

**UNIVERSITY OF NAIROBI**  
**CENTRE FOR ADVANCED STUDIES IN ENVIRONMENTAL LAW AND POLICY**  
**(CASELAP)**

**APPRAISING SPECIALISED ENVIRONMENT COURTS IN THE ATTAINMENT OF  
ENVIRONMENTAL JUSTICE: THE KENYAN EXPERIENCE**

**BY**

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**(Z51/82357/2012)**

**A Thesis Submitted in Partial Fulfillment of the Requirements for the Degree of Master of  
Arts in Environmental Law of the University of Nairobi.**

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## **DEDICATION**

This thesis is dedicated to my family members, my brothers, sisters and my parents for their immense support, prayers and encouragement. God bless you all.

## **ACKNOWLEDGEMENT**

I am highly humbled by the steadfast love and grace of God Almighty for the inspiration, knowledge and wisdom He has bestowed unto me. I owe lots of gratitude to my supervisors for their guidance and direction that shaped the format and substance of this paper, many thanks Dr. Odote and Dr. Muigua.

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**DECLARATION**

**Declaration by the candidate**

This research thesis is my original work and has not been presented nor is it currently being presented for a degree in any other University. No part of this thesis may be reproduced without the prior written permission of the author and/or University of Nairobi.

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## **LIST OF ABBREVIATIONS**

ACHPR	African Charter on Human and Peoples' Rights
ADR	Alternative Dispute Resolution
EIA	Environmental Impact Assessment
ELC	Environment & Land Court
EIAAR	Environment Impact Assessment & Audit Regulations
EMCA	Environmental Management and Co-ordination Act
EU	European Union
ICE	International Court of the Environment
IELRC	International Environmental Law Research Center
IJIEA	International Judicial Institute for Environmental Adjudication
JSC	Judicial Service Commission
KLR	Kenya Law Report
NEMA	National Environment Management Authority
NET	National Environment Tribunal
NGOs	Non Governmental Organizations
NGT	National Green Tribunal
PCC	Public Complaints Committee
PIL	Public Interest Litigation
UK	United Kingdom
UN	United Nations
UNEP	United Nations Environment Programme
UNCED	United Nations Conference on Environment & Development
WCED	World Commission on Environment and Development

## ABSTRACT

The Constitution of Kenya 2010 ushered in a paradigm shift in regard to the principles of judicial dispensation of justice and environmental governance. Among the fundamental changes was in the exercise of the judicial authority in environmental governance through the creation of the specialized environment and Land Court.

Article 162 of the Constitution of Kenya provides for the establishment of the Environment and Land Court which has the same status and jurisdiction akin to the High Court. In 2011, Parliament enacted the Environment and Land Court Act through which the Environment and Land Court was established. In accordance with the provisions of this Act, the court is mandated to ensure reasonable and equitable access to justice in land and environment matters.

This study sought to determine whether the establishment of the specialized Environment and Land Court in Kenya as designed has improved the dispensation of justice in environmental matters. Further, it sought to assess the jurisprudence emerging from the courts with a view to discern early trends and their contribution to environmental management and sustainable development in Kenya. In this regard, the study proceeded to assess the perception of litigants, advocates, and stakeholders in the justice sector on whether the establishment of the court has improved access to environmental justice.

The study noted that despite the fact that the ELC had been established in 16 stations across the country not all cases relating to land are being filed in this court. In addition, insufficient number of judges has greatly hindered access to justice, the study also noted

that a very small percentage of the matters filed in the court were purely environmental in nature, this was majorly attributed to the lack of awareness by Kenyans on their environmental rights as articulated in the Constitution, the judiciary was blamed for not having carried out campaigns to popularize the court.

Therefore, the study proposes that the courts adhere to the establishment of the ELC by exclusively handling matters related to Environment and Land, Article 162 (2) of the Constitution created a specialized environment court that was expected to enhance the role of the courts in environmental management. The study further proposes that the Chief Justice should cease using his administrative authority in appointing judges of the court to listen to matters outside their jurisdiction as their jurisdiction stems from Article 165 of the Constitution. Section 7 of the Environment & Land Court Act sets out the criteria to be followed in appointing judges the JSC should adhere to this criteria, it should also ensure that the court is set up in 47 counties in order to ensure that access to environmental justice is enhanced across the country,

The study further proposes that the judges appoint a principal judge to the court and a registrar as stipulated in the ELC Act this will ensure that the court structures are in place thus streamlining its operations. The study further recommends that the judges in the ELC should refer minor disputes to other existing resolution mechanisms to ease backlog in the courts

## CHAPTER ONE

### The Framework of the Study

#### 1.1 Background of the Study

Access to justice in environmental matters is a key constitutional principle<sup>1</sup> in ensuring that environmental laws, regulations and principles are enforced.<sup>2</sup> The Constitution provides that every person has the right to a clean and healthy environment which includes the right to have the environment protected for the benefit of present and future generations through legislative and other measures; and to have obligations relating to the environment fulfilled.<sup>3</sup>

Over the last three decades, judicial institutions in some countries have responded to environmental challenges in innovative ways, over 350 specialized environmental courts and tribunals have been established in 41 countries.<sup>4</sup> The major persuasion towards the establishment of the specialized environment courts has been four: the access to environmental justice, the expertise and efficiency, the clear and effective environmental jurisprudence, and faster and efficient disposal of environmental litigation matters.<sup>5</sup> This has been the background and rationale for constitutional and statutory recognition of specialized courts and

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<sup>1</sup>Article 10(2) of the Constitution, 2010.

<sup>2</sup>David R. Boyd, “*The Constitutional Right to a Healthy Environment.*” *Environment: Science and Policy in Sustainable Development* (2010) at p. 56, accessed on 9 July-August, 2012).

<sup>3</sup>Article 42 of the Constitution, 2010.

<sup>4</sup>George (Rock) Pring & Catherine (Kitty) Pring, ‘Greening Justice Creating and Improving Environment Courts and Tribunals,’ Access Initiative (2009) available at [www.law.du.edu/documents/ect-study/greening-justice-book.pdf](http://www.law.du.edu/documents/ect-study/greening-justice-book.pdf), accessed on 3<sup>rd</sup> April, 2014.

<sup>5</sup>Raghav Sharma, ‘Green Courts in India: *Strengthening Environmental Governance*’, *4/1 Law, Environment and Development Journal* (2008), p. 50, available at <http://www.lead-journal.org/content/08050.pdf>, accessed on 2/7/2014.

adjudicativetriunals which in essence is based on their overarching purpose “to qualitatively improve outcomes for litigants and society”.<sup>6</sup>

The establishment of specialized environmental courts has been given weight given how the general, non-specialized court systems handle environmental and land use issues affecting development and future sustainability concerns of litigants, judges, government decision-makers, public interest non-governmental organizations (NGOs), and developers alike.<sup>7</sup>

The world has come to recognize that good environmental governance is fundamental to achieving sustainable development.<sup>8</sup> At the Earth Summit<sup>9</sup> in Rio de Janeiro in 1992, 178 governments signed the Rio Declaration.<sup>10</sup> The summit affirmed the principle that environmental decisions are best made with the participation of all relevant stakeholders’ participation that is supported by access to information and backed by access to remedies and relief.

Although discussions on environmental rights commonly focus on substantive rights, with the right to a clean and healthy environment occupying pride of place, environmental procedural rights to information, participation and access to justice have been increasingly recognized in international legal instruments.

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<sup>6</sup> David B. Rottman, ‘Does Effective Therapeutic Jurisprudence Require Specialized Courts (and Do Specialized Courts Imply Specialist Judges’, 37 court rev. 22 (2000) (emphasis added).

<sup>7</sup> George (Rock) Pring & Catherine (Kitty) Pring, ‘Greening Justice Creating and Improving Environment Courts and Tribunals,’ (2009) available at [www.law.du.edu/documents/ect-study/greening-justice-book.pdf](http://www.law.du.edu/documents/ect-study/greening-justice-book.pdf), accessed on 3<sup>rd</sup> April, 2014.

<sup>8</sup> Ibid

<sup>9</sup> UN.org, U.N. Conference on Environment and Development (1992), available at <http://www.un.org/geninfo/bp/enviro.htm>. Accessed on 30th June, 2014.

<sup>10</sup> See Robert V. Percival & Dorothy C. Alevizators eds, ‘Law and the Environment: A Multidisciplinary Reader,’ 366 (1997) Rio Declaration on Environment and Development, U.N. Doc. A/CONF.151/Rev. 1

The rationale behind access to environmental information as a key pillar of the concept of “access to environmental justice” is that access to environmental information is important because an informed public is more alert to problems, more apt to challenge the conventional wisdom of government or corporate decision-makers, more likely to organize social and political change. Further, access to decisions matters because people want and need to shape the choices that affect their well-being:- the quality of the air they breathe, the purity of the water they drink, the aesthetics beauty of their neighborhood, or the wilderness of their favourite place to hike. When people have access to justice: - where independent courts provide remedy and redress free from politics, there is greater accountability for decisions that affect the environment. <sup>11</sup>

It is against this backdrop that in 1996, the United Nations Environment Programme (UNEP) recognized the central role the judiciary plays in promoting environmental governance. This was done by developing and implementing a program to engage judiciaries of all countries in the pursuit of the rule of law in the area of environmental and sustainable development.<sup>12</sup> Further in August 2002, UNEP convened the Global Judges Symposium on Sustainable Development and the Role of Law, along with the World Summit on Sustainable Development in Johannesburg, South Africa.<sup>13</sup> The symposium drew over 120 judges from more than sixty developed and developing countries.<sup>14</sup> The judges found that, “the deficiency in the knowledge, relevant skills and information in regard to environmental law is one of the principal causes that contribute to the lack of effective implementation, development and enforcement of environmental law” at the national and local levels.

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<sup>11</sup>Dr. MuhammedTawfiq Ladan, “*Enhancing access to justice in environmental matters in common law Africa*” paper presented at the 4th city of Rio De Janeiro Attorney General’s office international congress on environmental law: - tribute to professor C. O. Okidi.; [available at www.abu.edu.ng/publications/2009-07-03-151859-3901.doc](http://www.abu.edu.ng/publications/2009-07-03-151859-3901.doc)

<sup>12</sup>Ibid.

<sup>13</sup> U.N. Environment Programme, UNEP Global Judges Programme VI (2004), available at [www.unep.org/law/PDF/UNEP\\_Global\\_Judges\\_Prog\\_New.pdf](http://www.unep.org/law/PDF/UNEP_Global_Judges_Prog_New.pdf) accessed on 2/7/2014.

<sup>14</sup> Ibid

To address such concerns, attendees pledged to improve environmental laws and to challenge environmentally damaging developments in order to fulfill their duties to defend human rights, public health, and the environment. The participants pledged to commit to the principles of the rule of law as embodied in the Johannesburg Principles on the Role of Law and Sustainable Development (the Johannesburg Principles), signed and adopted by acclamation by the judges, and presented to the then Secretary-General of the United Nations, Kofi Annan, and presented at the World Summit on Sustainable Development.<sup>15</sup>

The Principles are founded on the premise that an independent judiciary should act as the “guardian of the Rule of Law to implement and enforce applicable international and national laws ensuring that the inherent rights and interests of succeeding generations are not compromised. Globally, specialized “environmental” courts and court-like tribunals first appeared almost a century ago.<sup>16</sup> Denmark’s Nature Protection Board, created in 1917, focused on preservation of the natural environment, and Sweden’s Water Court, created a year later, focused at first on water rights issues.

The 1970s “environmental movement” generated new environmental, natural resources, and public health laws around the world, and many countries, states, and local jurisdictions created specialized environmental courts and tribunals as part of this reform. The next wave of Environmental Courts came in the 1990s and 2000s, prompted in large part by increasingly complex environmental laws and issues, growing court backlogs, and a recognized need for decision makers who were specifically trained in environmental law. For example, in New Zealand, the Environment court was established and constituted by dint of the Resource

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<sup>15</sup>Ibid

<sup>16</sup> George (Rock) Pring & Catherine (Kitty) Pring Specialized Environmental Courts and tribunals: The Explosion of new institutions to adjudicate environment, climate change, and sustainable development.

Management Amendment Act, 1996. The Court is an expert oriented court that purely addresses public interest questions related to resource management and environmental law.<sup>17</sup>

Closer home, Tanzania by virtue of the Environment Management Act, 2004 which came into effect in February, 2005 established the Environmental Appeal Tribunal to hear disputes dealing in environmental matters. This is also the case in Kenya when the National Environmental Tribunal was established by dint of the Environmental Management and Coordination Act.

At the international front specialized courts have been established too, the International Court of Justice established an environmental Dispute Resolution Chamber in 1993.<sup>18</sup> In addition, there is the dispute settlement mechanisms established under the 1982 United Nations Convention on the law of the Sea, such as the International Tribunal for the Law of the Sea and Annex VII arbitral tribunals.<sup>19</sup>

The National Environment Tribunal (NET) was established to hear grievances including a refusal to grant a license or to the transfer of a license under the Act or regulations made thereunder; the imposition of any condition, limitation or restriction on his license under this Act

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<sup>17</sup> Ibid

<sup>18</sup> See the ICJ's advisory opinion on the Legality of the Use of Nuclear Weapons, in its judgment in the Case concerning the Gabcikovo/Nagymaros dispute (Hungary/Slovakia) concerning the construction of barrages on the Danube (September 1997), and its provisional measures order in the case concerning Pulp Mills on the River Uruguay, brought by Argentina against Uruguay (July 2006); available at [www.oecd.org](http://www.oecd.org)

<sup>19</sup> See the International Tribunal for the Law of the Sea's provisional measures orders in the Southern Blue-Fin Tuna cases brought by Australia and New Zealand against Japan, addressing Japan's unilateral scientific experimental fishing (August 1999), in the MOX Plant case brought by Ireland challenging the United Kingdom's authorization of a new nuclear facility at Sellafield (December 2001), and in the Land Reclamation case brought by Malaysia against certain land reclamation activities of Singapore'

[available at researcharchive.vuw.ac.nz/xmlui/bitstream/handle/10063/thesis.pdf](http://researcharchive.vuw.ac.nz/xmlui/bitstream/handle/10063/thesis.pdf)

or regulations made thereunder; the revocation, suspension or variation of his license under this Act or regulations made thereunder; the amount of money which he is required to be paid as a fee under this Act or regulations made thereunder; the imposition against him of an environmental restoration order or environmental improvement order by the Authority under this Act or regulations made thereunder.<sup>20</sup>

The establishment of NET, despite its limited mandate, provided avenues for expeditious and cost-effective resolution of environmental disputes, decisions from NET are still, however, subject to appeals to the High Court.<sup>21</sup>

Despite the enactment of EMCA, there were still challenges in accessing environmental justice such as the procedural technicalities, length of time in litigation and the lack of expertise in environmental law.<sup>22</sup>In 2007 the then Chief Justice established the Land and Environment division, this was a division within the high court and was mainly set up to deal with the numerous land cases filed at the judiciary, the division operated like other divisions within the high court and had a head, however the judges in the division were appointed to serve in the court by the Chief Justice and could be transferred to serve in other high court divisions when the need arose.

Consequently, when the Constitution was enacted in 2010, the ELC was introduced to enhance access to environmental justice.<sup>23</sup>

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<sup>20</sup>Section 129 of the Act.

<sup>21</sup>Section 13(4) of the Act.

<sup>22</sup>See: *'The Role of Administrative Dispute Resolution Institutions and Processes in Sustainable Land Use Management: the Case of the National Environment Tribunal and the Public Complaints Committee of Kenya'*; Paper presented at the colloquium of the IUCN Academy." [Elisa1.ugm.ac.id/files/cahyonoagus/..Land\\_use\\_Law\\_sust\\_devt1.pdf](http://Elisa1.ugm.ac.id/files/cahyonoagus/..Land_use_Law_sust_devt1.pdf)

<sup>23</sup>Article 162(2) of the Constitution, 2010.

In operationalizing this provision, Parliament enacted the Environment and Land Court Act<sup>24</sup> to establish the Environment and Land Court.<sup>25</sup> The jurisdiction of the court is to deal with matters relating to environmental planning and protection, climate issues, land use planning, title, tenure, boundaries, rates, rents, valuations, mining, minerals and other natural resources; compulsory acquisition of land; land administration and management; public, private and community land and contracts, choses in action or other instruments granting any enforceable interests in land; and any other dispute relating to environment and land.

There is enhanced jurisdiction of the Environment and Land Court to even deal with constitutional issues arising out of the environment as the subject matter of litigation.<sup>26</sup> Apart from instilling the jurisdictional specialty in terms of the subject matter, the Act also emphasizes on competence or expertise specialty with regard to adjudication of environmental matters.<sup>27</sup>

The new constitutional and statutory dispensation with regard to the specialized environment court is in contradistinction with the former order in respect to the fact of non-constitutional specialization within the High Court and the jurisdiction of the specialized environmental tribunals. Under the old Constitution (now repealed) there were no specialized jurisdictions within the High Court to deal in environmental matters<sup>28</sup>, the specialized ELC is now a right step towards enhancing environmental justice as discussed hereunder.

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<sup>24</sup>Section 4 of the Environment and Land Court, Cap 12 A of the Laws of Kenya.

<sup>25</sup>Section 13 of the Environment and Land Court, Cap 12 A of the Laws of Kenya.

<sup>26</sup>Section 13(3) of the Act.

<sup>27</sup>Section 7 of the Act.

<sup>28</sup> See Section 60 of the Constitution (Repealed Act)

## 1.2 Access to Environmental Justice

Access to environmental justice to vindicate environmental rights has become a customary norm<sup>29</sup> which was restated as principle 10 of the Rio Declaration on Environment and Development, therefore the custom of ensuring access to courts for environmental adjudication is evidenced by individual national, state or provincial decisions to establish environmental courts and tribunals and procedures to ensure public access to justice for environmental claims. Concerns with how non-specialized courts handled environmental and land use issues affecting development and future sustainability have accelerated the creation of specialized environment courts and tribunals.<sup>30</sup> The issues regarding general courts including accessibility, lack of legal and technical expertise, high litigation costs, delay, quality of decisions, lack of public information and participation and public trust are all seen as limiting access to justice.<sup>31</sup>

### 1.2.1 Access to Environmental Justice under Rio Principle 10

Access to environmental justice is specifically captured and emphasized under principle 10 of the 1992 Rio Declaration of the United Nations Conference on Environment and Development (UNCED). The principle is reflected in the 1998 Convention on Access to information, public participation in decision making and access to justice in Environmental matters, adopted at Aarhus, Denmark, on 25th June, 1998.<sup>32</sup>

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<sup>29</sup>Nicholas A. Robinson, 'Ensuring Access to Justice Through Environmental Courts,' 29 Pace Envtl.L.Rev.363 (2012). Available at: <http://digitalcommons.pace.edu/pelr/vol29/iss2/1>.

<sup>30</sup>George (Rock) Pring & Catherine (Kitty) Pring, 'Greening Justice Creating and Improving Environment Courts and Tribunals,' with an introduction by Lalanath de Silva, The Access Initiative (2009) available at [www.law.du.edu/documents/ect-study/greening-justice-book.pdf](http://www.law.du.edu/documents/ect-study/greening-justice-book.pdf), accessed on 3<sup>rd</sup> April, 2014.

<sup>31</sup> Ibid

<sup>32</sup> Ibid.

Principle 10 provides that at the national level, each individual shall have appropriate access to information concerning the Environment that is held by Public Authorities, including information on hazardous materials and activities in their communities, and the opportunity to participate in decision making process. States are obliged to facilitate and encourage public awareness and participation by making information widely available. Effective access to judicial and administrative proceedings, including redress and remedy shall be provided.<sup>33</sup>

### **1.2.2 Access to Environmental Justice in Kenya**

The Constitution provides for access to justice to ensure that there is no discrimination in the dispensation of justice and enforcement of fundamental rights. The state is required to ensure that there is equal access to justice for all and that where fees is required, it is reasonable and does not impede access to justice.

Under **Article 22(3)**,<sup>34</sup> the Chief Justice is empowered to make rules for enforcement of fundamental rights and freedoms. The rules must satisfy the following criteria;

- (a) the rights of standing provided for in **Article 22(2)** of the Constitution are fully facilitated;
- (b) formalities relating to the proceedings, including commencement of the proceedings, are kept to the minimum, and in particular that the court shall, if necessary, entertain proceedings on the basis of informal documentation;
- (c) no fee may be charged for commencing the proceedings;

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<sup>33</sup>Reproduced in 31 ILM 878(1992).

<sup>34</sup>Constitution of Kenya, 2010.

(d) the court, while observing the rules of natural justice, shall not be unreasonably restricted by procedural technicalities; and

(e) An organization or individual with particular expertise may, with the leave of the court, appear as a friend of the court.

These rules have now been promulgated as the *Constitution of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules, 2013*.<sup>35</sup>

Prior to the rules, the courts have hitherto issued inconsistent and varying orders with regard to costs in similar matters. In *Peter K. Waweru V- Republic*<sup>36</sup> the High Court on the issue of costs ruled that each party should bear his own costs as it was a matter of public interest. In this case, the applicants were charged with the offences of discharging raw sewerage into a public water source and the environment contrary to the Public Health Act. They sought orders from the High Court for quashing of the criminal proceedings against them. Justice Nyamu granted the orders sought but ordered each party to bear its own costs.

