ACCESS TO LAND JUSTICE: AN OVERVIEW OF THE ENVIRONMENT AND LAND COURT IN KENYA

BY

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DECLARATION

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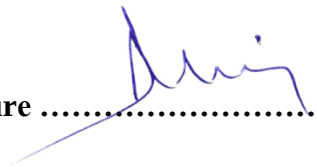
Signature ……  **Date 13th October, 2021**

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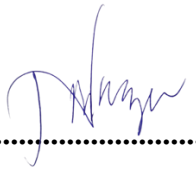
Signature.....  **Date 13th October, 2021**

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This project paper is dedicated to my wife, Evelyne Omwenga and my children who supported me throughout the period of this study. Their encouragement greatly motivated me to complete this study.

LIST OF CASES

Ctr. for Minority Rights Dev. (KENYA) and Minority Rights Group International on behalf of Endorois Welfare Council v Kenya, Comm, 276/2003, 27th ACHPR AAR Annex (2009)

Dry Associates Limited v Capital Markets Authority & Anor (2012) eKLR

Kenya Bus Services Limited and Another v Minister of Transport & 2 Others (2012) eKLR

Kibaki v Moi & 2 others, Election Petition No 1of 1998, (2008) 2 KLR (EP)

Leatch v National Parks & Wildlife Service (1993) 81 LGERA 270

LSK (Nairobi Branch) v. Malindi LSK 56 and Others (2017) 2KLR

Re Interim Independent Election Commission (2011) eKLR

S v Makwanyane 1995(3) SA (CC)

Waratah Coal Pty Ltd v Youth Verdict Ltd & Others [2020] QLC 33

LIST OF STATUTES

Kenyan Statutes

Alternative Dispute Resolution Bill, 2019.

Civil Procedure Act.

Constitution of Kenya, 2010.

Environment and Land Court Act, No. 19 of 2011.

Legal Aid Act, No. 6 of 2016.

Mediation Bill, 2020.

Statute Law (Miscellaneous Amendments) Act No. 25 of 2015

South African Statutes

Constitution of the Republic of South Africa, 1996.

Restitution of Land Rights Act, No. 22 of 1994.

Australian Statutes

Constitution of Australia

Land and Environment Court Act, No. 204 of 1979, New South Wales.

National Parks and Wildlife Act 1974, New South Wales.

Land Court Act, Queensland, No. 1 of 2000, Queensland

International Legal Instruments

Convention on the Elimination of All Forms of Discrimination Against Women.

International Convention on Civil and Political Rights.

Universal Declaration of Human Rights.

Regional Legal Instruments

African Charter on Human and People's Right.

African Charter on the Rights and Welfare of the Child

LIST OF ACRONYMS

ACHPR	African Charter on Human and Peoples Rights
ACRWC	African Charter on the Rights and Welfare of the Child
ADR	Alternative Dispute Resolution
CEDAW	Convention on the Elimination of All forms of Discrimination Against Women
CoK	Constitution of Kenya, 2010
ELC	Environment and Land Court
ELCA	Environment and Land Court Act
FAO	Food and Agricultural Organization
GDP	Gross Domestic Product
ICCPR	International Covenant on Civil and Political Rights
LCC	Land Claims Court
LDT	Land Disputes Tribunals
JSC	Judicial Service Commission
LEC	Land and Environment Court
NSW	New South Wales
PIL	Public Interest Litigation
PWDs	Persons with Disability
TDRM	Traditional Dispute Resolution Mechanisms
UN	United Nations
UNDP	United Nations Development Programme
UDHR	Universal Declaration of Human Rights

ABSTRACT

Access to land justice is the ability of marginalised communities confront, manage daily legal problems and seek redress and demands for their rights in land which is a key element of sustainable development. However, access to justice in land is a growing problem in Kenya for marginalised groups mainly due to institutional and structural challenges. The creation of the Environment and Land Court (ELC) by Kenya's 2010 Constitution (CoK) and the Environment and Land Court Act (ELCA) was considered as transforming access to land justice.

The ELC was envisaged to use its expertise as an effective and efficient tool to enable expeditious and cost-effective access to land justice. However, this has not happened due to various barriers of poverty, complex laws and technicalities of procedure, lack of alternative dispute resolution (ADR) legal framework, backlog of cases, corruption in the Courts, lack of knowledge of rights, physical access and bias towards women, the youth and persons with disabilities (PWDs) and the lack of political will and commitment.

The study used two research methods to collect and analyse data. First, was desktop review of secondary and primary data to analyse the variables. Secondly, a comparative study was done of some best practices namely: Queensland, New South Wales (NSW) and South Africa which revealed that Kenya had a number of lessons to learn on how the marginalised groups can access land justice. In particular, financial autonomy and independence, enactment of ADR laws and mandatory mediation, comprehensive jurisdiction including criminal and human rights, public participation and the creation of monitoring and measuring tools for access to land justice.

In conclusion challenges in access to land justice in Kenya would only be achieved if the institutional and structural challenges in the entire justice delivery system would be addressed. Some recommendations offered revolved around the enactment of an ADR legal framework, enhancement of legal aid, expand jurisdiction of the ELC to deal with environmental crimes and

human right issues, financial autonomy and independence of the judiciary, employment more judges and developing a monitoring tool for access to land justice.

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CHAPTER ONE

INTRODUCTION AND BACKGROUND

1.0 INTRODUCTION

This study addresses fundamental issues affecting access to land justice in Kenya by interrogating Kenya's legal regime in the administration, management and disposal of interest in land and resolution of land-related disputes. The aim of the study is to forge a way forward, towards access to land justice by vulnerable and marginalized members of the community by critically analysing the ELC that is central to this study.

In addition, the study examined the extent to which the Constitution of Kenya (CoK)[1] through the ELC enabled the poor and the marginalized access land justice. It further analysed how other jurisdictions have created specialized land Courts to address similar challenges in land injustice and which lessons Kenya could learn. Finally, some recommendations were made on the necessary reforms that would address access to land justice in Kenya.

Land is arguably the most important economic resource in the African society[2] as an important social and economic driver of development globally.[3] In Kenya, land is an important asset to a diverse array of citizens but many organizations as well.[4] Land is a critical economic resource in Kenya since the country relies on agriculture as the backbone of socio-economic prosperity. Agriculture contributes to an estimated 26% of the gross national production (GDP) which is enhanced with linkages to other sectors of the economy.[5]

[1] Constitution of Kenya, Article 48.
[2]Patricia Kameri Mbote, *The Land Question in Kenya: Legal and Ethical Dimensions* (Strathmore and Law Africa: Nairobi, 2009) at 6.
[3] Ibid at 5
[4] Ibid at 6
[5] Ibid at 4.

In the light of this fact, many investors in Kenya have heavily invested in land and while some are genuine, others have been tainted with high levels of illegality land acquisition mainly perpetrated by senior government officials and even organizations.[6] This resulted in increasing land disputes that threatened numerous efforts aimed at the security of land title ultimately to sustainable development, and peace in the Country.[7] Disputes arising from land allocations were not expeditiously settled leading to delays in decision making arising from numerous land conflicts that took long in Kenyan Courts for years which hindered access to justice.[8] Therefore, there was need for the transformation of the systems and institutions of justice to resolve land disputes to effectively administrate and manage land in the Country.

1.1 BACKGROUND OF THE STUDY

Environment and land law scholars have described the CoK, as a 'greener' Constitution with respect to the Country's previous laws on environment and land matters. It sought to strengthen access to land and environment justice.[9] A notable feature of the CoK towards access to justice in land was the requirement that Parliament create the ELC with dual jurisdiction to handle land and environmental issues.[10]

The promulgation of the CoK paved way for the establishment of the ELC.[11] Its original and appellate jurisdiction enabled the court to determine disputes contemplated by the Constitution in environmental and land matters.[12] Further, the ELC hears all disputes related to land and the

[6] Ibid.
[7] Ibid at 10.
[8] Muigua, K., '*ADR under the Court Process: A Paradox?'* Alternative Dispute Resolution and Access to Justice in Kenya (2015), at 125-127, available at http://kmco.co.ke/wp-content/uploads/Accessed on 8th October 2020.
[9] Donald W. Kaniaru, 'Launching a New Environment Court: Challenges and Opportunities', (2012) 29 *Pace Environmental Law Review* 626.
[10] Constitution of Kenya, Article 162(2) (b).
[11] ELCA, Section. 4.
[12] Ibid, S. 13.

environment. It has the discretion to choose any remedy to enforce all interests in land.[13] In addition, the ELC has jurisdiction to listen to appeals on matters of land either from judgments of subordinate Courts or tribunals.[14] This mandate extends to supervisory jurisdiction over all Courts lower in rank that handles disputes over the administration and management of land pursuant to the CoK.[15]

Prior to the creation of the ELC, land disputes were handled by Magistrates Courts and the High Court.[16] This was in addition to criminal and other civil matters which made it difficult for the Courts to hear land matters in good time leading to unreasonable delays in the resolution of land disputes.[17] As a remedy the State created the Land Disputes Tribunals (LDT) which were also unsuccessful due to the same reasons.[18]

The LDT was intended to serve the same purpose of handling land disputes and improving access to land justice as the ELC.[19] Initially, when the tribunals were established, they were very effective in hearing land disputes but this declined over time.[20] Delays in court cases led to growth in backlog of cases pending before the tribunal.[21] Access to land justice was impeded as the tribunals failed in establishing expeditious resolution of land disputes.[22]

Other than repealing the independent Constitution, the essence of promulgating the CoK was to address land disputes in Kenya that had been so sensitive to the extent of tearing the Country's

[13] Mbote, *Supra* note 4 at 7.
[14] Ibid at 8.
[15] Constitution of Kenya, Article 165(6).
[16] Mbote, *Supra* note 4 at 6.
[17] Ibid.
[18] Land Dispute Tribunals Act No. 18 of 1990[Repealed] .
[19] Land Development and Governance Institute, 'An Assessment of the Performance of the Environment and Land Court: 12th Scorecard Report' 2013 at 7.
[20] Ibid at 12.
[21] Muigua, *Supra* note 8 at 5.
[22] GOK, *Report of the Commission of Inquiry into the Land Law System of Kenya (Njonjo Commission),* (Government Printer: Nairobi, 2002) at 5.

socio-economic, cultural and ethnic fabric.[23] Land injustice had been rife even before independent and after it there had been increasing outcry for justice in land-related disputes by many Kenyan citizens.[24] The CoK sort to remedy this by requiring the government to facilitate its citizens' access justice in land disputes.[25] The ELC as envisaged by the CoK was largely meant to ensure there was access to justice in land disputes by resolving the unresolved backlog of land cases in the Courts.[26]

The CoK involved various institutions like the National Land Commission (NLC)[27] to complement the ELC in its mandate of resolving land disputes and accessing land justice in Kenya. However, the study primarily focused on the ELC as the legal institution mandated by the Constitution and statute mandated to resolve land disputes as an aid in accessing land justice in Kenya.

1.2 PROBLEM STATEMENT

Access to land justice in Kenya is pegged on two critical thresholds: first is the ability of citizens to be knowledgeable about their constitutional and legal rights.[28] Secondly, the capacity of the people to seek redress from existing justice systems (formal and informal). Contrary to expectations reforms that led to the establishment of the ELC focused on institutional transformation without addressing the other challenges on access to justice especially physical and financial access as well as delays in hearing of cases.

[23] Ibid.
[24] Ibid
[25] Constitution of Kenya, Article 48.
[26] Ibid, Article 162(2).
[27] Ibid, Article 67.
[28] Ibid, Article 22(1).

The thrust of Article 22(1) of the CoK is to empower every individual to file a claim anytime that a right is infringed, violated or denied. To implement this provision, the Chief Justice has an obligation to create rules and procedures that would operationalize this provision.[29] The rules need to meet certain minimum criteria that observe the rules of natural justice and avoidance of unreasonable restrictions arising from procedural technicalities.[30]

Articles 48 and 159 of the Constitution envisaged enabling the marginalized access justice through affordable legal services and alternative dispute resolutions respectively. Article 48 is an express provision of the Constitution that if implemented would enable all people access land justice at an affordable and reasonable cost. This is further concretized by Article 159(1) that requires expeditious access to justice without unnecessary technicalities.[31]

Access to justice in land for the marginalized will therefore continue being a challenge for as long as the other non-legal challenges are not addressed. They include: lack of information and awareness, limited and lack of infrastructure (long distances to the Courts), high costs, illiteracy, long delays and backlog of cases.[32] Moreover, despite the enactment of the Legal Aid Act,[33] those in need of aid are yet to access the services due to failure in the operationalization of the statute and inadequate financial resources.

1.3 JUSTIFICATION OF THE STUDY

The study sought to deepen understanding on the ELC and its role in access to land justice and in the enforcement of rights to land. Additionally, it contributes to debate on justice with respect to vulnerable communities. Besides, some of the recommendations made on measures to address

[29] Constitution of Kenya, Article 22(3).
[30] Muigua, *Supra* note 8 at 6.
[31] Constitution of Kenya, Article 159(2).
[32] Muigua, *Supra* note 8 at 130.
[33] No. 6 of 2016.

access to land justice would be useful in assisting the ELC and other state agencies create policies that secure land justice for the vulnerable communities in addition to securing their interest in land. Similarly, the study would facilitate a better understanding of their right to land as an entitlement and the inherent challenges attached to it.

1.4 Conceptual Framework

Access to justice has generally been misconstrued to mean the existence of Courts or formal justice systems to the exclusion of other non-formal justice systems. According to UNDP, access to justice should enable people get a remedy using formal or informal mechanisms of justice for disputes that respect human their rights.[34]

CEDAW takes a gender outlook on accessing justice, defining it as the ability of women who are systemically discriminated against to get a legal remedy.[35] It is an indispensable element in the promotion of human dignity and rights especially in the creation of equality, equity and the promotion of human dignity.[36] According to UNICEF, access to justice enables those who are vulnerable get a remedy using formal and informal means.[37] This section endeavours to define the concept by breaking it down into its component parts in an effort to contextualize the concept.

[34] J Beqiraj and L McNamara, *International Access to Justice: Barriers and Solutions (Bingham Centre for the Rule of Law Report 02/2014)* (International Bar Association: London, 2014) at 8.
[35] Article 2, CEDAW
[36] Beqiraj and McNamara supra note 34 at 8
[37] United Nations Children's Fund, *Equitable Justice for Children in Central, Eastern Europe and Central Asia* (UNICEF; Geneva, 2015) at 24.

1.4.1 The Concept of Access to Justice

The rule of law and access to justice are intimately linked for enabling individuals apply available legal mechanisms to access their rights.[38] It is not just a process of accessing rights and freedoms but is a goal that is critical in ensuring individuals benefit from existing procedures and substance of rights available in the law. The bottom line is that access to land justice should enable vulnerable communities achieve just and equitable rights in land.[39]

Justice Majanja[40] views access to justice as the ability to enrich access to rights, awareness of rights and justice systems, information, equality before the law, availability of formal and informal legal infrastructure and the ability to afford a conducive environment that is facilitative of access to timely legal services. He further believes that access to justice does not only speak to the dry letter of the law but to its spirit as well.

Thus, the most important elements of access to justice are procedural and substantive justice. Whereas the former encompasses elements of fair hearing in an impartial tribunal, the latter is composed of fair and just outcomes for any form of violation.[41] To that extent, access to justice in land involves justice not only in the formal but informal sense as a form of dispute resolution mechanism. Through these mechanisms, it is envisaged that the community would achieve equality and equity that ensures non-discrimination in terms of race, ethnicity, gender, status or orientation.

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[38] Ibid.
[39] UNDP, *Access to justice practice note (Practice note), access to justice and rule of law. Democratic Governance Group, Bureau for Development Policy* (UNDP: New York, 2004) at 8.
[40] *Dry Associates Limited v Capital Markets Authority & Anor* (2012) eKLR
[41] *Kenya Bus services Limited and Another v Minister of Transport & 2 Others* (2012) eKLR

1.5 Theoretical Framework

This study adopted the theory of transformation to explain access to land justice. The theory rests on the idea that societies in transition require changes in institutional infrastructure that would enable the delivery of access to justice as an important component of the rule of law.

1.5.1 The Transformation Theory

The theory of transformation has been used to explain everything from transformative education,[42] politics,[43] economics and social transformation.[44] The theory explains the political movement from an autocratic to a liberal state as part of the construction of transitional justice.[45] The main concern of the theory is that in most cases, this movement is not always followed by addressing issues of transition justice such as access to justice.[46]

The transformation theory links the current state to its autocratic past and how it created political and legal structures to deconstruct the past illegitimate regime.[47] The concept of justice in transition is contextual as it looks to the past injustice while legitimizing the present as just.[48] The theory seeks to achieve diversity, inclusivity and social justice as the cornerstone of access to justice.[49]

[42] Jack Mezirow, "Transformation Theory: Postmodern Issues. Adult Education Research Conference, 1999.
[43]Chad Hoggan, Kaisu Mälkki, and Fergal Finnegan, 'Developing the Theory of Perspective Transformation: Continuity, Intersubjectivity, and Emancipatory Praxis', (2017) 67 (1) *Adult Education Quarterly* 48.
[44] Ibid.
[45] Ruti Teitell, 'Transitional Jurisprudence: The Role of Law in Political Transformation', (2009) 106 *The Yale Law Journal* 2012.
[46] Ibid at 2013.
[47] Ibid.
[48] Ibid at 2016.
[49] Mezirow, S*upra* note 42 at 6.

The transformation theory is therefore relevant to this study as it addresses four issues that are germane in the achievement of access to land justice.[50] First is social reproduction which represents the barriers that limit access to land justice. Secondly, are the existing gaps or opportunities inherent in the theory, thirdly, is the possibility or prospect of using the theory to achieve social change. Fourth and finally, are transformative strategies or solutions to shortcomings and existing opportunities in achieving access to land justice.[51]

In 2010, Kenya established a new constitutional dispensation that has been described as transformative as it was based on the Country's historical context to replace the post independent one.[52] The Constitution introduced a new political, social and legal order. Through it, Kenyans chose transformation over revolution in granting a new vision to the judiciary that had since independence been an appendage of the executive.[53] The creation of the ELC was transformative in nature as it envisaged an era when justice would be readily available for those who required it. This study examined the creation of the ELC as a specialized Court as part of the transformative agenda that envisaged a break with mechanical interpretation of the Constitution. Further transformation included recognition of traditional justice systems in Article 159 and a general duty by the Courts to be facilitative in access to justice[54] by independent judges.[55] The Supreme Court of Kenya,[56] in an advisory opinion rejected a formalistic or positivistic approach to Constitutional interpretation because the people of Kenya have sovereign power.[57] The Court

[50] Willy Mutunga, 'The 2010 Constitution of Kenya and its Interpretation: Reflections from the Supreme Court's Decisions', (2015) 9 *THE PLATFORM* 46-54
[51] Ibid at 46
[52] Ibid at 48
[53] Mitulla W., Odhiambo, M. and Ambani, O, *Kenya's Democratisation: Gains or Losses*? (Nairobi: Claripress, 2005) at 34.
[54] Constitution of Kenya, Article 48.
[55] Ibid, Article 163.
[56] *Re Interim Independent Election Commission* (2011) eKLR, para [86].
[57] Constitution of Kenya, Article 159(1).

was of the view that Courts should reflect on this in their decision-making process to facilitate its role in respect to access to land justice.

1.6 LITERATURE REVIEW

This section covers literature review relevant in access to justice in land. While scholarly interest has for long been focused on access to justice in general, very little attention has been given to access to land justice in developing countries which is considered crucial for purposes of sustainable development. With that in mind, this study seeks to expand this knowledge in Kenya by relying on literature developed from developed jurisdictions that have created similar specialized Courts.

Evolution of Land Injustice in Kenya

According to the Kenya Human Rights Commission land injustices in Kenya began during colonialism.[58] Observing that colonialists used illegal means of land acquisition from the local communities. This was done through the creation of native enclaves known as reserves that led to forced displacement in Talai, Turkana and Sabaot, land acquisition by Multi-national Corporation and other methods as well. The policies and rules used by the colonial government had long term negative effects on indigenous land ownership through displacement. The impression created was that certain land rights could not be enjoyed by communities. After independence, the new rulers used existing rules to turn settlement schemes for personal gain.

The promotion of the policy of willing buyer and seller was used by land buying companies and the government which skewed empowerment of communities with respect to land acquisition to

[58] Kenya Human Rights Commission, *Redress for Historical Land Injustices in Kenya: A Brief on Proposed Legislation for Historical Land Injustices* (KHRC: Nairobi, 2019)

those considered close to power. During this period land laws were essentially ignored leading to illegal land acquisition of land in Karura and Ngong forests among other areas. This is what became known as historical land injustices. Failure to resolve issues of forced land acquisition and displacement led to ethnic tensions leading to conflict in 1992, 1997 and 2007/8 that was mainly attributed to historical land injustice. Forms of land injustice discussed in the report include illegal acquisition of public land, forced displacement, land grabbing and forced eviction commonly witnessed in the Rift Valley, the coast province, among the Mijikenda and the Taita. The issues raised in the report on historical injustice have not been addressed since the Truth, Justice and Reconciliation Commission (TJRC) findings were neither disclosed nor implemented.

