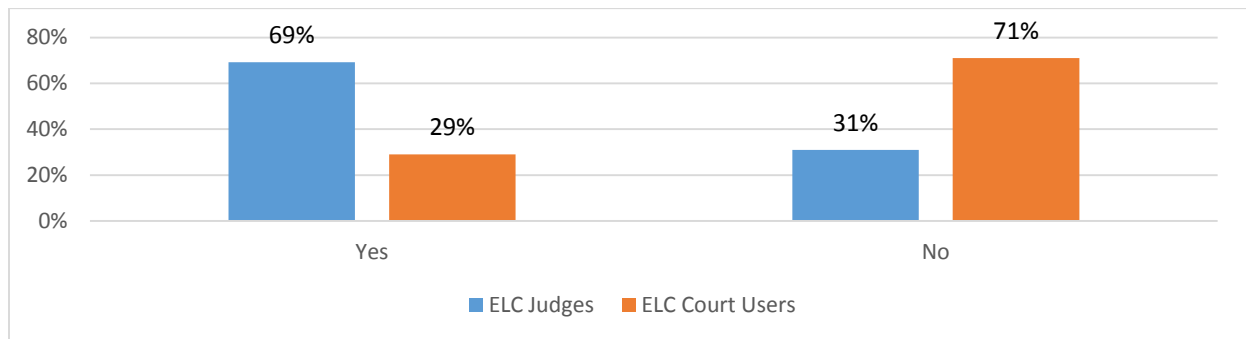
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<sup>105</sup> Respondent 27 (n 19).

<sup>106</sup> Respondent 45 (n 49).

<sup>107</sup> Respondent 7 (n 7).

**Figure 4. 16: Level of satisfaction with the role of the ELC in enforcing environmental law**



Despite the fewer number of environmental cases in the ELC, coupled with the high number of land cases, the ELC judges (69%) agreed that the ELC has tried its best in solving environmental matters and developing jurisprudence.<sup>108</sup> According to them, there is a growing jurisprudence emanating from the ELC on issues such as locus standi, international environmental principles, and enforcement of the right to a clean and healthy environment, amongst others.<sup>109</sup> They were of the view that the ELC has qualified judges who can hear and determine environmental disputes effectively and that instead of the High Court entertaining environmental matters on the ground that there are cross cutting issues in environmental disputes, they should transfer those matters to the ELC.<sup>110</sup> An environmental legal practitioner opined that there is need of other organs such as NEMA to ‘synchronize their roles and operations to ensure limited latitude in handling environment matters’.<sup>111</sup>

The judges (31%) who had a different view argued that indeed the ELC as it exists now is submerged under the weight of land disputes and that there is very little of environmental disputes

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<sup>108</sup> Respondent 29 (n 30).

<sup>109</sup> Respondent 16 (n 4).

<sup>110</sup> Respondent 5 (n 9).

<sup>111</sup> Respondent 26 (n 39).

taking place.<sup>112</sup> One of the judges lamented as follow: ‘I wish there were more cases filed so that we could develop jurisprudence in this area like many countries who deal with a lot of environment cases’.<sup>113</sup> Due to the fewer number of environmental matters in the ELC, the impact is therefore hardly felt.<sup>114</sup> Another judge stated as follows:

I am of the view that the court should also have been given criminal jurisdiction so that it may deal with destruction of forests, pollution of water, illegal trade in game trophies and other endangered species of flora and fauna.<sup>115</sup>

Whichever argument the judges take, the essence of sufficient caseload is to grant a court, which cannot institute court proceedings on its own motion, a chance to adjudicate and resolve the disputes concerning the environment. If a court is not presented with this opportunity, then there will be no one to interrogate the law and the degradation of the environment will continue unabated.

**b. The extent that the number of environmental cases can influence the role of the ELC in enforcing environmental law.**

This study sought to find out to what extent the environmental caseload can influence the role of the ELC in enforcing environmental law.

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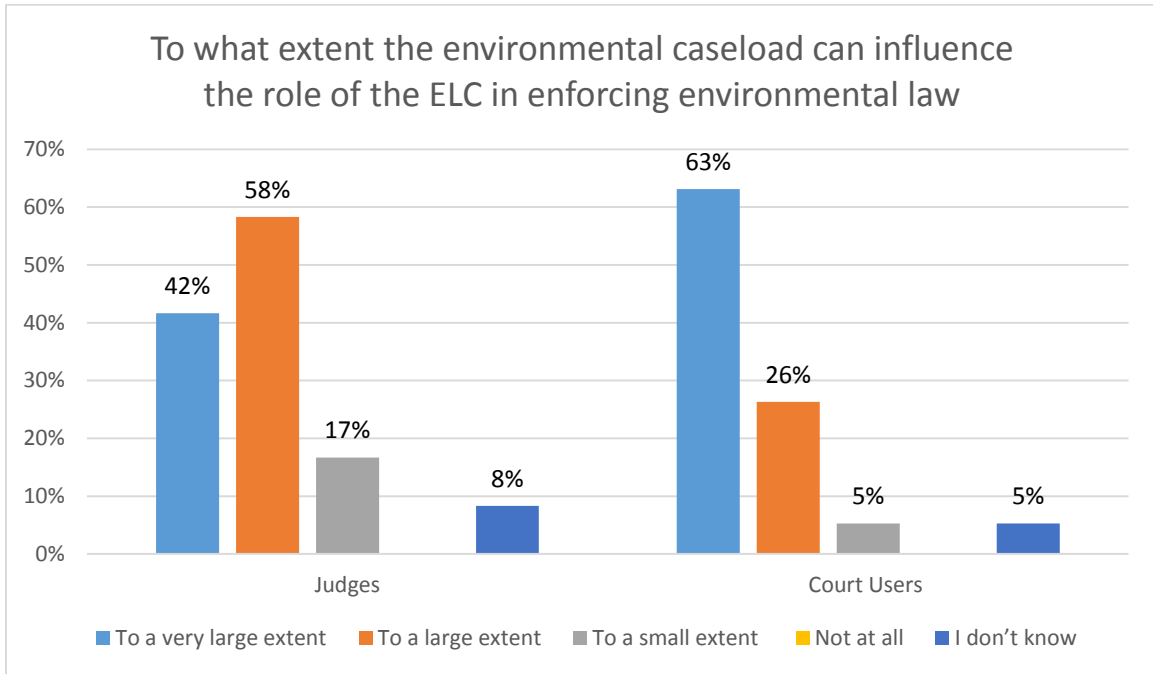
<sup>112</sup> Respondent 7 (n 7).