However in the case of *Peter K. Mwanikivi- Peter N. Gicheha & Others*<sup>37</sup> the costs were awarded to the Plaintiffs as winners. In this case, the plaintiffs filed an application for an injunction restraining the defendants from constructing a slaughter house within Limuru Township alleging that it will affect peoples' lives negatively when it starts to operate. Justice Aluoch found for the plaintiffs and granted a permanent injunction against construction of the slaughterhouse.

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<sup>35</sup>Legal Notice No. 117 of 2013.

<sup>36</sup>High Court Misc. Application no. 118 of 2004

<sup>37</sup>HCCC. NO. 67 OF 2006

The issue of costs has affected public interest litigation matters, most litigants are usually afraid to file PIL as they are unable to meet the costs of the suit awarded by the courts. How the courts determine the issue of costs is a determining factor as it encourages citizens to bring cases in defense of the environment.<sup>38</sup>

The Honorable chief justice of Kenya took the debate on costs in public interest environmental litigation to a higher level when he said,<sup>39</sup> *‘advocates should take great interest in the litigation to the environmental law compliance and enforcement bearing in mind the public interest in a safe and healthy environment. The court shall consider establishing a rule of procedure allowing the waiver of court filing fees for the environmental law actions, which the litigants pursue for the common benefit of the society.’*

From the perspective added by the Chief Justice, it only remains for a public minded citizen to take up a public interest environmental matter to court for litigation, using pauper brief provisions. The judiciary could also go a long way in promoting public interest environmental litigation by putting in place rules allowing for the waiver of court filing fees as well.

Indeed, courts should move to a situation where public interest cases brought in favour of the environment, they hold that this is a special circumstance justifying the departure from the traditional rule that costs follow the event. All that courts should determine is whether the case meets the test for departing from the presumption that the “loser” pays.

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<sup>38</sup>Maurice Makoloo, Benson Owuor & Collins Odote, *‘Public interest environmental Litigation in Kenya; prospects and challenges,’* (2007) 4 eco governance series

<sup>39</sup>See speech by the Honourable Mr. Justice J.E. Gicheru, E.G.H., The Chief Justice of the Republic of Kenya on the occasion of the Admission of Advocates to the Roll on Thursday 7 December, 2006 pp.2.

Secondly, on the issue of *locus standi* previously, in **Wangari Maathai vs- Kenya Times Media Trust**<sup>40</sup>, an environmental case brought before the court as a public interest matter, *locus standi* was denied. The plaintiff was a resident of Nairobi and of the Greenbelt Movement, a non-governmental organization (NGO) working in environmental conservation. She filed suit on her own behalf seeking a temporary injunction to restrain the defendant from constructing a proposed complex in a recreational park in Nairobi. The court upheld the defendant's objection that the plaintiff lacked standing to bring the suit, because the plaintiff would not be affected more than any other resident of Nairobi.

The court in this case took the traditional narrow view of *locus standi*. It sought to establish whether the plaintiffs had sufficient interest as well as unique interest over and above that of the public generally.

The issue of *locus standi* has been resolved by the Constitution and EMCA. Article 22(1) and (2) of the Constitution provides:

*“22. (1) Every person has the right to institute court proceedings claiming that a right or fundamental freedom in the Bill of Rights has been denied, violated or infringed, or is threatened.*

*(2) In addition to a person acting in their own interest, court proceedings under clause (1) may be instituted by—*

*(a) a person acting on behalf of another person who cannot act in their own name;*

*(b) a person acting as a member of, or in the interest of, a group or class of persons;*

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<sup>40</sup> High Court of Kenya Civ. Case No. 6153 (1989)

(c) a person acting in the public interest; or

(d) an association acting in the interest of one or more of its members.”

In the case of *Maina Kamanda & Another vs. Nairobi City Council*<sup>41</sup> the High Court adopted a fairly liberal position on *locus standi* and granted the plaintiff the right to be heard. The applicants in this case had brought a suit in their capacity as ratepayers to the Nairobi City Council objecting to the action of the council extending its facilities to the second respondent when the latter had ceased to be the chairman of Nairobi City Commission. The applicants argued that this action amounted to a misuse of the funds of the council. Justice Akilano Akiwumi ruled that the applicant *had locus standi* stating that the ratepayer has sufficient interest as such, to challenge in court the action of a public body to whose expenses he contributes.

In the above case, the judge quoted a passage from the speech of Lord Diplock in the House of Lords case of *IRC V. National Federation of Self Employed and Small Business Ltd.*<sup>42</sup> “It would, in my view, be a grave lacuna in our system of public law if a pressure group, like the federation, or even a single-spirited taxpayer, were prevented by outdated technical rules of *locus standi* from bringing the matter to the attention of the court to vindicate the rule of law and get the unlawful conduct stopped. The AG, although he occasionally applied for prerogative orders against public authorities that do not form part of central government, in practice never does so against government departments. It is not, in my view, a sufficient answer to say that judicial review of the actions of officers or departments of central government is unnecessary because they are out their functions. They are accountable to parliament, and of

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<sup>41</sup>High Court of Kenya Civ. Case No. 6153 (1992)

<sup>42</sup>1982 AC 617 at 740.

*that parliament is the only judge; they are responsible to a court of justice for the lawfulness of what they do, and of that the court is the only judge.”*

This position was however not followed in a case brought two years later by the late Prof Wangari Mathai against the City of Nairobi. In this case, *Wangari Maathai and 2 others v City Council of Nairobi and 2 others*,<sup>43</sup> the plaintiffs sued the defendants and sought declarations that the sub-division, sale and transfer of a piece of land was irregular and *ultra vires* the powers of the City Council, and that the subsequent issuance of a Certificate of Title for the said piece of land by the Commissioner of Lands was irregular and contrary to law. The defendants resisted the plaintiff's claims, arguing that the latter had no *locus standi* to bring the proceedings before the court since they had not shown that they would suffer any private injury.

Denying the plaintiff's right to sue, the court stated that whereas a public authority may take action explicitly to protect the environment, a private litigant might only take court action to seek redress for a private injury. Any environmentally protective individual wishes to bring action to redress private injury to the public, he has to seek the permission of the AG to use his name in an action known as a “realtor action.”

However, an *obiter dicta* was noted to the contrary by the judge in the case of *Paul Nderitu Ndungu and 2 others v. Pashito Holdings Limited and Another*.<sup>44</sup> In this case, the plaintiffs, on behalf of residents of Loresho Estate, a high class Nairobi suburb, sought to restrain two real estate developers from taking possession, developing, fencing off or selling parcels of land hitherto reserved for a police station and a water reservoir until they were allocated by the Commissioner of Lands. The defendants challenged the validity of the suit arguing that the

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<sup>43</sup>HCC No. 72 of 1994, Reported in UNEP, Compendium of Judicial Decisions on Matters Relate to Environment, National Decisions Vol., 1998, 19-21

<sup>44</sup> HCC No. 3063 of 1996 Reported in The Economic Review. May 5-11, 1997.

plaintiffs had no *locus standi* to institute the suit and that it is only the AG who has legal authority to institute a suit on behalf of the public.

Rejecting this objection, the court stated obiter:

*“The submission that the AG is the only competent authority to institute a suit on behalf of the public is restrictive and may lead to miscarriage of justice.”*

The above cases were determined when Kenya did not have a law governing the environment. The lack of a clear legislative position on *locus standi* in environmental public interest suits seemed to have been resolved by the enactment of the EMCA.<sup>45</sup> The Act<sup>46</sup> clearly spells out the right of every citizen to bring an action to protect the environment and does away with the requirements of sufficient personal interest. The Act expends the requirement of *locus standi* and makes it possible for public-spirited citizens to bring suits of a public nature in courts for settlement.

In the case of *Sylvia C. Endere v Karen Roses Ltd.*<sup>47</sup>, the plaintiff filed a suit seeking orders of permanent injunction to restrain the defendant from excavating, constructing, directing or channeling storm water, waste water or other substances into the plaintiff's dam in Eldama Ravine. The defendant submitted that the plaintiff was a busybody who would not be affected by the rehabilitation of the dam in question, prayed for the suit to be dismissed. The learned judge found that an EIA had not been conducted, for which reason it concluded that:

*“It is clear that the plaintiff is not a busybody. She is within her rights as provided for under Section 3 of EMCA to enforce the provisions of the said Act if she was of the view that the*

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<sup>45</sup> Act Number 8 of 1999.

<sup>46</sup> Section 3 of the Act.

<sup>47</sup> HCCC (Nakuru) No. 298 of 2005. Reported on [2006] eKLR

*defendant was likely to contravene the provisions of the said Act and cause harm to the environment.”*

This trend was further upheld by a three judge-bench of the High Court of Kenya in the case of *Samson Lereya and 800 Other v The AG and 2 Others*<sup>48</sup> where the plaintiffs main prayer was for orders for the eradication of a weed called *ProposisJuliflora*, which was said to be invasive, in Marigat and Mugutani administrative divisions of Baringo District of the Rift Valley Province. One of the objections raised by the defendants was the fact that the plaintiffs had no specific interest in the subject matter and therefore, lacked *locus standi*. The learned judges had this to say about the plaintiffs’ *locus standi*:

“On the basis of section 3(3) and 4 of EMCA, we hold that the preliminary objection of lack of *locus standi* has no merit and it is hereby dismissed.”

The Constitution of Kenya 2010 has embodied environmental provisions that are included in Chapter 4 entitled rights and fundamental freedom, Chapter 5 under Environment and natural resources and Chapter 10 under Judicial and Legal system. The right to a clean and healthy environment is now firmly embedded in the Constitution and is not just a statutory right as it previously existed under EMCA.<sup>49</sup>

The constitutional environmental right includes “having the environment protected for the benefit of present and future generations through legislative and other means, particularly those contemplated in article 69. Article 69 (a) of the Constitution acknowledges the role of the state in ensuring sustainable development as well as the importance of equitably sharing benefits derived from the environment.

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<sup>48</sup>HCCC No. 115 of 2006. Reported in [2006] eKLR.

<sup>49</sup>Article 42 of the Constitution, 2010.

The present Constitution, in Article 69 (c), safeguards indigenous knowledge systems and acknowledges their role in the conservation of biological diversity. Article 69(h) of the Constitution obliges government to ensure that the environment and natural resources are utilized for the benefit of the people of Kenya.

While the right to a healthy environment is what people commonly think about when considering environmental rights, environmental procedural rights to information, participation, and access to justice have been increasingly recognized in international law through treaties and conventions.<sup>50</sup> Greater protection to environmental rights is now guaranteed and further enhanced by mechanisms for enforcement by allowing every person access to justice through public interest litigation and by assigning courts special roles in protecting environmental rights.<sup>51</sup>

Procedural rights enhance accountability and transparency in decision-making by the policy makers and afford protection to minorities and the marginalized groups who are the most adversely affected groups by environmental harm. One may thus hold the government accountable for failing to protect their right to a clean and healthy environment; if there is failure to avail requisite information; if one is denied an opportunity to participate in environmental decision-making processes and if one is denied access to courts for an environmental harm.<sup>52</sup>

Therefore, the role of procedural rights cannot be gainsaid in the environmental context. In *Musa Mohammed Dagane & 25 Others*<sup>53</sup>, procedural rights were in focus, the court

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<sup>50</sup>See Paper on Human Rights and the Environment, 13<sup>th</sup> Informal ASEM Seminar on Human Rights (Asia-Europe Meeting). 21-23 October, 2013. Copenhagen, Denmark.

<sup>51</sup>Muigua Kariuki and Kariuki Francis: 'Safeguarding Environmental Rights in Kenya,' available at [www.kmco.co.ke](http://www.kmco.co.ke) accessed on 2/7/2013.

<sup>52</sup>Ibid at page 8

<sup>53</sup>HCCC. NO. 56 OF 2009 Embu High Court

observing that the petitioners had not been granted an opportunity for genuine consultation, there was no adequate and reasonable notice prior to the scheduled date of eviction and no alternative land or housing was made available in reasonable time to all those affected. There was also no representation from an independent organization or the applicants during the forcible eviction to avoid casualties and claims of illegality or provision of legal remedies made available to the applicants. The court also observed that the applicants were also not granted legal aid in order for them to seek legal redress from the court, and there was no evidence that their consent was sought before the action.

### **1.2.3 Supportive Principles of Environmental Justice**

#### **1.2.3.1 Access to Information<sup>54</sup>**

The rationale for information access is simple without access to information held by state actors; it is often difficult for civil actors to participate in environmental governance since they lack sufficient knowledge of what is happening.<sup>55</sup> In Kenya, access to information is a constitutional right for every citizen, citizens have the right to access information held by the state. While the Constitution recognizes this right, it is important to improve access to environmental information by revising some relevant legal instruments with a view to making the right to information explicit, the government should be obligated to collect and distribute environmental information, whereas in certain areas of laws restrictions on the freedom of access to information helps secure national security, when applied to environmental justice, access to information if not liberally granted and interpreted can lead to the covering up of abuse and

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<sup>54</sup>Constitution of Kenya 2010, Article 35

<sup>55</sup> W. Baber, '*Ecology and Democratic Governance: Toward a Deliberative Model of Environmental Politics*', 41(3) social science Journal 331 (2004)

mismanagement as opined by professor Patricia KameriMbote, the restrictive laws must therefore be repealed and or amended accordingly. <sup>56</sup>

### 1.2.3.2 Public participation<sup>57</sup>

Participation is premised on a concern that citizens and non-governmental actors should obtain greater control and power over issues of concern to them. Public participation as a national value is an expression of the sovereignty of the people articulated in **Article 1** of the Constitution. The golden thread running through the Constitution is one of sovereignty of the people of Kenya and **Article 10** that makes public participation a national value is a form of expression of that sovereignty. **Article 94** vests legislative authority of the people of Kenya in Parliament whereas **Article 118(1)(b)** obliges the legislature to “*facilitate public participation and involvement in the legislative and other business of Parliament and its committees.*”

Article 69 (1) (d) of the Constitution states that *the State shall encourage public participation in the management, protection and conservation of the environment.* One of the ways to ensure public participation in environmental governance is through environmental Impact Assessment. This is a tool used to control all projects that are likely to have harmful impact on the environment; it is one of the most well-known tools for environmental assessment.

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<sup>56</sup>Patricia KameriMbote, ‘*Strategic planning and implementation of public involvement in environmental decision-making as they relate to EIA in Kenya,*’ International Environmental Law Research Center, IELRC working paper, 2000. Also available online [www.ielrc.org/content/w0003.pdf](http://www.ielrc.org/content/w0003.pdf) accessed on 12th October 2013

<sup>57</sup> Article 69(d) of the Constitution, 2010.

Prior to the establishment of legislation specific to EIA in Kenya, the impact of development projects on the environment was assessed using 77 sectoral policies and laws.<sup>58</sup>

Guidelines and procedures established by international organisations also guided the EIA process. EMCA was the first legislation to formally define EIA within the Kenyan context, as well as to establish procedures and supporting institutions for EIA. This was followed by the Environmental Impact Assessment and Audit Regulations of 2003 (EIAAR).<sup>59</sup>In addition, NEMA prepared guidelines and administrative procedures for EIA, Environmental Audit and more recently (between 2006 and 2009); subsidiary legislation to EMCA has been enacted to support EIA and environmental audit and monitoring.

A key component in access to information is that of provisions of necessary information on environmental laws and rights, this is the view held in the case of *Friends of Lake Turkana Trust V Attorney General & 2 Others*<sup>60</sup> where Justice Nyamweya held that there is a positive duty on the part of the state to provide all information necessary to ensure effective participation by the affected persons on the protection and management of the environment.

Further in determining the form and adequacy of public participation I am guided by Sachs J's., observation in *Minister of Health and Another NO v New Clicks South Africa (Pty) Ltd and Others* 2006 (2) SA 311 (CC) at paragraph 630, that, "*The forms of facilitating an appropriate degree of participation in the law-making process are indeed capable of infinite variation. What matters is that at the end of the day a reasonable opportunity is offered to*

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<sup>58</sup> A. Angweny, 'Environmental Legislation and Domestication of International Environmental Law in Kenya' paper presented at the sesei programme sub-regional legal workshop Nairobi Kenya NEMA  
[http://www.nema.go.ke/envirom\\_legislation.htm](http://www.nema.go.ke/envirom_legislation.htm)

<sup>59</sup> Kenya, Environmental (Impact Assessment and Audit) Regulations (Legal Notice No. 101, Kenya Gazette Supplement No. 56, Legislative Supplement No. 31, 13 June 2003).

<sup>60</sup> Nairobi ELC Suit No 825 Of 2012.

*members of the public and all interested parties to know about the issues and to have an adequate say. What amounts to a reasonable opportunity will depend on the circumstances of each case.”*

In *Robert N. Gakuru & Others vs. Governor Kiambu County & others*,<sup>61</sup> the Petitioners were seeking in the main a declaration that the Kiambu Finance Act, 2013 gazetted vide Kiambu County Gazette Supplement No. 8 (Act No.3) violated various provisions of the Constitution and that the same was null and void. The grounds on which these matters were based were that no consultations took place and no invitations were made by the Respondents before the said Act was enacted. It was further contended that the provisions of the said Act contravened the provisions of the Constitution as it contained levies and/or taxes which the Respondents were not empowered to impose. Some of the issues that the court was to determine and are relevant for this study was whether the Kiambu Finance Act, 2013 was passed with sufficient public participation as required by the Constitution of Kenya, 2010. The court held that there was no public participation as contemplated under the Constitution and the County Government Act, 2012 and declared the said Act null and void as it violated the Constitution.

### **1.3 Statement of the Research Problem**

Non-specialized Environment courts have played a crucial role in advancing Principle 10 of the Rio declaration. The courts have produced decisions that have contributed towards balancing environmental and developmental considerations. However, there have been concerns of how these courts handle environmental disputes in terms of speed, expertise and quality of

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<sup>61</sup> Pet. No. 532 of 2013 & 12,35,36,42,&72 of 2014 & JR MISC NO. 61 OF 2014 available at KLR

judgments, which have affected the development and future sustainability and limited access to environmental justice.<sup>62</sup>

As a paradigm shift, the Constitution of Kenya, 2010 established the specialized Environment and Land Court under Article 162 of the Constitution. Pursuant to this Article, Parliament enacted the Environment and Land Court Act<sup>63</sup>, which created a specialized Environment and Land Court. The competence of the Judges of the Court is provided for at section 7 of the Environment and Land Court Act. The section provides that for appointment as a judge of ELC, the person must meet the requirements of Article 166(2)(a) and (5) of the Constitution, have at least 10 years experience in land and environment either as a practitioner or scholar, and meets the qualifications of chapter six of the Constitution, 2010.

Further, Article 165 of the Constitution states that, *the High Court shall not have jurisdiction in respect of matters within the jurisdiction of the Environment and Land Court.* Therefore, a Judge appointed to the ELC can only exercise his or her jurisdiction within the Environment and Land Court and not as other High Court Judges who have unlimited jurisdiction over all other matters, reason being that their jurisdiction stems from the Constitution and the Environment and Land Court Act. However in practice this has not been the case as Judges appointed to the Environment and Land Court are being appointed to hear other matters by the Chief Justice thereby negating the essence of specialization and asserting the

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<sup>62</sup>Raghav Sharma, 'Green Courts in India: Strengthening Environmental Governance', 4/1 Law, Environment and Development Journal(2008), p. 50, available at <http://www.lead-journal.org/content/08050.pdf>. accessed on 2/7/2014.

<sup>63</sup>Enacted in 2011.

administrative authority of the Chief Justice as opposed to upholding the spirit of the Constitution as intended.<sup>64</sup>

The establishment of the Environment and land Court was intended to improve access to justice through the quality of judgments emanating from the judges based on their competence and or expertise in matters environment, speed in the determination of cases, and jurisprudence emerging from the courts.

The study sought to determine whether the constitutional structure enables the Court to deliver on this expectation and whether in practice since establishment in 2012 it has done so. The study also notes that the court has been handling mostly land matters this is by a perusal of the cause lists from the three stations visited none had handled more than 10 purely environmental cases the study shall therefore seek to establish whether merging of the courts has affected the dispensation of environmental justice in Kenya.

#### **1.4 Objectives of the Study**

The study sought to determine the following:-

- i. To investigate whether the Environment and Land Court as constituted was operating as a specialized court as intended by Article 162 of the Constitution
- ii. To investigate whether court specialization had improved quality dispensation of environmental justice in terms of speed, efficiency, and jurisprudence.
- iii. To investigate whether merging land and environment matters has affected the dispensation of environmental justice by the court.

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<sup>64</sup> See the case of *Samson Matende V- Republic*, Malindi Criminal Appeal No. 141 of 2009eKLR

## **1.5 Research Questions**

The research answered the following questions: -

- i. Is the Environment and Land Court as presently constituted operating as a specialized court as intended by Article 162 of the Constitution?
- ii. Has the establishment of the specialized environment and land court led to improved quality dispensation of environmental justice in terms of speed, efficiency and quality of jurisprudence in Kenya?
- iii. Will merging of the environment and land court affect the dispensation of environmental justice in Kenya?

## **1.6 Hypothesis**

The study was based on the presumption that the full operationalization of the Environment and Land Court as envisaged both in the Constitution and the statute in terms of the normative content of access to environmental justice will lead to the attainment of environmental justice in Kenya.

