COUNTRY REPORT: KENYA
The New Environmental and Land Court

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Introduction

By including the right to a clean and healthy environment in its *Constitution*,[1] Kenya joined the growing list of countries that recognize the importance of giving constitutional protection to the environment.[2] That recognition also underscored the key environmental challenges facing the country requiring legal solutions.

Effective environmental governance requires the existence of sound laws and policies containing substantive provisions and a supportive institutional framework. These however, only represent half the equation. The other half requires procedural rules to give meaning to the substantive constitutional and legal provisions. 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.[3] Article 10 of the *Rio Declaration* provides the launching pad for discussions on procedural rights. It provides that:

> 'Environmental issues are best handled with the participation of all concerned citizens, at the relevant level. 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 opportunities to participate in decision-making processes. States shall participate and encourage public

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[1] *Constitution of Kenya* (Government Printer, 27 August 2010, Nairobi), article 42.
[2] For discussions of countries with constitutional provisions relevant to environmental management, see: D. Boyd, *The Environmental Rights Revolution: A Global Study of Constitutions, Human Rights and the Environment* (2012) UBC Press, Toronto. For countries within the African context having environmental rights contained in their Constitutions, see: C. Bruch, W. Coker & C. Vanarsdale, *Constitutional Environmental Law: Giving Force to Fundamental Principles in Africa* (2007) Environmental Law Institute, Washington DC.
[3] S. Kravchenko, 'Environmental Rights in International Law: Explicitly Recognized or Creatively Interpreted?' (2012) 7(2) *Florida A. M. University Law* Review, 164.

> awareness and participation by making information widely available. Effective access to judicial and administrative proceedings, including redress and remedy, shall be provided.'[4]

This Country Report seeks to review the provisions on access to environmental justice in Kenya with special reference to the recent establishment of the Environment and Land Court. It discusses the importance of this court in providing a framework for resolving environmental disputes. Through the introduction of this court, Kenya breaks a path and joins a select number of jurisdictions, like New South Wales,[5] that have created specialized courts to resolve environmental disputes.

The Resolution of Environmental Disputes before the Constitution of Kenya (2010)

Before Kenya adopted its current *Constitution* through a referendum in August 2010, the right to a clean and healthy environment was not captured in the country's *Constitution*. The substantive laws for environmental management were consequently found in statute law. In 1999, the Kenyan Parliament passed the *Environmental Management and Coordination Act*[6] (EMCA) as its framework environmental law. EMCA was intended to provide the overall legislative framework for environmental matters and consequently it prescribed that: 'any written law, in force immediately before the coming into force of (the) Act, relating to the management of the environment shall have effect subject to the modification as may be necessary to give effect to this Act, and where the provisions of any such law conflict with any provisions of this Act, the provisions of this Act shall prevail'.[7] Despite challenges in interpretation regarding whether ordinary legislation such as EMCA could be superior to another simply on the basis of its more contemporary promulgation,[8] the Act remains the principal legislation governing environmental matters in Kenya.

When EMCA was adopted, the issue of dispute resolution received attention too. While ordinary courts existed even then, there was appreciation that such courts were not fully suited for dealing with environmental issues. As Albert Mumma correctly quips:

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[4] United Nations Conference on Environment and Development, Rio De Janeiro, Brazil, 3-14 June 1992, *Rio Declaration on Environment and Development*, Principle 10 (U.N, Doc. A/CONF.151/26/ REV.1/(Vol 1) Annex 1(12 August 1992).
[5] See the website of the court at http://www.lawlink.nsw.gov.au/lec.
[6] Act 8 of 1999.
[7] EMCA, section 148.
[8] See M. Akech, 'Governing Water and Sanitation in Kenya' in C. Okidi et al *Environmental Governance in Kenya: Implementing the Framework Law* (2008) East African Educational Publishers, Nairobi, 305-334. Here Akech discusses the relationship between the *Water Act* (2002) and the *Environmental Management and Coordination Act* (1999), critiquing the validity of the assertion that EMCA is a framework law and of superior status to other environmental laws.