<sup>113</sup> Respondent 14 (n 10).

<sup>114</sup> Respondent 4 (n 5).

<sup>115</sup> Respondent 1 (n 11).

**Figure 4. 17: To what extent the environmental caseload can influence the role of the ELC in enforcing environmental law.**



The responses show that environmental caseload will affect the role of the ELC in solving environmental matters to a very large extent (42% Judges and 63% Court Users) and to a larger extent (58% Judges and 26% Court Users). As stated in the preceding chapters, environmental caseload gives the court the opportunity to develop the law and jurisprudence on environment and in turn inform policy decisions. One of the respondents was of the view that:

...a wider number and variety of cases may present a better opportunity for the Court to resolve a broader variety of cases hence contributing to the enforcement and development of environmental law.<sup>116</sup>

<sup>116</sup> Respondent 6 (n 32).

### **4.3 Chapter Conclusion**

Public awareness and the recognition of the ELC as the appropriate forum in settling environmental disputes is the major factor contribution to the environmental caseload in the ELC. This is as a result of the distribution of the ELC across the country. Being only in 26 counties, the establishment of the ELC has not been recognized as the only appropriate organ to deal with environmental disputes. It is on the basis of this unequal distribution of the court across the country that the law was amended granting magistrates the jurisdiction to hear environmental matters in accordance with their pecuniary jurisdiction.

The granting of the Magistrates' court with the jurisdiction to hear and determine environmental matters is therefore a great step towards environmental protection because they are distributed all over the country. However, there is need for a regulatory framework to provide guidance on when the magistrates' jurisdiction can be invoked because the pecuniary value of environmental degradation might not be easy to ascertain.

## CHAPTER FIVE

### 5.0 FINDINGS, CONCLUSIONS AND RECOMMENDATIONS

#### 5.1 Summary of Research Findings and Conclusions

This study sought to: determine the ELC environmental caseload; the jurisprudence emanating from the ELC; factors that contribute to the environmental caseload; assess the level of satisfaction with the ELC in the enforcement of environmental law and development of environmental jurisprudence; and suggest measures to enhance caseload on environment.

##### a. Environmental caseload

There is no public information on environmental caseload in the ELC. Since it was established, the judiciary has been publishing *State of the Judiciary and the Administration of Justice Reports* on the caseload in the ELC without distinguishing between environment and land matters. Since it was operationalized, neither the ELC nor the judiciary has statistical information on environmental caseload. The public data available on the number of cases filed in the ELC are generally categorized as ELC matters.

Further, the filing system of cases does not distinguish between environment and land matters at the onset. Due to the lack of a policy direction that environment and land matters be distinguished, the ELC judges are not in a position to provide with precision the number of environmental matters they have handled. This observation in itself is a setback in determining environmental caseload that would inform policy considerations.

Despite the lack of statistical data from the ELC Registries, ELC judges and the judiciary on the number of environmental cases filed in the ELC, the data collected in this study indicates that

the ELC has handled very few environmental cases as compared to land matters. This is evidenced by the responses given by the ELC judges and the DRs. Further, the data compiled by the NCLR on the number of rulings and judgments emanating from the ELC indicate that more than 99% of cases handled by the ELC every year are related to land. This study makes a research finding that even in the absence of statistical data on environmental caseload, the ELC has handled very few environmental matters.

**b. The Role of the ELC in developing environmental law and jurisprudence**

The implication of the low environment cases in the ELC not only undermines the operationalization of the ELC as an environmental court, but also makes the ELC look like it is solely a land court. A court can only function effectively if it has enough cases. It is through caseload that the court gets the opportunity to solve disputes, enforce the law and develop jurisprudence.

Despite the low environmental caseload in the ELC, the ELC has taken steps in developing environmental law and jurisprudence. The jurisprudence emanating from the fewer cases handled by the ELC sends a clear message that if granted more opportunities, the ELC has the capability of resolving environmental disputes. Most of the cases handled by the ELC so far involved development planning and environment revolving around decisions made by other statutory dispute resolution mechanisms such as NEMA, NET and the County government. The issues raised in those cases concerned with the compliance with environmental law in development projects; environmental impact of projects; NEMA approvals; the granting of EIA licenses and public participation in development.

The jurisprudence emanating from the ELC is that in development planning, compliance with environmental law and the strict adherence to the substantive and procedural law is mandatory. Where parties fail to comply with environmental law, the ELC will not hesitate to require the parties to go back to the drawing board and do the right thing. Where other statutory dispute resolution mechanisms are established by the law, the ELC has held that parties must exhaust those mechanisms before invoking the jurisdiction of the ELC.