## **1.7 Theoretical Framework of the Study**

The study was based on the theory of justice. One of the grounds of the theory is distributive justice and political justice. Distributive justice refers to the perceived fairness of one's outcomes, when a reward is allocated or a decision is made people often make a judgment whether or not the outcome was fair. Environmental justice implicates not only distributive justice but also political justice. Political justice concerns the fairness of the decision making

process.<sup>65</sup> Professor Ronald Dworkin captures this conception of justice with his reference to the ideal that all citizens should be treated with equal concern and respect.<sup>66</sup>

Claims for environmental justice often include both distributive and political components. Professor Gerald Torres observes that the environmental justice movement arose out of the civil rights movement and is therefore inclined to apply civil rights theories and approaches.<sup>67</sup> Questions concerning the fairness of decision making processes also arise when federal, state, or local governments make environmental policy decisions.<sup>68</sup>

Environmental policy choices may favour certain groups by providing them with more benefits or burdens than others. For example, if saving open space was to become a governmental priority over slowing pollution in urban areas that policy choice would be to the benefit of those already living in more remote areas, such as the suburbs. Poorer urban communities would be less likely to receive a benefit from such a policy choice. Thus, to the extent that decisions are made that appear less likely to consider the needs of minority or low-income communities, such communities may not be receiving equal concern and respect in the decision making process.

Environmental enforcement decisions may also favour some at the expense of others lead environmental agencies lack sufficient funds to enforce every violation, and enforcement

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<sup>65</sup> Neither the imposition of an undesirable land use nor the denial of an environmental benefit means, per se, that the decision to impose the harm or deny the benefit was politically unjust. As Professor Dworkin notes, if a group's interest is taken into account it may nonetheless be outweighed by the interests of others who will gain from the policy."

<sup>66</sup> See also Been, 'Undesirable Land Uses,' at 1063-64 (quoting Professor Dworkin and stating that decision-making process could be considered unjust if it "failed to treat people with 'equal concern and respect,' instead valuing certain people less than others"). within available at [www.aulareview.org/pdfs/47/47\\_2/Kaswan.pdf](http://www.aulareview.org/pdfs/47/47_2/Kaswan.pdf)

<sup>67</sup> See Torres, Environmental Justice supra note 10, at 602, 604

<sup>68</sup> See generally Lazarus, *Pursuing "Environmental Justice,"* (discussing the significance of governmental environmental policy decisions on distributional outcomes); Torres, Environmental Burdens, (discussing importance of injecting environmental justice concerns into governmental decisions affecting the environment, [papers.ssrn.com/.../SSRN\\_ID1087454\\_co](http://papers.ssrn.com/.../SSRN_ID1087454_co)

agencies have considerable discretion in choosing enforcement priorities. Enforcement issues arise in connection with many different types of environmental laws, including national, state, and local pollution control laws, laws establishing agricultural pesticide practices, laws to alleviate lead poisoning, and the like. Those in the environmental justice movement keep exploring mechanisms to prevent environmental injustices from occurring or to provide remedies where they have already occurred.

Some of the remedies directly address questions of distributive or political justice. Other proposals, however, are more instrumental: they use legal mechanisms unrelated to questions of "Justice" to accomplish particular ends. Most of the attention on the use of environmental laws in the pursuit of environmental justice has focused on their ability to provide an instrumental means to the goal of stopping a project.<sup>69</sup>

A sitting agency's violation of substantive standards imposed by environmental laws would provide one basis for a legal challenge for example, if a local government allowed a wetland to be filled without a permit, an adjoining community could bring suit under applicable federal regulations. Similarly, if a proposed development violated a local zoning code, the violation could provide the basis for a legal challenge. Remedies for distributional injustice include both preventive and remedial approaches. The preventive approach involves the consideration of demographic impacts in the decision making process. The remedial approach involves identifying and developing legal remedies where a perceived distributional injustice has already occurred.

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<sup>69</sup>See generally Luke J. Cole, *Environmental Justice Litigation: Another Stone in David's Sling*, 21 FORDHAM URB. LJ. 523, 526-28 (1994)

Proponents of the theory such as Rawls,<sup>70</sup> Dworkin<sup>71</sup> opine that focusing solely on distributional outcomes would fail to address political inequalities skewing decision making processes, they advocate for activism geared toward ensuring public participation in compiling, and access to, information critical to environmental decision making processes. This model "equates fair process with justice."

Professor Foster notes that environmental laws requiring the consideration of a proposed project's impacts and encouraging public participation in the analysis of those impacts provide an existing model for achieving fair decision making the expectation is that participation will increase the possibility that decision makers will consider all interests equally.

Distributive justice therefore calls for the fair allocation of the benefits and burdens of natural resource exploitation among and within nations. It cannot be achieved without procedural justice which requires open, informed, and inclusive decision-making processes, corrective justice which imposes an obligation to provide compensation for historic inequities and to refrain from repeating the conduct that caused the harm and social justice, an aspect of environmental justice that recognizes that environmental struggles are inextricably intertwined with struggles for social and economic justice.

John Rawls in his book, *A Theory of Justice*<sup>72</sup> writes that theories of justice are about the appropriate way to structure government and society that is political theory, writ large. In his view, a theory of justice is needed because publicly agreed terms of social cooperation are both necessary and possible. For Rawls, justice is the structural rules of society within which people

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<sup>70</sup>John Rawls, *A Theory of Justice* (Harvard University Press, Cambridge, Mass, 1971)

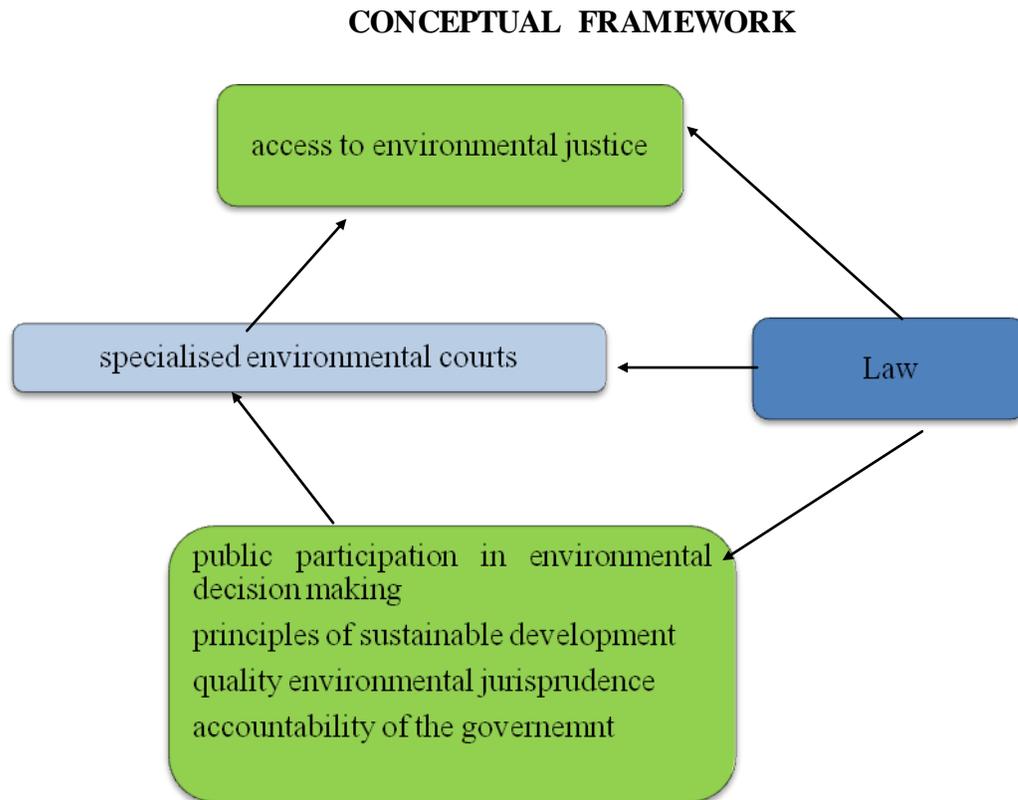
<sup>71</sup> Ibid

<sup>72</sup> Ibid

who have different sets of values and goals in life can co-exist, cooperate and to some extent compete. He states that rules are necessary for people to cooperate to create social and individual goods within society.

In order to fuse these theory to my study, my argument is that environmental justice itself is a concept with multiple, integrated meanings which must be boldly interpreted and enforced by the responsible institutions, in this case, the Environment and Land Court.

**Fig; 1**



Source - Author

The conceptual framework of this study as represented by figure 1 above shows that specialized environmental courts are necessary in order to enhance access to environmental justice.

The public is basically the main actor in environmental management and in this study these are the government, non-governmental organizations, private individuals, institutions and companies (public and private) and the civil society, among other actors. The participation of the public in environmental management is necessary and an important requirement to realize that there is environmental justice. Specialized courts will also enhance the development of quality

jurisprudence in environmental cases. This will also lead to government accountability in environmental matters hence enhance sustainable development.

There is a causal relationship between the three; public participation in environmental management depends on and requires specialized environmental courts; specialized environmental courts helps the public engage in the all important exercise of environmental decision-making whose ultimate objective is to realize access to environmental justice of anomalies that call for engagement of the mainstream justice system in resolution.

Participatory decision-making enhances the ability of governments to respond to public concerns and demands, to build consensus, and to improve acceptance of and compliance with environmental decisions because citizens feel ownership over these decisions.<sup>73</sup> Access to justice facilitates the public's ability to enforce their right to participate, to be informed, and to hold regulators and polluters accountable for environmental harm.

The diagram emphasizes the centrality of law in the three relationships. All the three relationships (specialized environmental courts, public participation in environmental decision-making, access to environmental information and access to environmental justice) are interdependent and they all require that they be anchored on a legal framework the justification of which is demonstrated by the theoretical framework of this study.

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<sup>73</sup>Peggy Rodgers Kalas & Alexia Herwig, 'Dispute Resolution under the Kyoto Protocol,' 27 Ecology Law Quarterly., 53, 58 (2000)

Principle 23 of the World Charter for Nature provides that:

All persons, in accordance with their national legislation, shall have the opportunity to participate, individually or with others, in the formulation of decisions of direct concern to their environment, and shall have access to means of redress when their environment has suffered damage or degradation

Principle 10 of the Rio Declaration on Environment and Development set out above illustrates the link between the right to environmental information, public participation in decision making and responsible environmental decision making.

### **1.8 Justification of the Study**

Courts have played a crucial role in advancing the Principles contained in the Stockholm and Rio Declarations, they have produced numerous decisions that have contributed to balancing environmental and developmental considerations, promoting natural resources conservation and sustainable use, achieving equity and justice, and, overall, implementing the goals of sustainable development.

At present, Kenya is in transition. Legal reforms are at centre-stage given that we are now in the throes of implementing the new Constitution promulgated in 2010. With the new constitutional order, there is need for a paradigm shift in terms of the jurisprudence emerging from our courts with regard to environmental litigation. There must be a co-relationship between the specialized environment courts with the quality of jurisprudence emerging which contributes to good environmental governance.

#### **1.8.1 Policy Justification**

The main justification of the study is to examine whether the specialized courts through their judgments and opinions have led to attainment of environmental justice in Kenya. Further

and related to this justification is the need for capacity building. Being a new court, there is need to take an independent stock of its workings so that the judiciary relevant institutions can help equip it in terms of its capacity hence the research will act as a reference too especially based on its recommendations.

While various researches have been undertaken in this field and there are quite a number of texts and scholarly articles which highlight the specialized courts in other jurisdictions, Kenya has not experienced the workings of specialized courts with the status of the High Court. Thus, there is a shortage of an indigenous Kenyan comprehensive research on the field.

Thirdly, the study shall seek to explore a legally sustainable approach towards attaining environmental justice in Kenya. It shall further distil recommended best practices based on existing models that have effectively minimized barriers to access to environmental justice. It shall involve a comparative analysis of expert's perceptions of EC's operational successes and failures and relative strengths and weaknesses based on the opinions that are more highly recommended than others which will further help to provide insights whether the courts will work in Kenya

### **1.8.2 Academic Justification**

The research will offer insights to legal scholars on how Kenya having established a new court can ensure that it uses an approach through subsequent experience and performance evaluation of the country's that have managed to attain environmental justice through the courts.

The research finding from data collection and discussion will be relevant to legal practitioners, policy-makers, law reform agencies and gender advocates in Kenya and beyond

seeking comprehensive analysis of the workings of specialized environmental courts in the post-new Constitution period.

## **1.9 Research Methodology**

The study was based on both qualitative and quantitative data collection methods. Qualitative methods were used in order to study perception as well as understanding of respondents of the issues under discussion whereas quantitative methods were applied to obtain the data and analyzing the same.

### **1.9.1 Sampling Design**

The target group of this study was court users, judicial staff, legal sector stakeholders and environmental experts they were drawn from three court stations namely Nairobi, Eldoret and Nyeri. A multi-stage sampling procedure was used for the study in as far as respondents at the court stations were concerned. The total number of respondents was 41 drawn from the following categories; judges, court registrars, registry staff, court users, advocates, and a NEMA representative. Purposive selection was used for all key informants.

The study selected Nyeri due to the many land cases filed in the court, the study wanted to establish whether this had impacted in any way on the environment cases. Eldoret was selected due to the fact that the two high profile environment cases had been filed there, the laptop project case and the Embotut forest rights claim case. Similarly, the ELC judge in Eldoret had also written certain papers on the court and the study was keen to discuss with him and gauge his perception on the court. Nairobi was selected because it is the headquarters of the Judiciary and where the Judicial Service Commission sits being the policy making body of the judiciary,

further the study was keen to determine if there was any linkage between the court and environment and land court division.

### **1.9.2 Data collection**

Primary data was collected in June and July 2014, the data was obtained through various techniques, in collecting primary data the research instruments used included questionnaires, interview guide and observation guide, the questionnaires used consisted of both open ended and closed ended questions. Discussions were also held with the judges and registry staff. Observation was also undertaken in the three court stations, the researcher sat through court sessions for 1 hour to listen in during the court session.

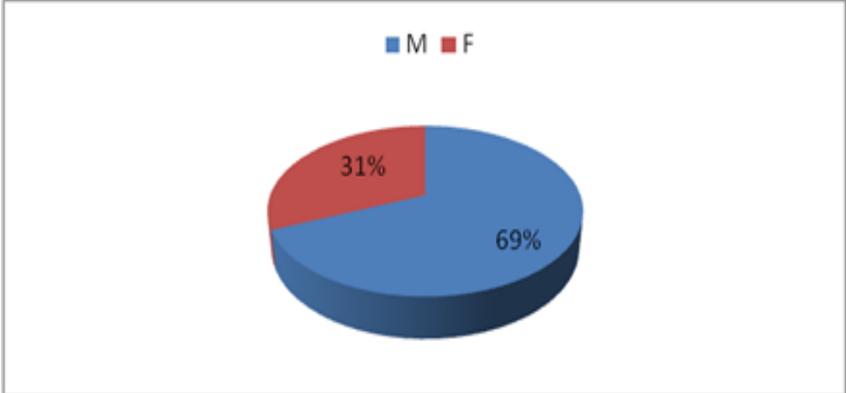
Secondary data was obtained through an extensive literature review to determine what other scholars have written on the research problem and to reveal strategies, procedures and measuring instruments that have been found useful in investigating the problem in question. It entailed a review of books, journals, magazines, reports, cause-lists, case reports, scholarly articles and papers.

### **1.9.3 Data Analysis**

Data was analyzed using the SPSS analysis. The analysis mainly focuses on using descriptive statistics. SPSS and Microsoft office excel were used in the data analysis and study findings were represented in tables and charts for clear visualization. The findings are presented in the form of a research report containing appropriate illustrations and themes that speak to the study objectives.

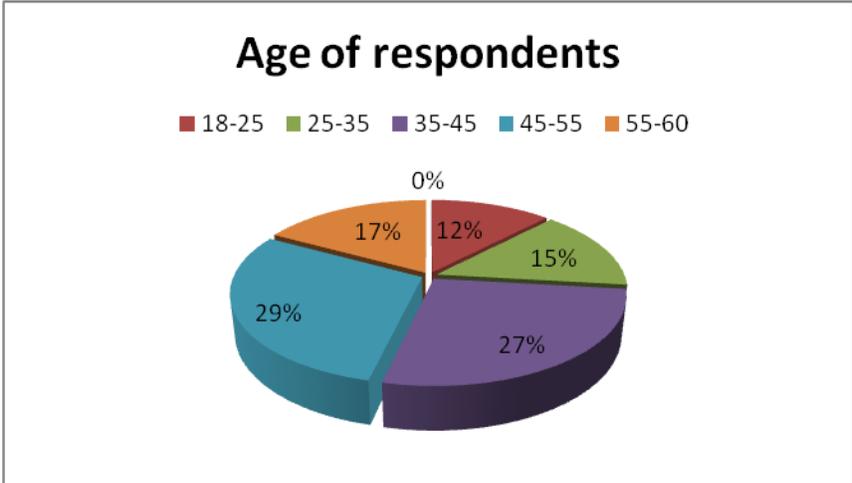
**1.9.4 Demographic information of respondents**

The demographic information of respondents was based on their gender, age, and professionals as shown in the chart below



**Fig: 2 Chart: Gender of the respondents**

29 % of the respondents were aged between 45- 55years as shown in the chart below.



**Fig 3: Age of the respondents**

### **1.9.5 Limitations of the Study**

The busy schedule of the judges made it difficult to organize and conduct interviews and this delayed the study as scheduled interviews had to be postponed a number of times, it was not possible to interview more than two Judges in Nairobi as was intended due to their busy schedules. The study however managed to interview 3 judges and this was adequate to inform the objectives of the study.

Further, because the registries are not automated made it very difficult to get data on the number of cases filed, further no classification has been done the cases for the ELC are still recorded as civil cases and are received in the central civil registry the study managed to get the data by manually counting the environment and land cases from the entry books.

### **1.10 Chapter Breakdown**

The thesis is structured into five chapters. Chapter One captures the framework of the study in terms of the objectives of the study, the research questions and the Statement of the Problem. Before setting out these parameters a background of the study was provided this helped distill the main issues for consideration in the research.

Chapter Two deals with the analysis of the various literature materials that informed the intellectual bedrock of this study. The literature materials were analyzed under specific thematic areas including the specialized environmental courts; the right to a clean and healthy environment; public participation and the right to information.

Chapter three covers the analysis of the legal framework governing the specialized environment courts. In this respect the chapter analyzed both the national and international legal

framework governing the specialized environment courts in Kenya and how the courts have developed jurisprudence on the functioning of the courts.

Chapter Four covers the research findings and analysis with the main goal of finding out whether the specialized environment and land court in practice is operating as envisaged under Article 162 and 165 of the Constitution. In a nutshell the study sought to determine through the analysis of the findings whether the operation of the court achieved the advantages of specialized environment and land court all geared towards the promotion of good environmental governance and increased access to environmental justice.

Chapter Five deals with conclusions and recommendation of the study.

## CHAPTER TWO

### 2.0 LITERATURE REVIEW

#### 2.1 Introduction

This chapter analyses the various literature materials that were reviewed during this study. The review was necessary in order to help ground the various concepts relevant to the topic of this study in terms of their development, meaning and application. Care was taken in choosing the topic to avoid a repeat of a research that has already been done. Accordingly, as shall appear in the body of the review of each literature material, the distinction with the instant study is made.

For logical flow and ease of comprehension of the study the materials were reviewed and herein presented in thematic areas revolving around access to environmental justice more specifically including: Specialised Environmental Courts, the right to a clean and healthy environment; public participation and Right to Information, and Alternative Dispute Resolution Mechanisms.

In every judicial system, in order for the system to function with efficiency, it must set out clear procedural rules. In particular, this refers to who can bring an action, the scope of the action, the available remedies, and the costs and so on. The way the judiciary normally works is based on the assumption that whoever claims the impairment of a right has an interest to act, may bring a case before a Court in order to seek redress of a situation caused by other private subjects or by the public sector. Access to justice in environmental decision-making is secured through the incorporation of environmental procedural rights in emerging international and regional instruments. These provisions are then deposited in national legislations to give them effect at that level.

The issue of the status of international instruments that a state has signed and ratified but not domesticated remains but jurists point to the Vienna Convention's Article 26 which provides that "every treaty in force is binding upon the parties to it and must be performed by them in good faith. The literature reviewed hereunder delves deeply into the issue of access to justice more so in environmental matters and the justification for it, justification is given why access to justice in environmental matters has improved over the years and the reason why nations have over time reviewed their laws to ensure that there is access to justice in environmental matters.

### **1.9 Specialized Environmental Courts and Tribunals**

**George Pring and Catherine Pringin** their paper '*Specialized environmental courts and tribunals: the explosion of new institutions to adjudicate environment, climate change, and sustainable development, 2010,*'<sup>1</sup> opine that rapid growth of serious environmental problems, including anthropogenic climate change, coupled with increasing public awareness and concern, has generated demand worldwide for new forms of governance to adjudicate environmental issues justly, quickly, and cheaply. The result has been an explosion of specialized environmental courts and tribunals (ECTs) and a parallel escalation in climate change litigation over the past five years.

The authors link the two, suggesting that specialized ECTs can provide an ideal forum for assuring access to environmental justice in climate change lawsuits. Well-designed ECTs have the capacity to resolve complicated environmental cases expertly, independently, holistically, rapidly, consistently, and justly, incorporating key principles of sustainable development such as the precautionary, polluter-pays, and intergenerational equity principles.

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<sup>1</sup>Available at <http://www.law.yale.edu/document/ect-study/Unitar-Yale-Article.pdf> accessed on (May 12, 2014)

This study shall attempt to therefore complement the instant study with respect to the ELC and tribunals and assess how the emerging environmental issues in Kenya will be handled by the court in order to achieve both environmental justice and promote sustainability. However the study shall not only focus on the new emerging environmental issues but the existing ones and their root causes, it shall also seek to examine other ways of alternative dispute resolution in attaining environmental justice as opposed to only through the courts as suggested in the paper.