The Concept of Access to Justice

According to Mattei,[59] access to justice has been neglected in comparative law arising from a number of assumptions that relate to the objectivity and neutrality of the law, Euro-centric concept of law, the difference between the law on paper and the actual law. The article describes declarations of legislative action in many jurisdictions that are never followed up with implementation. In Kenya where the Constitution and statute is clear on access to justice yet it has never been achieved since the approach is usually narrow. For example, access to justice is often impacted by other non-legal factors like poverty, illiteracy, poor infrastructure and cultural practices. To that extend the article helps in the understanding of access to justice in a comparative sense, clarifying that it is broader than access to Courts as founded in the western

[59] Ugo Mattei, 'Access to Justice. A Renewed Global Issue?', (2007) 3 (11) *Electronic Journal of Comparative Law* 4.

concept of law. Thus, access to justice is a global issue that encompasses western, Islamic, traditional and indigenous legal systems.

Baraza has observed that legal aid is a new concept in Kenya's constitutional and legal history.[60] Although legal representation was a right in the previous Constitution, its greatest shortcoming was the implicit high cost. Access to legal aid was only available through efforts of private institutions and NGOs like Kituo Cha Sheria, FIDA and others that offered legal representation for individuals who could not afford legal services.

All this changed on account of the new constitutional dispensation, access to justice was considered a basic tenet of the rule of law that is not confined to one branch of the law. Thus, there is a requirement that for access to justice to be realized, equality of parties should be emphasized regardless of one's gender, ethnicity or even race. Baraza believes that accessing justice requires legal assistance to certain categories of persons like those who risk severe penalties, with complex matters and the accused without the ability to defend themselves.

In the opinion of Lima and Gomez,[61] access to justice should enable individuals use available legal tools and mechanisms to facilitate the vulnerable get remedies in Courts of law. They view the ability in accessing justice not only as a right but a means that would enable the marginalized access other rights enshrined in the international, regional and national norms. The study agrees with the authors that numerous challenges have a debilitating effect on accessing justice. The challenges include; long delays, severe limitations in existing remedies, gender bias, lack of adequate information, lack of an adequate legal aid regime, too many land laws, formal and costly legal processes leading to many poor people avoid the legal system.

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[60] Nancy Baraza, 'Legal Aid and Kenya's Legislative Framework: Towards Achievement of Access to Justice for the Poor in Kenya', (2019) 4 (4) 4 *International Journal of Innovative Research and Knowledge* 14.

[61] Valesca Lima and Miriam Gomez; Access to Justice: Promoting the Legal System as a Human Right. Available at: *https://www.researchgate.net/publication/338423278.* Accessed on 18th October 2020.

Lima and Gomez believe in the duty of the state to ensure fairness in a county's justice systems and in political, economic or social grounds. They propose that states, should construct a legal and institutional framework to enhance access to justice in the protection of fundamental rights and freedoms, awareness and public participation as well as development of legal aid programs.

This view is shared by Okonmah,[62] who believes that access to justice enables land rights to be enforced in the form of group or individual rights. However, the situation is different in terms of group rights, a situation the authors propose should provide a forum that allows all the parties to a dispute present evidence to establish the violation of the right or damage.

The author focused on the complexity of the law as the main challenge the poor face in accessing justice in Court of law which is a narrow scope unlike this study that examines a broad range of issues not limited to the complexity of the law.

Zhou and Banik,[63] examines access to justice in relation to land amongst the rural residents in China. The study noted that while filing land petitions is free, the indirect costs such as transport and accommodation associated with Court petitions are high due to the Court cases taking unnecessarily long time to be finalized. A barrier the authors believe makes access to justice to be out of reach for most rural dwellers.

Lawson, Dubin and Mwambene has focused on access to justice for women who comprise 80% of all the poor people in the Sub-Saharan Africa (SSA).[64] The authors observe that many African countries are member states of international and regional human right instruments. They therefore have obligations for the protection of social, economic and particularly women rights.

[62] Okonmah P. D, 'Right to Clean Environment: The Case for the People of Oil-Producing Communities in the Niger Delta,' (1997) *Journal of Africa Law* 19.

[63] Chao Zhao and Dan Banik, 'Access to justice and Social Unrest in China's Countryside: Dispute on Land Acquisition and Compensation', (2014) 6 *Hague Journal on the Rule of Law* 254.

[64] David Lawson Adam Dubin and Lea Mwambene, *Ensuring African Women's Access to Justice: Engendering Rights for Poverty Reduction in Sub-Saharan Africa, Policy note no 2* (The Nordic Africa Institute: Uppsala, 2019)

However, women are not able to access these rights, thus the ratification and protection of the rights in question are of no consequence at all. They argue that the gist of the sustainable development goals (SDGs) is that access to justice should be key to the fulfilment of social and economic rights.

While many countries on the African continent have found a solution in reforming rules and laws that are gender insensitive, the human rights approach is useful for enabling women access justice due to high levels of illiteracy, poverty, discrimination and marginalisation. Women similarly have difficulties in accessing resources, information and power that would influence change that gender-neutral laws and policies would correct the gap. Thus, addressing inequality in access to justice, resources needs to be made available to them. The authors view is that despite the passage of gender equality laws access to justice for women would be realized through adequate budgetary allocation as it would signal a change in focus from the usual legal implementation to real enforcement.

Skavdahl provides a judge's perspective on access to justice for litigants who represent themselves.[65] He observes that integrity and quality of access to justice has to be looked at holistically not by mere words. In the judge's view, decisions given in a court of law depend on the relevance of the evidence provided. Thus, the judge would depend on what the party's counsel present in open court, particularly legal precedent in support of the client's position. Based on the appreciation of facts, courts would be able to offer decisions that are legally correct as the embodiment of justice in action. When a judge gets it wrong, such a decision can either be reviewed through judicial review or appealed against.

[65] Scott W. Skavdahl, 'Access to Justice: A Judge's Perspective', (2009) 32 (1) *Wyoming Lawyer*

In circumstances where both litigants appear pro se (without legal representation), the judge is in unfamiliar territory as he/she cannot benefit from the research, precedent that arises from legal representation. According to the author, this is how justice is being lost in the legal system. The author brings out a unique aspect that is hardly addressed in access to justice discourse where both parties lack legal representation. This is particularly key because the judge is a referee who depends on representation by the legal counsels without which they are at a loss on which way forward. It therefore justifies the need to strengthen legal aid program that would ensure litigants have access to legal aid.

The Land Question in Kenya

Access to land justice has been problematic in Kenya for a long time and according to Koissaba, who provides a historical account of the land question as beginning with the British colonization of Kenya.[66] Colonialism introduced a new land regulation system based on individual ownership that was alien to Kenya whose previous land tenure was largely communal. The author's focus is on how the Maasai lost their land to the British through the instrument of two agreements of 1904 and 1911 that were not well understood by the Maasai.

The two agreements were used by the colonial government to dispossess traditional land that belonged to the Maasai similar to what was happening to other communities through the declaration that all land belonged to the crown. The author's contention is that this exacerbated the land question, customary/indigenous land laws were cast aside even after the Maasai challenged the appropriation in the *Ole Njogu* case[67] which sealed the British appropriation of

[66] Koissaba B. R. Ole, *Elusive Justice: The Maasai Contestestation of Land Appropriation in Kenya. A Historical and Contemporary Perspective.* Available at; https://intercontinentalcry.org/elusive-justice-maasai-contestestation-land-kenya/. Accessed on 19th October 2020.
[67] (1913) EALRV. 70.

Maasai land. However, this challenge failed due to general bias by the British Court on account of lack of jurisdiction.

The state failed to address these historical injustices and human rights violations even after independence. The study contributes in the analysis of Kenya's land question. In a sense they view the Constitution as an opportunity to address access to land justice. However, the analysis is limited to the effect of the Maasai agreements that contributed to appropriation of Maasai land and the effect of the technicalities of the law. This is the gap this study seeks to bridge.

The complex relationship between impunity and legal pluralism, according to Helbling, Kälin and Nobirabo motivated judicial reforms pursuant to the 2010 Constitution.[68] The authors observed that access to justice is mainly caused by the impunity of certain powerful groups in the country. The land clashes experienced in the Rift Valley in 1992, 1997 and the post-election violence of 2007/8 were attributed to the inability to access justice in land that was jeopardized by legal pluralism.

In the opinion of the authors, having an effective judicial system is not enough so long as functional impunity still persists and hence promotes the adoption of legal pluralism particularly ADR such as reconciliation, mediation, TDRM. The latter is better placed to facilitate access to justice since it is rooted within local and ethnic context due to poor presence of the state at the local level. They underscore the advantages of TDRM for being cheap, easy to access, use local languages, geographic proximity, and simple procedure, flexible and expedient. However, the author recognizes the weaknesses of TDRM like lack of legal definition, ill-defined and therefore easily manipulated by the elites, inadequate training of providers and poor supervision, replication and reinforcement of discriminatory practices against women, PWDs the youth, the

[68] Jürg Helbling, Walter Kälin and Prosper Nobirabo, 'Access to justice, impunity and legal pluralism in Kenya', (2015) *The Journal of Legal Pluralism and Unofficial Law*

poor and its inability to deal with inter-community disputes. The authors believe that access to justice in land is made worse by conflicting expectations between of customary and statutory law in land. The article focused on functional causes of impunity and plural legal systems while disregarding other barriers like institutional ones.

Transformation of Land Rights in Kenya

Muigua views Kenya's 2010 Constitution as being transformative and as a turning point in good governance and social, economic and political inclusivity.[69] The introduction of ADR is viewed as an important step that would enable the marginalised access justice in the Country. He observes that access to justice is determined by two factors, people's awareness of rights and the ability to access redress mechanisms anytime rights are violated.

In analysing the Constitution, the author is vindicated by Articles 22(1), 48 and 159 of the Constitution. Article 22(1), which gives the right to any person whose rights are infringed to institute proceedings for redress. This imports the element of citizen awareness of human rights. Article 48 is the overriding right to access justice at an affordable cost while Article 159 non-discrimination, inclusivity, expeditious decision making and adoption of ADR particularly TDRM. In effect Article 159 expands opportunities for access to justice.

Muigua's approach to access to justice is spot on but however, the analysis is narrow as it focuses only on ADR. This scope is narrow while this study will examine a broad range of issues, ADR being one of them. This is the gap which this study seeks to bridge.

[69] Kariuki Muigua, *Access to Justice and Alternative Dispute Resolution Mechanisms in Kenya*. Available at:file:///C:/Users/HP/Desktop/Kariuki%20Muigua%3B%20Access%20to%20Justice%20&%20ADRM%20in%20Kenya.pdf. Accessed on 18th October 2020.

The transformative nature of the CoK is a view shared by Matu,[70] in her opinion the ability of people to access justice improved greatly with the passage of the 2010 Constitution. Noting that the concept of access to justice in Kenya underwent a complete transformation in 2010 with the passage of the Constitution. Her argument is based on Article 20 of the CoK which envisages a horizontal human rights protection regime (as opposed to the repealed Constitution that was vertical and the sole responsibility of the state) that binds all persons (individual and corporate) in human rights protection.[71] The effect of this provision is to expand liability for human rights violations to natural persons and private entities.

The author believes that abolishing the constraints of *locus standi* after the 2010 Constitution enhanced access to justice. However, the author has focused on a narrow perspective that is limited to Article 20 of the Constitution while this study is much broader.

ELC and Access to Justice in Land

Kaniaru analyses how the ELC can make a turnaround in enabling access to land justice in Kenya.[72] According to him, the ELC should interpret land laws so as to enhance values of the Constitution as well as learn certain lessons from other ELCs in New South Wales and New Zealand. The author proposed the revision of the High Court rules of procedure before they were applied to the ELC. The proposal to streamline the role of the judiciary in land matters was timely given that every statute on land in Kenya establishes a board/Committee/tribunal including an appeal process.

[70] Doris Matu, 'Improving Access to Justice in Kenya through Horizontal Application of the Bill of Rights and Judicial Review', (2017) *Strathmore Law review* 63.
[71] Gardbaum S, 'The "Horizontal Effect" of Constitutional Rights', (2003) 102 (3) *Michigan Law Review* 388.
[72] Donald W. Kaniaru, 'Environmental Courts and Tribunals: The Case of Kenya', (2012) 29 *Pace Environmental Law Review*.566

The author observed that delaying of cases in the Courts before the transition to the ELC complicated the operation of the latter and moving forward he urged co-operation between the two institutions. In the alternative, he proposed the establishment of clear supervisory guidelines that would manage the transition. The article was written to provide guiding principles for transition to the ELC but now that it is already operational, its findings are only relevant for historical purposes. However, it presents real challenges for jurisdictions that desire to make that transition particularly learning lessons from best practices.

In another article, Kaniaru views the creation of the ELC as opening up numerous opportunities for the harmonization of various interpretations of statutes pertaining to the environment and land use.[73] In a sense, the author is vindicated since the ELC is a superior court of record unlike the tribunals, boards and committees that came them. He believes that the ELC would facilitate the rationalization of existing inconsistencies in policies brought about by international environmental legal instruments now that any treaty ratified by the country forms part of its legal system.[74]

In the author's opinion, the ELC would be required to critically define its jurisdiction in the knowledge that land has a deep cultural value having been a key factor in the struggle for independence. Under colonialism, land law was defined by English and Indian laws dating back to the 18th century. According to the author these were complex issues created by statutes that established tribunals, boards, committees and land commissions. This was beside the existence of huge backlog of cases arising from the over reliance on an expatriate judiciary and judges with little understanding of Kenyan land laws. He notes that while these were challenges, they presented opportunities for the ELC to stamp its legacy in access to land justice in Kenya.

[73] Kaniaru *supra* note 9 at 629
[74] Article 2(5)(6), Constitution of Kenya 2010

The LDGI notes that the ELC became operational in 2013 with 20 judges in 16 counties across the country.[75] It made an assessment of the performance of the ELC by interviewing 466 respondents and users of the ELC across 27 counties out which only 16 had an ELC. Out of the total, 47% of respondents were satisfied with the level of access to the ELC, 51% with the ease of accessing information with the majority saying that the cost of accessing the ELC is prohibitive. Over 50% are convinced that getting justice at ELC is slow, while 61% saw little corruption at the ELC, with 62% being confident in the ELC's ability to deliver justice. The respondents were clear that expeditious hearing of cases, hiring of more judges, and the use of ICT, reduction in cost of filing cases and enhancement of ELCs in more counties would be key in addressing challenges in access to justice. The report provides a factual assessment of the performance of the ELC from its inception but is not exhaustive enough as to the barriers, besides some of the recommendations such as the hiring of more judges has already been done.

Challenges in Access to Land Justice

Young and Sing'oei opine that the biggest challenge facing indigenous peoples is access to justice in all forms in politics, access to land, civil and criminal rights, social and economic rights.[76] The authors assess the status of access to rights at the national level through judicial decisions, regional human rights institutions and transition justice framework. In a sense, the authors are convinced that access to justice for indigenous peoples is more of a political than legal issue. It begins by defining the very notion of indigenous which is not well understood as being unique in how it relates to land. This concept is a barrier to justice in Kenya among the marginalized and is yet to be settled despite constitutional provisions that have given it proper

[75] LDGI *supra* note 19 at 7
[76] Laura A. Young and Korir Sing'Oei, *Access to Justice for Indigenous Peoples in Africa*, available at https://academiccommons.columbia.edu› accessed on 10 September 2021

context. The *Endorois* is a vindication of the inability of the country to facilitate access to justice in land for indigenous peoples.

Wasunna, Okanga and Kerecha trace the challenges faced by the Turkana particularly after the discovery of oil in the county.[77] The authors observe that the Turkana had clearly established traditional and customary pathways to resolve disputes of all types and had relied on them for centuries. Through elders, the Turkana clan elders had strict roles in this hierarchy depending on the type of dispute. The arrival of the extractive industry got them by surprise as they lacked the skills to resolve emerging disputes that were likely to arise.

Their grievances after the discovery of oil were caused by land speculators who purchased land at very low prices. Being pastoralists, many of them lost grazing lands while the mining agreements were made without adequate consultation with the local community. This created tension, competition for natural resources was heightened, fear of displacement with the potential for conflict. The report elucidates the challenges local communities face in the form of disputes not envisaged by the TDRM.

According to Odote,[78] the need to transform the Judiciary was one of the crucial drivers for reforming Kenya's constitutional dispensation. The Country's Judiciary had hitherto been perceived as opaque, executive leaning, slow, corrupt and ineffective in dispute resolution. The current Constitution is transformative and has made major reforms to the Country's judiciary such as the creation of a specialized ELC.[79]

To Odote, the challenges facing the ELC included an overlapping jurisdiction that lead to forum shopping, the backlog of cases, and third, acute shortage of judges. However, Odote's paper has

[77] Melba K. Wasunna, Jacqueline Okanga and Geoffrey K. Kerecha, *Advancing Capacity and Access to Justice in Kenya's Extractives Sector* (Extractives Baraza: Nairobi, 2018)
[78] Odote C. "Kenya: The New Environment and Land Court', (2013) 1 (4) IUCN *Academy of Environmental Law E Journal*.171-177.
[79] Constitution of Kenya, Article 162(2) (b).

only addressed a few challenges while this study is much broader.This is the gap which this study would seek to fill.

Ooko, believes that the huge backlog of cases is the greatest barrier in access to justice in Kenya.[80] The author arrives at this finding after a thorough examination of case management in the Courts of law in Kenya. He observes that the backlog of cases has been rising exponentially between 2013 and 2015. For example, in 2013 the backlog was 426, 508 cases distributed into 332,000 criminal cases with 9400 civil cases. Magistrate's Courts had the highest share of cases with 276,517 cases, the High Court had 145,596 while the Court of Appeal had 4329 cases. The implication is that if no new cases are filed, it would take the High Court 13 years to clear. In the 2015, the backlog rose to over 1 million that was made worse by limited budgetary allocation. For a Country of over 50 million people, Kenya had only 455 magistrates, 80 High Court judges, 30 Court of Appeal judges and 9 Supreme Court judges which is far below the recommended international standard. Whereas the backlog of cases is a major barrier in accessing justice, it is by no means the only one obstacle. It is affected by a wider spectrum of reasons than those in the thesis above and which this study would discuss.

Angote opines that the idea of creating the ELC was a noble one, it has proceeded without the publication of data particularly in the context of environmental caseload.[81] According to the author, this is problematic because it is only through such data that the success or shortcomings of the ELC can be determined to either support or refute the claim that an estimated 60% of backlog of cases are composed of environment and land cases.

[80] Peter Oduor Ooko, *Implications of Case Backlog on Access to Justice in Kenya: The Case Study of Mavoko Law Courts* (Unpublished LLM Thesis: University of Nairobi, 2018).
[81] Oscar Amuge Angote, *The Role of the Environment and Land Court in Enforcing Environmental Law: A Critical Examination of Environmental Caseload* (Unpublished LLM Thesis: University of Nairobi, 2018).

The author has a firm belief that the creation of the ELC brought benefits and challenges. Among the benefits were faster judgments, greater expertise through specialization, enhancement of jurisprudence in environmental and land laws, uniformity in the application of the law, effectiveness and efficiency and flexibility in decision making. However, these benefits are counter balanced by a number of challenges like backlog of cases causing numerous delays, high cost of litigation, corruption, lack of public awareness among other reasons.

Though the ELC has jurisdiction to hear environment and land matters, Angote's review has a bias towards environmental matters especially its caseload. However, it must be noted that much of the backlog of cases are comprised of land cases because they take longer to settle due in part to the complexity of land laws. This study seeks to elaborate on the challenges facing access to justice in land left out by the study in review.

Okong'o[82] in his paper opines that the initial jurisdictional conflicts between the ELC with and Magistrates' Courts began in 2015 due to amendments to the ELCA and the Magistrates Act.[83] The study agrees with him that the amendments were necessary and were catalysed by the challenges the ELC faced at that point in time. The study further agrees with him that, one of the major challenges the amendment sought to address was the acute shortage of judges in the new Court.

The amendments allowed the subordinate Courts to handle land disputes.[84] The study further, agrees with him that the ELC Act does not confer criminal jurisdiction upon the ELC. However,

[82] Samson Okong'o on *'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, available at <*https://www.environmental-adjudication.org/assets/Uploads/General/Okongo-PPT2.pdf*> accessed on 13th October 2020.
[83]Statute Law (Miscellaneous Amendments) Act No. 25 of 2015.
[84].ELCA, Section 26 (4).

the study disagrees with him that the jurisdiction of the ELC be limited to environment disputes only and that the land cases be taken to the High Court.

The paper is important to this study as it gives an in-depth analysis of the controversial issue of the Court's jurisdiction and the 2015 amendments to the ELCA. The author only highlighted the key factors that lead to the 2015 amendments to the ELCA while this study is much broader. This is the gap which this study would seek to fill.

Schetzer and Judith Henderson provides a summary of the barriers and the persons most disadvantaged in access to justice in Australia.[85] The main barriers include limited funding for legal services, legal aid, and unaffordable representation. Those disadvantaged with respect to justice comprise PWDs, minorities, the youth, the elderly, rural dwellers, the illiterate, women and the homeless The report makes an additional element of addressing access to justice that if it has to succeed, focus should be placed on targeting specific groups and their particular barrier.