The right to a clean and healthy environment is well anchored in the CoK and the EMCA. In protecting the right to a clean and healthy environment, the ELC has been categorical that where the legal procedures put in place are not followed, then a presumption arises that the impugned act is a threat to this right. This is a great step towards protecting and conserving the environment because litigants do not have to wait until they suffer injury or damage is done to the environment before seeking redress in court.

The application of the strict rule of standing in environmental matters as was applied in the previous regime has no place in the current constitutional dispensation. Any person, without having to prove that they have suffered personal harm or injury, can approach the ELC. This should in essence trigger environmental litigation. The people of Kenya should not therefore fear approaching the ELC when they come across acts which have a negative effect on the environment.

Further, the cases filed in the ELC have given it the opportunity to develop the law. For example, in the case of *Moffat Kamau & 9 others v Aelous Kenya Limited & 9 others*, the court held that in the absence of a provision stipulating the required minimum distance between a wind turbine generator and residential premises, NEMA and environmental experts should determine the set-back distance of a specific project. Further, the ELC was called upon to determine whether a new EIA Study Report is required before an EIA variation certificate could be issued. While



invoking Regulation 28 of the EIA Regulations, the court was clear that where there is substantial change that goes to the gist of the project, such a project should be deemed as a new project which requires a new EIA license, meaning that a fresh EIA must be carried out.

The issue of public participation in developments which are likely to have a negative impact on the environment has now been settled by the ELC. In compliance with environmental law and the CoK, all people who are likely to be affected by any project must be consulted by the proponent of the project. The ELC has further developed jurisprudence on waste disposal management. If granted more opportunities through the filing of cases, the ELC will be in a position to interrogate pressing environmental concerns in the country. Environmental litigation must be encouraged. People should not shun away from approaching the ELC for dispute resolution even where there is no direct personal benefit accruing to them.

### **c. Factors contributing to the number of environmental cases filed in the ELC**

Environmental caseload grants the ELC not only with the opportunity to enforce environmental law, but also to develop environmental jurisprudence. This study identified the factors that contribute to the said few number of environmental cases filed in the court.

*i) Public awareness and recognition of the ELC as an appropriate legal forum in solving environmental disputes.*

This study found that public awareness and the recognition of the ELC as the appropriate legal forum to settle environment disputes is the major factor contributing to the fewer number of environmental cases. The ELC is not only a new court, but it is also distributed in only 26 counties in Kenya. The remaining 21 counties have no ELC. There is need to establish more ELC stations at county level. The involvement of various institutions such as NEMA, NET, Magistrates courts

and other mechanisms established under different statutes in environmental governance implies that environmental litigants are likely to choose the alternative fora depending on the dispute in question. What is required is to create awareness of all institutions involved in environmental governance and the level of involvement of each institution

*ii) Public awareness on what constitutes environmental matters*

Public awareness on what constitutes environmental matters affects environmental caseload. A public that is aware of what constitutes environmental matters is very critical. The need to distinguish between land and environmental matters is very vital for the purpose of prioritizing the matters for hearing. Once the public is aware that environmental matters will be given priority over land matters in terms of hearing, they will be motivated to file such cases in the court. However, this will only be effective if the public understands what constitutes environmental matters, thus putting them in a position to identify an environmental issue and seek redress in the ELC. This study found that public awareness of what constitutes environmental matters is lacking. The civil society and the government agencies should play a key role in creating public awareness on what constitutes environmental issues through trainings, conferences, barazas, workshops etc.

*iii) Lack of public awareness on the constitutional provisions on environment*

The objective of entrenching environmental provisions in the CoK such as public interest litigation; the right to a clean and healthy environment; locus standi in environmental matters; the remedies to be granted by the court; application of international environmental principles; the use of ADR in environmental litigation and the establishment of the ELC as a specialized forum to hear and determine environmental disputes is to enhance environmental litigation. This study found that there is lack of public awareness amongst the members of the public on the

Constitutional provisions pertaining to the environment. Public awareness and understanding of the constitutional provisions in respect to the environment is key in enhancing environmental litigation and environmental governance.

*iv) Comprehensive and centralized jurisdiction of the ELC*

The ELC enjoys a comprehensive jurisdiction when it comes to handling environmental matters. However, whether it enjoys a centralized jurisdiction amidst the various institutions which are clothed with the mandate to hear and resolve environmental disputes is still debatable. It is the finding of this study that there is need to enhance collaboration and coordination between the ELC and the various institutions involved in environmental governance to avoid forum shopping and confusion amongst litigants.

*v) Public attitude and apathy towards environmental issues and environmental litigation.*

Due to the public nature of environmental matters, Kenyans are more unlikely to file environmental cases because, in their view, they are not directly affected by environmental degradation. This is a misplaced attitude because environmental degradation affects both the present and future generations, directly or indirectly. Furthermore, one does not need to prove personal injury in an environmental matter. The people of Kenya need to prioritize environmental matters just as they do with land matters.

The main objective of this study was to determine the factors contributing to the number of environmental cases at the ELC and how it impacts on the operationalization and functionality of the ELC in developing environmental law and jurisprudence. Based on the research findings and conclusions above, the research objectives and questions of this study were achieved.