**Justice SilaMunyao:**<sup>2</sup> in his paper, '*Jurisdiction question in Environmental law Issues,*' gives an overview of why Kenya created the Environment and Land Court. He discusses the position of the Environment and Land Court in the Kenyan judicial system, and further gives an overview of the jurisdiction of the court, from what is obvious to the controversial and to the prospective. It combines both environmental and land issues, for the reason that the Environment and Land Court combines both environmental and land issues.

The paper discusses the judicial system that existed previously and how environment and land disputes were handled by the general courts. The paper delves deeply into the sticky issue of the court's jurisdiction and supports the argument that the court is a specialised court and should only adjudicate environment and land matters, the paper also opines that in creating the specialised court the Constitution removed jurisdiction from general courts to handle environment and land cases and vested it in this court, the other courts therefore have no jurisdiction to hear and determine environment and land matters.

He also discusses the issue of speciality of judges a subject that has elicited a lot of debate, the judge opines that the court cannot to be a specialised court without having specialised

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<sup>2</sup> Paper presented at the NEMA/ELC Conference in Mombasa, June 2014( Unpublished on file with author)

judges serving in the court, thus these judges are appointed to only serve in the ELC and should not handle matters outside the jurisdiction of the court.

This paper is important to this study as it discusses the controversial issue of the court's jurisdiction, speciality of judges and whether the court has jurisdiction to deal with environmental offences, it shall inform the objectives of the study which intend to establish whether the court in practice is operating as a specialised court as envisaged in Article 162 of the Constitution. However, the present study will not only look at the book structure of the court but also the work that the court is doing, dwelling on the cases that the court has handled so far and the emerging jurisprudence since its inception.

**Professor Bharat Desai**<sup>3</sup> in his article, '*Green Tribunal of India,*' gives a background of India's quest for the establishment of an environment Tribunal. He explains how the court mooted the idea of a standing ecological sciences research group to advise and assist the court as and when required. As such, the court in its concerted view, also called for the establishment of specialized environment courts. In fact some of these marathon litigations have gone on for many years. Subsequently, there were some half-hearted efforts in this direction such as the 1995 National Environment Tribunal Act (,NET') and the 1997 National Environment Appellate Tribunal. Thus, twenty-four years after the original Supreme Court suggestion, the 2010 National Green Tribunal (NGT) Act has been enacted by the Parliament and it received the Presidential assent on June 2, 2010, and was duly notified on October 18, 2010.

According to him, the overall purpose of the NGT is to provide for the ,effective and expeditious disposal of cases relating to environmental protection and conservation of forests and

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<sup>3</sup> available at <https://www.nycourts.gov/court-innovation/>. Accessed on 7/7/2013

other natural resources, including enforcement of any legal right relating to environment and giving relief and compensation for damages to persons and property.’ in stating the tribunals jurisdiction he states that the coverage of NGT is quite broad and covers almost the entire range of issues concerning environment protection and conservation of natural resources in India (as regulated by the seven enactments mentioned in Schedule I to the NGT Act).

Several things will need to go into the working of the NGT to address the effectiveness and efficacy of the NGT such as the existing composition of the tribunal and the manner in which judges and expert members are selected does not inspire much confidence for imparting ,green justice.’ in his view if the NGT comprises those people whose age, expertise and background does not augur well, the tribunal may not be able to measure up to the expectations of the public he recommends a transparent and institutionalized process be put into place moreover, the rules for the practice and procedure of the NGT will need to be forward-looking to ensure it could stand up to huge developmental pressures, bureaucratic inertia, and corporate clout.

He concludes by saying that the overall success of the tribunal will depend on whether and to what extent the executive takes the NGT seriously.

This paper offers a glimpse into India’s push for the establishment of a green tribunal it brings into fore how a robust and focus driven judiciary can result to judicial reforms even without support from government and still manage to have a ‘specialised environment court’ that is not recognised or established under any law. However, the paper does not address the need for a specialised court to deal with appeals that will arise from the tribunal. This is critical in the current jurisprudence. The current study appreciates the move from just a tribunal to a

specialised ELC to expedite and enhance administration of justice in environmental courts. Secondly, appeals from the tribunals will be heard by judges in the specialised environmental courts.

**Donald W. Kaniaru** in his article '*Environmental Courts and Tribunals: the case of Kenya*,<sup>4</sup> takes cognisance of the fact that the environment has become a crucial force behind humanity awakening to the urgency of ensuring its continued survival and well-being which is dependent on safeguarding and sustaining precious and threatened environmental resources, he notes that as a result at every level local, national, regional and global environmental policies, laws and governance have been put in place over the last four decades.

Further he opines that critical underpinning of the environment meant that a bottom-up approach had to work simultaneously with a top-down approach while arbitration of disputes or conflicts during the approach was also vital, he notes that the judiciary then was not informed and therefore not sensitive to the developments that had taken place over the years.

He notes that evolution of the judiciary is a key pillar of governance and so is that of the Executive and the Legislature he however notes that the three arms are at different stages in the development of an environmental management path. He credits the UNEP for engaging judiciaries across the globe in order to build their capacity to enable them deal with emerging environmental issues due to the policies, laws, treaties that have resulted to growth of national environment policies and laws, this has led to governments acknowledging these treaties and conventions and domestication of the same, the courts thus being charged with the responsibility

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<sup>4</sup>[Digitalcommons.pace.edu>LAW>PELR>VOL.29\\_Iss.2.2012](http://digitalcommons.pace.edu/LAW>PELR>VOL.29_Iss.2.2012)

of interpreting the law needed to be prepared in order to avoid disastrous or adverse effects to legal developments which would negate the gains made.

He goes further to appreciate that environmental courts and tribunals are a fact of life today and their establishment depends on the circumstances of each country including the capacity inherent in the country and its extent of land use, urbanisation, commitment to sound environmental governance and existence of processes of implementing the principles of sustainable development. The article further discusses the role of the Environment and Land Court of Kenya, it states that in exercise of its mandate and jurisdiction the court will streamline and direct appropriate integration of environmental policies, principles rights and laws that are spread over natural resources laws applicable in the country.

This article is of importance to this study as it clearly underscores the importance of having an environment and land court, it notes that Kenya has various structures and mechanisms (e.g.NET) of resolving environmental disputes established by statutes dealing with matters of environment, he opines that for the court to effectively exercise its jurisdiction, there is need for restructuring and streamlining of these mechanisms in the new Constitutional dispensation and legal order, it will therefore be prudent on the stakeholders to adjust the existing mechanisms in order to promote better coordination and management of the environment sector. However, the article does not address the need for ADR in environmental disputes and whether the ELC judges will have to be judges specialised in environmental matters, an aspect that is addressed in this article.

**Angela Mwenda & Thomas Kibutu** in their Article, *'Implications of the New Constitution on Environmental Management in Kenya,'*<sup>5</sup> opine that the new Constitution by having environmental protection provisions is a positive move as this enables the enforcement of environmental rights, as elaborated in Article 70. In establishing environmental courts with the status of the High Court, which is designated as a superior court, the new constitution demonstrates prioritisation of environmental issues.

The designation of environmental courts with the status of the High Court also ensures that there is no conflict with existing institutions, that is, the Public Complaints Committee and the National Environment Tribunal, which exist at a similar level. The Journal looks at the Constitutional provisions touching on the environment and their importance in attaining environmental justice in Kenya.

The study at hand shall not only discuss the Constitution but also other statutes that have an impact on environmental management in Kenya, it shall also discuss how the NET, PCC, Environment and Land Court practice rules, enforcement of court decisions, judicial officers among other stakeholders play a role in environmental governance in Kenya. This article only looks at the Constitutional provision on specialised environmental courts. The study at hand shall not only discuss the Constitution but also other statutes that have an impact on environmental management in Kenya, it shall also discuss how the NET, PCC, Environment and Land Court practice rules, enforcement of court decisions, judicial officers among other stakeholders play a role in environmental governance in Kenya.

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<sup>5</sup> Available at [www.lead-journal.org/content/12076](http://www.lead-journal.org/content/12076) pdf accessed on 10th March 2014

**Richard Macrory** in his chapter in the article, '*Environmental Courts and Tribunals in England and Wales; A tentative New Dawn*,<sup>6</sup>' gives an overview of the judicial system in England and Wales that existed before, previously environmental matters were handled by the general courts, he states that because of this there was informal specialization of Judges owing to the many environmental cases they handled.

He writes that the clamour for creation of a specialised Environment court began in 1989 when a Judge was asked to examine problems of enforcement in the planning sector. The push for the establishment of a specialised environment court received support from the then Chief Justice of England who stated that his vision therefore, was not just for a court or existing tribunal under another name, but something quite radically different.

According to him, the specialised courts would be a multi-faceted, multi-skilled body which would combine the services provided by the existing courts, tribunals, and inspectors in the environmental field. It would be a 'one-stop shop' which should lead to faster, cheaper and more effective resolution of disputes in the environmental area.

He notes that although The Aarhus Convention contains no formal sanctions for noncompliance, more problematic for the UK are two key European Community Environmental Directives i.e. the 1985 Directive on Environmental Assessment and the 1996 Directive on Integrated Pollution and Prevention Control, which were both amended in 2003 to include specific reference to the Aarhus Convention provisions on access to justice.

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<sup>6</sup>Available at [law.pace.edu/~jciMacrory\\_Final\\_3-17\\_c](http://law.pace.edu/~jciMacrory_Final_3-17_c). accessed on 7/june2013

Accordingly, the requirement that procedures must not be prohibitively expensive is now a legal obligation under European Community law giving the European Commission the right to bring an infringement proceeding against a member state for noncompliance.

### **2.3 The right to a clean and healthy environment**

**David R. Boyd** in his book, *'A global study of the Constitution, Human Rights and the Environment,'*<sup>7</sup> examines how the right to a clean and healthy environment has generated a lot of interest at the national, regional and international level. He also takes note of the positive move made by various nations Kenya included in incorporating extensive environmental provisions he sees the need for countries to move beyond philosophical debates about human rights and the environment. He further argues that time has come to begin the difficult process of evaluating the effectiveness of the right to a healthy environment not through nose coloured glasses but through an even handed assessment of factual evidence.

He attempts to determine whether the Law and Constitutions matter and whether rights are an effective tool in promoting social change. In his view the best way for the world to fulfil its aspirations to protect both human rights and the environment is if efforts and resources are re-directed towards this goal.

This book is of importance to this study as it encourages governments to invest more resources towards achieving environmental sustainability it sheds more light on the importance of Constitutions in promoting environmental justice and shall be a guide in assessing how Constitution of Kenya 2010 has played a role. The instant study shall however discuss other statutes and not only focus on the Constitution in promoting environmental justice, it shall also

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<sup>7</sup>[Available at www.environmentmagazine.org/archives/...constitutional -rights-full.ht](http://www.environmentmagazine.org/archives/...constitutional-rights-full.ht) accessed on 10/10/13

discuss how other stakeholders can play a role and help the policy makers and government in implementing these laws.

**Ben KirombaTwinomugisha**, in his article, '*Judicial Protection of the Right to a clean and healthy environment in Uganda*,'<sup>8</sup> connotes that in Uganda there has been significant progress in the field of environmental protection through various legal and policy strategies. The Constitution of Uganda and the National Environment Act contain novel provisions, including the right to a clean and healthy environment. The judiciary in Uganda has decided a number of cases concerning violations of this right. Against this background, this article reflects on the extent to which the judiciary has protected the right. The article finds that through a creative application of the right, the judiciary has to some extent held the state, its agencies and private actors accountable.

The article concludes that there are still challenges facing judicial protection of the right. For an enhanced judicial protection of the right, the article recommends a more expanded application of relevant constitutional provisions. Environmental and human rights activists should not only educate the public on the right to a clean and healthy environment and its enforcement but also adduce necessary scientific and technical evidence in court.

### **2.3 Role of the Judiciary in Environmental Compliance**

**Kenneth J. Markowitz and Jo J. A Gerardin** their article, '*Importance of the Judiciary in Environmental Compliance and Enforcement*,'<sup>9</sup> acknowledge the initiatives globally, locally and nationally being undertaken to protect human health, limit greenhouse gas emissions, conserve

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<sup>8</sup> (2007) 3(3) Law, Environment and Development Journal 244

<sup>9</sup> Available at <http://digitalcommons.pace.edu/perl/Vol.29//iss2/5>

biodiversity and wildlife and manage natural resources as significant though these initiatives are being undertaken challenges remain critical.

They opine that robust national environmental compliance and enforcement systems for environmental laws are critical parts of an effective overall governance strategy to achieve a green economy, poverty eradication and sustainable development. The article further states that for judges, Attorney generals and prosecutors to apply legal rules to circumstances that are complex and frequently entangled with the competing interests of different stakeholders they need clear and enforceable laws, specialised training, reliable information, public confidence and political will, these coupled with capacity building will be central to their success.

The two take the approach that sustainable development depends upon good governance, good governance depends upon the rule of law and the rule of law depends upon effective compliance and enforcement. In their view the environment and land courts allow governments to address environmental and closely related socio-economic issues that require specialised knowledge. In their view therefore an enforcement mechanism must be available in order to give effect to the decision of an environment court or tribunal.

These article is of importance to the instant study as it clearly explains the need for an enforcement mechanism for the courts to be effective, it also notes that promoting the rule of law through good governance and political goodwill are key in promoting and enhancing sustainable development, however the study shall not only focus on enforcement it shall seek to look at all the issues that encompass environmental justice which include the procedural rights such as access to information, public participation and awareness as being key in achieving a green economy and ensuring that the environment and land court lives up to its Constitutional mandate.

**JonaRazzaque** in his article, '*Access to Environmental Justice: Role of the Judiciary in Bangladesh*',<sup>10</sup> observes that national court decisions play an important role in promoting the application of internationally recognised principles, he argues that if courts implement international norms with sufficient regularity, their decisions could have a deterrent effect thus helping to shape future conduct. He further states that through their decisions national courts can help incorporate international norms into national law thereby supplementing or even correcting the work of legislatures.

He notes that the Bangladeshi Judiciary takes an anthropocentric approach and the unqualified right to the environment has not been established. He suggests that the only way to achieve environmental justice through the courts is to have an environment fund which can give monetary assistance to those filing claims in court, issue of costs be done away with as this has been one of the greatest deterrent to litigants. While appreciating the role of courts in promoting environmental justice, he suggests that other alternative dispute settlement mechanism could be a viable option to initiate better protection of the environment he also opines that the strength of a Judiciary depends much on a strong and comprehensive regulatory framework.

This article is of great importance to this study as it explains the factual position on the way specialised courts have handled environmental issues, the challenges they face and suggests ways through which the judiciary can lead to attainment of environmental justice. The article appreciates the role of the judiciary but also suggest other mechanisms of resolving disputes, he also recognises the need to have various stakeholders participating in the process to ensure that environmental justice is achieved.

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<sup>10</sup> available at [www.eng\\_consult.com/ben/papers/paper-jona.pdf](http://www.eng_consult.com/ben/papers/paper-jona.pdf) accessed on 7/6/2014

## 2.4 Use of Alternative Dispute Resolution Mechanisms in Environmental Cases

**Kariuki Muigai** in his paper, '*Reflections on ADR and Environmental Justice in Kenya*,<sup>11</sup> articulates the need to enhance access to justice by using Alternative Dispute Resolution Mechanisms as provided for under Article 159 of the Constitution of Kenya, he notes that the Constitution recognises the place of alternative dispute resolution mechanisms such as reconciliation, negotiation, mediation and arbitration in ensuring access to justice in Kenya. He emphasises the importance of ADR in ensuring access to justice owing to the attributes of the mechanisms such as party autonomy, flexibility of the process, non- complex procedures and low cost as compared to the system of courts.

He further notes that by use of ADR public participation in environmental matters could be realised. The paper appreciates that not all cases can be resolved through alternative dispute resolution however the opportunities offered by ADR should not be ignored but rather be undertaken to improve access to environmental justice in environmental conflict in Kenya.

This paper is of importance to this study it shall seek to expound other available means of resolving environmental conflicts in Kenya this will offer insights into how other means other than the courts can lead to the attainment of environmental justice in Kenya.

## 2.4 Conclusion

The Constitution of Kenya at Article 42 creates an environmental right for all persons. This right includes having the environment protected for the benefit of present and future generations. Further, environmental protection for the people of Kenya is enshrined as a constitutional concept that is actionable and enforceable as a basic right through a petition for

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<sup>11</sup>available at [www.kmco.co.ke/](http://www.kmco.co.ke/) accessed on 10/2/2014

enforcement of fundamental rights to the High Court (article 70).The constitutional environmental right includes having the environment protected for the benefit of present and future generations through legislative and other means, particularly those contemplated in article 69 of the Constitution.

The aspect of having a right fulfilled through legislative and other means coupled with the liberalized *locus standi* for access to justice provides an opportunity for Kenya to realize some positive enhancement in environmental management. The specialized environment and land court is expected to actualize the realization of these rights and the articles and writings opine that courts can do a lot in ensuring that access to justice is achieved if they through their decisions uphold the principles of sustainable development however the writers observe that all stakeholders in the sector must work together to actualize rights as envisaged in any Constitution or legislation.

This literature review brings to light how states by being parties to treaties and conventions have been forced to change and amend their laws in line with these treaties and how they influence national law the aim being in this case to enhance and improve access to environmental justice. This study will discuss the mechanisms existing presently and further shed light on the changes that have been brought about by the Constitution in environmental management and governance in Kenya.

The literature therefore informs the study as it postulates that the environment and land court cannot purport to resolve environmental issues facing Kenya without a clear and structured process which will streamline all the laws in the environment sector, there must be an integration of policies, laws and institutions in order to allow the court effectively discharge its mandate as envisaged by the constitution.

The study will also look at the emerging jurisprudence from the Environment and Land Court and the Constitution of Kenya 2010. In this regard, analysis will be done to see how effective the court has been handling the environmental matters.

The literature analysed fails to bring out jurisdictional issues that arise in the specialised environmental courts an aspect that this study will look at. Similarly, the study will also look at the specific cases that the ELC has dealt with so far and establish the emerging legal issues and legal trends from the specialised courts. In this regard, analysis will be done to see how effective the court has been handling the environmental matters. The literature is lacking in terms of the effectiveness of the specialised ELC as established in the Constitution of Kenya while various researches have been undertaken in this field there are quite a number of texts and scholarly articles which highlight the specialized courts in other jurisdictions, Kenya has not experienced the workings of a specialized courts with the status of the high court, thus there is a shortage of an indigenous Kenyan comprehensive research in this area.

## CHAPTER THREE

### 3.0 THE LEGAL FRAMEWORK GOVERNING THE SPECIALIZED ENVIRONMENT COURTS

#### 3.1 Introduction

As captured in the previous chapter, the Environment and Land Courts established in the Constitution, 2010 and its operations are accordingly intertwined in a vibrant and transformative legal framework consisting of the substantive provisions of the Constitution, the statutory laws enacted there under and the international laws having force in Kenya either as customary international legal principles, the *jus cogens*, or the international legal provisions ratified by Kenya<sup>12</sup> and the Rules of Procedure under which the Courts operates. Accordingly, it is this legal framework that shall form part of the discussion herein.

#### 3.2 The Constitution of Kenya, 2010

One of the key features of the Kenya Constitution, 2010 is the introduction of a transformative courts system covered in its structure and the principles of the courts operations. The transformative nature of the Constitution is replicated in the entire constitutional text beginning with the preamble. In its preamble, the Constitution is respectful of the environment to which it affirms the environment as being the Kenya's peoples' heritage and accordingly the people should be determined to sustain it for the benefit of future generations.<sup>13</sup> Further, the Constitution provides that the people of Kenya therefore recognize the aspirations of all Kenyans

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<sup>12</sup>Article 2(5) and (6) of the Constitution, 2010.

<sup>13</sup>The Preamble to the Constitution, 2010.

for government based on the essential values of human rights, equality, freedom, democracy, social justice and the rule of law which are key tenets of good environmental governance.<sup>14</sup>

The Constitution establishes<sup>15</sup> and gives jurisdiction<sup>16</sup> to specialized environmental courts having the status of the High Court.<sup>17</sup> The jurisdiction of the High Court is limited not to extend to matters falling within the jurisdiction of the courts contemplated in Article 162(2) of the Constitution.<sup>18</sup>

Like in all other systems of courts in Kenya, the Constitution enjoins the Environment and Land Court to be guided by several constitutional principles in exercising its judicial authority.<sup>19</sup>

A critical innovative way is to ensure the courts are guided by the principle of sustainable development.<sup>20</sup> Sustainable development is a term coined at the 1992 Rio Earth Summit with the environmental adjudicative bodies being part of the effort in achieving the vision based on the technical and scientific nature of the environmental litigation. Sustainable Development is a principle coined by the World Commission on Environment and Development<sup>21</sup> which defined sustainable development as: “development that meets the needs of the present without

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<sup>14</sup>The Preamble to the Constitution, 2010.

<sup>15</sup>Article 162 (1) and (2) (b) of the Constitution, 2010.

<sup>16</sup>Article 165(5) (b) of the Constitution, 2010.

<sup>17</sup>Article 162(2) of the Constitution, 2010.

<sup>18</sup>Article 165(5) of the Constitution, 2010.