Tools in Access to Justice

Marchiori has proposed a framework for measuring access to justice due to the complexity associated with it and more challenging as it revolves around numerous indicators and elements.[86] According to him access to justice is underpinned by rights and obligations enshrined in laws, rules, regulations accompanied by the ability to bring claims any time they are violated using available dispute resolution mechanisms (formal and informal). Therefore, the criteria for determining access to justice should be measurable, easily understood and capable of being conveyed to the public by capturing the elements of access to justice. While the article focused

[85] Louis Schetzer and Judith Henderson, *Access to Justice and Legal Needs: A Project to Identify Legal Needs, Pathways and Barriers for Disadvantaged People in NSW* (Law and Justice Foundation of New South Wales: Sydney, 2003)

[86] Teresa Marchiori, *A Framework for Measuring Access to Justice: Including Specific Challenges Facing Women.* Report commissioned by UN Women realized in partnership with the Council of Europe, 2015.

on measuring access to justice for women, the same measure can still be applied in determining access to justice in land.

Beqiraj and McNamara have classified barriers in access to justice into social and cultural, institutional and other barriers that does not fit into the two above:[87] In the author's opinion corrective measures for each of the barriers is different. For example, the solution to socio-legal barriers is found in Civic education and accountability of actions. Institutional barriers can be addressed through: resourcing justice systems, informal dispute resolution mechanisms, legal assistance and representation, fairness, openness, enforcement and compliance. The authors provide an overview of the challenges faced by the ELC together with the solutions but fail to state where they have particularly been put into practise.

According to the Vera Institute of Justice the measurement of access to justice is based on the availability of a legal framework, nature of legal knowledge, whether or not legal advice is given, the availability of a legal, the fairness of the process and enforceable mechanisms.[88] The legal framework should not only comprise formal justice systems but non-formal ones. The laws of the land should clearly define the relationship between the State and the citizen, which duties are owed to the other, the limits and the procedures to be followed when fundamental rights and freedoms are violated. However, despite the existence of these six elements, there is still a gap in access to justice in Kenya due to various barriers related to poverty, geographical barriers, limited resources to fund legal aid programs, issues of corruption and inadequate capacity.

[87] Julinda Beqiraj and Lawrence McNamara, *International Access to Justice: Barriers and Solutions* **(**International Bar Association: London, 2014.**)**

[88] Vera Institute of Justice, *Measuring Progress toward Safety and Justice: A Global Guide to the Design of Performance Indicators across the Justice Sector* (Vera Institute of Justice: New York, 2003)

Amondi,[89] in her paper examines the use of legal aid by the poor and marginalized as one of the tools useful in accessing justice as being key in achieving the rule of law, equity, equality and inclusiveness in Kenya especially the more than 50% who live below the poverty line as prime targets of legal aid.[90] Noting that without legal aid, the poor are deprived of their only protection against the violation of rights.

This she attributes to the passage of Kenya's 2010 that provided for the creation of a legal aid statute. The author observes that legislation would not be enough since there are other barriers that would be unaddressed. The author equates the inability by the government to facilitate citizen access to legal aid as a major failure in its obligations. The net effect is that without equality of parties in the Courts, the balance of power continues to tilt against the vulnerable thus exposing them to exploitation. This is tantamount to violation of the human right of equality.

The author observed that the provision of legal services through legal aid enables the poor access their foundational rights that support due process. The author is however disappointed by the lack of political will to support legal aid which in effect affects its effectiveness. This explains why despite the establishment of the Legal Aid Act in 2016, legal aid has had little impact as it is very poorly funded.

The article's contribution to the study is with respect to legal aid as an important tool in access to justice. This is a narrow approach to the one envisaged in this study which views legal aid as one of the mechanisms used to access justice and not the only one.

[89]Caroline Amondi, Legal Aid in Kenya: Building a Fort for Wanjiku, in Yash Pal Ghai and Jill Cottrell Ghai, *The Legal Profession and the New Constitutional Order in Kenya* (ICJ: Nairobi, 2014) at 201-220.

[90]Kenya Institute for Public Policy Research and Analysis, *Economic Report for 2013* (Nairobi: KIPPRA, 2013) at xxi.

The Danish Institute for Human Rights (DIHR) provides a comparative analysis of access to justice and the challenges inherent in achieving legal aid in Kenya, Tanzania and Uganda.[91] It identifies trends in legal aid practices and linkages in the region as a platform for offering a way forward for legal aid stakeholders in the region and as a stepping stone to enhanced access to justice, strengthening co-operation and coordination in the countries covered.

According to DIHR legal aid comprises elucidating the law in the context of a dispute that reduces the cost of resolution that enables people realise their rights. Legal assistance involves using professionals and institutions at various stages to help in accessing legal aid. In the view of DIHR legal aid models in East Africa can either be classified as public or private, funded legal schemes, financial contribution of beneficiaries of legal aid actors and types of legal aid provided. In the author's contention, legal aid schemes have been discussed in the context of developed countries and not necessarily developing countries like EA. This invariably translates into insufficient attention to legal awareness as a central aspect of legal aid for marginalized communities.

Legal aid can also be provided using technology based as a tool for legal aid. Cabral in his journal article believes that technology or automated legal assistance can be used as a tool and the future of access to justice.[92] According to the author, technology has capacity to increase the quantity and quality of legal services. This is because technology has offered solutions to other sectors and should similarly provide such solutions for legal services. The gist of the article is that modern technology increases capacities of the civil legal services community to meet legal

[91] The Danish Institute for Human Rights, *Access to Justice and Legal Aid in East Africa: A comparison of the legal aid schemes used in the region and the level of cooperation and coordination between the various actors.* A report by the Danish Institute for Human Rights, based on a cooperation with the East Africa Law Society, December 2011.

[92] James E. Cabral, 'Using Technology to Enhance Access to Justice', (2012) 26 (1) *Harvard Journal of Law & Technology* 243.

needs of poor persons even if the funding needs would be constant. This article is based on studies done in the USA that have developed web-based processes, wide spread use of smart phone and the use of social media to facilitate access justice.

Web based legal delivery services are informed by the fact that more and more people have access to the internet.[93] The use of technology is a cost saving measure that is efficient and effective in an era of reduced funding for legal services at a global level. Web based legal solutions are best suited for rural areas that face many challenges such as fewer traditional sources of pro bono services and limited legal funding.

The use of technology in the delivery of justice maybe an asset but has its own risks as it brings about the digital divide. Thus, it may institutionalize a two-tie justice system that is incapable of delivering justice to the poor and marginalized groups. However, the success of the technology based legal assistance would depend on the ability of legal aid community to develop new mobile strategies to address content, functionality and design of the delivery system.

This theme is amplified by Njuguna whose thesis is that technology has been used to make it easier to do many tasks that can be described as repetitive and could do the same for access to justice. He proposes the use of ICT in access to justice especially during this period of COVID 19 that is characterised by social distancing and keeping physical distance so as to avoid infection.[94] According to the author, other than the pandemic, the adoption of ICT in access to justice became necessity due to changing socio-economic dynamics, globalization of trade and business and the convergence of many professions. The author believes that the legal profession cannot escape the globalization of ICT and for that matter not sustainable. This is because access to justice in the 21st century would be available to those who opt to use technology.

[93] Ibid at 244.

[94] James Ndungu Njuguna, *Adopting Information Technology in the Legal Profession in Kenya as a Tool of Access to Justice*, 2021. Available at http://journalofcmsd.net › uploads › accessed on 5 September 2021.

Globalization and the changing socio-economic dynamics could not convince the legal profession into adopting ICT, despite that the outbreak of the pandemic changed all that. This is partly because legal practice has long relied on physical appearance that would be tenable in a post COVID era that prohibits close proximity. ICT can facilitate access to justice through virtual court sessions, E-Systems and digitization of legal services. The greatest challenge is the conservative nature of the legal profession, how to secure credibility of information, inadequate capacity and maintenance of IT infrastructure and inadequate training. The author recommends training of judicial staff, enhancing ICT security and protection and the adoption of ICT infrastructure. In as much as the article analyses the use of ICT in access to justice, it covers a very small aspect of the study.

Best Practice in Access to Land Justice

Preston[95] provides a comprehensive discussion on what characteristics a successful Environment and Land Court should possess. They include; comprehensive and centralized jurisdiction, independence, impartiality, autonomy and judges well versed in environment and land matters. Preston further provides practical overviews of specialized Land and Environment Courts (LEC). The author's discussion is based on the LEC of New South Wales, Australia.

Pring and Pring[96] explored the issue of access to land and environmental justice through specialized environment and land Courts and tribunals. The authors provide twelve tests that decision makers should put in mind in the creation, improvement or reforms in an Environment and Land Court. The tests comprise: type of institution, its jurisdiction including territorial

[95] Brian J Preston**, '***Characteristics of Successful Environmental Courts and Tribunals:* A Presentation to the Eco Forum Global Annual Conference Guiyang 2013.

[96] George (Rock) Pring & Catherine (Kitty) Pring, 'Greening Justice: Creating and Improving Environmental Courts and Tribunals,' (2009) Available at; https://www.law.du.edu/documents/ect-study/greening-justice-book.pdf . Accessed on 9th October 2020.

coverage, process of decision making, number of cases, *locus standi*, affordability, and application of ADR, its competence and tools and remedies at its disposal.

Pring and Pring provide a detailed guideline to strategists and policymakers on how to establish and keep improving the existing ELCs or tribunals.[97] The authors have given a comprehensive appraisal of the 'best practices' that characterize successful ELCs. According to the authors, success amounts to practices that ensure ability to access justice, improve land and environmental jurisprudence using processes tailor made to achieve quick and cost-effective judicial results that uphold the rule of law. Best practices in access to land justice include: financial autonomy and independence, flexibility (to develop its own rules and procedures), comprehensive jurisdiction (including criminal and human rights) and an enhanced legal aid program.

The Refugee Consortium of Kenya (RCK) proposes a human rights approach to access to justice among the Turkana in Turkana County.[98] The RCK links public participation and access to justice and how it relates to democracy and good governance. According to RCK, access to justice has four elements: public participation and inclusion, which revolves around stakeholder engagement between the public and the legislation. Second is the concept of non-discrimination on any ground while protecting affirmative action for vulnerable groups that helps them overcome historical injustices.

The duty of accountability is an important one for it enables law and policy to outline the role of power of duty bearers for state and non-state actors. Accountability should provide mechanisms that provide checks and balances and oversight using administrative bodies, courts and even

[97] George (Rock) Pring & Catherine (Kitty) *Pring, Environmental Courts and Tribunals: A Guide for Policy Makers* (UNEP: Nairobi, 2016) at 12.

[98] Refugee Consortium of Kenya, 'Refugee Insights: Promoting Access to Justice and Governance in Turkana County', (2018) 28 *Newsletter of the Refugee Consortium of Kenya*

appellate institutions for purposes of dispute resolution. According to the authors, access to justice in Turkana County is a challenge due to the absence of a concise definition of public participation. Although courts have made certain decisions on it they only provide inference out of which elements of public participation, like access to information in a manner that s acceptable and the promotion of opportunities for self- expression. In essence without these elements, public participation cannot be assumed to have been accomplished.

Mumma believes that ADR is the solution to access to justice reckoning that the existence of formal legal systems in Kenya gives the impression that all citizens are bound by it.[99] While this is true in theory, many communities use customary law that is recognised by Article 159 of the Constitution as being applicable in personal matters. However, the use of customary law has some shortcomings like an ill-defined scope and thus its details and practices that would be useful in dispute resolution are either not clear but differ from one community to the next.

In part the author believes that the invisible aspect of customary law and cultural practices may determine the standing of women in the community which amplifies the negative effect of customary law in access to justice. The author's opinion is that ADR is a mechanism that would enable women access justice that is informed by various challenges. For example, courts and lawyer are located in urban areas, they have limited resources with limited legal aid services and for those able to access legal aid, court processes are not only lengthy but unnecessarily complex due to its adversarial nature.

[99] Catherine Muyeka Mumma, *Accessing Justice and Protecting the Rights of the Vulnerable through Cultural Structures: A Tool On Working With Elders in Communities* (Kenya Legal and Ethical Issues Network: Nairobi, 2010)

1.7 OBJECTIVES

1.7.1 Broad Objective

To establish the role of the ELC in access to land justice for marginalized and vulnerable communities in Kenya.

1.7.2 Specific Objectives

i. To determine whether the creation of the ELC would facilitate access to land justice for the marginalized in Kenya.

ii. To determine whether the ELC legal framework offers adequate tools for access to land justice in Kenya.

iii. To investigate how other jurisdictions have used specialised Courts to deal with challenges in access to land justice and which lessons Kenya can learn.

iv. To recommend reforms that would be required in the enhancement of access to land justice in Kenya.

1.8 BROAD ARGUMENT LAYOUT

The ELC was created as a key mechanism that would enable access to land justice in Kenya. Victims of violation of rights in land particularly the marginalised, the poor and the underprivileged have faced various challenges in access to land justice despite the establishment of the ELC. This study examines these challenges with a view of proposing various recommendations that would enhance access to land justice in Kenya.

1.9 HYPOTHESIS

i. The ELC is an important mechanism in the realisation of access to land justice in Kenya for many marginalized and under privileged Kenyans

ii. The ELC legal framework is inadequate in so far as enabling the marginalized access land justice.

iii. Other jurisdictions like New South Wales, Queensland and South Africa have used specialised Courts to address challenges in access to land justice and Kenya has important lessons to learn from them.

iv. Various reforms to the ELC would be required to enhance access to land justice in Kenya.

1.10 RESEARCH QUESTIONS

i. What is the role of the ELC in realising access to land justice in Kenya for the marginalized and vulnerable communities in Kenya?

ii. To what extent is the ELC legal framework adequate as a tool to address challenges of access to land justice in Kenya?

iii. How have other jurisdictions used specialised Courts to deal with various challenges in access to land justice and to which lessons can Kenya learn?

iv. Which legal, policy and institutional reforms are required to enhance access to land justice in Kenya?

1.11 RESEARCH METHODOLOGY

This research is primarily qualitative in nature that used both secondary and primary data to discuss variables in access to land justice in Kenya. Secondary data was consulted specifically to access background information and theories of the concept of access to justice and land justice in particular. The main sources of secondary data consisted of text books, journal articles and internet-based sources.

Primary data was consulted to access specific information about the policies and laws that regulate access to land justice. The main sources of primary data used in this study were the Constitution, statutes from Kenya and other jurisdictions, international legal instruments, decided cases and certain relevant reports of historical importance.

This research used a desktop analysis of documented works on access to justice and land justice in particular with respect to ELC as the primary basis of the study. Further, the study used a comparative approach to determine access to land justice in Kenya by comparing South Africa and Australia on how they have addressed the challenges in the area of access to land justice for purposes of making recommendations.

1.12 LIMITATION OF THE STUDY

The major limitation of the study is that the ELC has been in existence for about ten years only which is a short period of time in terms of making any assessment of its achievements considering that for purposes of fairness, Courts have to be analysed over a longer period of time. This informs the limited scholarly research done in access to land justice. Furthermore, the study will primarily be limited to access to justice in land in Kenya and not access to justice in

general. This is despite the ELC having a dual environment and land jurisdiction, emphasis will be placed on the challenges of the latter to the exclusion of the former.

1.13 CHAPTER BREAKDOWN

The study has five chapters. Chapter one lays the foundation on how the study will be conducted and the detailed outlook of the proposed thesis. Its main parts include, the introduction, background, statement to the problem, objectives, theoretical framework, research methodology and literature review.

Chapter two covered the concept of access to land Justice globally and Kenya in particular. It provides an overview of the historical background to the land question, the evolution of land Courts and their role in Kenya in relation to access to land justice. The chapter also covers philosophical conceptions of access to land justice using the transformation theory of justice.

Chapter three will focus on Kenya's legal framework on access to land justice, setting out the legal provisions that guarantee access to land justice in international, regional and national instruments. It also examined some of the possible challenges that face the marginalised and the poor in accessing land justice in Kenya

Chapter four is a comparative analysis and best practices of how Kenya could best deal with challenges in access to land justice and the lessons to be can learned. Some best practices chosen are the New South Wales (NSW) and Queensland both in Australia and South Africa.

Chapter five is the summary of findings, conclusions and recommendations. It would discuss the legal, policy and institutional reforms required to enhance access to land justice in Kenya.

CHAPTER TWO

OVERVIEW OF ACCESS TO JUSTICE

2.0 Introduction

Chapter two provides an overview of the concept of access to justice in general and land in particular beginning with the elucidation of the concept itself and its essential components followed by the transformation theory of justice. An exploration of the land question gives a preview of the challenges inherent in access to land justice amidst a variety of competing interests and rights. The chapter then provides an examination of the evolution and justification of the ELC in Kenya.

2.1 The Concept of Access to Justice

Access to justice is an important aspect in the achievement of the rule of law, human dignity and sustainable development. However, the concept of access to justice has many facets and has to be understood in its actual context. This section expounds on the essential elements of access to justice namely accessibility, non-discrimination, equity and equality, its appropriateness, efficiency and effectiveness of the process.

2.1.1 Accessibility

The concept of access involves both economic/financial as well as physical access. Economic accessibility or affordability refers to the ability of people to afford legal services without any hardship considering the price and opportunity cost of the legal services.[100]

[100] World Bank, *A Tool for Justice: A Cost Benefit Analysis of Legal Aid* (World Bank: Washington, 2019) at 6.

Physical access is the availability of legal services and institutions within reasonable reach of those who need them most.[101] This is relevant because access to justice is a prerequisite for the rule of law in addition to providing freedom to plan their activities, live freely including ability for self-sustenance.[102] It enables the protection of fundamental rights and freedoms, limits executive power, and ensures accountability of executive actions.[103] Diminished of access to justice reinforces poverty by limiting sustainable development, exclusion and the violation of human rights.[104]

2.1.2 Non-Discrimination

Non-discrimination is a key in the discourse of access to justice which envisages accessibility of judicial services to all people without any distinction.[105] In actual fact it implies making available judicial services to the poor and marginalized and not just to those who have the ability to afford legal services. This also means that all groups that are systematically discriminated against like women, the youth, the poor and minorities are facilitated with the necessary infrastructure that would enable them access justice.[106]

2.1.3 Equity and Equality

Equity is the ability of individuals to access justice fairly and impartially unhindered by any of the financial or infrastructural barriers. At a broader level it means all barriers put on the way

[101] OECD, Understanding Effective Access to Justice 3-4 November 2016 OECD Conference Centre, Paris. Workshop Background Paper at 4.
[102] Ibid at 4
[103] Ibid at 6
[104] Parliamentary Assembly, *Equality and non-discrimination in the access to justice*. Report of the Committee on Equality and Non-Discrimination, Council of Europe, 2015 at 13
[105]Article 26, United Nations Principles and Guidelines on Access to Legal Aid in Criminal Justice Systems. Resolution
[106] Ibid.

should be levelled to allow those who desire to access justice do so including the marginalized ones.[107]

To bring semblance of equity would mean providing of legal assistance to the very poor unable to afford legal representation.[108] With respect to equality, the tendency to disregard traditional legal in the belief that existing judicial systems are true representations of models that facilitate access justice.[109]

2.1.4 Appropriate

Access to justice can only be meaningful if it is appropriate, its appropriateness being determined by the type of structures created to incentivize dispute resolution at all required levels. This is granted that without access indicates the existence of challenges to formal and non-formal dispute resolution mechanisms. For that matter existing legal services need to be prepared to address issues that act as barriers in access to justice.[110]

2.1.5 Efficiency and Effectiveness

A justice system is efficient if it is capable of achieving an outcome that is affordable, with minimal effort and wastage.[111] Access to justice imports the element of efficiency which means the ability to offer legal services within the shortest time possible and with minimum effort. It is also the ability to resolve a dispute with minimum expenditure in terms of time and effort.[112] The essence of an efficient dispute resolution mechanism is the ability to deliver fair outcomes as

[107] Parliamentary Assembly *supra* note 104 at 13.
[108] Ibid.
[109] Mossman, Mary Jane, 'Gender Equality and Legal Aid Services: A Research Agenda for Institutional Change', (1993) 15 (1) *Sydney Law Review* 35.
[110] Ibid.
[111] Erol Digiusto, 'Effectiveness of public legal assistance services. A discussion Paper', (2012) 16 *Justice Issues* 2.
[112] OECD *supra* note 101 at 3.

efficiently as possible. This would mean deliberate choice of the most expeditious and cost-effective mechanism (formal or non-formal).[113]

Justice is effective when it can demonstrate that certain desired positive outcomes are possible that are independent of other having potential positive effect on the outcome occurring.[114] The endgame for the legal justice system is the delivery for the best outcomes for all those involved in the delivery of justice and their clients.[115] Such delivery should not be viewed from a narrow perspective as is the case but broad enough that goes beyond formal institutions and equitable justice in support of the rule of law.[116] Anything less would be a miscarriage of justice and the very anti thesis of efforts to access justice for the poor and marginalized in Kenya.