## 5.2 Recommendations

Based on the above findings and conclusions, this study recommends:

### *A. Immediate action*

- a. There is need to enhance and create public awareness on the role of the ELC in handling environmental matters. The ELC need to make use and strengthen the CUC and open court days in educating the public on the jurisdiction of the ELC and the other institutions dealing with environmental governance.
- b. The civil society, such as ILEG, must continue playing its role in advocacy and public interest litigation, and creating public awareness of the role of the ELC in environmental governance and management.
- c. Faith based organizations should also enhance advocacy and public awareness on environmental issues at the grassroots levels.
- d. The media in Kenya plays a great role in bringing to the attention of the public environmental matters. For instance, through investigatory journalism, the media in Kenya brought to the limelight the “Lead Case” in Changamwe, Mombasa. The media should continue to increase its reportage coverage on the role of the ELC in the conservation and protection of the environment.
- e. The ELC should endeavor to finalize environmental cases within reasonable time. The ELC should avoid granting many adjournments in environmental matters. There is need to provide timelines within which environmental matters should be determined depending on the nature of the case.
- f. The ELC should encourage ADR mechanisms and traditional dispute resolution mechanisms where applicable as a method of resolving environmental disputes faster. The use of ADR

mechanisms such as arbitration, reconciliation, mediation and traditional dispute resolution mechanisms are well entrenched not only in the CoK but also in the statutory framework such as Section 20 of the ELC Act.

***B. Medium term***

- a. The judiciary needs to reduce the court fees or waive them all together in the filing of environmental cases in the ELC and especially in public interest litigation matters. Not many of the litigants are able to afford environmental lawyers and the court filing fees. Where an environmental concern exists, there is need to grant to public spirited individuals incentives of filing the cases by scrapping of the court filing fees.
- b. The hearing of environmental matters in priority to other matters by the ELC can only be achieved if the ELC registries distinguish land cases from environmental cases. All the ELC registries should have two registers and registries, one for land matters and the other for environmental matters. The two registers and registries will enable the ELC identify with precision the matters concerning the environment and allocate them dates on a priority basis. Such a system will not only see an improvement in the number of environmental cases filed, but will also assist the court in rating itself on its role in promoting environmental governance. Just like the High Court, which has several divisions like the family, commercial and criminal divisions, it is imperative that the ELC creates land and environment divisions to enhance environmental governance in the country.
- c. Training of the judicial staff and lawyers in environmental law and governance is critical. Judges need to be trained on environmental law not only at the national level but also at the international level. This can be done through informal, formal and refresher courses. There is need to involve the legal practitioners and legal scholars, both from within the

country and without in trainings on environmental litigation and adoption of best practices. This calls for deliberate training programs and partnership between the Judiciary, the Bar, the legal scholars, the civil society as well as an incentive system to encourage public interest litigation.

- d. Unlike the current Civil Procedure Rules which the ELC uses, there ought to be a simplification of the ELC procedures to make it easier for the public to file environmental matters. The ELC should have separate, distinct and simplified procedures governing the filing and hearing of environmental disputes. New environmental procedural rules should be enacted and applied by the court in a manner that is responsive to the unique aspects of environmental litigation.
- e. The current administrative arrangement tends to suggest that the ELC is an appendage of the High Court, while in actual sense, the ELC is a distinct superior court established by the Constitution. The ELC should therefore be treated as such to enable the public to recognize it as an independent specialized court. Currently, all the 26 ELC stations are in the same locality, both physically and administratively, with the High Court, with the High Court Judges being the presiding judges of those stations (for the High Court, the ELC and the ELRC). Indeed, although the High Court has one overall Principal Judge, with Presiding Judges in all the stations, the ELC has one Presiding Judge based in Nairobi. Considering that none of the ELC Judges is heading any of the stations, an assumption arises that the ELC is subservient to the High Court, thus compromising the courts' visibility in terms of its distinct nature as a specialized court. This perception by the litigants has informed some of them to file environmental matters in the High Court on the assumption that it is the superior court in a particular station. It is therefore recommended

that each ELC should have a separate courtroom, a registry or registries, a Deputy Registrar and members of staff. Each ELC station should also have a Presiding Judge, unlike the current scenario where a High Court Judge is the Presiding Judge not only for the High Court, but also for the ELC and ELRC in that station, his seniority notwithstanding. An ELC with an overall Principal Judge, Presiding Judges, Deputy Registrars and staff will go a long way in enhancing efficiency and visibility, thus encouraging more litigants to file environmental disputes in the court

*C. Long term*

- a. The institutions of education need to integrate environmental governance into the learning process. This will change the attitude of the younger generation on environmental conservation and litigation.
- b. The Ministry of Education, in conjunction with the other environmental stakeholders should strive towards developing a curriculum from the lowest level of the education system that seeks to integrate environmental matters to the highest level of education.
- c. The County governments should be proactive in environmental issues, including environmental governance and be lead players in helping to realize the mandate of the ELC in Environmental matters.
- d. The government agencies involved in environmental governance like NEMA should be at the forefront in the filing of cases in the ELC with a few of protecting the environment. NEMA, as an enforcement agency, needs to strengthen its enforcement tools and create awareness to the public of the mandate of the ELC.
- e. The number of ELC judges and ELC Stations should be increased. This is a policy decision that will be dependent on whether the judiciary has the funds to do so. The

governments should channel more resources to the court to enhance capacity building of the ELC. There is also a need to carry out a survey in each ELC station to determine the capacity required before channeling resources to those stations.