<sup>19</sup>Article 159(2) of the Constitution, 2010.

<sup>20</sup>Article 10(2) (d) of the Constitution, 2010.

<sup>21</sup> The World Commission on Environment and Development (WCED) was appointed by the UN General Assembly in 1983 to find ways to reconcile the increasingly polarized debate between developing countries and developed countries on economic development, on the one hand, and environmental protection, on the other.

compromising the ability of the future generations to meet their needs.”<sup>22</sup> Sustainable development has evolved considerably since its adoption by the WCED in 1987 and is now considered an umbrella term encompassing both substantive and procedural components.<sup>23</sup>

The administration of justice to all, irrespective of status is a principle connoting fair hearing in the administration of justice. Fair hearing should be read together with Article 50 of the Constitution, 2010 which the embodiment of the right to fair hearing. Article 50(1) provides;

*“every person has the right to have any dispute that can be resolved by the application of law decided in a fair and public hearing before a court or, if appropriate , another independent and impartial tribunal or body.”*

Comparatively, the right to a fair hearing is guaranteed by **The European Convention on Human Rights and Fundamental Freedoms (1950)**. The content of the right is well captured in the **Halsbury Report that;**

*“Everyone who is a party to proceedings must have a reasonable opportunity of presenting his case to the court under conditions which do not place him at a substantial disadvantage, the principle of equality of arms.”*<sup>24</sup>

Article 27(1) provides as follows;

*“(1) every person is equal before the law and has the right to equal protection and equal benefit of the law.”*

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<sup>22</sup>See our common future, the report of the world commission on environment and development 43 (1987).

<sup>23</sup>See SumuduAtapattu (2006), “emerging principles of international environmental law for a comprehensive discussion of sustainable development, its emergence, how it has been operationalized and its legal status.”

<sup>24</sup>Halsbury’s Laws of England 4th Edition Reissue Volume 8(2).

The second applicable principle is on the administration of justice without delay. The determination of the reasonableness of time a dispute should be determined depends on a case to case basis based on the complexity of the case, the number of cases handled by a single judge of the court and the number of judges posted to the court. The Civil Procedure Act has introduced the Overriding Objective principle to ensure that justice is dispensed without delay. Section 1A of the Act provides that;

*“1A. Objective of the Act*

*(1) The overriding objective of this Act and the rules made hereunder is to facilitate the just, expeditious, proportionate and affordable resolution of the civil disputes governed by the Act.*

*(2) The Court shall, in the exercise of its powers under this Act or the interpretation of any of its provisions, seek to give effect to the overriding objective specified in subsection (1).*

*(3) A party to civil proceedings or an advocate for such a party is under a duty to assist the Court to further the overriding objective of the Act and, to that effect, to participate in the processes of the Court and to comply with the directions and orders of the Court.”*

The Constitution also enjoins the Environment and Land court to adopt and promote alternative forms of dispute resolution including reconciliation, mediation, arbitration and traditional dispute resolution mechanisms.<sup>25</sup> However, the use of these alternative means should not contravene the Bill of Rights; should not be repugnant to justice and morality and should not be inconsistent with the Constitution or other written law.

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<sup>25</sup> Article 159 2(c) of the Constitution.

One of the critical and transformative provisions in the dispensation of justice is the inclusion of a constitutional provision which provides that justice shall be administered without undue regard to procedural technicalities.<sup>26</sup> It is the law that prescribes the procedures to be taken in enforcing rights and duties of parties to a suit and the manner in which redress may be obtained.<sup>27</sup> Procedural laws have for a long time taken centre stage in the adversarial system of litigation.

The practice of procedural laws takes different forms depending on the nature and the complexity of a given case. It accordingly varies in terms of the amount of time between filing and trial, a judge's authority to enforce court orders (through contempt or otherwise), and the availability of appeals. Scholars have discussed and emphasized on the importance of procedural laws. They provide that no procedural decision can be completely neutral in the sense that it does not affect substance.<sup>28</sup> If procedures are to serve any purpose at all, they will affect litigation behaviour and create new winners and new losers.

The primary purpose behind procedural law is to make certain that every case brought to court is justly and consistently treated. Uniform legal procedural rules help ensure that courts do not impose criminal or civil penalties against a person without due process or fundamental justice. For instance, procedural law helps ensure that a defendant in a civil lawsuit or an accused person in a criminal case has received notice of the suit or case and has been given an opportunity to defend himself and present evidence in court.<sup>29</sup>

Further, procedural laws have played a key role in mitigating excessive costs and undue delays in litigation. This has been done through various methods including: giving the judge a

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<sup>26</sup>Article 159(2) (d) of the Constitution, 2010.

<sup>27</sup>Walston Dunham, 'Substantive and Procedural Issues' in *Introduction to Law*, <[www.delmarlearning.com/.../dl\\_display\\_sampchap.aspx?isbn...cid=7](http://www.delmarlearning.com/.../dl_display_sampchap.aspx?isbn...cid=7)> accessed on 8<sup>th</sup> April, 2014.

<sup>28</sup>Donald Elliott, 'Managerial Judging and the Evolution of Procedure', (U. CHI. L) 53.

<sup>29</sup> *ibid.*

more active role; tailoring the procedure to the complexity of the case including introduction of summary procedure for small claims; setting time limits for filing suits; and the introduction of Alternative Dispute Settlement procedures before invoking court litigation.<sup>30</sup> This proposition was emphasized and the principle first applied in East Africa in the case of *Iron and Steel Wares Ltd v. C. Martyr and C*<sup>31</sup>, where it was held that the function of the rules is to facilitate the administration of justice and not otherwise.

Courts have summed up the importance of procedural law in the following cases. In the case of *Chelashaw vs. Attorney General & Another*<sup>32</sup>, the court observed that without rules of practice and procedure the application and enforcement of the law and the administration of justice would be chaotic and impossible and their absence or non-adherence would lead to uncertainty of the law and total confusion since laws serve a purpose and they enhance the rule of law.

In the case of *Ratman vs. Cumarasamy*<sup>33</sup> Lord Guest delivering the opinion of the *Privy Council* at p. 935 said:-

*“The rules of the Court must, prima facie, be obeyed and in order to justify a court in extending the time during which some step in procedure requires to be taken there must be material on which the Court can exercise its discretion. If the law were otherwise, a party in breach would have unqualified right to an extension of time which would defeat the purpose of the rules which is to provide a time table for the conduct of litigation.”*

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<sup>30</sup> C.H. Van Rhe (2004), ‘The Law’s Delay: Essays on undue delay in Civil Litigation’, (Antwerp/Oxford/New York; Intersentia).

<sup>31</sup>(1956) 23 EACA.

<sup>32</sup> [2005] 1 EA 33

<sup>33</sup>[1964] 3 ALL E.R. 933.

Despite the above cited advantages of procedural laws, it has been argued that they have many times been abused at the expense of substantive dispensation of justice hence the constitutional provision on not giving undue regard to procedural technicalities in the dispensation of justice. This objective is not to be compromised by undue rigidity in the application of procedural requirements, which are ancillary to it.<sup>34</sup> Lord Justice Bowen in the case of *Cropper v. Smith*<sup>35</sup> where the principle of substantive justice was reaffirmed held that;

*“It is a well-established principle that the object of courts is to decide the rights of the parties, and not to punish them for mistakes they make in the conduct of their cases by deciding otherwise than in accordance with their rights.”*

Principally, the constitutional provision was necessitated by the numerous dismissals of cases on procedural technicalities by judicial officers. The provision seeks to protect the litigants from the injustice that would be occasioned on them by the courts if there were to be any procedural technicalities in a case. This provision further shows that the Constitution attaches great importance to access to justice.

Again the exercise of this discretion as to whether a given procedure is an undue technicality depends the substance of a given case, the determination of which shall be tested on the focus group discussions and interviews to be conducted and reviewed in the next chapter.

Lastly, under the principles of exercising judicial authority, the court is enjoined to respect and observe the purpose and principles of the Constitution. This is affirmed in Article 259 of the Constitution which provides that the Constitution should be interpreted in a manner

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<sup>34</sup>DBM Mosotah (2011), “Article 159 and Oxygen Principle not Magic Wands.” Nairobi Law Monthly at pg.22, April, 2011.

<sup>35</sup>(1884) 26 Ch D 700 at 710.

that promotes its purposes, values and principles; advances the rule of law, and the human rights and fundamental freedoms in the Bill of Rights; permits the development of the law; and contributes to good governance.

On the need to permit the development, this is a very crucial and important provision noting that environment is a scientific phenomenon with several management and administration principles being discovered, formulated and enacted with time.

The constitution adopts a three pronged approach in ensuring the independence of the Environment and Land Court.<sup>36</sup>The first approach is to constitutionalise the functioning independence by providing that the functioning of the court shall only be in accordance with the constitution and the law and shall not be subject to the control or direction of any person or authority.<sup>37</sup> The second approach is to provide for clear terms and conditions of service otherwise termed as security of tenure both in terms of duration and remuneration. The third approach is to limit personal liability as a result of a bona fide action or omission while executing the functions of the office of a judge.<sup>38</sup>

The Constitutional independence of the Court is hinged on the doctrine of separation of powers between the various organs and institutions of the government with the judiciary as the ultimate interpreter and arbiter in legal and factual issues.<sup>39</sup> The value of judicial independence is not limited to the protection of the citizen from power-abuse; it also feeds into the general quality

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<sup>36</sup>Article 160 of the Constitution, 2010.

<sup>37</sup>Article 160(1) of the Constitution, 2010.

<sup>38</sup>Article 160(5) of the Constitution, 2010.

<sup>39</sup>Prof. B.O. Nwabueze (1973), "Constitutionalism in Emergent States."

of governance, and of the interplays of the different organs of government. This principle is expressed in The Bangalore Principles of Judicial Conduct<sup>40</sup>:

*“A judiciary of undisputed integrity is the bedrock institution essential for ensuring compliance with democracy and the rule of law. Even when all other protections fail, it provides a bulwark against any encroachments on its rights and freedoms under the law.”*

R.W.M. Dias in his classic work, Jurisprudence<sup>41</sup>, remarks:

*“Every constitution has to be interpreted, so the effectiveness of its restraints rests ultimately with the interpreters, i.e., the judges and the measure of their sympathy with and independence of government.”*

Dias further observes<sup>42</sup>:

*“The success or failure of judicial control of the abuse of power, whatever form such control may assume, depends on the judges being independent of those wielding the power. Independence means far more than immunity from interference; it means that they are free to bring their own sense of values to bear in considering legislation and do not simply reflect the values of government. For there can be no protection against abuse of power, even when safeguards are enshrined in the Constitution, if the judges who have to interpret these whenever the government is challenged are only puppets of the government”*

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<sup>40</sup> Edition of March, 2007.

<sup>41</sup>Dias, RWM(1976), “Jurisprudence.” London: Butterworths 4th Edn p 128.

<sup>42</sup>Ibid, p.129.

Though in text there seems to be structural independence of the judiciary, this has not always been the case. The judiciary has in the recent past faced challenges with regard to budgeting and financial control where its budget has been slashed with the net effect of hindering the construction of courts which leads overall to the limit on the right of access to justice.<sup>43</sup>

The above discussion on the constitutional text is relevant in evaluating the current operations and functioning of the Environment and Land Court with a view to determining its efficacy in facilitating access to justice. Further, the discussion shall become relevant in evaluating the emerging legal issues that are discussed at the latter part of this chapter.

### **3.3 The Environment and Land Court Act<sup>44</sup>**

This is an Act of Parliament enacted pursuant to Article 162(2) (b) of the Constitution, 2010. In line with the constitutional principles of administration of justice without delay and by not giving undue regard to technicalities; the Act has as its overriding objectives the facilitation of the just, expeditious, proportionate and accessible resolution of land and environmental disputes.<sup>45</sup>

The Act establishes the Environment and Land Court<sup>46</sup> with the jurisdiction to hear disputes relating to environment and land including disputes: relating to environmental planning and protection, climate issues, land use planning, title, tenure, boundaries, rates, rents, valuations, mining, minerals and other natural resources; relating to compulsory acquisition of land; relating to land administration and management; relating to public, private and community

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<sup>43</sup>Sunday Standard, March 2<sup>nd</sup> 2014.

<sup>44</sup> Cap 32, Laws of Kenya

<sup>45</sup>Section 3 of the Act.

<sup>46</sup>Section 4 of the Act.

land and contracts, choses in action or other instruments granting any enforceable interests in land; and any other dispute relating to environment and land.<sup>47</sup>

In exercise of its jurisdiction under this Act, the Court shall be guided by the following principles of sustainable development, including: the principle of public participation in the development of policies, plans and processes for the management of the environment and land; the cultural and social principles traditionally applied by any community in Kenya for the management of the environment or natural resources in so far as the same are relevant and not inconsistent with any written law; the principle of international co-operation in the management of environmental resources shared by two or more states; the principles of intergenerational and intra-generational equity; the polluter-pays principle; and the pre-cautionary principle.

Other principles include: the principles of land policy under Article 60(1) of the Constitution; the principles of judicial authority under Article 159 of the Constitution; the national values and principles of governance under Article 10(2) of the Constitution; and the values and principles of public service under Article 232(1) of the Constitution.<sup>48</sup>

In appreciation of the scientific and complexity of environmental litigation, the Act provides for stringent qualification for judges to include: possesses the qualifications specified under Article 166(2) of the Constitution; and has at least ten years' experience as a distinguished academic or legal practitioner with knowledge and experience in matters relating to environment

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<sup>47</sup>Section 13 of the Act.

<sup>48</sup>Section 18 of the Act.

or land.<sup>49</sup> Upon appointment the independence of the judges is assured through a security of tenure in line with the constitution, 2010.<sup>50</sup>

### 3.4 Application of International Legal Instruments

Environmental issues require global cooperation which in most cases is prone to the traditional challenges of international law making which are underpinned by concepts of State Sovereignty, State Equality, State Responsibilities, and the paramouncy of State Consent. Notwithstanding these constraints, States have over the past two decades established an international legal regime, albeit an evolving one, to address climate change and its impacts. On this Lord Bingham states;

*“If the daunting challenges now facing the world are to be overcome, it must be in important part through the medium of rules, internationally agreed, internationally implemented and, if necessary, internationally enforced that is what the rule of law requires in the international order.”<sup>51</sup>*

It is based on this understanding that the Constitution has changed the status of international law instruments ratified in Kenya into a source of law in Kenya. Prior to the promulgation of the Constitution, the sources of law in Kenya were the constitution; acts of parliament; some specified UK statutes; the common law, doctrines of equity and statutes of general application in force in England on 12th August 1897; and finally customary law.<sup>52</sup> Thus, international law and principles was considered not to form part of Kenyan law unless they were domesticated. In other words, Kenya adhered to the dualist principle of international law.

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<sup>49</sup>Section 7 of the Act.

<sup>50</sup>Section 8 of the Act.

<sup>51</sup> Thomas Bingham, *‘the Rule of Law,’*(2010), at p. 128-129 (Penguin Books).

<sup>52</sup>Section 3 of the judiciary Act.

The Constitution has adopted a monist principle of application of international law. In this regard, the Constitution provides that international treaties and conventions that are ratified by Kenya shall form part of the laws of Kenya.<sup>53</sup> Further, the general rules of international law form part of the law of Kenya.

The first major decision by the courts in this regard was in the case of *Re Zipporah Wambui Mathara*<sup>54</sup> where the court held that “principally I agree with the counsel for the debtor that by virtue of the provisions of section 2(6) of the Constitution of Kenya 2010, international treaties, and conventions that Kenya has ratified are imparted as part of the sources of the Kenyan law.”

Justice Njagi in the case of *Diamond Trust Kenya Limited v. Daniel Mwema Mulwa*<sup>55</sup> while declining to express a position on the application of international law said that while the Constitution is clear that international law is applicable in Kenya, it is the relationship between the international law instruments that Kenya has ratified and legislation that lacks clarity hence the dilemma unless resolved by a specific legislation.

Justice Majanja in the recent landmark decision in the case of *Beatrice Wanjiru and Anor. V. Hon. Attorney General and Anor*<sup>56</sup> seems to have settled the matter. He held that the use of the phrase “under this Constitution” means that the international conventions and treaties are subordinate to and ought to be in compliance with the Constitution. His reasoning was buttressed by the fact that Article 1 of the Constitution places a premium on the sovereignty of the people to be exercised through democratically elected representatives and a contrary

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<sup>53</sup>Constitution of Kenya, Article 2.

<sup>54</sup>Milimani Bankruptcy Cause No. 19 of 2010(Unreported).

<sup>55</sup>Milimani HCCC No. 70 of 2012(unreported)

<sup>56</sup>Milimani HCPT No. 190 of 2011, eKLR

interpretation would put the executive in a position where it directly usurps legislative authority through treaties thereby undermining the doctrine of separation of powers which is part of the constitutional setup.

He said that the provisions under the Constitution should not be taken as creating a hierarchy of law akin to the Judicature Act, but must be seen in the light of the historical application of international law where there was reluctance by the courts to rely on international instruments even those Kenya had ratified in order to enrich and enhance the enjoyment of human rights.

Justice Majanja seems to have been guided by the thinking taken by the judge in the 1970s, the Kenyan courts in a landmark case stated that where there is a conflict between national laws and international treaty instruments, national law takes precedence in the case of *Okunda v Republic*<sup>57</sup> the Constitution has affirmed the principle in *Okundaby* providing under its section 2(4) that “any law, including customary law which is inconsistent with the Constitution is void to the extent of the inconsistency....”While the general rules of international law, including treaties and conventions ratified by Kenya, shall form part of the law in Kenya according new Constitution all these laws shall only be valid if they are not inconsistent to or contrary to the principles of the Constitution.

The Constitution does not provide much direction in relation to treaty making while article 2(6) of the Constitution provides that all treaties “ratified” become law, article 94(5) reserves the power of making law to Parliament it states that “No person or body, other than Parliament, has the power to make provision having the force of law in Kenya except under authority conferred by this Constitution or by legislation.This therefore means that for a treaty to

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<sup>57</sup>[1970] EA 453,1

have the force of law and hence become part of the law of Kenya either the ratification process must be brought within the legislative ambit of Parliament or a treaty once ratified must again receive approval by Parliament. Indeed parliament passed the Treaty Making and Ratification Act<sup>58</sup> with the sole intention of giving effect to article 2(6) of the Constitution and to provide the procedure for the making and ratification of treaties and connected purposes.<sup>59</sup> The Act provides for the procedure of initiating and ratifying multilateral treaties and certain bilateral treaties.<sup>60</sup>

The Constitution, while providing that treaties ratified by Kenya shall form part of the law of the land, does not establish the hierarchical status of the treaties and international law in the domestic legal system also it does not state what takes precedence in case of conflict between treaties ratified by Kenya and the general rules of international law on the one hand, and locally-generated domestic law on the other.<sup>61</sup> While the supremacy of the Constitution is proclaimed the relationship between domestic law and international law is less clear.<sup>62</sup> There is the likelihood that many cases will arise pitting domestic provisions against international provisions and a clear position is thus required as was seen in the matter of **Ziporrah Wambui Mathara**<sup>63</sup> where the Court chose to uphold the International Convention on Civil & Political Rights instead of the Civil Procedure Act, Cap. 21, which allows the committal of judgment debtor to civil jail as one of the means of enforcing a judgment,

The traditional non-specialized international court is majorly the International Court of Justice (ICJ) which is the principal judicial organ of the United Nations. It was established in

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<sup>58</sup> Act No. 45 of 2012 available at government printers

<sup>59</sup> Ibid, preamble

<sup>60</sup> Ibid section 3

<sup>61</sup> Kenya national commission on human rights, occasional report; Making the bill of rights operational; policy, legal & administrative considerations at ch.2; available at [www.knchr.org](http://www.knchr.org) portal accessed on 14<sup>th</sup> Nov 2014

<sup>62</sup> Ibid

<sup>63</sup> Milimani Bankruptcy Cause No. 19 of 2010 (Unreported).

June 1945 by the Charter of the United Nations and began work in April 1946.<sup>64</sup> Article 36(1) of its statute provides that its jurisdiction comprises all cases which the parties refer to it and all matters specially provided for it in the Charter of the United Nations or in treaties and Conventions in force.<sup>65</sup>

Arguments, though, have been raised against the ICJ thus calling for a specialized international environment court. The procedurally orientated arguments in support for an international environmental court include the argument that proceedings before the ICJ are only open to states, thereby excluding applications from private individuals and environmental organizations.<sup>66</sup> Further arguments are that an international environmental court could be taken to add credibility to the body of international environmental law and perhaps give impetus to its development as a distinct legal discipline.<sup>67</sup>

Despite these concerted efforts and arguments in favour of international environment court, there are three possible objections being raised including: what law would be applicable? Why is it necessary for them to be a new body when existing juridical or dispute resolution institutions already exist to undertake the role envisaged for an ICE? And what would be the point of establishing a new international judicial body such an ICE if it was unable to enforce its decisions?

Hockman in his proposal and answer to the above objections for a specialized international environment court says that;

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<sup>64</sup>See <http://www.icj-cij.org/court/index.php?p1=1>

<sup>65</sup>Patrick Kelly, "The International Court of Justice," (1987) 12Yale J.Int'l L. 342, 342.

<sup>66</sup> See in general Peggy R Kalas, 'International Environmental Dispute Resolution and the Need for Access by Non-State Entities' (2001) 12 Colo J Int'l Env'tl L and Pol'y 191.