2.2 The Transformation Theory and Access to Justice

The concept of justice occupies a central position in the transformation theory as it represents a paradigm shift in securing of rights in individual action, formulation of policy and even in the law-making processes.[117] The gist of the transformation theory of justice is that justice should be available to the marginalized and vulnerable in an environment devoid of discrimination. This involves the empowerment of the marginalized and vulnerable in the context of equity and equality. According to Mezirow, the transformation theory is useful as a tool for societies in transition particularly those that are marginalized and vulnerable to use in changing the status quo from authoritarianism to one that is better aware and understanding of how to secure their

[113] Ibid.
[114] Digiusto, *Supra* note 111 at 9.
[115] Parliamentary Assembly *supra* note 107 at 13.
[116] Rawls J. *A Theory of Justice* (The Belknap Press: Cambridge, 1999) at 3.
[117] Mezirow, *Supra* note 42 at 72.

rights in land.[118] The transformation theory envisages empowerment of the society through awareness and knowledge in a participatory manner.[119]

In a South African case *S v Makwanyane,* the constitutional court observed that: transformation should mean something from arbitrary application of the law to one that espouses more rationality.[120] The path to transformation in Kenya from totalitarianism (Kenya before 2010) was not an easy as a number of questions were left unanswered such as which parts of the incoming legal regime would be sufficiently transformative?[121] This question was answered by the Constitution of Kenya that has received recognition for transforming the Kenyan society in more ways than one. After decades of struggle (both violent and peaceful), Kenya entered a new constitutional dispensation in 2010 thereby replacing the two previous Constitutions (the 1969 one and the colonial Constitution of 1963).[122] It was a culmination and reflection that redefined an obsolete social order replaced by a modern social, economic, cultural and political order that respects the dignity of vulnerable people. In certain quarters this has been called the second liberation.

2.2.1 Transformation Theory in Context

Kenya's current Constitution is transformational as it is a break from the previous massive violation of human rights.[123] Kenyans considered the past as being represented by the status quo which was archaic whose remedy would be found in: the reengineering of the Kenyan state from one that was considered autocratic under the repealed Constitution to one that is accountable,

[118] Jack Mezirow, 'Postmodern critique of transformation theory: a response to Pietrykowski and Transformative learning and social action; a response to Inglis', (1998) 49 *Adult Education Quarterly* 70-72.
[119] Ibid at 72.
[120] *S v Makwanyane* 1995(3) SA (CC) Para 156.
[121] Teitell, *Supra* note 45 at 106.
[122] Mutunga, S*upra* note 52 at 46.
[123] Mutunga, *Supra* note 52 at 47.

democratic, and responsive to the vision of the people with the confines of the Constitution.[124] Being representative of a new beginning, its values would revolve around national unity, respect for human dignity, diversity, democratic principles and decentralization of power.[125]

It would further give the people of Kenya sovereign power that they can use to delegate power to other institutions of governance [126] by prioritizing integrity in public leadership.[127] The Bill of Rights provided for economic, social and cultural rights[128] to reinforce the political and civil rights.[129] The protection of human rights provided a check against autocracy as the clearest signal a new state had been created that is prepared to cut links with the past that was dirty and untidy.

The period before 2010 was characterised by land grabbing of unimaginable proportions thus making land one of central issues in Constitution making. In that period the land question represented the status quo and a barrier to sustainable development.[130] Therefore the desire to create institutions that protected rights and human dignity, provided oversight and reflected in the will of the Kenyan people through the Constitution could not be over emphasized. Kenya chose transformation over revolution as the modus operandi of addressing perennial violation of fundamental rights, freedoms, dignity and the rule of law.

[124] Ibid.
[125] Ibid.
[126] Article 2, Constitution of Kenya.
[127] Ibid.
[128] Ibid, Article 43.
[129] Mutunga, *Supra* note 52 at 48.
[130] Ibid.

2.2.2 The Judiciary in the Transformation Theory

The Constitution sort to transform the judiciary from one that is an appendage[131] of the executive to an independent institution in a radical manner as the main agent of access to justice. The transformative nature of the Constitution could only be achieved through a pragmatic rather than a mechanical interpretation of the law as a barrier in access to justice as in *Kibaki v Moi & 2 others*.[132] In the Kibaki case the petitioner lost for inability to institute personal service to the head of state.

In determination of the suitability of judicial officers, their vetting pursuant the 2010 Constitution was done by a Board which had a broad mandate. A judicial fund was created to give autonomy and financial independence of the Judiciary. Last but not least, the Supreme Court was set up as an apex Court and final court with jurisdiction to hear Presidential petitions and the last court of reference in constitutional matters.

In effect, a totally new judiciary was established in an open process involving public participation. Article 159(2) created ADR that was an adoption of traditional justice systems to address the inefficiency and injustice inherent in litigation. More importantly, Article 20(3)(b), provided judicial officers with the leeway adopt a liberal interpretation favouring the enforcement of rights. This provision is useful in access to land justice for vulnerable communities and while recognizing indigenous laws, the Constitution promotes the significance of international law by adopting a monist approach to its domestication.[133]

[131] Mitullah, *Supra* note 52 at 34.
[132] *Kibaki v Moi & 2 others (No 2)*, Election Petition No 1of 1998, (2008) 2 KLR (EP) 308.
[133] Article 2(5)(6), Constitution of Kenya, 2010.

2.3 The Land Question in Kenya

Access to land justice in Kenya has been complicated by the complexity of issues revolving around the land question. Land is the most important resource in Kenya with wide ranging social, cultural, economic and political effects.[134] The land question refers to conflicts arising from colonial legacy and the inability of the post independent state to restructure access and ownership of land that has dominated discourse in Kenya.[135]

Notably, access and ownership of land has played a large part in all conflicts experienced on the Kenyan soil such as: the Mau rebellion,[136] tribal clashes 1992-1997[137] and the post-election violence.[138] The Kofi Annan led mediation process identified land reform as a prerequisite for peace in the Country.[139] The land question has also shaped Kenya's post-independence social, economic, legal and political status.

Solutions to the land question would therefore require taking into consideration the legality of economic, social, cultural, political and ethical aspects of land acquisition since the colonial times.[140] The main issues in the land question were existing inequalities in land ownership, different tenure systems, multiple claims on land holding, balancing customary and common law right to land, historical land injustices and claims on land, political patronage on access to land, communal and ethnic land disputes and lately the spectre of land grabbing.[141]

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[134] Mbote, *Supra* note 4 at 1.
[135] Ibid.
[136] Paul Syagga, Public land, historical land injustices and the new Constitution. Available at; http://constitutionnet.org/sites/default/files/public_land_historical_land_injustice_and_the_new_constitution-wp9.pdf. Accessed on 16th October 2020.
[137] Ibid.
[138] Ibid
[139] Ibid.
[140] Mbote, *Supra* note 4 at 1.
[141] Kanyinga, *Supra* note 3 at 5.

2.3.1 The Land Question in Kenya's Pre-Independent Period

Land was central in European colonization of Africa and when Kenya became a British colony in 1884 it began a regime of conflicts over the ownership and administration of land. This heralded a clash of two systems of land tenure, a traditional one using customary law and the common law that used the English legal system for the administration and regulation of land.[142] The objective of the British was the desire to entrench the settler economy that was viewed as being superior to that of the Africans.[143]

The colonial government introduced new administration and financial systems that were in variance with those practised by the indigenous population.[144] Thus the colonial administration became synonymous with violation of native rights to land. The demand for land by the settler community meant that indigenous land was expropriated in favour of the settler community through the introduction of English property laws.[145]

This was illustrated by the common law use of feudal doctrine of land tenure that dispossessed indigenous people's right to land thereby not only expelling them from their land but denying them of livelihoods and means of survival.[146] Henceforth, land became vested in the colonial government with no right of compensation turning the indigenous population into squatters in their own land thus they became "tenants of the crown."[147] This had consequences as it heralded the origin of disputes in land whose resolution would henceforth rely on two legal systems. First was an indigenous legal system based on customary law while the second one was based on the common law that was introduced by the colonial administration in Kenya.

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[142] H. W. O. Okoth-Ogendo, Formalising "informal" property systems: The problem of land rights reform in Africa. Commission on Legal Empowerment of the Poor (United Nations Development Programme: Nairobi, 2007) at 7.
[143] Ibid at 6
[144] Ogendo, *Supra* note 142 at 7.
[145] Ibid at 3.
[146] Hughes, L. *Moving the Maasai: A Colonial Misadventure* (Palgrave: Basingstoke, 2006a) at 10.
[147] Okoth, Ogendo, *Tenants of the Crown* (African Centre for Technology Studies Press: Nairobi, 1991) at 21.

In *Ole Njogo*,[148] the Maasai challenged the 1904 and 1911 agreements that purported to legalize annexation of Maasai land to the British. The complainant alleged that the two agreements were null and void and therefore illegal. However, the case was dismissed with the Court arguing that the agreements amounted to treaties between two states and thus inadmissible in a local Court.

The colonial government made some attempts at land reform through the Swynnerton Plan that recommended the consolidation of family land, followed by adjudication and finally by registration.[149] This affected the post independent land reform for example in Central province in Kenya, those who fought for independence (freedom fighters) lost their parcels of land to those who collaborated with the colonial government (loyalists). The latter were in turn protected by the judicial system which suspended all litigation over land affected by the rules made in 1956.[150]

The gist of the Native Lands Registration Ordinance of 1959[151] was that the first registration of native land would not to be subject to challenge whether or not the title was fraudulently obtained. It limited the persons appearing on the title as owners of land to five people as well as the introduction of the concept of trust for other members of the family.[152] However, this system only favoured men who were traditionally held as heads of the household who would then be registered as owners. In effect, women and younger men would not be registered as owners and therefore were excluded from the management of land and any other related resources.

[148] (1913) EALRV. 70.
[149] Swynnerton, R.J.M, *The Swynnerton Report: A plan to intensify the development of African agriculture in Kenya* (Government Printer : Nairobi, 1955) at 8.
[150] Native Lands Registration Ordinance of 1959, Section 70.
[151] No 28 of 1959
[152] Native Lands Registration Ordinance of 1959, Section 70.

2.3.2 The Land Question in Post-Independence Era

After independence in 1963, it was expected that the African elite and now in political leadership would restructure the colonial administrative and regulation of land ownership by reverting land left by the white settlers to the original owners.[153] Instead they entrenched the colonial system of land tenure by co-opting the new African leadership into the European economy. This was part of the elite consolidation of power through the adoption of colonial legal and tenure systems that had led to landlessness and which continued after independence. The introduction of resettlement policies failed to achieve the desired purpose as the squatters allocated land in the Rift Valley were viewed as foreigners.[154]

The state also failed to put in place a coherent national land policy. The default position was that land allocation relied on an opaque-criteria mainly ethnicity and the state used land to buy political support. The effect of this was the increase in political competition for the top seat as it was believed that it translated into more access to resources including land. The land question translated into a national security issue when it led to tribal clashes after every cycle of elections in the period 1992 to 2007.[155]

2.4 The Role of Courts in Access to Land Justice

Courts play a major role in facilitating access to land justice by the poor and marginalized and as enabler for the enforcement of laws and regulations pertaining to land.[156] Having specialized

[153] Swynnerton *supra* note 149 at 8
[154] Mbote, *Supra* note 4 at 11.
[155] KHRC *supra* note 58 at 7.
[156] Preston, B J, "The role of the judiciary in promoting sustainable development: the experience of Asia and the Pacific" 9(2&3) *Asia Pacific Journal of Environmental Law* 109-212.

expertise, the Court is well placed to enable its user's access land justice and, in the process, achieve sustainable development.[157]

While discourse on human rights is mainly focused on other rights like those of shelter, water and a clean environment, the right to land has received very little attention.[158] Courts are well placed to articulate the transformation of property rights by placing it in its actual context. But while Courts are very powerful, they face certain constraints as illustrated by contests over land being pushed back using popular protests, non-binding regulations and international rules.[159]

Existing national laws and the executive have proved inadequate in addressing the issue of access to land rights. ELC can affirm rights in environmental and land matters so long as the cases are well presented in Court. Judges presiding over such cases are alive to the plaintiff's financial resources and the nature of rules of procedure.[160]

2.4.1 Transformation of Property Relationships

Courts are essential in the transformation of property relationships.[161] This is particularly important in land grabbing; however, Courts have been unable to make the connection between land rights and rights to land. Especially how they are claimed and who is entitled with the outcome being different. Whereas Courts can define the right to land, this right is not granted by Courts of law but rather emanate from humanity itself.[162]

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[157] Preston, B J, "Operating an environment court: the experience of the Land and Environment Court of New South Wales, (2008) 25 *Environmental and Planning Law Journal* 386.
[158] Ibid at 388
[159] Alkin L Wily, 'The Law Is to Blame": The vulnerable status of common property rights in Sub-Saharan Africa', (2011)42(3) *Development and Change* 733.
[160] Ibid at 735
[161] Ibid at 734
[162]Boamah, F, How and why chiefs formalise land use in recent times: the politics of land dispossession through biofuels investments in Ghana',(2014a) 41 (141) *Review of African Political Economy* 406.

In circumstances where land is grabbed the relationship between the right to land and land rights is ignored. Interestingly, discourse on remedies have viewed land in terms of voluntary regulations, peasant movements, general random protests against land grabbing and how states react to them but often with little interest.[163]

Further, attention is paid to international land policies like UN Voluntary Guidelines on the Responsible Governance of Tenure of Land, Fisheries and Forests in the Context of National Food Security.[164] The objective of the latter document is the protection of land owners, creation of national investment legislation to protect land owners' interests and community revolt over grabbed land.[165]

2.4.2 Guarantor of Land Rights

Land grabbing, dispossession, deprivation is all forms of human right abuses that invoke the judiciary to restore justice.[166] The role of the Courts with respect to these violations or the judicialization of land grabbing is not very well understood. Courts have been granted roles that merely determine the rights of those displaced and enforcement of contracts pursuant to the transactions.[167]

Kenya's 2010 Constitution reformed the Courts as key tools in accessing justice in land. With respect to environmental and land matters, a specialized Court was created to underscore the centrality of land in Kenya's development agenda.[168] The establishment of the ELC was purposely to manage land cases, enhance the quantum of rights and decision making than is

[163]Branch, A. and Mampilly, Z, *Africa Uprising: Popular Protest and Political Change* (Zed: London, 2015) at 5.
[164] Ibid at 7
[165] Obeng-Odoom and Van Gyampo, *Supra* note 164 at 129.
[166] Grajales, J, Land grabbing, legal contention and institutional change in Colombia', (2-15) 42 (3-4) *The Journal of Peasant Studies* 541.
[167] Ibid.
[168]Odote, *Supra* note 78 at 335.

available in general Courts.[169] The Court was also designed to develop an appropriate model of access to justice regime capable of addressing the complex land issues encompassing formal and informal systems better suited to problem solving.[170]

2.4.3 Validation of Private Property

The creation of private property is in the best interest of society and Courts play a pivotal role in its validation.[171] In this context, Courts are better placed to ensure private property maintains its status of 'social trust'. In so doing, it would use its police powers to protect individuals against illegal acquisition of private property. The police power of a Court refers to the power of the ELC to interpret environment and land laws and provide remedies when and if it becomes necessary.[172]

Courts using their interpretive powers over statutes and Constitutions have the ability to define what is allowed and what is not in the context of property law. Police powers are useful in shaping private property as well as the rights of land owners that is subject to compensation.[173]

2.4.4 Tool for Economic Justice

Courts are used as tools that advance economic justice. For poor people, the right to property is not always guaranteed which translates to missing out on their economic potential and the

[169] Constitution of Kenya, Article 162(2).
[170] Pring, G & C Pring, *Supra* note 91 at 12.
[171] Ibid.
[172]Ely, R.T. *Property and Contract in their Relations to The Distribution of Wealth.* (Macmillan and Co. Limited, London, 1914) at 14.
[173] Ibid at 12.

Country in general.[174] Without economic justice, nation cannot have a strong market economy since they lack an information regime to record not just the ownership but administration of property rights in addition to other property and economic data.[175] Due to the existence of large segment of unreported property and economic data, many small enterprises lack the legal ownership of what they already possess. The consequence is that such individuals are unable to access credit, sell their businesses or even undertake expansion.

Courts are in unique role as protector of the weak and those unable to protect their land rights against the rich and powerful who routinely dispossess the poor of their land.[176] This is despite the view that Courts are generally viewed as a tool the strong use to oppress the poor.[177] This affects the ability of many poor and marginalised people to seek legal redress to conflicts arising from property ownership in Court simply for lack of ownership documentation. The government therefore finds it difficult to levy taxes leading to the creation of a dual economy, a formal and informal one[178]

The formal economy is mainly fraternized by an elite group usually a small minority that enjoy benefits arising from globalization. The poor and marginalized operate in the informal economy of which the majority belong and create their own rules as a means of survival and a framework for investment.[179] This group does not accrue any benefits from a globalized business environment and due to the fact that the rules lack enforcement machinery, they remain at the fringes of the social economic spectrum and poor.[180]

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[174] De Soto, H, *The Mystery of Capital, Why Capitalism Triumphs in the West and Fails Everywhere Else* (Bantam Press: New York, 2000) at 8.
[175] Ibid.
[176] Bourdieu, P, The Force of law: Toward a sociology of the juridical field; (1987) 38 *Hastings Law Journal* 805.
[177] Ibid.
[178] Ibid.
[179] De Soto, *Supra* note 174 at 23.
[180] Ibid.

2.4.5 Institutionalization of Informal Justice Systems

The assumption held by the western concept of property is that property rights are protected only using formal legal systems. To land owners formal legal systems of the law are considered objective in its operation as an impartial referee in land disputes.[181] This approach, seeks to enable Courts guarantee security of tenure but this approach is flawed. This concept is driven by a biased construction of western property rights which is inappropriate for societies where community property rights portray a mixture of individual, public and customary rights to land.[182]

Largely, the western concept of property rights overlooks the history of systems as it offers a narrow explanation of insecurity in land tenure. Hence formal legal systems have systemically misinterpreted sources of insecurity which is reflected in the policy interventions in dispute resolution mechanisms.[183] Although formal systems are broadly applied in the legal system, they are viewed as being ideologically biased since they represent a one sided and incomplete point of view of property rights.

In legal theory, formal systems represent a tool used by the powerful and the privileged to oppress the weak.[184] According to Marxist school of thought, the creation of formal legal institutions is born out of unequal relationships between capitalism and the workers. In this context, it is the same system that legalized accumulation by dispossession where the rich have been able to accumulate a lot of land by using the formal system.[185]

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[181] Banakar, R. and Travers, M, The power of the legal field: Pierre Bourdieu and the Law. In *Banakar, R. and Travers, M. (Eds.)* An Introduction to Law and Social Theory (Hart Publication, Oxford – Portland Oregon, 2002) at 189.
[182] Ibid at 190
[183]Obeng-Odoom, *Supra* note 164 at 7.
[184] Collins, J, Towards a socially significant theory of rent', (2017) 37 *Geography Research Forum* 148
[185] Ibid at 150

The drafters of Kenya's Constitution saw this gap in the legal protections of property rights by the introduction of alternative dispute resolution mechanisms.[186] This is an affirmation that informal justice systems such as ADR would enable a holistic access to justice in land.

2.5 Justification for Establishment of a Specialized ELC

The creation of specialized Courts is considered as an important reform mechanism in transforming the judicial system in many parts of the world.[187] Judicial specialization implies that judges not only use and have specialized skills and knowledge but have acquired certain levels of expertise specific in land or any area of the law.[188] In Kenya, the specialised Court was created by the Constitution which led to the enactment of the ELCA[189] that established the ELC.[190] This was based on the desire to develop expertise and enhancement of expertise in dispute resolution informed by best practices.[191]

Largely specialized Courts develop due to rising litigation in a certain specialized field than the general Courts can handle. It may arise due to the need to reduce delays in delivery of judgments and backlogs or the effective and efficient division of labour.[192] The argument by proponents of specialized Courts is that there is a general lack of technical expertise to handle matters of a scientific and technical nature.[193] Furthermore, maintaining the status quo would not only lead to

[186] Constitution of Kenya, Article 159.
[187] Collins *supra* note 183 at 1.
[188] Ibid.
[189] No. 19 of 2011.
[190] ELCA, Section 4.
[191] Ellen R Jordan, 'Specialized Courts: A Choice', (1981) *NW University Review* 745
[192] Ibid
[193] Ibid.

delays in decision making, but increase litigation costs, heighten incidences of corrupt practices which would reduce public confidence in the judicial process.[194]

2.5.1 Advantages of Specialized Land Courts

Specialization of Courts and land Courts in particular have certain specific advantages as it is associated with greater effectiveness and efficient delivery of services, uniformity in application of the law, judicial expertise due to qualitative decision making and increased flexibility.[195] The creation of specialized procedures leads to streamlining of operations and more efficiency. Through the diversion of land cases to specialized Courts, it reduces the caseload in general courts which has a positive impact on their operations.[196]

The use of specialized Courts invariably means better and decisions of a higher-quality, especially if the dispute is complex. Arising from the high skill levels, expertise and experience better decisions, outcomes and satisfaction for litigants is assured.[197] Moreover, creating special Courts having exclusive jurisdiction in areas of the law has capacity to enhance consistency and uniformity in decision making. This translates into greater predictability which increases public confidence in the judicial systems with diminished possibility for appeal.[198]

2.5.2 Disadvantages of Specialized Land Courts

Critics of specialized Courts have argued that specialized Courts may lead to negative outcomes. In a poor Country like Kenya it may lead to a diversion of resources from general Courts that are

[194] Markus B Zimmer, Overview of Specialized Courts. Available at; file:///C:/Users/HP/Downloads/SSRN-id2896064.pdf. Accessed on 21st October 2020.
[195] Ibid.
[196] Ibid.
[197] Gramckow and Walsh, *Supra* note 187 at 5.
[198] Ibid.

already facing budgetary cut backs and preferential treatment of legal officers.[199] Since legal officers and litigants operate in very close proximity, they may become very familiar with each other thus increasing chances of possible bias and corruption.[200] This may further increase risks to the impartiality and independence of the Court.