- f. There should be enhanced collaboration and coordination between ELC and the various organs that are involved in environmental governance. The civil society and environmental public interest litigators can influence environmental protection by bringing to the attention of the public environmental issues. The ELC must seek to improve its working relationships with other government agencies, the civil society and environmental public interest litigators involved in environmental governance by having joint workshops and exchanging information on the emerging issues in environmental law.
- g. The court should encourage public interest litigation in environmental matters by not punishing unsuccessful litigants in public interest litigation on environmental matters with costs wherever they lose cases.
- h. Considering the likely confusion that the issue of granting the magistrates with the jurisdiction to handle environmental matters may raise, and in view of the fact that a violation of the right to a clean and healthy environment may not be capable of being measured, for the purpose of developing the law and jurisprudence in environmental governance, the jurisdiction of the magistrate ought to be streamlined. All disputes relating to the environment, with the exception of a few disputes that should be stipulated in the law, should be heard by a specialized court, which in this case is the ELC. However, procedural disputes in environmental matters can be better handled by specialized statutory established institutions like NEMA and NET, with appeals being filed in the ELC. The hearing of environmental matters by the magistrates' courts, which are not specialized,



defeats the spirit of the Constitution which contemplated the hearing of environmental disputes by the ELC and other specialized bodies like the NET.

### **5.3 Further Areas of Research**

There is need to carry out further research in the following areas:

- a. To find out the actual number of environmental caseload in all the ELC stations across the country.
- b. This study limited its scope to court users. There is need for further research involving the public.
- c. There is need to carry out further research in areas that do not have ELC stations, to determine how it affects environmental caseload.
- d. While this study limited its discussion on final judgments emanating from the ELC, there are numerous Rulings emanating from the ELC that have settled environmental matters that need to be interrogated.

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## APPENDICES

### APPENDIX A: LIST OF RESPONDENTS

#### LIST OF RESPONDENTS

1. Respondent No. 1: Hon. Justice Samson Okong'o, ELC Judge, ELC Nairobi (ELC Nairobi, Questionnaire filled on 29 March 2018).
2. Respondent No. 2: Hon. Justice Millicent Odeny, ELC Judge, ELC Eldoret (ELC Eldoret, Questionnaire filled).
3. Respondent No. 3: Hon. Lady Justice Lucy N Mbugua, ELC Judge, ELC Meru, (ELC Meru, Questionnaire filled on 9 April 2018).
4. Respondent No. 4: Hon. Justice A Kaniaru, ELC Judge, ELC Busia (ELC Busia, Questionnaire filled on 26 March 2018).
5. Respondent No. 5: Hon Lady Justice Kossy Bor, ELC Judge, ELC Nairobi (ELC Nairobi, Questionnaire filled on 21 May 2018).
6. Respondent No. 6: Hon. Justice Yuvinalis Angima, ELC Judge, ELC Embu (ELC Embu, Questionnaire filled on 21 May 2018.)
7. Respondent No. 7: Hon. Justice Charles Mutungi, ELC Judge, ELC Kisii (ELC Kisii, Questionnaire filled on 15 February 2018).
8. Respondent No. 8: Hon. Justice SM Kibunja, ELC Judge, ELC Kisumu (ELC Kisumu, Questionnaire filled on 23 April 2018).
9. Respondent No. 9: Hon. Justice Antony Otieno Ombwayo, ELC Judge, ELC Eldoret (ELC Eldoret, Questionnaire filled on 9 May 2018).
10. Respondent No. 10: Hon. Justice Elijah Obaya, ELC Judge, ELC Nairobi (ELC Nairobi, Questionnaire filled on 8 May 2018).

11. Respondent No. 11: Hon. Justice James Olola, ELC Judge, ELC Malindi (ELC Malindi, Questionnaire filled on 10 May 2018).
12. Respondent No. 12: Interview with Hon. Lady Justice Christine Ochieng, ELC Judge, ELC Kajiado (ELC Kajiado, 15 March 2018).
13. Respondent No. 13: Hon. Judge Bernard Eboso, ELC Judge, ELC Nairobi (ELC Nairobi, Questionnaire filled on 23 April 2018).
14. Respondent No. 14: Interview with Hon. Lady Justice Lucy Waithaka, ELC Judge, ELC Nyeri (ELC Nyeri, 14 February 2018).
15. Respondent No. 15: Interview with Hon. Justice Boaz Oloo, ELC Judge, ELC Kirinyaga (ELC Kirinyaga, 28 February 2018).
16. Respondent No.16: Interview with Hon. Judge at the ELC Nakuru, ELC Judge, ELC Nakuru (ELC Nakuru, 31 January 2018).
17. Respondent No.17: ELC Deputy Registrar, ELC Kisumu (ELC Kisumu, Questionnaire filled on 23rd April 2018).
18. Respondent No. 18: ELC Deputy Registrar, ELC Bungoma (ELC Bungoma, Questionnaire filled on 11 April 2018).
19. Respondent No. 19: Isabella N Barasa, ELC Deputy Registrar, ELC Nairobi (ELC Nairobi, Questionnaire filled on 6 April 2018).
20. Respondent No. 20: Interview with M Kariuki, ELC Deputy Registrar, ELC Nyeri (ELC Nyeri, 14 February 2018).
21. Respondent No. 21: Martin, ELC Deputy Registrar, ELC Kisumu (ELC Kisumu, Questionnaire filled on 4 April 2018).



22. Respondent No. 22: Interview with CK Obara, ELC Deputy Registrar, ELC Meru (ELC Meru, 12 April 2018).
23. Respondent No. 23: Interview with M Kasera, ELC Deputy Registrar, ELC Kajiado (ELC Kajiado, 14 March 2018).
24. Respondent No. 24: Interview with Eric Otieno, ELC Deputy Registrar, ELC Kirinyaga (ELC Kirinyaga, 28 February 2018).
25. Respondent No. 25: Interview with the ELC Deputy Registrar, ELC Nakuru (ELC Nakuru, 7 February 2018).
26. Respondent No. 26: Interview with Henry Opondo, Advocate of the High Court of Kenya (Nakuru, 7 February 2018).
27. Respondent No. 27: Mr. Peter Munge, Advocate of the High Court of Kenya (Nairobi Questionnaire filled on 29 March 2018).
28. Respondent No. 28: Mr. Opondo Gerphas Keyah, Advocate of the High Court of Kenya (Nairobi, Questionnaire filled on 30 March 2018).
29. Respondent No. 29: Interview with Mr. Edward Wabwoto, Senior Legal Officer NEMA (Kajiado, 19 February 2018).
30. Respondent No. 30: Interview with Mr. Paul Munyao, Advocate of the High Court of Kenya (Mombasa, Questionnaire filled on 14 February 2018).
31. Respondent No. 31: Interview with Advocate of the High Court of Kenya (Nyeri, 14 February 2018).
32. Respondent No. 32, Cecilia Muthoni Gichohi, Advocate of the High Court of Kenya (Nyeri, 14 February 2018).