<sup>67</sup>John Gardner, 'The Virtue of Justice and the Character of Law' (2000) at p.53 CLP 1.

*“The establishment of the court is a valuable goal that would add to the body of jurisprudence in international environmental law and provide a forum both for State and for non-State entities.”*<sup>68</sup>

In his further defense to the ICE he emphasizes on the comparative advantage of such a court to include: an international convention in the right to a healthy environment with broad coverage; direct access by NGOs and private parties as well as State; transparency in proceedings; a scientific body to assess technical issues; and a mechanism to avoid forum shopping.<sup>69</sup> On the applicable laws, he says that there are very many sources of international environment law that have been enacted overtime for courts to apply.

Even without this proposal, the world boasts of many *ad hoc* regional and statutory national environmental courts. The greatest challenge though is that there is no treaty or international agreement mandating the establishment of these many new environmental courts and tribunals around the world.<sup>70</sup>

As a consequence there is established an International Judicial Institute for Environmental Adjudication (IJIEA) to act as a platform for sharing of judicial experience as a means to effective adjudication of environmental law.

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<sup>68</sup> Stephen Hockman QC, “*The case for an international court for the environment.*” *Journal of Court Innovation*,” Vol.3 Number 1, 2010.

<sup>69</sup> *Ibid.*

<sup>70</sup> Sheila Abed de Zavala, “An Institute for Enhancing Effective Environmental Adjudication.”

### 3.5 Current Cases handled by the Court:

Case types	Filed	Pending	Resolved
Environment and Land	8, 039	16, 336	443
Miscellaneous	131	19	0
Appeals	41	41	0
Judicial Review	4	4	4
Petitions/Const. References	7	7	0
<b>SUT-TOTAL</b>	<b>8, 222</b>	<b>16, 407</b>	<b>443</b>

Source: Status of the Judiciary and Administration of Justice Report 2012- 2013

The court has heard a number of cases, four hundred and forty three (443) have been concluded as shown in the table above and 16,407 are still pending this was between the year 2012 and 2013.

In the case of *Mohammed Said v County Council of Nandi*,<sup>71</sup> the Petitioner in this case filed a Constitutional Petition in the Land and Environment Court, alleging breach of his fundamental rights and freedoms with regard to his rights to land. The second respondent in protest claimed that the Environment and Land Court had no jurisdiction to hear a constitutional petition unless it fell under articles 42, 69 and 70 of the Constitution of Kenya 2010. Article 42 of the Constitution of Kenya 2010 provides for the protection of the right to a clean and healthy environment; Article 69 puts an obligation on the state to ensure sustainable exploitation,

<sup>71</sup>eKLR& L Petition No. 2 of 2013

utilization, management and conservation of the environment and natural resources and to ensure equitable distribution of accruing benefits, while Article 70 provides for enforcement of environmental rights. In its decision, the Environment and Land Court determined that in addition to matters falling under the previously mentioned sections of the Constitution, it has jurisdiction to interpret any other provision of the Constitution of Kenya.

In the case of *Joseph Leboo & others v Director of Kenya Forests Services*,<sup>72</sup> the applicants were seeking to have the respondents restrained from permitting the harvesting of trees from certain Blocks of Forests. The court had to determine whether the applicants had *locus standi* in environmental disputes. The basis of the application was that the respondents had illegally allocated pre-qualified and unqualified saw millers to harvest timber and fire materials in Lembus forest and that the community was not involved as per the law governing the harvesting of timber and firewood from the forests. Justice Munyao Sila, while granting the applicants the injunction they were seeking, stated that forests were so important, such that the Constitution<sup>73</sup> has given them a special mention. It is the target of the country, which is stated in the Constitution to attain a forest cover of 10% of the land of Kenya. Where the interest of environmental protection and those of private individuals, out to make a profit are weighed, the interest of environmental protection ought to far outweigh those of private individuals.

Similarly, in the case of *Ken Kising'a v Daniel Kiplagat Kirui* and others, the petitioner alleged that the respondents had violated his right to a safe, clean and healthy environment. One of the respondents specializing in construction of telecommunication masts had been granted

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<sup>72</sup>eKLR 273 of 2013

<sup>73</sup> Article 61(1)(d) of the Constitution of Kenya 2010.

approval to carry out the development. The applicant contended that the approvals and licenses were issued in contravention of the regulations governing their issuance. The respondents stated that the court had no jurisdiction to hear the matter. This line of defense was overruled. Justice Emukule, citing Article 165(1)(c) of the Constitution, stated that the issues raised were within the exclusive jurisdiction of the Environment and Land Court which was established before the cause of action had arisen.

In the case of *Joseph Letuya & 21 others v Attorney General & Others*,<sup>74</sup> the applicants were seeking restraining orders against the respondents from evicting them from Mau Forest. The applicants were members of the Ogiek community who were facing eviction from the Mau Forest. Justice Nyamweya ordered the National Land Commission to identify land for the settlement of the said Ogiek Community.

In the case of **Friends of Turkana Trust V the Attorney General and others**,<sup>75</sup> the petitioner sought relief to order the respondents to make full disclosure of each and every agreement or arrangement entered into or made with the Government of Ethiopia relating to the proposed purchase of 500MW from Gibe III. The basis for the petition was that by agreeing to purchase 500MW of electricity from the Government of Ethiopia, the Respondents was acting in a manner that will deprive the members of the affected communities their livelihood, lifestyle and cultural heritage and attachment to Lake Turkana in violation of Articles 26, and 28 of the Constitution, unless restrained by the Court. Justice Nyamweya granted the petitioners the orders sought and ordered the respondents to take measures to ensure that the natural resources of Lake

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<sup>74</sup> ELC Civil Suit No. 821 of 2012, [2014]eKLR

<sup>75</sup> ELC Suit No. 825 of 2012

Turkana are substantially managed, utilized and conserved in any engagement with the Government of Ethiopia.

In the case of *Kwanza Estates Ltd-vs. Kenya Wildlife Service*<sup>76</sup> the plaintiff filed an application seeking among other orders: that the defendants and or its agents be temporarily restrained from erecting, constructing and or use of the public toilet on the beach front next to Kilulu Island and Blue Bay Watamu pending the hearing and determination of this application and that they further be temporarily restrained from erecting, constructing and or use of the public toilet on the beach front next to Kilulu Island and Blue Bay Watamu pending the hearing and determination of this suit.

The court noted; .....

a)

b)

.....

c) *The Defendant has also not disputed that he is constructing a public toilet next to the Plaintiff's resort. What is in dispute, and what this court has been called upon to decide by the Plaintiff is whether the construction of the public toilet next to the "Resort" shall cause adverse environmental effect thus devaluing the Plaintiff's otherwise prime property.*

d) *The Environmental Management and Co-ordination Act, 1999 (EMCA) provides novel provisions for the implementation of the general principles by stipulating that in exercising the*

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<sup>76</sup>Civ Case no. 133 of 2012 Malindi

*jurisdiction conferred upon the court under Section 3, the court shall be guided by principles of sustainable development such as public participation amongst others.*

*e) The Essential principle of public participation while dealing with the issue of sustainable Management of the Environment is also provided for in Articles 69 (10 (d) of the Constitution. Public Participation is one of the principles that informed the requirement that before one finances and commences the carrying out of any undertaking specified in the second schedule of the EMCA, he must submit to NEMA an Environmental Impact Assessment Report.*

The court in allowing the applicant's application held that:

The Defendant in this matter has not annexed any document to show that it received the approval of NEMA to construct the public toilet at the beach. There is no report by an environmental expert on how the effluent from the said toilet is to be disposed or treated before draining the same to the ocean. The report which has been annexed on the Replying Affidavit by one Benard O. Mbede a Buildings Engineer dated 20th September, 2012 was prepared after the said construction had started and after the Plaintiff had filed the present suit.<sup>28</sup> There is also no indication that the Said Benard O. Mbede is an expert authorized to prepare such reports by NEMA pursuant to the provisions of section 59 (5) of EMCA. In the absence of an Environmental Impact Assessment Report for the construction of the toilets duly approved by NEMA, I do hold and find that the Plaintiff has established a prima facie case with chances of success. I also hold and find that unless the order of injunction is granted as prayed, the Plaintiff, and the users of the beach and the ocean are likely to suffer irreparable damage if the toilets being constructed are used before proper mechanisms are put in place to mitigate the environmental pollution that may occur.

### **3.7 Conclusion**

The chapter has reviewed some of the legal provisions-constitutional, statutory and internal- critical for the overall success of the Environment Court in Kenya. These legal tenets are consisting of both substantive and procedural legal aspects. The analysis of the legal framework and the emerging legal challenges shall form part of the recommendations for this project. Of critical concern now is to ensure clarity in the law and jurisprudence.

The study however postulates that the ELC has no jurisdiction over other matters other than environment and land matters the judges of the court though called upon to hear other matters is un-constitutional, it would be useful to underscore the importance of the question of jurisdiction for a court of law.

## **CHAPTER FOUR**

### **4.0 COURT USERS PERSPECTIVES ON THE OPERATIONS OF THE COURT**

#### **4.1 Introduction**

This chapter summarizes the findings of the study based on the data collated and analyzed. The main goal of this research study which was to appraise the specialized environment and land court and determine whether in practice the court was operating as a specialized court as envisaged by Article 162 and 165 of the Constitution.

The study also sought to determine whether the Judges in the ELC court were listening to other matters and not only environment and land matters, whether the registries were automated, the number of environment cases, whether the number of judges was sufficient, how the judges were managing the workload and the nexus between the ELC and the land and environment division of the high court.

The study was also keen to establish whether there was specialty of judges, whether the court had referred any matters to ADR and if the respondents were clear on the mandate and overall jurisdiction of the court, the study also sought to find out from the respondents whether the court had improved access to justice in environmental matters.

The following are the summary of the findings and analysis on the same.

##### **4.1.1 Nature of disputes**

While the ELC Act gives the court jurisdiction over environment and land matters, the study established that 98% of matters were land matters ranging from removal of cautions and

restrictions, double allocation and boundary disputes and cases of trespass to land. In Eldoret for instance the Judge indicated that he had handled only two cases that were purely environmental, the Nyeri Judge stated that he had not handled any matter that was purely environmental whereas the Nairobi Judge indicated that she had also not handled any purely environmental matter.

The judges also stated that most of the matters they handled per day were applications and mentions and due to the complexity of the cases they could only hear one or two hearing in a day.

**Fig 4: Nature of disputes handled by the Court**

<b>Nature of disputes</b>	<b>Percentage</b>
Land disputes	28%
Eviction	4%
Double registration	13%
Boundary dispute	22%
Succession	27%
Compulsory acquisition	3%
Environment matters	1%
Others	2%

#### **4.1.2 Persons filing cases**

The study found out that most of the matters filed in the court were filed by individuals; in Eldoret a community group and a Non-governmental organization was the only group who had filed environmental cases.

### **4.1.3 Number of Judges**

All the respondents interviewed indicated that the number of judges was not sufficient as they needed at least 4 more judges per station due to the huge backlog of cases. In particular, the Judges in Nyeri and Eldoret informed the study that being the only ELC judges in their respective stations was an impediment to access to justice as when they were away on training or were unable to carry out their duties then litigants were left to suffer. The judges stated that they had a huge backlog and could only manage to clear it with the support of more judges. In the year 2013 350 matters were filed, up to July 2014 about 250 other new matters have been filed. The study found out that only 21 ELC judges had been appointed so far. Section 5 of the ELC Act is silent on the number of Judges to be appointed to court, it states that the Court shall consist of a number of Judges to be determined by the Judicial Service Commission.

The Chief Justice recently appointed 5 judges to serve in the ELC bringing the total number to 21. However this number is still insufficient bearing in mind that 6 of the judges are based in Nairobi, the Law Society of Kenya Coast branch complained that though Mombasa was a busy station with many environment and land cases they had been assigned only 1 judge yet Nairobi had 6 judges, the study agrees with this view and hopes that future deployment of judges to other stations will consider the caseload in the respective stations.

### **4.1.4 ELC Judge's responses on whether they handle other matters other than environment and land matters**

Asked whether they handled only Environment and land matters or there were instances when they were called upon to listen to other matters, the judges indicated that once a year, the High Court holds a service week where all judges including ELC, handled other cases. They

handled other matters but only certificates of urgency when the other judges are absent and that strictly they only heard ELC matters but owing to the administrative dynamics and look of clear policy at times they were called upon to hear matters which are not ELC matters.

The study observed while in Nyeri and Eldoret the Judges listening to other matters, for instance in Eldoret the judge was listening to matters filed under certificate of urgency. The study also established that the judges were mostly handling applications they informed the study that due to the nature of the cases and their complexity they were only able to handle 2 hearings in a day.

#### **4.1.5 Court accessibility**

Majority (88.2%) of those interviewed indicated that the court was accessible to all court users in terms of location, respondents indicated that the court was accessible to all court users in terms of court rules and procedure while the same number of respondents indicated that the court was accessible to all court users in terms of filing fees charged.

#### **4.1.6 Merging Environment and Land Court**

90% of the respondents felt that it was a good idea to merge the environment and land court as the matters were related, those who differed however felt that Kenya has many land matters and merging the environment and land court would result in the court being more of a land court as opposed to an environment court.

#### **4.1.7 Length of time it takes to conclude matters**

The three judges interviewed indicated that most of the cases took between 3 to 5 years to be concluded they attributed this to the huge backlog of cases and the insufficient number of judges. The same was also confirmed by the court registrars in the three stations. Respondents complained that it was taking long to conclude cases but they attributed this to the insufficient number of judges.

#### **4.1.8 Specialty of Judges**

60% of respondents interviewed felt that judges appointed to the Court should be experts in land and environmental matters because there was need for knowledge and expertise in environment and land issues. One of the key informants informed the study felt that judges appointed to the court should not listen to other matter as this was against the Constitution. The fifteen advocates interviewed stated that there was no specialization as the Judges appointed to the court did not have any special training in environment and land matters, they further felt that the judges should be transferred to serve in other high court divisions as they were after all high court judges.

The study established that none of the ELC judges had any advanced academic training in Environmental law all the judges in Nairobi had a degree in law and those who had Masters Degrees they were not in Environmental Law. Out of the judges interviewed 2 had master's degrees in different field whereas one had a first degree in Law.

#### **4.1.9 Jurisdiction of the Court**

All the respondents stated that the court's jurisdiction had been a big problem at the initial stages however they were happy with the courts practice rules<sup>77</sup> as published by the Chief justice in July 2014 which in their view would help in defining the jurisdiction of the court. The litigants did not have an opinion on this issue as most were unaware of the jurisdiction problems being experienced by the court.

Another key informant informed the study that the issue of jurisdiction should not be an issue as the same was clear he stated that Article 162 of the Constitution contemplated to have separate courts with separate judges, the criteria to be used to appoint judges to the ELC was different the academic qualifications and experience were clearly spelt out in the advertisement,

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<sup>77</sup>Gazette Notice No. 5178

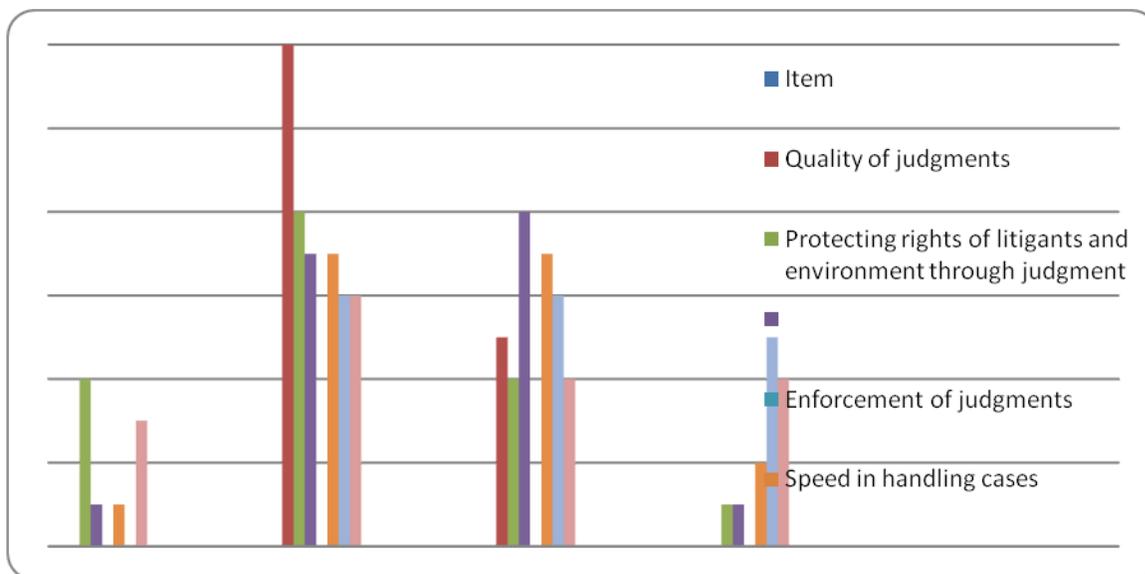
the qualifications required for one to be appointed to the ELC court were different from those of a judge to be appointed to the high court, he therefore argued that the Constitution did not only intend to create specialized courts but also specialized ELC judges.

The study notes that Note 8 of the Practice directions states that;

*Magistrate's courts shall continue to hear and determine all cases relating to the environment & use and occupation of and title to land (whether pending or new) in which the courts have pecuniary jurisdiction.* This study notes that the Chief Justice has returned jurisdiction to magistrate's court to hear and determine environment and land matters yet the Constitution states that these matters shall be handled by the ELC, the study sought to determine whether the ELC was operating as a specialized court and it found out that administratively no specialization is going on.

#### **4.1.10 whether the specialized court is better than the general courts that existed previously**

Majority (70.6%) of respondents indicated that quality of judgments was good, (47.1%) of respondents indicated that on protecting the rights of litigants through judgments the specialized court was better than the general courts that existed previously, the same number of respondents indicated that on enforcement of judgments the specialized court was average. (41.2%) of litigants indicated that in handling cases the specialized court was good while (35.3%) of litigants indicated that the court fees and costs were affordable.



**Figure: 4: Respondents assessment of previous courts performance and ELC**

#### **4.1.11 Continuous Judicial training**

One of the key informants informed the study that most of the trainings for the judges were organized by the Judicial training Institute and they were usually for all high court judges, however training had been organized in June for specifically for the ELC judges.

#### **4.1.12 Budget of the Court**

One of the key informants informed the study that the court did not have its own operating budget, it was still operating as a high court division, as there was no special support the court was still operating as it used to do when it was a high court division.

#### **4.1.13 Legal researchers assigned to the court**

The study noted that out of the three stations, only Nairobi had a researcher assigned to the ELC, Nyeri and Eldoret did not have a researcher.

#### **4.1.14 Use of Alternative Dispute Resolution**

Only 2% of those interviewed stated that they would resolve disputes through ADR if their opponents were also willing but they preferred the courts because they were respected and feared. They indicated that the court process was final, more cost effective, and that it was better

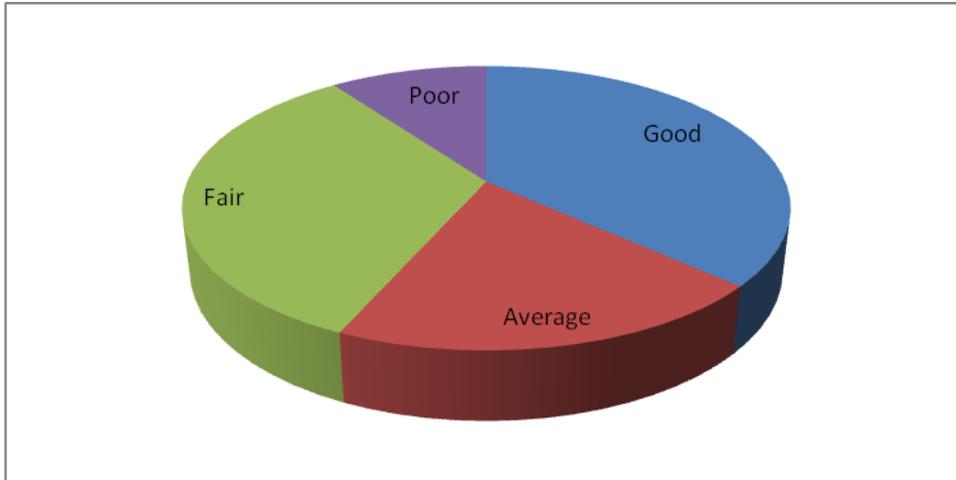
than ADR because courts were authoritative, courts execute matters expediently than ADR where matters may still be referred to the court.

#### **4.1.15 Performance of the court**

The chart below represents the respondents rating on the ELC since establishment most felt that despite the challenges the court had made a difference and had helped a big way in resolving land matters. However the study felt that the rating of the court was mostly in relation to land matters as the environment cases handled by the court were minimal.

The respondents felt that the court though slow in resolving disputes could do better if they had more staff including more judges to handle matters. Those who had filed applications were happy with the time taken to get interim orders from the court. The court was rated based on its accessibility to court users, court fees, quality of judgments, though this was mainly when it came to issuance of interim orders as the cases had not been concluded, registry services, most respondents felt that having more judges would help in easing the backlog in the court and also speed up the amount of time taken to resolve disputes.

On environmental cases the study noted that most of the cases filed had not been concluded however the respondents who had environmental cases complained that their cases had not been concluded and the delay was occasioned by government who were mostly the respondents in these cases.