To the contrary, non-specialized judges may infuse a broader perspective on specialized Courts on the economic and social effects of a particular decision.[201] Creating specialized courts requires additional resources if they have to work well.[202]

2.6 Evolution of the ELC

The evolution of the ELC was informed by events that happened to access and ownership of land since the advent of colonialism as observed above. Kenya attained its independence in 1963 and continued using the dual legal systems alongside each other. Unknown to the indigenous population, the coming of independence did not translate into land formerly acquired by the whites reverting to indigenous population but to selected political elites and the wealthy.[203] Legislation was passed that was unfriendly to the indigenous population mainly to sustain the status quo with more appropriation of land.

Abuse of power in appropriation of land was perpetrated particularly through the office of the President that exercised absolute power over trust land.[204] Land disputes at the time were heard in general Courts. Mumma has noted that general Courts are slow, costly with complex

[199] John Pendergrass, "Role of Judiciary in Pollution Management," Guidance Notes for Tools on Pollution Management (Washington, DC: World Bank, 2010) at 10.
[200] Ibid.
[201] Ibid at 10.
[202] Gramckow and Walsh, *Supra* note 180 at 8.
[203] Syagga, *Supra* note 136 at 13.
[204] Ibid.

procedures.[205] According to him, establishing the ELC would enable more access to justice, less costly, minimum complexity and expeditious since the rules give way to more discretion and flexibility.[206]

Kenya's motivation for a new Constitution arose due to the constant and consistent mutilation of the independence Constitution between the years 1963-1992. The state had perfected appropriation of public land better known as land grabbing in contravention of the existing law.[207] Kenyans desired a constitutional dispensation that would protect their hard-earned rights, address inequalities, executive excesses, judicial independence, land grabbing among other violations. The land question in particular had a lingering impact on every aspect of national development as a critical contributor to poverty in exercise of the due process.

The Constitution making process of the early 90s was an opportunity to address challenges facing access to land justice. Earlier, the Ndungu Commission[208] had recommended for the establishment of an LTT that would address the growing number of land cases.[209] This was believed that it would lead to expeditious resolution of land disputes, however, instead of the tribunal, the ELC was established via a gazette notice[210] with branches in Mombasa and Nairobi. For the rest of the Country, environment and land matters were still handled in general Courts.[211] At this time the ELC had no real specialization having no staff with any special expertise. Thus, without a clear criterion for appointment of those serving in the Court, the element of specialization was lost.

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[205] Mumma A. The Role of Administrative Dispute Resolution Institutions and Process in Sustainable Land Use Management: The Case of the National Environmental Tribunal and the Public Complaints Committee of Kenya, In Nathalie J Chalifour, Patricia Kameri Mbote, *Land Use Law for Sustainable Development* (Cambridge University Press: 2006) at 253.
[206] Ibid.
[207] Koissaba B. R. Ole, *Supra* note 73 at 7.
[208] Commission of Inquiry on the Illegal Allocation of Land.
[209] Ibid para. 83.
[210] Gazette Notice No.301 0f 2007.
[211] Angote, *Supra* note 81 at 25.

The Committee of Experts tasked with the mandate of harmonization of the Constitution, recommended for the creation an ELC with specialized staff on the same level with the High Court.[212] When the Constitution was overwhelmingly passed in 2010, the ELC became a reality as an important innovation with a dual environmental and land jurisdiction.[213]

The ELC was operationalized by ELCA in 2011[214] and became operational in 2012 with the appointment of 15 judges by the JSC.[215] Currently, there are 34 judges in the ELC spread out in 26 Counties.[216] This number is low considering that Kenya has 47 Counties that all require judicial services. It further puts into question how those in far flung Counties would access the Court which becomes an impediment to access to land justice.[217]

2.7 Conclusion

The concept of access to justice therefore encapsulates not just the physical access but financial access with elements of equity, equality, appropriateness and non-discrimination. This is borne out by the justice theories whose thesis is that justice should be equally distributed regardless of one's status, gender, race or any other consideration.

Access to justice in land is a complex issue that involves numerous social, economic, cultural and political interests that have to be balanced. As a consequence, the land question has made it difficult for the people of Kenya to achieve justice in land. Some of the barriers are set out as backlog of cases, inadequate and complex laws, corruption and political bias, lack of political will and the gendered nature of access to justice in land that is against women.

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[212] Government of Kenya, *Sustaining Judicial Transformation: A Service Delivery Agenda 2017-2021* (The Judiciary: Nairobi, 2017) at 4.
[213] Constitution of Kenya, Article 162(2)(b).
[214] ELCA, Section 4.
[215] Kenya Gazette Notice, No. 14346 of 2012
[216] Government of Kenya *Supra* note 212 at 4.
[217] Angote, *Supra* note 81 at 31.

The creation of the ELC was transformative under the Constitution designed to address the challenges in access to land justice. This establishment is justified on several fronts, like the use of expert judicial officers, the possibility of specialization to achieve efficiency and effectiveness of decision making. Last but not least is the possibility of reducing the backlog of cases.

However, the creation of a specialized Court has its own downside, for a start it diverts resources from general Courts that already experience limited resources. Staff working in this division may begin to think that they deserve special preference which may dampen morale in the general Courts. Furthermore, since they work in very close proximity to each other, it may easily lead to abuse of power and ultimately corruption. The following chapter investigates whether the legal framework on access to land justice has addressed the challenges articulated above.

CHAPTER THREE

THE LEGAL FRAMEWORK ON ACCESS TO LAND JUSTICE

3.0 Introduction

This chapter examines Kenya's legal regime in access to land justice with a view of identifying gaps that make it difficult for the marginalized to access land justice. It makes an assessment of access to justice legal frameworks set out in international, regional and domestic laws that are relevant to Kenya. Nationally, the approach preferred would be a thematic one in addressing the legal and policy framework. Although there is an elaborate legal regime on access to justice at international, regional and domestic (Constitutional and statutory) level, the marginalised, the poor and the vulnerable groups in the Country still face numerous challenges in access to land justice. Using a thematic approach, this chapter examines some of these barriers and how the quest by the Constitution and other statutory and legal instruments seek to mitigate them.

3.1 Access to Justice in International Law

Access to justice is a legal right recognized in international law under various human rights instruments such as: the Charter of the United Nations, UDHR, the ICCPR and Convention the CEDAW to mention but a few. The starting point for discussion on access to justice in international law is the UDHR which is viewed in international law as constituting *erga omnes* or part of customary international law.[218] Access to justice is an express provision of the UDHR[219] that equality and non-discrimination is an important principle that is underscored by

[218] Paul Behrens, 'None of their Business'? Diplomatic Involvement in Human Rights Involvement in Human Rights', (2014) 15 *Melbourne Journal of International Law* 3.
[219] Article 8, UDHR.

the declaration.[220] The UDHR provides that justice forms the foundation stone for freedom, peace, human dignity, equality and inalienable rights for all human beings.[221] Accordingly, every person should be able to get access to competent Court in pursuit of a remedy.[222] Article 10 of UDHR affirms the entitlement which entitles all to equality, fair public hearing in an independent and judicial system that is impartial. Pursuant to Article 2(5)(6) of the Constitution, all treaties ratified by Kenya form part and parcel of the Country's legal system. Kenya has ratified the above-mentioned instruments that speak to access to justice and therefore they form part of Kenya's legal system.

3.1.1 Access to Justice for Vulnerable Communities

Article 14 of the ICCPR requires states to provide free legal representation for individuals unable to access legal services in proceedings of a criminal nature.[223] The same right is also extended for litigants in civil cases where states are encouraged to establish a state funded legal assistance program that caters for minorities, the marginalized and the under privileged.[224] In most civil disputes in Kenya, poor litigants loose out in Courts for lack of legal representation with negative impact on their future both socially and economically.

[220] Preamble of UDHR.
[221] Ibid.
[222] Ibid Article 1 and 2.
[223] International Covenant on Civil and Political Rights (ICCPR), Adopted and opened for signature, ratification and accession by General Assembly resolution 2200A (XXI) of 16 December 1966, entry into force 23 March 1976, in accordance with Article 49.
[224]Human Rights Committee, General Comment No 32 on Article 14: Right to equality before courts and tribunals and to a fair trial, CCPR/C/GC/32, 23 August 2007, para 10.

Kenya ratified the ICCPR in 1992 and pursuant to the Constitution, all treaties ratified by the country are domesticated and form part of the legal system.[225] Therefore, the Country has an obligation to fulfil, protect and enforce mechanisms that facilitate access to justice.

Access to land justice is particularly challenging for women due to negative traditional and customary practices in Kenya.[226] CEDAW recognises that women have borne the brunt of discrimination in society for centuries and endeavours to eliminate discrimination of all forms against women.[227] The Convention emphasizes that states need to ensure equality between men and women is maintained and where job opportunities exist, competition between men and women should be equal terms.[228]

Article 1 envisages the inclusion of women mainly in circumstances where decision making would affect them. Exclusion had the effect of impairing the ability of women in exercising their rights. According to the convention, access to justice should be practically demonstrated and not a hypothetical provision in law books. This is an acknowledgement that barriers to access to justice are precipitated by the other non-legal factors such as lack of information, illiteracy and poverty especially for women who live in the rural areas.[229] The state has a duty to ensure equality between men and women is achieved progressively using all means necessary and not limited to positive administrative and legislative measures.[230]

[225] Articles 2(5) and (6), Constitution of Kenya, 2010.
[226] Rita Shackel and Lucy Fiske, "Making Justice Work for Women: Kenya Summary Report" (August 2016)
[227] Preamble, CEDAW, Adopted and opened for signature, ratification and accession by General Assembly resolution 34/180 of 18 December 1979 entry into force 3 September 1981, in accordance with article 27(1).
[228] Article 8.
[229] Recommendation of the committee on the elimination of discrimination against women no. 6.
[230] Article 11.

3.2 Access to Justice in Regional Legal Instruments

Accessing justice is a right that is protected under various regional legal instruments. Kenya is a state member of the three key instruments described below by subscribing to the instruments. The Country has an obligation to implement the provisions of the African Charter on Human and People's Right (ACHPR), the African Charter on the Rights and Welfare of the Child (ACRWC) and the Protocol to the African Charter on Human and People's Rights on the Right to Women.

3.2.1 Equality and Access to Justice for Children and Women

The ACHPR[231] takes a radical view on justice with the perspective that rights should be counterbalanced by responsibilities.[232] According to the Charter, enabling the under privileged access justice is the equality, freedom and human dignity as prerequisites in the achievement of legitimate aspirations for Africans.[233] The equality of all persons is guaranteed by the ACHPR regardless of gender, race or other considerations.[234] The role of the state in access to justice is its facilitation through the creation of administrative and legislative mechanisms to give it effect to the above protections.[235]

The ACRWC has recognized that youth face many challenges in accessing justice due to traditional customs that side-line them.[236] The ACRWC[237] incorporates participatory justice as the main component of access to justice where children are involved. Children form an important segment of the marginalised and according to the Charter all judicial and

[231] Adopted in Nairobi June 27, 1981 and Entered into Force October 21, 1986.
[232] Part 1, Article 1, ACHPR.
[233] Preamble, ACHPR.
[234] Article 3(1) and (2), ACHPR
[235] Article 7(1)
[236] Behrens *supra* note 218 at 3.
[237] adopted by the Assembly of Heads of State and Government of the Organization of African Unity, at its Sixteenth Ordinary Session in Monrovia, Liberia, from 17 to 20 July 1979.

administrative proceedings affecting children should be capable of facilitating communication that enables children to be heard.[238] This can be accomplished either personally or through legal representation with his/her views being considered.

The Protocol to the African Charter on Human and People's Rights on the Right to Women recognizes the challenges faced by women in Kenya in their quest to access justice arising largely from patriarchy.[239] The Protocol guarantees gender equality in Courts of law.[240] The obligation of the state is to eliminate discrimination of every nature pertaining to women using all measures at its disposal not limited to statutory, policy and institutional reforms to achieve the goals of the protocol.[241] The measures would comprise of the following: mainstreaming non-discrimination in national laws, it should further ensure gender equality.[242] Where legislation exists, it would need to be strengthened and where none exists, states would be required to create new laws that are designed curb discrimination against women.[243]

3.3 Access to Land Justice in National Law

Access to justice in Kenya is guaranteed by the Constitution of Kenya, the ELCA, the Civil Procedure Act and the Legal Aid Act. This section analyses these statutes to determine their effectiveness in the context of enabling access to legal services. Access to justice is an important constitutional principle in Kenya's 2010 Constitution as illustrated by the establishment of the ELC,[244] The Constitution also provides a foundation for the reception of international and

[238]ACRWC, Article 4.
[239] Shackel and Fiske, *Supra* note 225 at 9.
[240] Adopted by the 2nd Ordinary Session of the Assembly of the Union Maputo, 11 July 2003.
[241]Article 2(1)(a).
[242] Article 2(1)(b).
[243]Article 2(1)(a).
[244] The Constitution of Kenya, Article 60.

regional laws in access to justice.[245] The Constitution recognized Kenya as a monist state to the extent that all international conventions and treaties ratified by the Country become part and parcel of its legal framework.[246]

The foundation of the Constitution in access to justice is that it binds all state organs and all persons[247] calling on Courts to interpret the Constitution in a manner that upholds human dignity, equity, equality and freedom.[248] The Constitution of Kenya has an express provision that guarantees access to justice with an added duty to make it affordable especially for the marginalized groups (women, the youth, minorities and PWDs) in society.

Globally and Kenya in particular, access to justice is dependent on the ability of an individual's awareness of their rights under the Constitution and the ability to seek redress. In fulfilment of this and in accordance with Article 22(1), it enables every person to institute a claim of either a violation of a right or threats to intended violation. Rules for the actualization of these provisions by Courts should meet certain requirements (rules of natural justice and unreasonable restrictions like procedural technicalities) are envisaged to be made by the Chief Justice.[249] The gist of Article 159(1) is that justice should be delivered on time and without unnecessary procedures and technicalities.

3.3.1 The Jurisdiction of the ELC

Article 23(2) has enhanced the jurisdiction of ELC to determine applications for redress, denial and violations of fundamental rights and freedoms. In so doing Court have been empowered to

[245] Ibid Article 2(5) (6).
[246] Ibid.
[247] Ibid, Article 20(1).
[248] Ibid, Article 20(4)(a).
[249]Constitution of Kenya, Article 22(3).

grant various remedies like compensation[250] that are key in addressing historical land injustices and access to justice. The Constitution envisages expeditious decision making in our courts and where there is inability to afford legal costs, the state should provide mechanisms to address this gap.[251]

Section 4 of ELCA read together with Article 162(2) (b) of the Constitution, establish the ELC as a superior court of record. The ELCA contemplates the establishment of at least one ELC station in each of the 47 Counties, but currently more than half of the Counties do not have any ELC station. This was meant to facilitate access to land justice to the marginalized and vulnerable communities in the Country as well as address physical distance and cost of attending courts for litigants in rural areas. However, this has not been achieved as the ELC is available in 26 out of 47 Counties mainly due to the shortage of judges and budgetary constraints.

The ELC's jurisdiction is limited by the Constitution to and disputes and issues that relate to the environment.[252] The ELC Act expounds that jurisdiction.[253] The ELC has both original and appellate jurisdiction in respect of all disputes in land.[254] The Act[255] has gone a step further to elaborate, as to what a matter touching on environment and land is. The architect of the ELC reserved ADR a pride of place[256] giving it the power to give adopt these mechanisms where appropriate in matters before the court.[257] This is despite the absence of legislation on ADR in the resolution of land conflicts. The ELC invokes the provisions of section 59 of the civil procedure Act when referring a matter to the Court annexed mediation.

[250] Ibid, Article 23(3)(a).
[251] Ibid, Article 50(2)(e).
[252] Ibid, Article 162(2)(b).
[253] ELCA.
[254] Ibid, Section 13.
[255] Ibid, Section 13(2).
[256] J. Osogo, Ambani and M. Kiwinda Mbondenyi, *The New Constitutional Law of Kenya-Principles, Government and Human Rights* (Clari-Press Ltd: Nairobi, 2012) at 144.
[257] ELCA, Section 20.

The Constitution[258] read together with the Act[259] permits the use of ADR as a dispute settlement mechanism. The ELC is guided by the principles of intergenerational equity, international co-operation, intergenerational and intergenerational equity and ultimately public participation.[260]

3.3.2 Legal Aid in Access to Justice

Assisting the vulnerable to access justice is viewed as a mechanism to reduce the cost of securing land rights. The Legal Aid Act[261] was passed in 2016 to facilitate access to justice for those who are unable to do so. In addition, it enabled the formation of the National Legal Aid Service; to provide legal aid with a vision towards facilitation of access to justice for the marginalized communities.

Some of the objectives for statutory intervention included the creation of a set of policies, legislations and administrative structures that would enable quality access to justice for all Kenyans. The Act was also meant to provide a legal service that is of good quality in terms of cost, timely for the poor, marginalized and vulnerable using mechanisms that provide public awareness programmes in the promotion and institutionalization of alternative options including the paralegal approach in access to justice.

Another objective was the promotion of ADR as well as TDRM and establishment of an implementation, monitoring, regulatory and support framework for legal aid that creates awareness services in the country. Ultimately it would ensure the disbursement of adequate allocation of resources (financial, human and technical) to roll out a robust legal aid programme in the country.

[258] Constitution of Kenya, Article 159(2).
[259] ELCA, Section 20.
[260] Ibid, Section 18.
[261] No. 6 of 2016.

Two proposals to actualize the provisions of articles 48 and 159(2) (c) of the Constitution have been made. The National Assembly has published the Alternative Dispute Resolution Bill, 2019, while the Senate on its part has published the Mediation Bill, 2020 to provide for dispute resolution in matters of a civil nature through mediation, TDRM and conciliation. The enactment of the Bill into law would enhance access to land justice in Kenya. Using ADR in dispute resolution and land disputes would minimize delays in justice delivery in the ELC.[262] It would also provide an avenue for effective settlement of land disputes amicably. However, the two bills are yet to be enacted and therefore have no force of law in Kenya.

3.4 Challenges in Access to Land Justice

3.4.1 Legal, Institutional and Structural Challenges in Access to Land Justice

The legal framework shows certain gaps that act as barriers for access to land justice for the marginalised, the poor and the vulnerable. Notably the bulk of the barriers are institutional and structural where Courts are located in urban areas putting a cost for the marginalized to access them. The other barriers are with respect to poverty, complex laws and technicalities of procedure, lack of ADR legal framework and delays in the administration of justice, lack of knowledge of rights, physical access and bias towards women.

3.4.2 Poverty

Poverty is a major barrier to access to land justice in Kenya as it makes it difficult to create awareness of the law, harder to attain physical access to court and tribunals and to counsel. Additionally, poverty makes it difficult to access justice without access to legal counsel or even

[262] Renson Mulele Ingonga, 'Alternative Dispute Resolution in Environmental Disputes: A Case of the Specializes Environment and Land Court in Kenya, (2018) 2 (1) *Journal of Conflict Management and Sustainable Development.*

judicial services arising from lack of financial or economic accessibility. Poverty, illiteracy and discrimination, are formidable obstacles in accessing justice in land.[263] This explains why the elimination of poverty is a key goal in achieving SDGs.[264]

Poverty makes it difficult for one to access justice and its prevalence may exacerbate existing poverty.[265] The existence of poverty worsens other structural failures leading violation of economic and social rights that limits their ability to avoid exploitation.[266] Poverty leads to other obstacles like limited literary levels, information, political rights, stigma and discrimination.[267] Socially marginalized and disadvantaged people are more severely affected with poverty thus access to justice becomes a key empowerment tool.[268]

3.4.3 Slow and Delayed Legal Services

Delays in the management and administration of cases in the Courts are caused by delays in legal procedures in Kenya which is tantamount to denial of justice.[269] By 2010, Kenya's backlog of cases as a demonstration of delayed justice was in excess of 1 million cases out of which 60% comprised of land cases[270] due largely to inadequate number of judges in the ELC to expeditiously deal with land cases.[271] As a consequence, litigants are compelled to wait for long periods of time to either get hearing dates or get a decision. The other reasons for the delays include; unnecessary adjournments, misplaced or lost files but in essence files disappear as a deliberate move to lose a case as a means of soliciting for bribes.

[263] M Sepúlveda, *Equality and Access to Justice in the Post-2015 Development Agenda* (UN: New York, 2013) at 7.
[264] Ibid.
[265] Ibid.
[266] Ibid.
[267] Ibid.
[268] Ibid.
[269] Cappellete M, The Judicial Process: A comparative Perspective (1085) 243.
[270] Ibid
[271] Okong'o, *Supra* note 82 at 3.