33. Respondent No. 33: Anonymous, Lecturer/Advocate of the High Court of Kenya (Nakuru, 7 February 2018).
34. Respondent No.34: Anonymous, Advocate of the High Court of Kenya (Nakuru, 7 February 2017).
35. Respondent No. 35: Interview with Maureen Litunda, Advocate of the High Court of Kenya and Legal Counsel at the Nakuru County Government (Nakuru, 7 February 2017).
36. Respondent No. 36: Phone interview with Mr. Muchira, Advocate of the High Court of Kenya (Kerugoya, 28 February 2018).
37. Respondent 37: Interview with Godfrey Wafula, County Director Environment Kajiado (Kajiado, 22 March 2018).
38. Respondent No. 38: Interview with Fred Wamalwa, Sales and Marketing (Nakuru, 7 February 2017).
39. Respondent No. 39: Interview with Richard O Otieno, Criminologist (Nakuru, 7 February 2017).
40. Respondent No. 40: Interview Anonymous, Business Person (Nakuru, 7 February 2017).
41. Respondent No. 4: Interview Anonymous, Business Person (Nakuru, 7 February 2017).
42. Respondent No. 42: Interview with Kamau, Security Officer (Nyeri, 14 February 2017).
43. Respondent No. 43: Interview with a business person, Business Person (Nyeri, 14 February 2017).
44. Respondent 44: Mr. John Khayega Chivai, Advocate of the High Court of Kenya (Nairobi, Questionnaire filled on 14 February 2017).

45. Respondent 45: Mr. Benson Owuor Ochieng, Advocate of the High Court of Kenya and the Executive Director Institute for Law and Environmental Governance (ILEG) (Nairobi, Questionnaire filled on 5 June 2018).

## **APPENDIX B: INFORMATION SEEKERS SURVEY**

Good morning/afternoon.

My name is **OSCAR AMUGO ANGOTE**, a Master of Laws (LLM) student at the University of Nairobi. As part of my LLM degree, I am carrying out a study on ‘**ENVIRONMENTAL CASELOAD AND THE ROLE OF THE ENVIRONMENT AND LAND COURT IN ENFORCING ENVIRONMENTAL LAW: A CRITICAL ANALYSIS**’

The Environment and Land Court (ELC) was established under the Constitution of Kenya (Constitution) to hear and determine land and environment matters. However, for it to discharge this mandate, it will be dependent on the ELC being presented with sufficient cases, these cases being litigated effectively and the court’s ability to appreciate and determine those matters.

The main objective of this study is to determine the factors contributing to the number of environmental cases at the ELC and how it impacts on the enforcement of environmental law in the country. In order to achieve this, I am requesting for 30 minutes of your time to ask you questions that will enable me determine factors that contribute to the number of environmental cases filed in the ELC and how those factors impact on the enforcement of the environmental law.

Your participation is voluntary and the information you give will remain confidential and will only be used in analyzing the findings of this research. The data collected from this study will be used to provide both policy and legal considerations in addressing environmental caseload at the ELC in order to enable the ELC enhance environmental justice and develop environmental law and jurisprudence.

**Oscar Amugo Angote**

**APPENDIX C: CONSENT FORM**

**NAME:** Oscar Amugo Angote

**REGISTRATION NO.:** G/62/7028/2017

**RESIGNATION:** Master of Laws Student, Parklands School of Law

**CONTACT ADDRESS:** P.O Box 27554-00100, Nairobi

**PROJECT TITLE: FACTORS AFFECTING ENVIRONMENTAL CASELOAD AT THE ENVIRONMENT AND LAND COURT AND ITS IMPACT ON THE ENFORCEMENT OF ENVIRONMENTAL LAW UNDER THE 2010 CONSTITUTION OF KENYA.**

Please Tick

1. I confirm that I have read and understood the information in the above study and have had the opportunity to ask questions.
  
  2. I understand that my participation is voluntary and that I am free to withdraw at any time, without giving reasons.
  
  3. I agree to take part in the above study.
  
  6. I agree to the use of anonymised quotes in publications
-

Name of Participant

Date

Signature

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Name of Researcher

Date

Signature

**APPENDIX D: QUESTIONNAIRES**

**ELC JUDGES QUESTIONNAIRE**

**PART A: Introduction**

Please note that all information you give is confidential and will be used for research purposes only. Read each question carefully and give your honest response. Your responses will inform key policy and legal considerations that will provide the Court with sufficient caseload to enable it develop environmental law jurisprudence and settle environmental disputes. TICK where appropriate.

**PART B: Demographic Information**

- a) Name (optional): .....
- b) The ELC County: .....
- c) Designation/Work: .....
- d) Date: .....

**PART C: Number of Environmental Cases at the ELC**

- a) How many cases (both land and environment) have you adjudicated in your duty station since the ELC was established? Explain your answer.  
.....  
.....
- b) How many of these cases were/are of environmental nature?