**Fig 5: chart showing performance of the court**

#### **4.1.16 whether Kenya was ready for a Specialized Environment and Land Court**

Most respondents felt that Kenya was ready for the court, those in the legal profession felt that the environmental rights at Article 42 and Article 69 could only be actualized by the ELC. Other respondents felt that establishing the court was the only way to resolve the myriad land problems facing Kenya.

Most respondents felt that the general courts had done very little to resolve the challenges facing the land and environment sector, by having environmental rights enshrined in the Constitution was seen as being a positive step and the only way to ensure that the rights are not only on paper was to have a court to enforce them.

#### **4.2 Discussion on the Findings**

This section discusses the findings of the study in greater detail and goes further to compare the findings with that in literature review and the position that exists legally. From the preceding part of this chapter, the following emerging legal challenges are discussed;

- a. The jurisdiction of the court in transition;

- b. Whether the court has concurrent jurisdiction with the High Court on matters concerning environmental litigation; and
- c. Whether the Court has exclusive original jurisdiction or whether it has appellate jurisdiction from lower courts.
- d. Whether the Chief- Justice is abdicating his powers by transferring ELC judges to other High Court sections and assigning them to listen to other matters; Article 165 of the Constitution.

#### **4.2.1 The jurisdiction of the Court in transition**

The establishment of the environment and land court was never made in abstract. Before the establishment of the court, there existed as they still do disputes concerning the environment. These were handled by several environmental tribunals, magistrate's courts, the High Court and Court of Appeal as the case may be. In transition to the new Constitutional order, the Constitution provides that all judicial proceedings pending before any court shall continue to be heard and shall be determined by the same court or a corresponding court established under the constitution or as directed by the Chief Justice or the Registrar of the High Court.<sup>78</sup> The court is now established by dint of the Environment and Land Court Act, Cap 12A of the laws of Kenya.

The Act provides that;

*“(1) All proceedings relating to the environment or to the use and occupation and title to land pending before any Court or local tribunal of competent jurisdiction shall continue to be heard and determined by the same court until the Environment and Land Court established*

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<sup>78</sup>Section 22, Part 5 of the Sixth Schedule to the Constitution of Kenya, 2010.

*under this Act comes into operation or as may be directed by the Chief Justice or the Chief Registrar.*

(2) *The Chief Justice may, after the Court is established, refer part-heard cases, where appropriate, to the Court.*<sup>79</sup>

The Schedule on transitional provisions is Schedule 6 of the Constitution. With regard to transition of pending cases, the relevant provision is Article 22 of Schedule 6. The same clause is worded as follows:-

*All judicial proceedings pending before any court shall continue to be heard and shall be determined by the same court or a corresponding court established under this Constitution or as directed by the Chief Justice or the Registrar of the High Court.*

These provisions were aimed at ensuring that there would be no vacuum while transiting to the new regime envisioned in the Constitution. The transitional provisions provide for pending cases either to proceed in the courts in which the cases are pending, or in the new court, established by the Constitution, the ELC being one of them. Moreover, the Constitution empowered the Chief Justice and the Registrar of the High Court to give directions as to the hearing of pending suits. Parliament eventually enacted the Environment and Land Court Act, which Act came into force on 30 August, 2011.

However the court did not begin operations immediately as no judges had been appointed. The appointments were made more than a year later.

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<sup>79</sup>Section 30 of the Act.

The ELC, Act also makes allowance for transition under its Section 30 which is worded as follows:-

*30. (1) All proceedings relating to the environment or to the use and occupation and title to land pending before any Court or local tribunal of competent jurisdiction shall continue to be heard and determined by the same court until the Environment and Land Court established under this Act comes into operation or as may be directed by the Chief Justice or the Chief Registrar.*

*(2) The Chief Justice may, after the Court is established, refer part-heard cases, where appropriate, to the Court.*

It therefore means that matters pending before other courts, before the establishment of the ELC, were to continue to be heard in those courts, until the ELC was established, or as directed by the Chief Justice or Chief Registrar. Those courts could also entertain fresh matters before the ELC became fully operational.

The Chief Justice has issued three practice directions; two were issued before the court came into being; on 17 February 2012, and 28 September 2012. The last, which is the current one, was issued on 9 November 2012 after the ELC became operational. These practice directions are anchored in Article 22 of the Transitional Provisions of the Constitution and Section 30 of the Environment and Land Court Act. The practice notes provide that all new matters should be filed and heard at the ELC. The Registrar of the High Court and the judges are given a measure of discretion to decide on whether to order a transfer of the pending matters or continue hearing them. The discretion though should be exercised judiciously taking into account the stage of the hearing of the matter.

It is arguable though that provision 7 is unconstitutional because the provisions of Article 162 (2) (b) of the Constitution confer jurisdiction exclusively to the Environment and Land Court, and to no other court, when a matter relates to land or environment. The jurisdiction of magistrates' courts to hear partly heard matters is not in issue since this is protected by Section 22 of Schedule 6 of the Constitution. This study thus postulates that new matters, irrespective of the value of the subject matter cannot fall within the jurisdiction of the magistrates' courts.

Moreover, Section 22 of Schedule 6 of the Constitution only permits the Chief Justice to give direction on pending cases, not fresh cases. Note 7 attempts to give direction on fresh cases which in my view goes contrary to parameters of Section 22 of the 6th Schedule and also Section 30 of the ELC Act.

Certain cases have been decided to sort out the issue of transition by the courts. In the case of **Omar Tahir Said -vs- Registrar of Titles & Another**<sup>80</sup> the Mombasa High Court held that the court with jurisdiction to try any new matter touching on environment and land, is not the High Court, but the Environment and Land Court irrespective of the manner or procedure in which the case is presented.

Similarly, in the case of **Sarah Chelagat vs. Musa Kipkering**<sup>81</sup> the applicant filed a Motion in the Environment and Land Court (sitting at Eldoret), to have a matter pending hearing in the Eldoret Magistrates Court, transferred to the Environment and Land Court for hearing. The argument of the applicant was that with the operationalization of the ELC, the Magistrates Courts by dint of the provisions of Article 162 (2) (b) no longer had jurisdiction to hear the matter, which was a land matter. The application did not succeed. It was held that the matter was

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<sup>80</sup>Petition No. 22 of 2012, (2013) eKLR.

<sup>81</sup>Eldoret ELC Miscellaneous Application No. 6 of 2013, available at [www.kenyalaw.org](http://www.kenyalaw.org).

squarely covered by the transitional provisions within Schedule 6 of the constitution, as elaborated by Section 30 of the ELCA, and as clarified further in the Practice Notes.

These provisions combined, provided that matters pending hearing before the Magistrates Courts, before the establishment of the ELC, had to proceed in those courts till finalization. A similar holding was also made in the case of **John Nakhabio Okelovs. –Obura Nelson**<sup>82</sup>(Kibunja J), where the ELC at Busia, declined to allow a transfer of a suit filed in the year 2008 that was pending before the Magistrates' court in Busia.

The study determined that most litigants were still filing matters in the high court as opposed to the ELC court in stations where the court had been established, for instance the Judge in Eldoret informed the study that he received many cases referred to him by the high court, further some of these matters litigants are represented by counsel meaning that the issue of transition to the ELC was still un-clear even to advocates.

#### **4.2.2 Whether the court has concurrent jurisdiction with the High Court on matters concerning environmental litigation**

This head flows from the findings that the Chief Justice has been assigning different matters involving land and environment to a bench composed of both High Court and ELC judges. This ties up with the rationale in discussing the jurisdiction of the High Court and the Environment and Land Court is based on the now established jurisprudence that jurisdiction is everything and a court without jurisdiction cannot entertain a matter before it and any proceedings consequent of lack of jurisdiction is therefore null and void.

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<sup>82</sup>Busia High Court, Misc. application No. 205 of 2012

Ojwang J. (as he then was) in **Boniface WaweruMbiyu v Mary Njeri& Another**<sup>83</sup> observed as follows on jurisdiction;

*“The entry point into any court proceeding is jurisdiction. If a court lacking jurisdiction to hear and determine a matter overlooks that fact and determines the matter, its decision will have no legal quality and will be a nullity. Jurisdiction is the first test in the legal authority of a Court or tribunal, and its absence disqualifies the Court or tribunal from determining the question.”*

In **Re the Matter of the Interim Independent Electoral Commission Constitution**<sup>84</sup> the Supreme Court discussed the issue of jurisdiction in the following terms; “[29] *Assumption of jurisdiction by Courts in Kenya is a subject regulated by the Constitution, by statute law, and by principles laid out in judicial precedent. The classic decision in this regard is the Court of Appeal decision in Owners of Motor Vessel ‘Lillian S’ v. Caltex Oil (Kenya) Limited [1989] KLR 1, which bears the following passage (Nyarangi, JA at p.14): “I think that it is reasonably plain that a question of jurisdiction ought to be raised at the earliest opportunity and the Court seized of the matter is then obliged to decide the issue right away on the material before it. Jurisdiction is everything. Without it, a Court has no power to make one more step. [30] The Lillian ‘S’ case establishes that jurisdiction flows from the law, and the recipient-Court is to apply the same, with any limitations embodied therein. Such a Court may not arrogate to itself jurisdiction through the craft of interpretation, or by way of endeavours to discern or interpret the intentions of Parliament, where the wording of legislation is clear and*

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<sup>83</sup>Misc. Application No.639 of 2005.

<sup>84</sup>Application 2 of 2011 at para. 29 and 30

*there is no ambiguity. In the case of the Supreme Court, Court of Appeal and High Court, their respective jurisdictions are donated by the Constitution.”*

In the case of ***Omar Tahir Said -vs- Registrar of Titles &Another Mombasa High Court***<sup>85</sup> while dismissing a Petition filed before it held that;

*"The E and L Court has juridical likeness or similarity with the High Court. In this juridical likeliness, the E and L Court would have authority to entertain applications for the redress of a denial, or violation, or threat to a right or fundamental freedom in the Bill of Rights in matters falling under its jurisdiction. It is in acknowledgement of this, I suggest, that the Legislature, by Section 13(3) of the E and L Court Act, expressly recognized the authority of the Court to enforce the fundamentals rights under Articles 42, 69 and 70 of the Constitution. Yet to limit the Courts authority to the fundamental rights specified in Section 13(3) would be to unduly constrict the Constitutional intent of establishing a Court Under Article 162(2) (b) that would determine disputes relating to the Environment and the use and occupation of, and title to, land."*

Accordingly, the Court has jurisdiction to interpret the constitution and fundamental rights and freedoms over matters which fall under the subject matter of environment and land.

Though the study takes the above view, it noted that most respondents felt that the high court has jurisdiction to interpret the constitutional and fundamental rights and freedoms over any subject matter including environmental matters and therefore the high court could listen to such matters.

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<sup>85</sup>Petition No. 22 of 2012, (2013) eKLR.

### **4.2.3 Whether the Court has exclusive original jurisdiction in Environment and Land matters**

The jurisdiction of the court is anchored in Article 162 (2) (b) which provides as follows:-

*(2) Parliament shall establish courts with the status of the High Court to hear and determine disputes relating to—*

*(a) ...*

*(b) the environment and the use and occupation of, and title to, land.*

*(3) Parliament shall determine the jurisdiction and functions of the courts contemplated in clause (2).*

The ELC is therefore mandated to hear disputes "relating to the environment and the use and occupation to land defining the parameters of what a matter relating to the environment or land, has not been easy as no definition has been provided by the Constitution.

The Environment and Land Court Act, has however attempted to define the parameters of Article 162 (2)(b) of the Constitution. Section 2 provides that "environment" shall have the meaning assigned to it under the Environmental Management and Co-ordination Act, 1999 and the definition of "land" is that provided in the Constitution at Article 260. The definitions of land and environment are expansive, and do not help much in defining when the subject matter of litigation may relate to land and the environment.

Section 13 of the Environment and Land Court Act, attempts to define the parameters of the jurisdiction of the ELC. It states as follows on the jurisdiction of the ELC:-

13. (1) *The Court shall have original and appellate jurisdiction to hear and determine all disputes in accordance with Article 162(2)(b) of the Constitution and with the provisions of this Act or any other law applicable in Kenya relating to environment and land.*

(2) *In exercise of its jurisdiction under Article 162 (2) (b) of the Constitution, the Court shall have power to hear and determine disputes—*

(a) *relating to environmental planning and protection, climate issues, land use planning, title, tenure, boundaries, rates, rents, valuations, mining, minerals and other natural resources;*

(b) *relating to compulsory acquisition of land;*

(c) *relating to land administration and management;*

(d) *relating to public, private and community land and contracts, choses in action or other instruments granting any enforceable interests in land; and*

(e) *any other dispute relating to environment and land.*

(3) *Nothing in this Act shall preclude the Court from hearing and determining applications for redress of a denial, violation or infringement of, or threat to, rights or fundamental freedom relating to a clean and healthy environment under Articles 42, 69 and 70 of the Constitution.*

(4) *In addition to the matters referred to in subsections (1) and (2), the Court shall exercise appellate jurisdiction over the decisions of subordinate courts or local tribunals in respect of matters falling within the jurisdiction of the Court.*

The general jurisdiction is set out in Section 13 (1) which emphasizes that the ELC has both original and appellate jurisdiction to hear and determine all disputes in accordance with Article 162(2) (b) of the Constitution, relating to environment and land. Section 13 (2) clarifies the general jurisdiction in Section 13 (1), probably to elaborate more, as to what a matter touching on land and environment is. It sets out matters touching on environmental planning and protection, climate issues, land use planning, title, tenure, boundaries, rates, rents, valuations, mining, minerals and other natural resources.

Section 13 (2) (e) in very broad terms, states that the court has jurisdiction to hear any other dispute relating to environment and land from lower courts.

The study noted that through the practice and direction rules the CJ had returned jurisdiction to magistrates court to hear and determine land and environment matters, however the judges interviewed all opined that the ELC is the only court that can adjudicate environment and land matters and this jurisdiction emanates from the Constitution.

#### **4.2.4 Whether the Chief Justice can, lawfully and constitutionally, create a bench of judges of the High Court, the Industrial Court and the Land and Environment Court to hear and determine an environmental, criminal or civil matter**

This calls for the determination of the intention of the drafters of the constitution when creating the specialised court. This line of interpreting the constitution is now trite law. In the case of Nairobi High Court in **Karua vs. Radio Africa Limited T/A Kiss Fm Station and Others**,<sup>86</sup> the court stated that while a liberal and not an overly legalistic approach should be taken to constitutional interpretation the charter should not be regarded as an empty vessel to be

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<sup>86</sup>Nairobi HCCC NO. 288 of 2004 (HCK) [2006] 2 EA 117; [2006] 2 KLR 375

filled with whatever meaning the court might wish from time to time. The interpretation of the charter, as all constitutional documents, is constrained by the language structure and history of the constitutional text, by constitutional traditions and by the history, traditions and underlying philosophies of the society.

Accordingly, it is my preposition that there must have been a reason why we moved from the divisions of the High Court to specialised courts specifically anchored in the Constitution. The major persuasion towards the establishment of the specialised environment courts has been four, the access to environmental justice, the expertise and efficiency, the clear and effective environmental jurisprudence, and faster and efficient disposal of environmental litigation matters.<sup>87</sup> This has been the background and rationale for constitutional and statutory recognition of specialized courts and adjudicative tribunals which in essence is based on their overarching purpose “to qualitatively improve outcomes for litigants and society”.<sup>88</sup>

Another major concern is how the general, non-specialized court systems handle environmental and land use issues affecting development and future sustainability concerns of litigants, judges, government decision-makers, public interest nongovernmental organizations (NGOs), and developers alike these has accelerated the creation of Environment Courts.<sup>89</sup>

It is opined that well-designed Environmental Courts have the capacity to resolve complicated environmental cases expertly, independently, holistically, rapidly, consistently, and justly, incorporating key principles of sustainable development such as the precautionary, polluter-pays,

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<sup>87</sup>RaghavSharma(2008), ‘Green Courts in India: Strengthening Environmental Governance?’,4/1 Law, Environment and Development Journalp. 50,available at <http://www.lead-journal.org/content/08050.pdf>.

<sup>88</sup>David B. Rottman, Does Effective Therapeutic Jurisprudence Require Specialized Courts (and Do Specialized Courts Imply Specialist Judges),37 Court Rev. 22 (2000) (emphasis added).

<sup>89</sup>George (Rock) Pring& Catherine (Kitty) Pring, ‘Greening Justice Creating and Improving Environment Courts and Tribunals,’ with an introduction by Lalanath de Silva, The Access Initiative (2009) available at [www.law.du.edu/documents/ect-study/greening-justice-book.pdf](http://www.law.du.edu/documents/ect-study/greening-justice-book.pdf), accessed on 3<sup>rd</sup> April, 2014.

and intergenerational equity principles.<sup>90</sup> Specialized Environment courts usually require that decision-makers have a background and experience in environmental law and related fields of expertise, and provide on-going training.<sup>91</sup>

Specialisation and expertise is not with the abstract courts themselves but with the individual judges. This is well recognised in the constitutive Act establishing the Environment and Land Court.

However in the case of *Samson Matende vs. - Republic*,<sup>92</sup> the Appellant challenged the jurisdiction of the Court constituted to hear and determine his appeal, he had been convicted for the offence of robbery with violence contrary to section 296(2) of the Penal Code and was consequently sentenced to suffer death in the lower court. On 4<sup>th</sup> October, 2013, vide Gazette Notice number 13601, the Chief Justice, in the exercise of his general powers of direction and control vested in him as the head of the Judiciary, directed that all the Judges of the High Court, Industrial Court and Environment and Land Court hear pending criminal appeals from Subordinate Courts and also consider reviews of sentences as provided for under the Criminal Procedure Code, for purposes of decongesting prisons the Appellant objected to the hearing of his Appeal by Angote J, sitting with Meoli J, as Justice Angote was an ELC judge, the court held that the court was properly constituted to hear the criminal appeal before it.

Accordingly, the intention of the drafters of the constitution was to establish independent specialised courts with their independent judges and therefore constituting a bench of the judges

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<sup>90</sup>Ibid.

<sup>91</sup> Ibid.

<sup>92</sup> Criminal Appeal NO.1410F 2009 available at Eklr

from the High Court, Environment and Land Court and the Industrial Court will be null and void and hence unconstitutional. Section 7 of the Environment and Land Court Act provides;

*“A person shall be qualified for appointment as Judge of the Court if the person—*

*(a) Possesses the qualifications specified under Article 166(2) of the Constitution;*  
*and*

*(b) Has at least ten years’ experience as a distinguished academic or legal practitioner with knowledge and experience in matters relating to environment or land.”*

Arguments in support of the constitution of a mixed bench is that under Article 166 of the Constitution, there are no categories of Puisne Judges who serve various superior courts and in particular the High Court, the Industrial Court and the Land and Environment Court and that all the Puisne Judges take the same oath of office to protect, administer, and defend the Constitution.<sup>93</sup> Indeed it can further be construed that the additional qualifications are contra-the constitution.

#### **4.3 Conclusion**

Based on the data analyses discussed above, most of the respondents were happy with the judgments from the court, most felt that the judges in the court were competent and thus able to comprehend and decide the cases properly. On the challenges that were noted, the study concluded that these were not due to constitutional or statutory structural deficiencies but majorly bordered on capacity and administrative in nature and hence can be surmounted through a robust, constructive and independent engagement with all stakeholders. In particular, the study

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<sup>93</sup>Third schedule to the Constitution, 2010.

established that backlog and delay was a major problem in the courts. Most of the respondents felt that the JSC should assess the extent of this problem to determine the requisite number of courts and judicial officers in order to improve access to justice.

## CHAPTER FIVE

### 5.0 CONCLUSION AND RECOMMENDATIONS

#### 5.1 Introduction

This chapter deals with the conclusions on the study as derived from the previous chapters. This shall then be tied to the recommendations which will be in consonance to the objectives and the research questions of the study. Ultimately the conclusions and the recommendations shall seek to test the hypothesis of the study.

#### 5.2 Conclusion

Having set out the framework of the study in chapter one in terms of the objectives of the study, the research questions and the statement of the problem, the study preceded to chapter two by analyzing the various literature materials that guided the scope of this study. This was done according to the thematic areas. It is concluded that the rationale for the establishment of the specialized Environment and Land Courts is to enhance access to environmental justice. This special status, the research concluded is based on the fact of the nature of environmental disputes which are technical thus requiring an expert oriented, and an independent, holistic, and consistent jurisprudence in resolving them.

With the above theoretical and comparative justification of the ELC, the study sought to find out how to apply the functioning of specialized courts to Kenya's situation bearing in mind that the establishment of the ELC courts is new under the current constitutional dispensation. The study noted several emerging legal challenges with regard to the exercise of the functions of the court in transition, the jurisdiction of the court *vis-a-viz* other courts, and the composition of the bench. The conclusion reached while analyzing these challenges was that they were not really a question of the deficiency of the law or conflict of the law but were merely challenges

involving the interpretation and appreciation of the various provisions of the Constitution. Accordingly, it is my conclusion that these are just teething problems to be resolved overtime through a rich consistent jurisprudence by all the court users practicing fidelity to the constitution and the law.

The research questions of the study have been answered in the affirmative as indeed the establishment of the Environmental courts has led to enhancement of environmental justice in Kenya. The research has found that the Environmental Courts have the potential capacity to resolve complicated environmental cases expertly, independently, holistically, rapidly, consistently, and justly, incorporating key principles of sustainable development such as the precautionary, polluter-pays, and intergenerational equity principles subject to the recommendations proposed hereunder.