3.4.4 Technicalities of the Law

It has been noted above that the law sometimes encouraged and legalized dispossession and displacement of Africans from their ancestral land. This included in circumstances where land had been stolen as it happened to the Maasai and the Kikuyu. Technicalities of the law serve as barriers in accessing land justice[272] as it focuses on individual ownership and rights by disregarding community or group rights interests and sustainable land use.[273]

Laws that regulate access to land in Kenya are not only complex but procedures that regulate land ownership as well. Insufficient access to justice in this context is caused by multiple laws, gaps in law, non-formal laws (customary and other TDRM) and formal laws and institutions and uncertainty of legal enforcement.[274] In the context of land, many people are not aware of government structures or modes of appeal. The latter are technical and costly to the majority of those who desire to use the Courts. The option of reliance on traditional leaders presents an added disadvantage as customary laws are not just different with varied compliance mechanisms but lack accountability regimes as well.[275]

3.4.5 Inadequate ADR Legal Framework

ADR has been outlined above as a major mechanism that would facilitate access to justice. The CoK[276] and the ELCA provide for ADR that would enable the poor and marginalized access justice. ADR has many advantages especially when compared with litigation such as affordability, expedience, ability to maintain relationships and the use of an impartial

[272] Mbote, S*upra* note 4 at 12.
[273] Ibid.
[274] Ibid at 4.
[275] Ibid.
[276] Constitution of Kenya, Article 159.

mediator.[277] Moreover, ADR allows communities to use traditional dispute mechanisms that would be key for purposes of addressing disputes in marginalized areas of the Country.

However, Kenya does not have a legal regulatory framework for ADR which therefore limits the application of ADR in addressing justice in land for the marginalized communities. Currently two bills are before the National Assembly and the Senate namely; the Alternative Dispute Resolution Bill 2019 and the Mediation Bill, 2020 have been published but yet to be passed into law. The two bills seek to mainstream dispute resolution through ADR by the establishment of a legal framework.

3.4.6 Corruption in the Judiciary

Corruption and bribery are among Kenya's biggest shortcomings in accessing legal services[278] as the country ranks very high in the official global corruption index as one of the most corrupt Country globally. Characteristically the most corrupt sectors are the police, the lands department and the judiciary.[279] Corruption reinforces discrimination, enhances poverty making it difficult to enforce individual rights against the state or powerful individuals in society.[280]

Corruption hampers the fair resolution of disputes due to unfairness by discouraging the use of Courts as institutions of dispute resolution.[281] Corruption is caused by economic factors related to limit financing of justice systems, poor pay and obsolete traditional practices that are deeply ingrained in society. Many Judges and Magistrates have integrity and espouse judicial independence; however, other operators in the judicial system such as investigators, officials in

[277] Muigua, *Supra* note 8 at 16.
[278] Transparency International, *Global Corruption Barometer* (TI: London, 2010) at 7
[279] Ibid
[280] Ibid.
[281] Ashman, C. R, *The Finest Judges Money Can Buy: And Other Forms of Judicial Pollution* (Nash Publishing: Los Angeles, 1973) at 13.

the lands department and prosecutors have capacity to undermine justice delivery in land cases.[282] At the lower levels of justice system, corruption can be more vicious especially when judicial staffs are poorly paid as is often the case with its destructive effect in terms of accessing justice in land.[283]

3.4.7 Lack of Political Will

The absence of political is great impediment in accessing justice in Kenya as it undermines programs that would enable the poor access legal remedies. Political will is defined as the ability and commitment by key decision makers in support of a particular policy solution to a particular problem[284] in this case access to justice. Majority of perpetrators of land injustice in Kenya are well connected individuals wielding a lot of financial and political power in the Country.[285] Victims of infringement of land rights on the other hand are poor and under privileged lot with little capacity to challenge land dispossession.[286] This was demonstrated in the *Endorois Case*[287] which involved complaints to the African Court on allegations that the Kenya government had illegally dispossessed land belonging to the plaintiff Indigenous community whose entire livelihood depended on it without compensation. The Court held that Kenya had violated the right of the Endorois to religion, health, culture and natural resources. The recommended restitution of indigenous land, recognition of indigenous land ownership as well as compensation for losses incurred, however the Kenya government is yet to implement the judgment.

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[282] Ibid.
[283] Ibid.
[284] Amber N W Raille, Eric D Raille and Liri A Post, 'Analysis and Action: The Political Will and Public Will Approach', (2018) *Action Research* 1-8.
[285] Ndungu Commission.
[286] Office of the AU Panel of Eminent Personalities, Back from the Brink: The 2008 Mediation Process and Reforms in Kenya (Africa Union Commission, 2014) at 4.
[287] *Ctr. for Minority Rights Dev. (KENYA) and Minority Rights Group International on behalf of Endorois Welfare Council v Kenya, Comm*, 276/2003, 27th ACHPR AAR Annex (Jun 2009 - Nov 2009).

3.4.8 Gender and Access to Land Justice

Gender discrimination constitutes a major barrier to access to land justice since women are less likely to seek a remedy for any violation of rights related to land.[288] This is worsened by the fact that only 2% of women globally own land but make up 43% of the entire agricultural work force and 60% of the total food production in developing Countries.[289] However, women in developing Countries own 20% of all agricultural land.[290]

This is part of the general pattern of women subordination in terms of property ownership and land in particular. What makes most women unable to own property is poverty since most women have limited a resource which is translated into poverty and inability to access land. This is even made worse by under representation of women in administrative of formal justice, prosecutorial branch, the police as lawyers and even judges.[291]

There is little understanding for sensibilities for violations targeting women's land rights granted that access to justice arises from limited and systemic weaknesses in the operations of most justice systems like the police, prosecutions and early responders.[292] Similarly, women are less represented in informal justice forums as all decisions therein are made by men, which is further disadvantage to women seeking justice in land.[293] Women lack the required legal safeguards that would offer them justice in general and land justice in particular.[294] Even if women manage to get judgment in their favour, implementation and enforcement of judgment would be difficult

[288] UN and FAO *Supra* note 164 at 9.
[289] Ibid.
[290] AU, *Supra* note 271 at 5.
[291] Ibid.
[292] Ibid.
[293] FAO, *Supra* note 164 at 12.
[294] Ibid.

due to complex or lengthy procedures. In certain circumstances women may fail to enforce judgments in land if it is against a man due to stigma associated with such action.[295]

3.4.9 Inadequate Legal Aid Systems

Inadequate or limited legal aid programmes in Kenya mainly due to poor organization, shortage of staff, poor budgetary allocation and lack of awareness of legal aid programs as a major barrier in access to land justice in Kenya.[296] Legal aid programmes are at the centre of access to justice without which the under privileged would not readily achieve legal remedies. This is due to inequality between the parties which in an adversarial system favours those who can afford legal counsel. For that matter trials for the marginalized would not stand the test of fairness leading to inadequate protection of rights. With a limited legal aid programme due to resource constraints arising from high cost of legal services and high poverty levels.[297]

3.5 Conclusion

Chapter three set out to investigate the adequacy of the legal, policy and institutional framework of the ELC in addressing the challenges of accessing land justice. The ELC was established by the Constitution of Kenya and the ELCA for purposes of addressing the challenges inherent in access to justice in land. Some of the challenges included complexity of the laws, duality in the legal system, mounting backlog of cases, high cost of accessing justice and issues of corruption within the judiciary.

[295] Ibid.
[296] Ibid.
[297] Ibid.

In transforming access to justice, the drafters of the Constitution believed that a specialized Court would better address cases both quantitatively and qualitatively. After the formation of the Court, the marginalised, the poor and the vulnerable groups have faced a number of challenges.

The Act and the Constitution have clothed the ELC with comprehensive jurisdiction to address environmental and land disputes. With such jurisdiction, the Court is able to address matters including those that are integrated. Although these matters have been subject to litigation, it would take some time before the Court can take its proper place in the entire Court structure. This is borne out of the fact that it has little control over the other social (literacy and education), institutional, financial, structural and geographical barriers to access to land justice that fall squarely in other government departments. However, chapter four examines how other jurisdictions have dealt with these challenges and which reforms would be required in Kenya.

CHAPTER FOUR

COMPARATIVE ANALYSIS AND BEST PRACTICES

4.0 Introduction

This chapter provides a comparative analysis with other jurisdictions and best practices in access land justice. Some of the jurisdictions chosen include: Queensland and the New South Wales (NSW) both of which are in Australia and South Africa. One important characteristic of these jurisdictions is that they have successfully addressed similar challenges faced by Kenya's ELC articulated in chapter three above. They provide lessons as to which reforms Kenya would need in its ELC to enable the achievement of access to land justice.

4.1 Environment and Land Courts in Australia

Australia is a federal state comprising six territories with separate Court systems and one of the first jurisdiction to establish specialized Courts with the mandate to deal with land matters.[298] There are federal and state duties with the federal mandate being the management of the environment and land.[299] The duty of the federal state is with respect to regulation of foreign corporations,[300] trade and commerce[301] financial trade and external affairs.[302] Whereas the mandate of the federal state is limited in the context of land and environment, the states have no such limitations and have enacted legislations on environment and land matters specific to those states. This explains why much of the legislations on environment and land are created at the

[298] Australian Statistical Geography Standards, *Australian Bureau of Statistics*, 2020.
[299] 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 *Pace Envtl. L. Rev*. 396.
[300] Australian Constitution s 51(xx).
[301] Ibid s 51(i).
[302] Ibid s 51(xxix).

individual state level.[303] However, in circumstances where federal law is in conflict with state law, the former always prevails.[304] It is in the context that this study has chosen two jurisdictions: NSW and Queensland within the Australian federation as a best practice.

4.2 The Land and Environment Court (LEC) of NSW

The LEC of NSW is a specialist environment Court established as a superior Court of record.[305] The LEC came into operation in September 1980[306] having been established under the Land and Environment Court Act of 1979. The Court is mandated to achieve rationalization and specialization in land and environmental matters.[307] Its specialization was achieved through the congruity of the subject matter jurisdiction and the appointment of judges with expertise in land and environmental matters.[308]

The test for an optimal environment and land Court include; its status, its authority, level of decisional independence, financial autonomy and independence, comprehensive jurisdiction, exclusive jurisdiction, and ADR mechanism that enables the marginalized access justice among other factors.

4.2.1 Decisional Independence of the LEC

The LEC is globally acclaimed as a best practice for being operationally independent.[309] As part of the NSW judiciary, its decisions can only be reviewed by the Appeals Court and Supreme Court in its criminal and civil divisions. Despite that the LEC has maintained its operational and

[303] Robert J. Fowler, 'Environmental Law and its Administration in Australia', (1984) 1 *ENVTL. & PLAN. L.J.* 10
[304] Australian Constitution s 109.
[305] Preston *supra* note 299 at 396.
[306] Preston *supra* note 157 at 387.
[307] Preston, B, The Land and Environment Court of New South Wales: Moving Towards a Multi-Door Courthouse', (2008) 19 *Australasian Dispute Resolution Journal* 72.
[308] Land and Environment Court Act, 1979, Section 5(1).
[309] Preston, *Supra* note 298 at 396.

decisional independence.[310] The court comprises 6 judges and another 21 technical staff with expertise in science known as commissioners.

The Court's adoption of innovative best practices[311] is a testament to its commitment to continuous improvement, including; Online sentencing data, continuing professional training for judges, multi-door Courthouse, a principled sentencing approach tailored to fit the particular crime.[312] This has enhanced its independence and legitimacy as a dependable conflict resolution institution.[313] Judges of the court are granted security of tenure until statutory retirement age to ensure they remain independent.[314] Kenyan judges generally enjoy security of tenure including those in the ELC however, their independence is undermined by lack of financial autonomy as they have to rely on Parliament for budgetary allocation.

4.2.2 Financial Autonomy of the LEC

The LEC is an independent institution that has been enhanced through its financial autonomy as it is constitutionally able to controls its budget. [315] In effect its financing is not controlled by anybody from outside the judiciary thus providing it with operational and decisional independence.[316] This enables the court fund its own innovative projects as a sign of commitment to continuous practices that improve service delivery.[317]

This model of justice delivery in NSW began in 1980 pursuant to statutory provisions in the Progressive Authorizing Legislation of 1979. This has followed by long years of experience in

[310] Pring and Pring, *Supra* note 91 at 43.
[311] Ibid.
[312] Bjällås, Ulf, 'Experiences of Sweden's Environmental Courts', (2010) 3 *Journal of Court Innovation* 177
[313] Preston, *Supra* note 90.
[314] Brian J. Preston, 'The Enduring Importance of the Rule of Law in Times of Change" (2012) 86, *Australian Law Journal* 175.
[315] Ibid.
[316] Pring and Pring, *Supra* note 91 at 43.
[317]Ibid.

good governance of judicial services, adequate budgetary allocation, comprehensive jurisdiction, political good will with an elaborate stakeholder engagement. Kenya ELC on the other hand lacks an independent budgetary allocation thus the judiciary is incapable of proceeding on an innovative path as it has to answer to Parliament.

4.2.3 Comprehensive Jurisdiction of the LEC

The LEC is a superior Court of record[318] with judges at the same rank of the Supreme Court of NSW.[319] This according to Preston satisfies an important criterion for an ELC of being a superior Court of record.[320] It enjoys wide jurisdiction in matters of land and the environment.[321] Comparatively, the Kenyan ELC has the status of the High Court as well. It is not just anchored on a statutory enactment but has been given a constitutional underpinning as well.[322]

One other important characteristic of an effective ELC is the requirement of a comprehensive and an all-encompassing jurisdiction as possible covering four different areas; territorial jurisdiction, sufficient subject-matter jurisdiction, an ability to review cases and an appeal process. The geographic (territorial) jurisdiction in the context of the LEC implies actual physical access that it should be possible for everybody to be able to access the courts without any physical inhibitions as to distance physically. With distance not being a barrier in accessing justice it is possible for LEC to hold hearings on site not limited to the establishment. This has enhanced equitable access to all involving locations in multiple places.

[318] *Supra* note 303 Section 5(1).
[319] Preston, *Supra* note 304 at 344.
[320] Ibid.
[321] Ibid.
[322] Ingonga, *Supra* note 271 at 9.

Enhancement of the court's subject matter jurisdiction over land and environment-related laws is a unique feature of the LEC. Since the LEC deals with cross cutting issues of a civil, criminal, constitutional and judicial review, its expanded jurisdiction addresses them as well.

The LEC has a wide jurisdiction in land and environmental matters. This allows it to handle any matter which does not fall within its jurisdiction under the law so long as it falls within its jurisdiction.[323] The LEC thus has jurisdiction over matters that were initially under the purview of the Supreme Court inmates of concern to land and the environmental.[324]

The court's jurisdiction is divided into various classes which include civil enforcement, criminal, judicial review, appellate, monetary compensation for land acquired compulsorily land and claims of violation to the Aboriginal land rights.[325] In exercising its appellate jurisdiction, the court has jurisdiction to hear appeals from local Courts particularly on matters of law that emanate from courts lower in rank.

The Court has used its comprehensive jurisdiction to contribute towards the development of jurisprudence in land and environmental disputes.[326] It also facilitates good land and environmental governance. The LEC has exclusive jurisdiction in land and environmental matters.[327] Notably no other Court in NSW combines a broad range of jurisdiction to determine such matters as have the LEC specializes in.

Kenya's ELC lacks the exclusive jurisdiction over matters of land and the environment as is the case with the LEC. This jurisdiction is shared with Magistrates' Courts, the only limitation being that the matters should fall in line with the Court's pecuniary jurisdiction. Furthermore, Kenya's ELC, does not have criminal jurisdiction.

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[323] *Supra* note 308 Section 16 (1A).
[324] Preston, *Supra* note 304 at 346.
[325] *Supra* note 308 Section 16 (2).
[326] Preston, *Supra* note 304 at 345.
[327] Ibid.

4.2.4 Development of Land and Environmental Jurisprudence

The LEC having a comprehensive jurisdiction with specialized judges hears many cases and has the perfect opportunity in developing land and environmental jurisprudence.[328] This is done through the decisions of the Court on matters of substantive and procedural justice presented before it.

The Courts normally interprets and applies the law thus developing the jurisprudence. The law applicable in LEC derives either from the Constitution, statute, subsidiary legislation and decided cases under the doctrine of *stare decisis*.[329] In case the current rules are inadequate to deal with a particular case, then a fresh one must be developed and applied. The development of the new rule or principal to be applied in a case is reasoning by analogy.[330]

The LEC has made several decisions by applying the principle of reasoning by analogy. In Leatch[331] the Court was of the view that since there was no provision in the Act,[332] on the precautionary principle, it was nevertheless an important omission on the part of the legislature and its inclusion cures the mischief in the statute.

Comparatively, many land cases that were lodged in the Kenyan ELC are still pending determination as the Court has been in operation for a period of less than ten years. Most of the decisions that have been delivered relate to interlocutory applications. However, the Kenyan ELC as a superior Court of record has started developing jurisprudence in its area of jurisdiction,

[328] Preston, *Supra* note 304 at 344.
[329] Ibid.
[330] Ibid.
[331] *Leatch v National Parks & Wildlife Service* (1993) 81 LGERA 270.
[332] National Parks and Wildlife Act 1974.

although most cases take long to be determined. The average lifespan of a land case in Kenya is six to eight years.[333]

4.3 Operations of the LEC

4.3.1 Public Participation in Proceedings

An important feature of the LEC is the recognition of public participation which allows the public to actively engage and the ability to access justice. Any person with access to the Court can commence proceeding for purposes of remedying or avert breaches of the law.[334] The Court has taken pride in encouraging public interest litigation (PIL) partly motivated by its decisions in terms of procedural and substantive law.[335] PIL has mainly been pushed by NGOs that have received global recognition.

4.3.2 Criminal Jurisdiction

The LEC exercises criminal jurisdiction that has been instrumental in developing sentencing mechanisms for environmental and land crimes.[336] The Court has developed unique sentencing style that has taken in mind the uniqueness of environmental crimes. In so doing, the Court has made tremendous strides in sentencing for environmental crimes in a consistent and transparent manner.[337] Furthermore, it was the first Court to develop a database for sentencing in environmental crimes.[338]

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[333]Okong'o, *Supra* note 82 at 24.
[334] Environmental Planning and Assessment Act 1979 (NSW), S. 123 (Austl.)
[335] Brian J. Preston, 'Public Enforcement of Environmental Laws in Australia', (1991) 6 *J. ENVTL. L. & LITIG*. 39
[336] Brian J. Preston, Environmental Crime, in ENVIRONMENTAL RESPONSIBILITIES LAW NEW SOUTH WALES at 3.
[337] Brian J. Preston & Hugh Donnelly, The Establishment of an Environmental Crime Sentencing Database in New South Wales', (2008) 32 *CRIM. L. J*. 214.
[338] Brian J. Preston, A Judge's Perspective on Using Sentencing Databases', (2010) 9 *JUD. REV*. 421.

4.3.3 Hybrid Dispute Resolution and Mandatory Mediation

The LEC has embraced the use of ADR and more specifically conciliation in resolving land disputes.[339] The Court thus provides for hybrid dispute resolution mechanisms or ADR process using conciliation and followed by litigation.[340] The Court provides for mandatory mediation during the appeal process.[341] The Court's case management mechanism is effective and efficient that ensures expedient justice delivery that is affordable.[342]

Jurisdictions that have successfully addressed access to justice as a general rule have used voluntary mediation as a dispute resolution mechanism. This is the case with Kenya; however, in many jurisdictions such as NSW mandatory mediation has been used instead of a voluntary system. Mandatory mediation is where the mediation process is a either a legal requirement or referral is in pursuant to a Court order in particular civil suits.[343] The widespread use of ADR by the LEC comes from the many advantages it espouses like expediency and affordability that has ensured that cost for legal services have been minimized for the poor and marginalized.[344] Some of the ADR mechanisms incorporated and encouraged by the LEC in its operations are not limited to arbitration, mediation, conciliation; early dispute resolution mechanisms.[345]

The LEC has a comprehensive ADR model of dispute resolution referred to as the "Multi-Door Courthouse" approach. This model provides various options that enable parties resolve disputes without directly involving the courts.[346] The use of the various ADR processes enhances delivery

[339] Land and Environment Court Act, 1979 (NSW) s 34 (Austl.).
[340] Brian J. Preston, Conciliation in the Land and Environment Court of New South Wales: History, Nature and Benefits', (2007) 13 *LOC. GOV'T L.J.* 110.
[341] *Supra* note 308 Section 34(3) (Austl.).
[342] Civil Procedure Act 2005 (NSW) SS 56(1), (2) (Austl.).
[343] Preston, Justice Brian J. "The Use of Restorative Justice for Environmental Crime', (2011) 35 *Criminal Law Journal* 136.
[344] Ibid at 136.
[345] Ibid.
[346] Preston, *Supra* note 304 at 72.

of quicker justice at less cost to the litigants than would be achieved through litigation.[347] Mediation is provided by the LEC at no cost.[348] The mediation service can be offered by the Court staffs that are trained as mediators and the external mediators. The Court may also refer proceedings to neutral evaluation whether parties' consent to or not. The LEC has a mandatory mediation process while mediation in Kenya is not regulated but pursuant to a prior agreement between the parties through a process referred to as the Court annexed mediation process.