.....  
.....

c) Is/was it easy to categorize the cases filed in your court into land and environment? Explain your answer.

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.....

d) What are the most common environmental matters that have been filed and adjudicated by the ELC in your duty station?

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**PART C: Factors Contributing to the Number of Environmental Cases in the ELC**

**1. Public awareness and recognition of the ELC as the appropriate forum for settling environmental matters**

a) Who are the major litigants in the ELC?

Individuals

Environmental Organizations



Government Agencies

Any other

b) In your view, do you think there is public awareness and recognition of the ELC as the appropriate forum to settle environmental disputes and enforcing environmental law? Explain your answer.

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.....  
.....

c) In your view, can public awareness and recognition of the ELC affect the number of environmental cases filed at the ELC? Explain your answer.

.....  
.....  
.....  
.....

d) In your view, to what extent can public awareness and recognition of the ELC as the appropriate and legal forum to hear and determine environmental matters contribute to the number of cases filed and adjudicated in the ELC?

To a very large extent  To a large extent  To a smaller extent   
Not at all  I don't know

e) What mechanisms has your court put in place to enhance public awareness and its recognition in order to enhance the number of environmental cases in the ELC?

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.....

**2. The status and authority of the ELC.**

a) In your view, do you think that the status of the ELC as a court of superior record with the status of the High Court can influence the number of environmental cases filed in the ELC? If so how? Explain your answer.

.....  
.....  
.....  
.....

b) To what extent does the status of the ELC as a court of superior record with the status of the High Court influence the number of cases filed and adjudicated in the ELC?

To a very large extent       To a large extent       To a smaller extent   
Not at all       I don't know

**3. Environmental matters**

a) In your view, what constitutes environmental matters?

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.....

.....  
.....

b) Do you think distinguishing between environmental and land matters in the ELC [can] contribute to the numbers of environmental cases filed in the ELC? Explain your answer.

.....  
.....  
.....  
.....

c) In your view, to what extent can distinguishing between environmental and land matters in the ELC contribute to the numbers of environmental cases filed in the ELC?

To a very large extent       To a large extent       To a smaller extent   
Not at all       I don't know

**4. ELC jurisdiction.**

a) What is the ELC jurisdiction?

.....  
.....  
.....  
.....

b) In your view do you think the jurisdiction of the ELC is comprehensive and centralized in hearing and determining environmental matters? Explain your answer

.....  
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.....  
.....

c) In addressing the jurisdictional conflicts between the ELC and magistrate courts, the Court of Appeal in the decision of *Law Society of Kenya Nairobi Branch v Malindi Law Society & 6 Others Nairobi Civil Appeal No. 287 of 2016*, held that the magistrate courts can hear and determine environmental matters as a court of first instance and that the ELC does not have exclusive jurisdiction to hear such matters.

In your view, what will be the impact of the above decision on the number of environmental cases filed at the ELC? Explain your answer.

.....  
.....  
.....  
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d) In your view, do you think that the ELC should be granted exclusive jurisdiction in handling environmental matters and how will it affect the number of cases filed and adjudicated at the ELC? Explain your answer.

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e) In your view, do you think the number of environmental cases filed in the ELC can be influenced by its jurisdiction? Explain your answer.

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f) To what extent does the jurisdiction of the ELC influence the number of environmental cases filed and adjudicated in the ELC?

To a very large extent       To a large extent       To a smaller extent   
Not at all       I don't know

**5. Constitutional provisions and mechanisms**

a) In your view what are some of the mechanisms or provisions that the Constitution has put in place to enhance environmental litigation? Explain your answer.

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b) Based on your answer above, do you think the said constitutional mechanisms and provisions on environment can contribute to the number of environmental cases filed and adjudicated in the ELC and how? Explain your answer.

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c) In your view, to what extent can the Constitutional mechanisms and provisions on environment contribute on the number of environmental cases filed at the ELC?

To a very large extent       To a large extent       To a smaller extent   
Not at all       I don't know

**6. Other factors contributing to the number of environmental cases filed and adjudicated in the ELC.**

a) In your view, what other factors contribute to the number of environmental cases filed and adjudicated in the ELC?

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**PART D: Assessing the Role of the ELC in Enforcing Environmental Law**

a) Do you think the ELC has sufficient environmental cases to enable it discharge its mandate in enforcing environmental law, settling environmental disputes and development of environmental jurisprudence? Explain your answer.

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b) Do you think it was a good policy consideration to merge environment and land matters in the ELC and why?

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c) Are you satisfied with the role of ELC in enforcing environmental law? Explain your answer.

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d) Based on the answers given above, to what extent can the number of environmental cases influence the role of the ELC in enforcing environmental law? Explain your answer.

To a very large extent       To a large extent       To a smaller extent   
Not at all       I don't know

**PART E : Way Forward**

a) In your view, what mechanisms should be put in place to enhance the number of environmental cases in the ELC?

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b) Any final comments?

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**THANK YOU**



**ELC DEPUTY REGISTRARS QUESTIONNAIRE**

**PART A: Introduction**

Please note that all information you give is confidential and will be used for research purposes only. Read each question carefully and give your honest response. Your responses will inform key policy and legal considerations that will provide the Court with sufficient caseload to enable it develop environmental law jurisprudence and settle environmental disputes. TICK where appropriate.

**PART B: Demographic Information**

a) Name (optional): .....

b) The ELC County: .....

d) Date: .....

**PART C: Number of Environmental Cases at the ELC**

e) How many cases (both land and environment) have been filed in your duty station since the ELC was established?

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f) How many of these cases were/are of purely environmental nature?