On access to justice within the ELC itself, the study noted that the judiciary has established court users committees at every court to address a broad range of administration of justice matters both precautionary as well as responsive they are meant to provide the judiciary with an opportunity to make the justice system more participatory and inclusive. The public is represented through institutional representations of all arms of government, civil society organizations and private sector groups.

The study notes that the merging of the environment and land court has not impeded on access to justice, the few number of environmental cases was attributed to other factors as opposed to merging of the environment and land court.

Therefore, it is hoped that in the exercise of its mandate and jurisdiction, the ELC would streamline and hopefully direct appropriate integration of environmental policies, principles,

rights and laws that are spread over natural resources laws applicable to Kenya. This would include customary law, general international law, and treaties, to which the environment donates increasingly overwhelming numbers in bilateral and multilateral agreements.

The Environment and Land Court Act establishes a Superior court to hear and determine disputes relating to the environment and the use and occupation of, and title to, land pursuant to Article 162(2) (b) of the Constitution. It also provides for the court's jurisdiction and functions and for connected purposes. It replaced the Land and Environment Law Division of the High Court which had been established administratively by the chief Justice. How does the court relate to the High court? This is a question that the study sought to establish and it emerged that most of the litigants interviewed did not know the difference most felt that little had been done to distinguish the division from the court, it was noted that the registry did not have a separate register for the ELC matters and they were operating from the same premise this in essence meant that the court was and is still operating as a high court division.

The study also noted that Justice Nyamweya who was heading the Land and Environment high court division had been appointed to head ELC by the Chief Justice and no elections had been conducted to elect the principal judge of the court neither has a registrar been appointed to the court as is required in the ELC Act.

## 5.3 Recommendations

### 5.3.1 Short term measures

1. Though the judiciary has done a lot in establishing court stations across the country the devolved system of government whose main aim is to improve service delivery requires that the judiciary establishes ELC courts in all 47 counties, they should also set up mobile ELC courts in the marginalized areas and those that lack geographical access to courts.
2. Section 7 of the ELC Act stipulates the criteria to be used when selecting judges to serve in the court, the study recommends that further appointments should adhere to this criteria.
3. The study recommends that the Chief Justice should cease using his administrative authority to interfere with the jurisdiction of the ELC as established in the Constitution; he has no authority to appoint judges of the ELC to listen to other matters outside their jurisdiction as their jurisdiction stems from the Constitution. Further this study notes that the CJ has returned jurisdiction to the magistrates court to listen to environment and land matters this the study states is un-constitutional and the only way he can do that is to push for the Constitution to be amended to return jurisdiction to the magistrates' courts
4. Article 22 of the Constitution has now resolved the issue of *locus standi* this therefore calls for the adoption and implementation of public interest litigation guidelines to facilitate access to justice, this that should be spearheaded by the National Council on administration of justice.
5. Section 6 of the ELC act states that the Principal Judge of the court shall be elected in accordance with Article 165 (2) of the Constitution, section 9 deals with appointment of

the registrar of the court, though these requirements are in the Act the Chief Justice has failed to facilitate the filling of these positions and instead appointed the former head of Land and Environment Court division Judge Pauline Nyamweya to head the court. The study recommends that stakeholders in the environment and land sector and the ELC judges insist that the position of the principal judge of the court and registrar be filled to ensure that the ELC has an able leader who can spearhead the transition and sort out the issues such as Jurisdiction bedeviling the court. The president of the court will further be able to ensure complete transition from the previous Land and Environment high court division thus fully operationalizing the ELC. This can be done by first doing a petition on the justification for the leadership which is presented to the JSC. If JSC fails within a time frame without giving valid reasons for their refusal then this would be in breach of Article 47 of the Constitution on fair administrative process thus attracting a constitutional litigation in court.

6. EMCA be reviewed to expand the mandate of the NET to make it an effective tribunal that can resolve environmental disputes and further enhance the work of the court.
7. The study having established that though there is a specialized environment and land court, the court had not handled many environmental cases at the time of conducting the study. This should be done within the framework of the Judiciary Transformation Plan. In particular, there should be outreach programmes held. The Plan notes on this as follows;

*“The Judiciary has carried out public outreach activities in an attempt to give the institution and its staff a voice to communicate what they do and how the institution works. Through various platforms of dialogue and feedback, the Judiciary has begun to*

*nurture and sustain broad public support for its activities. These activities have sought to promote public participation in the administration of justice, as well as increase access to justice. They also seek to enhance the public accountability of individual judicial officers and staff, as well as the whole institution.”<sup>94</sup>*

This campaign should be a joint strategy involving all court users under an umbrella committee. In addition to this, the judiciary should employ other strategies including documentation and publication in various online journals and cites, increased media access and use in court litigation process subject to the sensitivity of the cases and the distribution of leaflets.

8. The study recommends that the Law Society of Kenya through its Continuous Legal Education Programme conducts more training in environmental law especially in stations to ensure that more advocates are trained in environmental law this will enable them actualize the realization of rights as envisaged in the Constitution, presently we have very few advocates engaging in public interest litigation in environment cases and this is attributed to lack of expertise in the field or lack of interest.
9. The court users committee should popularize the court by giving it visibility in the stations where it exists, there should be clear signs directing people to the court, and with the current reforms being undertaken the JSC should when constructing new courts try to separate the court from the vicinity of the High Court.
10. Under the Judicial Service Act, each Judge is entitled to have a legal researcher. One of the core duties of a legal researcher is to support the judge in delivering well-

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<sup>94</sup> State of the Judiciary Report, 2012-2013.

reasoned decisions considering relevant authorities and jurisprudence. JSC should recruit legal researchers with expertise in environment and land matters and assign them to the ELC judges. As was noted by the CJ, legal researchers have a key mandate in case management, identification of issues and research on them. Legal Researchers mandate include a broad range of duties including preparing the judge for the case including preparing bench memos; managing the judge's docket; researching and writing memos on specific aspects of cases; handling correspondence; and drafting orders and opinions; and verifying citations.

11. The study also recommends the automation of the registry and having back-up electronic files which will go a long way in securing files and thus ensuring expeditious resolution of cases. This should be undertaken as a matter of urgency in the ELC considering that environment and land matters are complex matters and may result in lengthy proceedings and documents being filed in the course of the hearings.

12. This study proposes that the Judicial Training Institute targets the ELC judges and organize periodic trainings such as the Continuous Legal Education program organized by the Law Society of Kenya, the study learnt that most of the training organized for the judges are usually for all high court judges and not specific, the judges had attended a training for ELC judges in June which was the first one organized by the institute for the ELC judges.

### **5.3.1 Long term measures**

1. As a long term measure, the JSC should ensure that Judges participate in regular national and international fora for sharing of experiences and best practices the environmental

field, capacity building of will not only enhance the quality of judicial pronouncements and improve judicial techniques and approaches in the application of green principles, but will also develop an environmental jurisprudence that can be used in enhancing environmental rule of law and justice.

2. In order to improve access to justice where the jurisdiction of a newly created specialized court is drawn from the jurisdiction of numerous generalist courts, it is important for the specialized court to be located as centrally as possible to all major population centers. Presently there are 21 ELC judges two years since the court was operationalized and it seems the JSC is not keen on recruiting more judges to serve in all the counties. The study recommends that there should be at least one judge in each county and the judiciary should as it establishes high court stations across the country also ensure that it sets up an ELC as well.
3. The study also proposes a balance when it comes to deployment of judges. It seems there is a perception that Nairobi has the most workload this could be true but this cannot justify having 6 ELC judges in Nairobi and only 1 judge in Mombasa bearing in mind that Mombasa has many complex environment and land issues, it would be prudent to deploy the judges based on the needs assessment of each station.
4. This study proposes that the working committee on the ELC consider clarifying the court's jurisdiction in the Environment and Land Court Act to include criminal jurisdiction of the court. The criminal jurisdiction of the court can also be clarified by the chief justice using the practice direction rules.

5. This study recommends that the judiciary works towards setting up structures to facilitate ADR in resolving disputes this will go a long way in reducing backlog as minor disputes such as boundary disputes can be quickly resolved through traditional dispute resolution mechanisms, judges should also take the initiative to inform litigants of this option and let them decide which one they prefer, through the interviews conducted the study noted that none of them had ever explained this as an option to the litigants.

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## **APPENDICES**

### **APPENDIX I: INFORMATION SEEKERS' SURVEY**

**June 2014**

Good morning/afternoon. I'm a graduate student at the University of Nairobi conducting a research thesis on APPRAISING SPECIALIZED ENVIRONMENT COURTS IN THE ATTAINMENT OF ENVIRONMENTAL JUSTICE: THE KENYAN EXEPRIENCE The research seeks to establish whether the specialized courts have improved access to environmental justice in Kenya. You have been sampled as one of the interviewees. I would like to ask you some questions the interview is in the nature of a questionnaire and will take about 20 minutes. The answers you give shall remain confidential and shall only be used in analyzing the findings of this research.

Please let me know if I have your consent to proceed with the interview.

Yours faithfully,

Nora Otieno

### **APPENDIX II: QUESTIONNAIRES NEMA REPRESENTATIVE**

Name:

Age:

Designation:

Date:

Gender:

- 
1. Was Kenya ready for a specialized environment court?
  2. Most people argue that instead of establishing a specialized court Kenya would have strengthened existing institutions such as the NET and the PCC. Kindly comment on this?
  3. Have you undertaken any programs to educate Kenyans on their environmental rights?
  4. On specialty of the judges do you think those serving in the court should be specialists in environment and land matters or should any high court judge be appointed to sit in the court?
  5. Do you think the court has improved access to environmental justice in Kenya?
  6. Do you think it was a good idea to merge the environment and land court considering that Kenya has many land issues that may result in the court being more of a land court?
  7. It has been said that no care was taken when selecting the specialized subject matter of the court hence a lot of problems have arisen on the issue of the court's jurisdiction and which matters it should deal with. Give your comments on this.
  8. Do you think the courts practice and directions rules as published by the Chief Justice will help in defining the jurisdiction of the court?
  9. Some jurisdictions have fixed terms or lifetime tenures for judges serving in their specialized courts, do you think this is something we should consider going forward in order to have specialist in certain areas of the law.
  10. Do you think establishment of the court has made access to justice convenient and available to all prospective litigants?

11. In your view has the court improved efficiency in the legal system by having lawyers being specialists in environment and land matters?

12. What do you think are some of the changes you would like to see made to improve the efficiency of the ELC?

13. What are some of the benefits that have been brought about by the establishment of the ELC?

14. Have you partnered with the court in any way, offered support being that your organization is a major stakeholder in the justice sector?

15. Any final comments.

Name:

Contact:

Date:

Designation: Senior Principal Litigation Counsel, Office of the Attorney General

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1. How many cases have you handled that are purely environmental since the court was established? -----

2. How many of these cases have you concluded? \_\_\_\_\_

3. Do you think it was a good idea to merge the environment and land court? Give reasons for your answer.

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4. On the issue of jurisdiction, do you think magistrate's court should listen to environment and land matters? Give reasons for your answer;

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5. Is there a linkage between the Environment and Land Court Division and this Court? Kindly explain your answer.

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6. Do you think Judges appointed to the Court should be experts in Land and Environment matters or should any Judge of the High Court be appointed to serve in the Court? Give reasons for your answer;

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7. On the enforcement of the court's decisions, the government has been accused of failing to implement court orders issued by the courts any comments;

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8. There is a committee that has already started meeting with a view of reviewing the ELC Act and the practice directions and rules and the you are one of the members; kindly comment on the objectives of this committee

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9. Should judges appointed to this court be transferred to serve in other divisions? Give reasons for your answer.

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10. How can you rate the performance of the Court so far?

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11. Do you think the court has improved access to environmental justice in Kenya?

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12. What are the challenges you have experienced in the court?

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13. What are the benefits brought about by the establishment of the court?

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14. What are some of the changes you would want made to improve the courts performance?

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Name: \_\_\_\_\_

Occupation: \_\_\_\_\_

Location of interview \_\_\_\_\_

Date \_\_\_\_\_ Age \_\_\_\_\_

Gender \_\_\_\_\_

Occupation \_\_\_\_\_

(Tick only one response in all the cases)

1. Do you have a matter in this court?

Yes

2. When did you file it? \_\_\_\_\_

3. What kind of matter is it? \_\_\_\_\_

4. Did you ever file a land or environment matter in the courts that existed before establishment of the specialised court? \_\_\_\_\_

5. Briefly explain your answer; (Interviewer may explain principles)

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6. Do you think the court is accessible to all court users in terms of:

- Location \_\_\_ Yes / No \_\_\_
- Court rules & procedures \_\_\_\_\_ Yes \_\_\_\_\_ No
- Filing fees charged Yes \_\_\_\_\_ No \_\_\_\_\_

7. Do you think the specialised court is better than the general courts that existed previously? In terms of: tick where appropriate

	very good	good	Average	Poor	Very poor
Quality of judgments					
Protecting rights of litigants and environment					

through judgments					
Competence of judges					
Enforcement of judgments					
Speed in handling cases					
Affordability Fees and costs charged					
Less technicalities and procedures adopted					

8. Do you think the establishment of the Court will help resolve land and environment problems in Kenya?

Yes  No

Give reasons for your answer

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9. Does the court handle only Environment and Land matters?

Yes  No

10. Are you aware of the existence of the National Environment Tribunal?

Yes  No

11. Have you ever filed a matter at the Tribunal?

Yes  No

12. Do you think Judges appointed to the Court should be experts in Land and Environment matters or should any Judge of the High Court be appointed to serve in the Court? Give reasons for your answer

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Should judges appointed to this court be transferred to serve in other divisions? Give reasons for your answer.

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13. The Constitution of Kenya now recognises Alternative Dispute Resolution as a way of resolving disputes in Kenya, what is your opinion; would you resolve a matter through ADR or do you still prefer the court process?

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14. How can you rate the performance of the Court so far?

Very Good            \_\_\_\_\_  
Good                    \_\_\_\_\_  
Average                \_\_\_\_\_  
Poor                     \_\_\_\_\_  
Very Poor              \_\_\_\_\_

15. Was it a good idea to have environment and land matters handled by one court? Give reasons for your answer:

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16. Do you think the magistrate's court should also listen to environment and land matters where they have pecuniary jurisdiction? Give reasons for your answer;

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17. What are the challenges you have experienced in the court?

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What are the positive things you can say have been brought about by the establishment of the court? \_\_\_\_\_

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18. What are some of the changes you would want made to improve the courts performance?

\_\_\_\_\_

\_\_\_\_\_

Any final comments?

\_\_\_\_\_

**PART B: ADVOCATES**

19. Do you have a matter in this court? \_\_\_\_\_ or have you ever had a matter in this court?

\_\_\_\_\_

20. Is it concluded or ongoing \_\_\_\_\_

21. When did you file it? \_\_\_\_\_

22. What kind of matter?

\_\_\_\_\_

\_\_\_\_\_

23. Do you think the specialized environment and land court is upholding the principles of the constitution? Do explain your answer.

\_\_\_\_\_

\_\_\_\_\_

24. Do you think judges appointed to this court should be transferred to serve in other high court divisions or should they only serve in the ELC court? Give reasons for your answer. \_\_\_\_\_

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28. What should be the role of the high court in listening to environment and land matters?

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29. How would you rate the performance of the court so far? In terms of;  
(Very good, good, fair, poor, very poor)

- Speed in handling cases
- 

- Jurisprudence
- 

- Quality of judgments
- 

- Case management
- 

- Issue of costs and court fees
- 

- Registry operations
- 

30. Did you ever handle a matter in the Environment and land court division of the high court? \_\_\_\_\_

- a) If yes what is different about the operation of this court and the high court division?
- 

31. Do you think the magistrate's court should continue listening to environment and land matters? Do give reasons for your answer.

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32. How many ELC Judges are in this station and how are they handling the workload?

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33. What are some of the successes of the court since establishment?

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Do you think the court has improved access to environmental justice in Kenya? Give reasons for your answer.

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34. What are some of the challenges?

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35. Any recommendations on how the court operations can be made better?

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36. Any final remarks?

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**ELC JUDGE NAIROBI, MACHAKOS & NYERI**

Personal details

Name:

Gender:

Contact:

Professional qualifications:

Date:

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1. When were you appointed to this station? \_\_\_\_\_

2. Do you have training in Environmental law or Land Law, if yes what level?

doctorate \_\_\_\_\_ masters \_\_\_\_\_ undergraduate \_\_\_\_\_

3. How many Judges are in this station? \_\_\_\_\_

4. Is this number sufficient? Give reasons for your

answer. \_\_\_\_\_

---

5. How many matters do you handle per day? \_\_\_\_\_

6. Do you handle only Environment and Land matters or are there instances when you are called

upon to listen to other matters? \_\_\_\_\_

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7. Most of the matters you listen to are:

- Applications \_\_\_\_\_

- Hearings \_\_\_\_\_

- Mentions

8. How many cases have you handled that are purely environmental since you came to this

station? \_\_\_\_\_

9. How many of these cases have you concluded? \_\_\_\_\_

10. How long does it take after a matter is filed for it to be concluded?

Under 1 year \_\_\_\_\_ 1 to 2 years \_\_\_\_\_ 3 to 5 years \_\_\_\_\_

Over 5 years \_\_\_\_\_

11. Do you think it was a good idea to merge the environment and land court? Give reasons for your answer.

\_\_\_\_\_

12. Do you have other non-legal staff such as scientists, environmentalists who assist you when you are handling technical environmental matters? \_\_\_\_\_

13. How often do you require use of environmental experts? Kindly give examples of cases;

\_\_\_\_\_

14. Do you have a legal researcher? \_\_\_\_\_

15. Does she/he have any training in environment and land matters?

\_\_\_\_\_

16. Do you have Jurisdiction to deal with Criminal environmental offences? If yes, kindly give example of cases that you have dealt with. \_\_\_\_\_

If no give reasons for your answer \_\_\_\_\_

17. How have you handled the issue of enforcement of the courts decisions, and what are some of the challenges if at all that you have faced?

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18. Have you had cases where you advised parties to resolve disputes through Alternative dispute resolution? If yes how many? \_\_\_\_\_

b) Why did you decide to refer the matter for ADR?

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c) Which ADR/TDR method was applied?

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20. On the issue of jurisdiction, do you think Magistrate's Court should listen to environment and land matters? Will this negate the intentions of the Constitution?

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b) If your answer to the above question is yes, kindly explain what the role of the High Court should be in Environmental matters?

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21. What is the function of the Land and Environment Division of the High Court? Is there a linkage between it and this Court? Kindly explain your answer.

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22. In your view are Kenyans more aware of their environmental rights now that they have a specialized Environment and Land Court? Give reasons for your answer;

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19. To what extent has this court embraced the use of ICT? Kindly give your comments.

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b) And the parties appearing before the court how have they embraced the use of ICT?

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20. Have you undergone any training since being appointed to this court and was it specifically for ELC Judges or all High Court judges.

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21. What are some of the challenges that you have faced since establishment of the court.

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22. Any advice and or recommendations for any country that intends to establish an Environment and Land Court?

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23. What would you say are the achievements of the ELC since establishment?

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24. Any final comments or remarks?

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## **PART B**

### **DEPUTY REGISTRARS NYERI, ELDORET, NAIROBI**

26. How many appeals have been filed to this court from the National Environment Tribunal?

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27. Who files most of the cases before this court?

a. N. G. O \_\_\_\_\_

b. Community Groups \_\_\_\_\_

c. Individuals \_\_\_\_\_

d. Private companies' \_\_\_\_\_

e. Government \_\_\_\_\_

28. How many matters are filed per day \_\_\_\_\_?

29. How do you assess filing fees? \_\_\_\_\_

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30. Is the Registry automated? \_\_\_\_\_

31. How many Judges have been posted to the ELC? And how many are currently serving in their stations? \_\_\_\_\_

32. Is this number sufficient \_\_\_\_\_

33. Were they selected using specific criteria? \_\_\_\_\_

If yes what criteria was used? \_\_\_\_\_

\_\_\_\_\_

\_\_\_\_\_

34. How many of the Judges have training in Environment and Land matters?

35. Does the ELC court have other non-legal staff such as scientists, environmentalists who assist the judges in decision making when they are handling technical environmental matters?

36. On the use of ICT by the court, kindly give your comments.

\_\_\_\_\_

37. On the issue of on-going judicial training, how often do the Judges go for training? And is the curriculum needs specific or is it organized generally for all high court Judges. \_\_\_\_\_

\_\_\_\_\_

38. Does the Court have its own annual operating budget separate from other court divisions or is the allocation the same? Does the court receive support directly i.e. financial, technical, capacity building from other non-governmental institutions and or other donors?

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39. How many legal researchers are assigned to the Court? \_\_\_\_\_

40. How many cases has this station handled that are purely environmental since inception?  
\_\_\_\_\_

41. How many of these cases have been concluded? \_\_\_\_\_

42. What case management strategies have you put in place to deal with the issue of backlog of cases? \_\_\_\_\_

43. What are some of the challenges that you have faced and what recommendations can you propose to make things better?

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44. Any final comments or remarks?

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## **APPENDIX II: OBSERVATION CHECK LIST**

1. The location of the court and whether it is accessible.
2. Do the courts have signboards directing people to the court?
3. Is the Judge listening to other matters as opposed to only environment and land cases?
4. How are cases filed recorded in the registry?
5. How many registry staff is assigned to the ELC?
6. How do the formal waste companies collect and transport waste?
7. How many hearings does the judge conduct in a day?