4.3.4 Monitoring Mechanisms for Access to Justice

The LEC has developed performance indicators that are used not only to measure the achievements of the LEC but as monitoring process to determine the performance of the measures taken by the Court.[349] Some indicators of achievement of the Court are measured in terms of how just the process is, how quick in delivery of services and the level of affordability especially by the poor and marginalised. The objectives of the Court are set out to be equitable, effectiveness and efficiency. The evaluation of performance in these three areas made in reference to output and performance.[350] Output refers to the services delivered by the justice service while outcomes comprise the impact of the services provided either individually or in groups.[351]

Equity and equality and effectiveness and efficiency are measured in terms of accessibility to justice both qualitatively and quantitatively. Some of the attributes would include affordability, accessibility (geographical and persons with disability (PWDs), access to information, legal aid, ADR, public participation, response to peoples' needs compliance with standards for completion

[347] *Supra* note 308, Section 34.
[348] Preston, *Supra* note 304 at 74.
[349] Ibid.
[350] Ibid at 422.
[351] Ibid.

of cases.[352] Effectiveness is measured in terms of qualitative service offered. Efficiency on the other hand measures levels of attendance, clearance of cases and cost per unit of every case.[353]

Measuring 'just' resolution of cases is however more challenging in terms of quantity. Despite these, there are a number of principles that would help this process in ensuring access to justice.[354] They include, delivery of just results, the level of fairness of outcomes, offering appropriate procedures that are affordable to those in need, expeditious delivery of services, an understanding environment, being responsive particularly to the needs of the marginalized in society, certainty of outcomes, adequate financial resources and administrative structure.[355]

The achievements of the LEC in terms of facilitation of models of access to land justice are tremendous. Some of the benefits are outlined as rationalization, specialization, multiple access routes, decisional and operational independence and autonomy from the state, its response to issues of the environmental, ability to facilitate access to land justice and the environment, the development of a robust jurisprudence in environmental protection, transformation and reforming the LEC administrative structure. The court's ability to innovate is exemplary by improving on its mission statement, values and flexibility in service delivery as the cornerstone of the LEC.[356]

[352] Ibid at 423.
[353] Ibid.
[354] Harry Woolf, Access to Justice: Final Report to the Lord Chancellor on the Civil Justice System in England and Wales 2 (1996). Available at; https://books.google.co.ke/books/about/Access_to_Justice.html?id=EeC0QgAACAAJ&redir_esc=y. Accessed on 4th November 2020.
[355] Ibid.
[356] Preston, *Supra* note 304 at 29.

4.3.5 Facilitation of Access to Land Justice

The LEC has made great strides in ensuring access to land justice by being innovative through substantive decision making, practice and procedures.[357] The essence of substantive decision-making is for purposes of upholding the whole gambit of the right to access land justice. The LEC has similarly played a major role in upholding and enforcement of other rights that reinforce and complement the right to access land justice. Some these rights include access to information, public participation and rights to review legislative and administrative decisions.[358] Innovative practices and procedures have enabled the Court mitigate shortcomings in access to land justice through models such as interest litigation that has made rules on standing easy to apply. Security for costs has become an important tool the court has used to ensure total commitment by litigants in cases of grant of compensation or the costs of the proceedings.[359] Rules on who can appear have as well been made easier where parties may appear either by representation or agent authorized in writing, or in person.[360]

The practice and procedure of the court is not formal with limited technicality which delivers expeditious justice.[361] This has been in addition to making it easier persons living with disabilities access the courts, easy access to information (by information. Unrepresented litigants are assured of special attention[362] while geographical accessibility has been addressed through the use of technology.[363] The Court is flexible as it can conduct hearings where the dispute took place thus bringing justice closer to the marginalized.[364]

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[357] Ibid
[358] Ibid.
[359] Supra note 308, Pt4 r 4.2.
[360] Ibid Section 63.
[361] Land and Environment Court Act 1979 (NSW) s 38(1) (Austl.).
[362] Ibid at s 38(2).
[363] Preston, *Supra* note 304 at 35.
[364] Ibid.

4.4 Land Court of Queensland

Queensland has established a specialized Court to deal with disputes in land and the environment.[365] The aim of establishing the Court is the creation of a land Court with jurisdiction to address land disputes and other related purposes.[366] The jurisdiction of the Court is unlimited and has been described as being exclusive to matters of land within Queensland.[367] Some of the matters heard in the Court are related to claims of compensation after compulsory acquisition, it has an appellate jurisdiction for valuation purposes, mining disputes and resource related matters including the usage of cultural sites.[368] The broad range of the court's jurisdiction is derived from the Constitution and statutory law.[369]

4.4.1 **Composition and Jurisdiction of the Land Court of Queensland**

The Land Court of Queensland has unlimited monetary jurisdiction conferred by various legislative instruments.[370] The jurisdiction of the Court extents to matters of claims for compensation arising from compulsory acquisition of land, matters of appeals over valuations, appeals on matters affecting government decision making pursuant to various statutory authority. The jurisdiction is broad enough to encompass mining disputes mining and cultural rights to land.[371]

The Court is composed of the President as its head with other members[372] appointed by the Governor in Council.[373] Those appointed to the Court are Barristers or Solicitors with five years'

[365] Land Court Act No. 1, 2000, Section 4.
[366] Land Court Act, No. 1 of 200, Preamble.
[367] Ibid, section 5(2).
[368] Land Court of Queensland, *Annual Report* 2015-2016.
[369] Aboriginal and Torres Strait Islander Communities (Justice, Land and Other Matters) Act 1984.
[370] The Land Court of Queensland, *Annual Report, 2015-2016* (Attorney-General and Minister for Justice and Minister for Training and Skills: Brisbane, 2016) at 4.
[371] Ibid.
[372] Section 13.

experience in land related matters.[374] Other Judges are appointed by the JSC with powers of the judge of the Supreme Court.[375] The initial appointment is for fifteen years that could be renewed for a further fifteen years.[376] Forming part of the highest Court in the state, it is exempt from strict rules of evidence which provides a lee way to seek for evidence[377] from any reliable source other than that adduced in court. For that very act, the Court does not stick to strict adversarial with elements of inquisitorial nature.

For administrative purposes, the land Court of Queensland is divided into two divisions: the Cultural Heritage and the General Division. Similarly, the Court has an appeal division known as the Land Appeal Court established under section 53(1) of the Act. The land Court is a Court of record guided by the principles of equity and good conscience.[378]

4.4.2 Expanded Human Rights Jurisdiction

The land Court has at the same time expanded its jurisdiction to include human rights protection. In *Waratah* Coal case,[379] the Defendant applied for mining lease and environmental authority in respect of its proposed Galilee Basin Coal Mining Development. Land owners and activist groups were opposed to this application on grounds that doing so would be incompatible with human right protections. This according to the plaintiff would be a violation of the human right to property, limit the right to life among other protected rights. The decision of the Land Court in this matter was final as it concurred with the plaintiff that it had jurisdiction to entertain claims

[373] Section 16(1).
[374] Section 16(4).
[375] Section 8(3).
[376] Section 16(3).
[377] Section 7(a).
[378] Section 7(b).
[379] *Waratah Coal Pty Ltd v Youth Verdict Ltd & Others* [2020] QLC 33.

under the Human Right Act of 2019. In contrast, Kenya's ELC does not have jurisdiction to entertain matters of a human rights nature which is left to the High Court.

4.4.3 Alternative Dispute Resolution Mechanisms

The Court has recognized the use of ADR as a tool to expedite dispute resolution under Section 37(1) of the Supreme Court of Queensland Act 1991 and the Uniform Civil Procedure Rules of 1999. ADR enables litigants' access justice in a much more affordable manner through the use of a mediator. While Kenya's ELC has embraced ADR, its application is still voluntary that relies on a pre-existing agreement by the parties. Besides, the Country lacks legislation on ADR. For as long as ADR remains voluntary in Kenya, its real benefits such as reduction in backlog of cases would not be felt.

4.5 The Land Claims Court (LCC) of South Africa

South Africa established the LCC with jurisdiction to correct historical land injustices.[380] In 1996, the LCC was created to address disputes of land as a result of the land reform initiative. It thus addresses issues of restitution of land operating in areas where land injustices were prevalent. The Court uses local languages to enhance access to justice in land.[381] The Court with same status as High Court is established using national statute[382] in line with the provisions of the Constitution.[383] The court has powers to grant a wide range of remedies including; restitution, compensation, declaratory order and constitutional matters.[384]

[380] Olaf Zenker, 'South African Land Restitution, White Claimants and the Fateful Frontier of Former Kwa Ndebele', (2015) 41 (5) *Journal of Southern African Studies* 1019.
[381] Ibid.
[382] Restitution of Land Rights Act, No. 22 of 1994, Section 22 (1).
[383] Constitution of the Republic of South Africa, Section 166(c).
[384] Ibid Section 22(1).

4.5.1 Jurisdiction of the LCC

The LCC is conferred with exclusive jurisdiction on land matters.[385] The establishing Act is clear that neither the High Court nor the Magistrates' Courts have jurisdiction to handle land disputes. The Court has unlimited territorial jurisdiction throughout the Republic of South Africa with powers falling within its jurisdiction and that of the High Court.[386] Similarly, the Court has jurisdiction to deal with land matters only with environmental matters being handled elsewhere. The Court has appellate jurisdiction to hear any appeal conferred by law and any other appellate jurisdiction.[387] Comparatively, the LCC has jurisdiction to determine land disputes only while the Kenyan ELC has a dual jurisdiction on both land and environment disputes. Kenya's ELC also lacks exclusive jurisdiction over land matters.

4.5.2 Composition and Jurisdiction of the Land Claims Court

The LCC is headed by the President of the Court together with other judges appointed by the President of the Republic of South Africa in consultation with the JSC for a fixed period of time.[388] Judges serving in the LCC serve for a fixed term of period. Where the need arises, acting judges may be appointed by the President of the Republic for a specific period of time in consultation with the president of the LCC.[389] The Minister of Justice has powers to appoint acting judges in consultation with the President of the Court for a period that does not exceed one month.[390] The appointment of acting judges may be extended by the Minister of Justice at the expiry of the initial term of appointment contemplated by the Act.[391]

[385] Ibid.
[386] Ibid, Section 22(2).
[387] Ibid, Section 28N
[388]Ibid, Section 22(5).
[389]Ibid Section 22(8).
[390] Ibid.
[391] Section 22(6).

Other judges from the High Court that are not part of the LCC team may also serve in the Court for a specific period of time.[392] Whereas the appointment of judges to the Court is for a specific term, Kenyan judges appointed to the ELC have security of tenure until retirement at the age of 70 years.

4.5.3 Financial Independence of the LCC

The expenditure of the Court in respect of its administration and functioning is appropriated directly by Parliament.[393] Parliament is required by law to set aside money for the administration and running of the Court in the annual national budget of the Republic of South Africa. Unlike Kenya where the ELC does not have its own funds, the South African Court gets its own funds in the national budget. The advantage the Court has in having its own funds is that it is able to plan and fund its own activities

The Act does not contemplate any appeals unless leave is granted by the Court for that specific purpose.[394] The Supreme Court may however grant such leave where the LCC fails to do so thus the LCC or the Supreme Court of Appeal of South Africa have discretion in grant of leave so long as certain requirements set by the Court are adhered to in appropriate circumstances.[395]

Application for leave is filed in the Supreme Court of Appeal of South Africa within a period of 15 days, after the Court refusal to grant leave on appeal.[396] All appeals against a decision of the LCC are first taken to the Supreme Court of Appeal of South Africa from where a further appeal may be taken to the Constitutional Court of South Africa. Decisions arising from the LCC are

[392] Ibid Section 22(6).
[393] Ibid Section 28J (1).
[394] Ibid Section 37 (1).
[395] Ibid, Section 37(5).
[396] Ibid, Section 37(6).

conclusive to the extent that minimal appeals are encouraged to the Supreme Court of Appeals. In contrast all appeals from the ELC in Kenya end at the Court of Appeal.[397]

4.5.4 ADR in the LCC

The Restitution of Land Rights Act, 1994,[398] empowers the LCC to direct any party to a suit through the process of mediation and negotiation. Such proceedings may however be stayed pending such process in which case the Court may refer the matter for mediation as part of the case management mechanism.[399] The mediator who chairs the mediation process is appointed and paid by the LCC for the services rendered. The process of mediation at the LCC is confidential and all parties to the process are prohibited from disclosing deliberations of the mediation process which henceforth remain privileged.[400]

4.5.5 Legal Aid

Accessing justice in South African LCC has been facilitated by the passage of the Legal Aid Act to provide for legal aid to indigent litigants.[401] Any party unable to afford legal services under the South African law particularly the Legal Aid Act has automatic entitlement to legal representation by a legal aid programme funded by the state. Evidently, the programme has helped many under privileged in South Africa to access to justice in land in the LCC. In contrast, although Kenya has a national legal aid programme under the Legal Aid Act, it is not properly funded and therefore its effect on access to justice is limited.

[397] Environment and Land Court Act, 2011, Section 16.
[398] *Supra*, note. 340, Section 35A (1).
[399] Ibid, Section 35A (2) (a).
[400] Ibid, Section 35A (4).
[401] Ibid, Section 29 (4).

4.6 Conclusion

In conclusion, Kenya has a number of lessons to learn from the best practices outlined above in terms of legal innovation, hybrid dispute resolution mechanisms like mandatory mediation, an automatic state funded legal assistance mechanism, introduction of a monitoring tool to determine or measure achievements of the ELC in enabling the under privileged access justice. The success of an effective ELC depends on four critical things: first is sufficient budgetary allocation, second is the structure of the judiciary and its creativity or ability to be innovative and the development of a monitoring mechanism.

Access to land justice is not possible without proper financing for purposes of employing persons who are experts in land and environment as judges of the Court, building of Courts, rolling out programmes like ADR among other infrastructure. Judicial independence would be key so that judges are not influenced externally before making decisions. This is achieved through clear appointment criteria, proper financing and insulation from legislative and executive interference.

The Courts should have comprehensive jurisdiction and flexible enough to allow access to justice through formal and informal means like the introduction of mandatory mediation. The mandate of such a Court goes beyond issuing existing remedies but rather offer restorative justice informed by historical land injustices as clearly articulated in South Africa.

Finally, the operationalization of state financed legal aid programmes to those unable to access justice should fill the gap as is practiced in South Africa. The following chapter examines the way forward for Kenya on how it would ensure the under privileged and marginalized citizens are facilitated to access justice in land using the ELC as the reference point.

CHAPTER FIVE

SUMMARY OF FINDINGS, CONCLUSIONS AND RECOMMENDATIONS

5.1 Summary of Findings

In summary the study established that the ELC is key in the realisation of access to land justice in Kenya as it addressed some of the systemic barriers that made it difficult for a majority of marginalized Kenyans access justice in land. Secondly, while the ELC is created by the Constitution and the ELCA, these legislative frameworks on their own form an inadequate tool for access to land justice as they have merely addressed the institutional reforms rather than a holistic approach to the problem.

However, other jurisdictions (like Australia (NSW and Queensland) and South Africa) have used specialised Courts to address land matters and Kenya has important lessons to learn from the three. Finally, a number of legislative and institutional reforms would be required to enhance access to land justice in Kenya.

5.2 Conclusions

The objective of this study was to determine whether the establishment of the ELC in Kenya had translated into meaningful access to justice in land for the great majority of Kenyans. To do so, the study examined the essence of establishing the ELC as a mechanism for the realisation of access to land justice and whether its legal framework was adequate in doing so. The study also investigated how other jurisdictions have used specialised Courts to address land matters and what lessons Kenya can learn. Finally, it determined which legal and institutional reforms would be necessary in enhancement of access to land justice in Kenya.

Chapter one was the introductory part of the study. It provided a background in access to land justice that is caused by the failure to view the issue in a holistic manner. It is observed that though the regulation and management of land formed an important grievance that made it necessary for Constitutional changes prior to 2010, the remedy is not piecemeal institutional changes. Other reforms should have included physical access (for the marginalized and PWDs), financial accessibility and a comprehensive legal aid programme. The study has used the transformation theory that explains how societies should use transition justice mechanisms to change societies in this context how to access land justice.

Chapter two addressed the concept of justice and established that the concept was a broad one that encapsulates not just the physical access but financial access with elements of equity, equality, appropriateness and non-discrimination. This was borne out by the justice theories whose thesis is that justice should be equally distributed regardless of one's status, gender, race or any other consideration.

The complexity of access to justice was brought to the fore due to the issues involved (such as complicated and numerous laws) and the amount of social, economic, cultural and political interests that have to be balanced. As a consequence, the land question made it difficult for the people of Kenya to achieve justice in land. Some of the barriers were set out as backlog of cases, inadequate and complex laws, corruption and political bias, lack of political will and the gendered nature of access to justice in land that is against women.

The creation of the ELC was a transformative under the Constitution designed to address the challenges outlined above. This establishment was justified on several fronts, like the use of expert judicial officers, the possibility of specialization to achieve efficiency and effectiveness of decision making. Last but not least is the possibility of reducing the backlog of cases. However,

the creation of a specialized Court has its own downside, for a start it diverted resources from general Courts that already experienced limited resources. Staff working in this division may begin to think that they deserve special preference which may dampen morale in the general Courts. Furthermore, since they work in very close proximity to each other, it may easily lead to abuse of power and ultimately corruption. .

Chapter three established that the ELC legal, policy and institutional framework is not adequate in addressing the challenges of access to land justice. This is despite the ELC was created for purposes of addressing the challenges inherent in access to land justice. Some of the challenges include complexity of the laws, duality in the legal system, mounting backlog of cases, high cost of accessing justice and issues of corruption within the judiciary. In an effort to transform access to land justice, the drafters of the Constitution believed that a specialized Court would better address disputes quantitatively and qualitatively.

The CoK and the ELCA have clothed the ELC with comprehensive jurisdiction to address environmental and land disputes. With such jurisdiction, it was envisaged that the Court would be able to address matters including those that are integrated. However, the Court experienced certain challenges emanating from conflicting jurisdictions with the High Court and the Magistrates' Courts.

Although these matters have been subject to litigation, it would take some time before the Court can take its proper place in the entire Court structure. This is borne out of the fact that the Court had very little control over the other social (literacy, poverty, cultural practices and education), institutional, financial, structural and geographical barriers to access to land justice that fall squarely in other government departments.

Chapter four addressed comparative study and best practices and concluded that Kenya has a number of lessons to learn from the best practices outlined above in terms of legal innovation, hybrid dispute resolution mechanisms and mandatory mediation, government funded legal aid programmes and the creation of a monitoring tool to determine or measure the extent of access to justice.

It was made clear that the success of an effective ELC depended on four critical things: first was sufficient budgetary allocation, second was the structure of the judiciary and third was its creativity or the ability to be innovative in the development of a monitoring mechanism. Access to land justice was not possible without proper financing for purposes of employing persons who are experts in land and environment as judges of the Court, building of Courts, rolling out programmes like ADR among other infrastructure.

Judicial independence would be key so that judges are not influenced externally before making decisions. This would have been achieved through clear appointment criteria, proper financing and insulation from legislative and executive interference. The Courts should have comprehensive jurisdiction and flexible enough to allow access to justice through formal and informal means like the introduction of mandatory mediation. The mandate of such a Court goes beyond issuing existing remedies but rather offer restorative justice informed by historical land injustices as clearly articulated in South Africa. Finally, for those who were still unable to access justice, legal aid programmes should be able to fill this gap as is practiced in South Africa.

5.3 Recommendations

5.3.1 Parliament

5.3.1.1 To Enhance Judicial Independence

It is recommended that judicial independence should be enhanced to enable the ELC achieve its stated objective of enabling access to justice for vulnerable communities. Although Article 160 of the Constitution guarantees judicial independence, it is consistently being undermined by Parliament through the reduction of its budgetary allocation. This is important because the judiciary relies on the good will of Parliament for its budgetary requirements. In a number of times, Parliament has reduced judicial allocation which affects the delivery of justice. This has the effect of jeopardising judicial independence.

5.3.1.2 Enhance Jurisdiction of the ELC

Parliament needs to enhance the exclusive jurisdiction of the ELC to enable it comprehensively deal with land and environmental disputes. Increasing it to include criminal and human rights jurisdiction would enable the ELC address environmental offences and other related rights within various Acts of Parliament. This mandate should not be shared with Magistrates' Courts that is currently the case. Kenya' ELC lacks criminal jurisdiction that would enable it prosecute offences in the ELCA, this would be in addition to human rights jurisdiction.

5.3.1.3 Mandatory Mediation

Kenya's needs to introduce a mandatory mediation framework where litigants using the judicial system are compelled to undergo mediation as a precondition before the commencement of a suit. This is because mandatory mediation reduces the issues that a Court of law would look at.

Kenya does not have a law on mediation and therefore it would be a requirement for Parliament to pass such a law to regulate mediation practice in the Country. Although currently mediation is a voluntary process in most jurisdictions including Kenya.

5.3.1.4 Passage of ADR Legislation

The National Assembly and the Senate should move with speed to pass laws that would regulate the application of ADR in our legal system. The Alternative Dispute Resolution Bill of 2019 and the Mediation Bill, 2020 published by the National Assembly and the Senate respectively are yet to pass the required procedures before becoming law. The passage of the two would mainstream and cement the application of ADR in civil dispute resolution in Kenya.

5.3.1.5 Expansion of Legal Aid

The necessity to expand legal aid cannot be over stated because for most persons who are marginalized, it forms the difference between getting justice or missing it altogether. This is because much of the justice delivery infrastructure is found in the urban centres leaving the rural areas unattended. Kenya needs to follow the example of South Africa in its Legal Aid Act that provides for automatic legal aid to those who cannot afford legal counsel.

5.3.1.6 Enhancement of Legal Aid Programme

It is recommended that Parliament should operationalize and enhance legal aid programme to ensure that all those who are unable to afford legal counsel are automatically provided with one. The high cost of legal services is a major barrier in access to justice despite the passage of the

Legal Aid Act in 2016. However, failure to operationalize the Act for various reasons makes it difficult for Kenyans in marginal areas to access land justice.