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g) Do you face any challenges in categorizing the cases filed in your court into land and environment? If so what are the challenges? Explain your answer.

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h) In your view, what are some of the factors that contribute to the number of environmental cases filed in the ELC?

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i) In your view, what mechanisms should be put in place to enhance the number of environmental cases in the ELC?

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**THANK YOU**

**COURT USERS QUESTIONNAIRE (ENVIRONMENTAL SCHOLARS/LEGAL PRACTITIONERS/ CIVIL SOCIETY/ GOVERNMENT AGENCIES/PUBLIC)**

**PART A: Introduction**

Please note that all information you give is confidential and will be used for research purposes only. Read each question carefully and give your honest response. Your responses will inform key policy and legal considerations that will provide the Court with sufficient caseload to enable it develop environmental law jurisprudence and settle environmental disputes. TICK where appropriate.

**PART B: Demographic Information**

- a) Name (optional): .....
- b) Designation/Work: .....
- c) Date: .....

**PART B: Factors Contributing to the Number of Environmental Cases in the ELC**

**1. Public Awareness and Recognition of the ELC**

- a) What are some of the environmental matters/cases/concerns affecting environmental management in Kenya that you are aware of?

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**b)** In your view, which institution is the best appropriate to handle environmental disputes and enforce environmental law? Explain your answer.

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**c)** Are you aware of the existence of the ELC and its role? Explain your answer

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**d)** Have you ever filed an environmental case at the ELC? Explain your answer?

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**e)** Do you recognize the ELC as the only appropriate and legal forum to hear and determine environmental matters in Kenya and why?

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f) In your view, to what extent can public awareness and recognition of the ELC as the appropriate and legal forum to hear and determine environmental matters contribute to the number of cases filed and adjudicated in the ELC?

To a very large extent       To a large extent       To a smaller extent   
Not at all       I don't know

g) In your view, what mechanisms should be put in place to enhance public awareness and recognition of the ELC in settling environmental disputes and environmental law?

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**2. Status and Authority of the ELC**

a) The ELC is anchored in the Constitution, is a court of superior record with the status of the High Court.

In your view, do you think that the status of the ELC as a court of superior record with the status of the High Court can influence the number of environmental cases filed in the ELC and how? Explain your answer.

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b) To what extent can the status of the ELC as a court of superior record with the status of the High Court influence the number of cases filed and adjudicated in the ELC?

To a very large extent       To a large extent       To a smaller extent

Not at all       I don't know

**3. Environmental matters.**

a) What constitutes environmental matters?

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b) In your view do you think it can be difficult to distinguish purely environmental matters from land matters and why? Explain your answer.

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c) Do you think distinguishing between environmental and land matters in the ELC can contribute to the numbers of environmental cases filed in the ELC and how? Explain your answer.

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d) In your view, to what extent can distinguish between pure environmental matters and land matters in the ELC contribute to the numbers of environmental cases filed in the ELC?

To a very large extent  To a large extent  To a smaller extent

Not at all  I don't know

**4. ELC Jurisdiction**

a) What is the ELC jurisdiction?

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b) In your view do you think the jurisdiction of the ELC is comprehensive and centralized?

Explain your answer.

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c) In addressing the jurisdictional conflicts between the ELC and magistrate courts, the Court of Appeal in the decision of *Law Society of Kenya Nairobi Branch v Malindi Law Society & 6*

*Others Nairobi Civil Appeal No. 287 of 2016*, held that the magistrate courts can hear and determine environmental and matters as a court of first instance and that the ELC does not have exclusive jurisdiction to hear such matters.

In your view, what will be the impact of the above decision on the number of environmental cases filed in the ELC? Explain your answer.

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d) In your view, do you think that the ELC should be granted exclusive jurisdiction in handling environmental matters and how will it affect the number of cases filed and adjudicated at the ELC? Explain your answer.

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e) In your view, do you think the number of environmental cases filed in the ELC can be influenced by its jurisdiction and how? Explain your answer.

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f) To what extent can the jurisdiction of the ELC influence the number of environmental cases filed and adjudicated in the ELC?

To a very large extent  To a large extent  To a smaller extent

Not at all  I don't know

**5. Constitutional provisions and mechanisms**

a) What are some of the mechanisms or provisions that the Constitution has put in place to enhance environmental litigation? Explain your answer.

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b) Based on your answer above, do you think the said constitutional mechanisms and provisions on environment can contribute to the number of environmental cases filed and adjudicated in the ELC and how? Explain your answer.

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c) In your view, to what extent can the Constitutional mechanisms and provisions on environment contribute on the number of environmental cases filed at the ELC?

To a very large extent  To a large extent  To a smaller extent

Not at all  I don't know

**6. Other factors contributing to the number of environmental cases filed and adjudicated in the ELC.**

a) In your view, what other factors influence the number of environmental cases filed and adjudicated in the ELC?

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**PART C: Assessing the Impact of the Number of Environmental Cases on the Role of the ELC in Enforcing Environmental Law**

a) Do you think the ELC has sufficient environmental cases to enable it discharge its mandate in enforcing environmental law, settling environmental disputes and development of environmental jurisprudence? Explain your answer.

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b) Are you satisfied with the role of ELC in enforcing environmental law? Explain your answer.

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c) Based on the answers given above, to what extent can the number of environmental cases influence the role of the ELC in enforcing environmental law? Explain your answer.

To a very large extent  To a large extent  To a smaller extent   
Not at all  I don't know

**PART D: Way Forward**

1. In your view, what mechanisms should be put in place to enhance the number of environmental cases in the ELC?

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2. Any final comments?

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**THANK YOU**