> '(t)he development of laws relating to sustainable environmental management is relatively recent. Consequently, the courts, as the principal avenues for resolving disputes are not quite prepared to deal with issues arising from them. Additionally, the court processes tend, typically, to be slow, costly, and complex.'[9]

Consequently, EMCA provided two avenues for resolving environmental disputes to complement the ordinary courts of law. These were the establishment of the Public Complaints Committee and the National Environmental Tribunal.

The Public Complaints Committee was established under EMCA to carry out investigations either on the request of any person or on its own initiative, relating to cases of suspected environmental degradation.[10] The ideology behind the establishment of the Public Complaints Committee is to have a body that receives complaints directly from members of the public, much like an ombudsman.[11] Its aim is to determine the scope of facts on an environmental issue and recommend public action to redress the complaint.[12] The Public Complaints Committee has continued to provide an easy mechanism for dealing with environmental disputes due to the informal nature of its operations. It is not hamstrung by technical rules of procedure and an inquisitorial approach to dispute resolution. Its main shortcomings relate to the structure of its operations, being established as a Committee of the National Environmental Management Authority (NEMA), the statutory body responsible for coordinating environmental management in the country. This limits the Committee's operational and legal autonomy, since part of its mandate relates to investigating the actions of NEMA.

The second dispute resolution body is the National Environment Tribunal (NET). NET was established to hear technical disputes relating to the administration of the Act. It is chaired by a person qualified to be appointed Judge of the High Court of Kenya. It hears appeals relating to decisions of the NEMA.[13] The establishment of NET, despite its limited mandate,

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[9] A. Mumma, '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' in N. Chalifour et al *Land Use Law for Sustainable Development* (2007) Cambridge University Press, New York, 253.
[10] EMCA, sections 31-32.
[11] A. Angwenyi, 'An Overview of the Environmental Management and Coordination Act' in Okidi (supra note 8), 154.
[12] C. Okidi & P. Kameri-Mbote (eds) *The Making of a Framework Environmental Law in Kenya* (2001) Acts Press, Nairobi, 126.
[13] EMCA, section 126.

provided avenues for expeditious and cost-effective resolution of environmental disputes. Decisions from NET are still, however, subject to appeals to the High Court.

The courts, however, have had challenges in addressing environmental issues such as: the technical nature of most environmental cases; the fact that many current longstanding members of the judiciary have no training in environmental law; and locus standi limitations. These challenges have meant that Kenya's regular courts are not suited to deal with environmental litigation.[14]

The Land and Environment Court: Law and Practice

The need to reform the Judiciary was one of the major drivers for reforming Kenya's constitutional dispensation. The country's Judiciary had hitherto been seen as opaque, executive leaning, slow, corrupt and an ineffective arbiter of disputes. Kenya's contemporary *Constitution* makes fundamental reforms to the Judiciary and its practical impact has been phenomenal. At the end of 2012, the Judiciary was the most respected public institution in Kenya, from a body that was not long ago despised and revered in equal measure. The Judiciary is constitutionally obliged to be independent and accountable. Several constitutional provisions seeks to ensure this, including those providing: that judicial authority derives from the people and must be exercised for their benefit; for the dispersal of judicial authority; for the establishment of a Judicial Service Commission with representation from the public; for clarity and objectivity in the process of disciplining and removing judges; and for judicial vetting.[15]

The *Constitution* provides for the establishment of a specialized court by Parliament to hear and determine disputes 'relating to the environment and use and occupation of, and title to, land'.[16] On 30 August 2011, the *Environment and Land Court Act*[17] came into effect and it provides for the jurisdiction, structure and operations of the Environment and Land Court (ELC). The ELC is established as a specialized court with the same status as the High Court. This means that the decisions of the LAC are of equivalent value to that of a High

[14] For a discussion of courts and environmental management, see generally: *Kenya Law Reports (Environment and Land),* 'Land, Environment and Courts in Kenya' (2006) National Council for Law Reporting, xiv-xxxiv; M. Makoloo, *Public Interest Environmental Litigation in Kenya: Prospects and Challenges* (2007) ILEG, Nairobi; and P. Kameri-Mbote and C. Odote, 'Courts as Champions of Sustainable Development: Lessons from East Africa' (2009) 10(1) Sustainable Development Law and Policy Law, 31.
[15] M. Akech et al *Judicial Reforms and Access to Justice in Kenya*: *Realizing the Promise of the New Constitution* (2011) ACT, Nairobi, 28-33.
[16] *Constitution of Kenya*, article 162(2)(b).
[17] Act 19 of 2011.