5.3.2 The Judicial Service Commission

5.3.2.1 Devolution of ELC

The JSC should devolve the services of the ELC throughout the Country. Although Article 6 of the Constitution and the ELCA provide for devolution of services including legal services, the ELC has not been sufficiently devolved to all Counties in the Country. In the alternative courts of a similar jurisdiction such as the High court should be empowered to hear land cases in counties where the ELC is lacks presence.

5.3.2.2 Increase the Number of Judges

It is recommended that the number of judges should be increased to reduce the backlog of land cases in the Courts throughout the Country. This would be in addition to devolution, the JSC should employ more judges to the ELC to ensure affordability of legal services and expedient decision making and ultimately access to justice for marginalized Kenyans. The ELC has few judges who are not able to discharge their services as mandated by the Constitution and the ELC. This would ensure a reduction in the backlog of land cases in the Courts.

5.3.3 The Judiciary

5.3.3.1 Develop a Monitoring Mechanism for Access to Land Justice

Kenya's judiciary needs to develop a mechanism to monitor tools for access to justice since the best way to measure the achievements of access to justice in land using the ELC is the

development of performance indicators. As an illustration, the LEC has developed a monitoring process to determine the performance of the measures taken by the Court. The achievement of the Court is subject to indicators of just, quick and cost-effective resolution of issues.

Equity and effective and efficiency are measured in terms of accessibility to justice both qualitatively and quantitatively. Some of the attributes would include affordability, accessibility (geographic, persons with disability (PWDs), access to information, legal aid, ADR, public participation, response to peoples' needs compliance with standards for completion of cases. Effectiveness is measured in terms of qualitative service offered. Efficiency on the other hand measures levels of attendance, clearance of cases and cost per every unit.

BIBLIOGRAPHY

Books

Ambani, J. Osogo& M. Kiwinda Mbondenyi, *The New Constitutional Law of Kenya-Principles, Government and Human Rights* (Clari-Press Ltd: Nairobi, 2012)

American Bar Association, *Access to Justice Assessment Tool: A Guide to Analyzing Access to Justice for Civil Society Organizations* (American Bar Association: Washington, 2012)

Amondi, Caroline, Legal Aid in Kenya: Building a Fort for Wanjiku, in Yash Pal Ghai and Jill Cottrell Ghai, *The Legal Profession and the New Constitutional Order in Kenya* (ICJ: Nairobi, 2014).

Ashman, C. R, *The Finest Judges Money Can Buy: And Other Forms of Judicial Pollution* (Nash Publishing: Los Angeles, 1973).

Australian Statistical Geography Standards, *Australian Bureau of Statistics*, 2020.

Banakar, R. and Travers, M, 'The power of the legal field: Pierre Bourdieu and the Law. In *Banakar, R. and Travers, M. (Eds.)* An Introduction to Law and Social Theory (Hart Publication: Oxford, 2002).

Beqiraj, J and L McNamara, *International Access to Justice: Barriers and Solutions (Bingham Centre for the Rule of Law Report 02/2014)* (International Bar Association: London, 2014)

Branch, A. and Mampilly, Z, *Africa Uprising: Popular Protest and Political Change* (Zed: London, 2015)

Cappellete M, *The Judicial Process: A comparative Perspective* (1085)

De Soto, H., *The Mystery of Capital, Why Capitalism Triumphs in the West and Fails*

*Everywhere Else (*Bantam Press: New York, 2000).

Ely, R.T, *Property and Contract in their Relations to the Distribution of Wealth* (Macmillan and Co., Limited: London, 1914).

Government of Kenya, *Sustaining Judicial Transformation: A Service Delivery Agenda 2017-2021* (The Judiciary: Nairobi, 2017).

GOK, *Report of the Commission of Inquiry into the Land Law System of Kenya* (Government Printer: Nairobi, 2002) (Njonjo Commission).

Hughes, L. *Moving the Maasai: A Colonial Misadventure* (Palgrave: Basingstoke, 2006a).

Kenya Institute for Public Policy Research and Analysis, *Economic Report for 2013* (Nairobi: KIPPRA, 2013).

Kenya Human Rights Commission, *Massive Internal Displacement in Kenya due to Politically Instigated Ethnic Clashes: Absence of Political and Humanitarian Response, No. 471/2* (KHRC: Nairobi, 2007).

Kenya Human Rights Commission, *Redress for Historical Land Injustices in Kenya: A Brief on Proposed Legislation for Historical Land Injustices* (KHRC: Nairobi, 2019)

Land Development and Governance Institute, *An Assessment of the Performance of the Environment & Land Court, 16th Scorecard Report* (LDGI: Nairobi, 2014).

Lawson, David, Adam Dubin and Lea Mwambene*, Ensuring African Women's Access to Justice: Engendering Rights for Poverty Reduction in Sub-Saharan Africa, Policy note no 2* (The Nordic Africa Institute: Uppsala, 2019).

Lyons, David, *Forms and Limits of Utilitarianism* (Oxford University Press: Oxford, 1965).

Mbote, Patricia Kameri, the Land Question in Kenya: Legal and Ethical Dimensions (Strathmore and Law Africa: Nairobi, 2009).

Mitullah, W., Odhiambo, M. & Ambani, O, *Kenya's Democratisation: Gains or Losses*? (Nairobi: Claris press, 2005).

Mumma A. The Role of Administrative Dispute Resolution Institutions and Process in Sustainable Land Use Management: The Case of the National Environmental Tribunal and the Public Complaints Committee of Kenya, In Nathalie J Chalifour, Patricia Kameri Mbote, *Land Use Law for Sustainable Development* (Cambridge University Press: 2006).

Mumma, Catherine Muyeka, *Accessing Justice and Protecting the Rights of the Vulnerable through Cultural Structures: A Tool on Working With Elders in Communities* (Kenya Legal and Ethical Issues Network: Nairobi, 2010).

Okoth-Ogendo, H. Formalising "informal" property systems: The problem of land rights reform in Africa. Commission on Legal Empowerment of the Poor, United Nations Development Programme, Nairobi, 2007

Pendergrass, John, "Role of Judiciary in Pollution Management," Guidance Notes for Tools on Pollution Management (Washington, DC: World Bank, 2010).

Pring, George (Rock) & Catherine (Kitty) Pring, 'Greening Justice: Creating and Improving Environmental Courts and Tribunals,' (2009)

Pring, George (Rock) & Catherine (Kitty) Pring, 'Environmental Courts and Tribunals: A Guide for Policy Makers' (UNEP, 2016).

Rawls J. A Theory of Justice (The Belknap Press: Cambridge. 2005).

Schetzer, Louis and Judith Henderson, *Access to Justice and Legal Needs: A Project to Identify Legal Needs, Pathways and Barriers for Disadvantaged People in NSW* (Law and Justice Foundation of New South Wales: Sydney, 2003)

Sepúlveda, M, *Equality and Access to Justice in the Post-2015 Development Agenda* (UN:

New York, 2013).

Søreide, Tina and Aled Williams, *Corruption, Grabbing and Development: Real World Challenges* (Edward Elgar Publishing, 2013).

Swynnerton, R.J.M, *The Swynnerton Report: A plan to intensify the development of African Agriculture in Kenya* (Government Printer: Nairobi, 1955).

Syagga, P. M, Public Land, Historical Land Injustices, and the New Constitution. Society for International Development (SID), 2011.

United Nations Children's Fund, *Equitable Justice for Children in Central, Eastern Europe and Central Asia* (UNICEF; Geneva, 2015)

UNDP, Access to justice practice note (Practice note), access to justice and rule of law. Democratic Governance Group, Bureau for Development Policy, UNDP, New York)

United Nations Food and Agricultural Organization, *Gender and Access to Land* (FAO: Rome, 2002).

Wasunna, Melba K, Jacqueline Okanga and Geoffrey K. Kerecha, *Advancing Capacity and Access to Justice in Kenya's Extractives Sector* (Extractives Baraza: Nairobi, 2018)

Williams, Bernard "A Critique of Utilitarianism," In J. J. C. Smart and Bernard Williams, *Utilitarianism: For and Against*. Cambridge University Press, 1973

World Bank, *A Tool for Justice: A Cost Benefit Analysis of Legal Aid* (World Bank: Washington, 2019)

Journal Articles

Baraza, Nancy, 'Legal Aid and Kenya's Legislative Framework: Towards Achievement of Access to Justice for the Poor in Kenya', (2019) 4 (4) 4 *International Journal of Innovative Research and Knowledge* 14

Bjällås, Ulf, 'Experiences of Sweden's Environmental Courts', (2010) 3 *Journal of Court Innovation* 177.

Behrens, Paul, 'None of their Business'? Diplomatic Involvement in Human Rights Involvement in Human Rights', (2014) 15 *Melbourne Journal of International Law* 3.

Boamah, F, How and why chiefs formalise land use in recent times: the politics of land Dispossession through biofuels investments in Ghana', (2014a) 41 (141) *Review of African Political Economy* 406.

Bourdieu, P, 'The Force of law: Toward a sociology of the juridical field', (1987) 38 *Hastings Law Journal* 805, Collins, J, 'Towards a socially significant theory of rent', (2017) 37 *Geography Research Forum* 148

Cabral, James E, 'Using Technology to Enhance Access to Justice', (2012) 26 (1) *Harvard Journal of Law & Technology* 243

Digiusto, Erol, 'Effectiveness of public legal assistance services. A discussion Paper', (2012) 16 *Justice Issues* 2.

Elahi, K., Stilwell, F, 'Customary land tenure, neoclassical economics and conceptual bias', (2013) 5 *Nuigini Agrisayens* 28.

Fowler, Robert J. 'Environmental Law and its Administration in Australia', (1984) 1 *ENVTL. & PLAN. L.J.* 10.

Gardbaum, S, 'The "Horizontal Effect" of Constitutional Rights' 102 (3) *Michigan Law*

Review, 2003, 388

Grajales, J, Land grabbing, legal contention and institutional change in Colombia', (2015) 42 (3-4) *the Journal of Peasant Studies*, 42, 3-4, 541-560.

Gramckow, Heike and Barry Walsh, Developing Specialized Court Services International Experiences and Lessons Learned (World Bank: Washington, 2013)

Hanks, Melissa 'Perspectives on Mandatory Mediation', (2012) 35 (3) *University of New South Wales Law Journal* 930.

Helbling, Jürg, Walter Kälin and Prosper Nobirabo, 'Access to justice, impunity and legal pluralism in Kenya', (2015) *The Journal of Legal Pluralism and Unofficial Law*

Hoggan, Chad Kaisu Mälkki, and Fergal Finnegan, 'Developing the Theory of Perspective Transformation: Continuity, Intersubjectivity, and Emancipatory Praxis', (2017) 67 (1) *Adult Education Quarterly* 48.

Jordan, Ellen R, 'Specialized Courts: A Choice', (1981) *NW University Review* 745.

Donald W. Kaniaru, 'Environmental Courts and Tribunals: The Case of Kenya', (2012) 29 *Pace Environmental Law Review*.566

Donald Kaniaru, 'Launching an Environmental Court: Challenges and Opportunities', (2012) 29 (2) *Pace Environmental Journal Review* 629

Matu, Doris, 'Improving Access to Justice in Kenya through Horizontal Application of the Bill of Rights and Judicial Review', (2017) *Strathmore Law review* 63.

Mossman, Mary Jane, 'Gender Equality and Legal Aid Services: A Research Agenda for Institutional Change', (1993) 15 (1) *Sydney Law Review* 35.

Mutunga, Willy, 'The 2010 Constitution of Kenya and its Interpretation: Reflections from the Supreme Court's Decisions', (2015) 9 *THE PLATFORM* 46-54

Nyantakyi-Frimpong, H. and Kerr, B.R, 'Land grabbing, social differentiation, intensified migration and food security in northern Ghana', (2016) 44 (2) *The Journal of Peasant Studies* 421.

Odote C. 'Kenya: The New Environment and Land Court', (2013) 4 (1) IUCN *Academy of Environmental Law E Journal 171*.

Okonmah P. D, 'Right to Clean Environment: The Case for the People of Oil-Producing Communities in the Niger Delta,' (1997) *journal of Africa Law*.

Preston, Brian J. 'The Enduring Importance of the Rule of Law in Times of Change" (2012) 86, *Australian Law Journal* 175.

Preston, Brian J. "The Use of Restorative Justice for Environmental Crime', (2011) 35 *Criminal Law Journal* 136.

Preston, Brian J. 'Public Enforcement of Environmental Laws in Australia', (1991) 6 *J. ENVTL. L. & LITIG*. 39.

Preston, Brian J, Environmental Crime, in Environmental Responsibilities Law New South Wales (2007).

Preston, Brian J. & Hugh Donnelly, The Establishment of an Environmental Crime Sentencing Database in New South Wales', (2008) 32 *CRIM. L. J*. 214.

Preston, Brian J, A Judge's Perspective on Using Sentencing Databases', (2010) 9 *JUD. REV*. 421.

Preston, Brian J. Conciliation in the Land and Environment Court of New South Wales: History, Nature and Benefits', (2007) 13 (110) *LOC. GOV'T L.J* 123.

Preston, Brian J. 'Operating an Environment Court: The Experience of the Land and Environment Court of NSW" (2008) 25 *Environmental and Planning Journal* 387.

Preston, B, The Land and Environment Court of New South Wales: Moving Towards a Multi-Door Courthouse', (2008) 19 *Australasian Dispute Resolution Journal* 72.

Preston, Brian J. 'Benefits of Judicial Specialization in Environmental Law: The Land and Environment Court of New South Wales as a Case Study', (2012) 29 *Pace Envtl. L. Rev.* 396.

Preston, B J, 'The role of the judiciary in promoting sustainable development: the experience of Asia and the Pacific', (2005) 9 (2&3) *Asia Pacific Journal of Environmental Law* 109-212.

Raille, Amber N W, Eric D Raille and Liri A Post, 'Analysis and Action: The Political Will and Public Will Approach', (2018) *Action Research* 1-8.

Refugee Consortium of Kenya, 'Refugee Insights: Promoting Access to Justice and Governance in Turkana County', (2018) 28 *Newsletter of the Refugee Consortium of Kenya*

Skavdahl, Scott W, 'Access to Justice: A Judge's Perspective', (2009) 32 (1) *Wyoming Lawyer*

Teitell, Ruti, 'Transitional Jurisprudence: The Role of Law in Political Transformation,' (2009) 106 *The Yale Law Journal* 2012.

Wasilczuk, Madalyn K, 'Substantial Injustice: why Kenyan Children are Entitled to Counsel at State Expense', (2012) 45 *International Law and Politics* 291.

Wily, AlkinL,'The Law Is to Blame": The vulnerable status of common property rights in Sub-Saharan Africa', (2011)42(3) *Development and Change* 733.

Zhao, Chao and Dan Banik, 'Access to justice and Social Unrest in China's Countryside: Dispute on Land Acquisition and Compensation' (2014) 6 *Hague Journal on the Rule of Law* 254.

Zenker, Olaf, 'South African Land Restitution, White Claimants and the Fateful Frontier of Former Kwa Ndebele', (2015) 41 (5) Journal *of Southern African Studies* 1019.

Online Sources

Access to Justice Taskforce, Australia "A strategic Framework for Access to Justice in the Federal Civil Justice System" 2009.Available at;https://www.ag.gov.au/sites/default/files/2020-03/A%20Strategic%20Framework%20for%20Access%20to%20Justice%20in%20the%20Federal%20Civil%20Justice%20System.pdf. Accessed on 17th October 2020.

Asian Development Bank. "Environmental Governance and the Courts in Asia" (June 2012). Availableat;http://www.adb.org/publications/environmental-governance-and-courts-asia-Asian-judges-network-environment. Accessed on 12October 2020.

Global Corruption Barometer, Transparency International, 2010. Available at; https://www.transparency.org/gcb201011/in_detail. Accessed 12th October 2020.

Environmental Adjudication in the 21st Century. A presentation made at the Symposium held in Auckland New Zealand on 11th April 2017, available at <https://www.environmental-adjudication.org/assets/Uploads/General/Okongo-PPT2.pdf>Accessed on 13th October 2020.

Henke, Friederike, "Specialised Court Systems. Comparative Paper Analysing the Possibilities of Implementing a Specialised Court System in India," Available at;http://www.fdrindia.org/publications/CourtSystemInIndia_PR.pdf. Accessed on 10 October 2020.

Koissaba, Ben, *Elusive Justice: The Maasai Contestation of Land Appropriation in Kenya: A*

Historical and Contemporary Perspective,

The LEC's description of these at www.lec.justice.nsw.gov.au/Pages/about/strategic_ innovations.aspx.

Land Development & Governance Institute, 'An Assessment of the Performance of the Environment and Land Court: 12th Scorecard Report' (2013). Available at; http://ldgi.org/index.php/media-centre/reports-and-publications/38-ldgi-12th-scorecard-report-assessment-of-the-environment-a-land-court/file. Accessed on 8th July 2019.

Lima, Valesca & Miriam Gomez; Access to Justice: Promoting the Legal System as a Human Right. Available at: https://www.researchgate.net/publication/338423278.Accessed on 18th October 2020.

Mezirow, Jack, "Transformation Theory: Postmodern Issues. Adult Education Research Conference, 1999, available at https://newprairiepress.org/aerc/1999/papers/29. accessed on 10 October 2020.

Muigua, Kariuki, *Access to Justice and Alternative Dispute Resolution Mechanisms in Kenya*. Availableat:file:///C:/Users/HP/Desktop/Kariuki%20Muigua%3B%20Access%20to%20Justice%20&%20ADRM%20in%20Kenya.pdf. Accessed on 18th October 2020.

Muigua, K., '*ADR under the Court Process: A Paradox?'* Alternative Dispute Resolution and Access to Justice in Kenya (2015) 125-127 available at http://kmco.co.ke/wp-content/uploads/2018/09/pdf.Accessed on 2 November 2020.

Mutunga Willy, The 2010 Constitution of Kenya and its Interpretation: Reflections from the Supreme Court's Decisions. Available at; http://www.saflii.org/za/journals/SPECJU/2015/6.html, accessed on 6th November 2020.

Njuguna, James Ndungu, *Adopting Information Technology in the Legal Profession in Kenya as a*

Tool of Access to Justice, 2021. Available at http://journalofcmsd.net › uploads › accessed on 5 September 2021.

Oloo, Adams, Elections, representations and the new Constitution.

Available at;https://www.sidint.net/sites/www.sidint.net/files/docs/WP7.pdf. Accessed on 16th October 2020.

Young, Laura A. and Korir Sing'oei, *Access to Justice for Indigenous Peoples in Africa*, available

at https://academiccommons.columbia.edu› accessed on 10 September 2021

Zimmer, Markus B, Overview of Specialized Courts. Available

at; file:///C:/Users/HP/Downloads/SSRN-id2896064.pdf. Accessed on 21st October 2020.

Conference/Workshop Papers

OECD, Understanding Effective Access to Justice 3-4 November 2016 OECD Conference Centre, Paris. Workshop Background Paper.

Okong'o, Samson,*' 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,

Preston**,** Brian J **'***Characteristics of Successful Environmental Courts and Tribunals:* A Presentation to the Eco Forum Global Annual Conference Guiyang 2013: The 3rd Environmental Justice Seminar 19-21 July 2013, Guiyang, Guizhou, China.

Reports

The Danish Institute for Human Rights, *Access to Justice and Legal Aid in East Africa: A comparison of the legal aid schemes used in the region and the level of cooperation and coordination between the various actors.* A report by the Danish Institute for Human Rights, based on a cooperation with the East Africa Law Society, December 2011.

Hughes, T, Managing group grievances and internal conflict: Ghana country report. Working Paper Series, Netherlands Institute of International Relations 'Clingendael. Conflict Research Unit. Working paper 11, 2003.

Marchiori, Teresa, *A Framework for Measuring Access to Justice: Including Specific Challenges Facing Women.* Report commissioned by UN Women realized in partnership with the Council of Europe, 2015.

Njonjo Commission Report. Available at; http://kenyalaw.org/kl/index.php?id=5697. Accessed on 14th October 2020.

Parliamentary Assembly, *Equality and non-discrimination in the access to justice*. Report of the Committee on Equality and Non-Discrimination, Council of Europe, 2015. Available at; http://assembly.coe.int/nw/xml/XRef/Xref-XML2HTML-en.asp?fileid=21753. Accessed on 22nd October 2020.

Shackel, Rita and Lucy Fiske, "Making Justice Work for Women: Kenya Summary Report" (August 2016), available at; http://opac.library.usyd.edu.au:80/record=b5365443~S4. Accessed on 2nd November 2020

State of the Judiciary and the Administration of Justice Annual Report 2011–2012," Judiciary of Kenya, 14–15, October 19, 2012.

Woolf, Harry, Access to Justice: Final Report to the Lord Chancellor on the Civil Justice

System in England and Wales 2 (1996). Available at; https://books.google.co.ke/books/about/Access_to_Justice.html?id=EeC0QgAACAAJ&redir_esc=y. Accessed on 4th November 2020.

Thesis

Angote, Oscar Amuge, *The Role of the Environment and Land Court in Enforcing Environmental Law: A Critical Examination of Environmental Caseload* (Unpublished LLM Thesis: University of Nairobi, 2018)

Ooko, Peter Oduor, *Implications of Case Backlog on Access to Justice in Kenya: The Case Study Of Mavoko Law Courts* (Unpublished LLM Thesis: University of Nairobi, 2018)