Court and consequently can only be appealed to the Court of Appeal. Kenya's *Constitution* provides for a devolved system of government based on forty-seven counties. This is a departure from the previous centralized system. Despite this, judicial functions still remain a function of the National Government. The *Constitution*, however, requires that state organs, their functions and services be decentralized from the capital of Kenya.[18] The *Environment and Land Court Act* has consequently provided for the ELC to be based at the county level. In 2012, the President, on the recommendation of the Judicial Service Commission, appointed sixteen judges to the ELC. This still leaves a balance of thirty-one judges, if all the counties are to have one judge to deal with environment and land matters.

One of the most problematic issues at the induction of the members of the ELC was the issue of jurisdiction. While the *Constitution* stipulates broadly that the ELC will listen and determine matters relating to the environment and use, occupation and title to land, unless properly delineated, this may result in these courts taking up the majority of matters brought before the High Court. For a developing country like Kenya, where land forms the basis of livelihoods,[19] the majority of cases that go to the courts relate to land. Yet, the number of judges in the ELC is such that if the jurisdictional issue is not properly determined, these courts will become clogged. This would defeat the purpose for establishing these courts. The *Environment and Land Court Act* elaborates on the jurisdictional issue by defining the areas of the courts' intervention to include:

- Disputes relating to environmental planning and protection, trade, climate issues, land use planning, title, tenure, boundaries, rates, rents, valuations, mining, minerals and other natural resources.
- Compulsory acquisition of land.
- Land administration and management.
- Public, private and community land and contracts.

In addition, the ELC is given the power to hear and determine matters relating to: the right to a clean and healthy environment;[20] obligations in respect of the environment;[21] and the enforcement of environmental rights.[22] While this ensures that constitutional issues relating to the environment are dealt with by the ELC, the High Court also has the constitutional authority to deal with all matters relating to the interpretation and enforcement of

[18] *Constitution of Kenya*, article 174(h).
[19] See National Land Policy, Sessional Paper Number 3 of 2009 (Government Printer, Nairobi, 2009).
[20] *Constitution of Kenya*, article 2.
[21] *Constitution of Kenya*, article 69.
[22] *Constitution of Kenya*, article 70.

constitutional rights. Towards this end, the Chief Justice has established a Constitutional and Human Rights Division. There is therefore some overlap between the constitutional jurisdiction of the ELC and the High Court, which will require resolution so as to avoid forum shopping. A third jurisdictional issue relates to criminal cases. EMCA creates environmental offences, implying that the ELC has jurisdiction to deal with criminal aspects too. This requires clarity to determine whether the court's jurisdiction extends to criminal cases or is limited to civil matters only. This is particularly important since the remedies under the *Environment and Land Court Act* seem only to contemplate civil remedies such as: injunctions; prerogative orders; damages; compensation; specific performance; restitution; declaration; and cost orders.[23]

On establishment, the Chief Justice, relying on the powers bestowed upon him by section 24 of the Act, developed *Practice Rules* to regulate the procedure of the ELC. These *Practice Rules*, promulgated on 9 November 2012, provide for matters that can continue to be heard by several other courts and tribunals (such as Magistrates Courts, business premises tribunals and rent tribunals) where appropriate, with appeals to the ELC. The *Practice Rules* also confirm that issues to do with succession (although occasionally dealing with land) fall outside the jurisdiction of the *Environment and Land Court Act* and will be heard by the High Court or Resident Magistrates Court. The spirit underpinning these *Practice Rules* appears to be to properly delineate which matters will be heard and determined by the ELC. They do not however address the confusion relating to the criminal jurisdiction of the ELC.

Furthermore, the fate of the NET remains unresolved. When it was established, NET was supposed to be a specialized tribunal. In light of the establishment of the ELC, questions remain regarding the utility of having both a specialized court and the NET since both are specialized.[24] Appeals from the NET lie to the High Court in accordance with EMCA; while under the *Environment and Land Court Act*, the High Court has supervisory jurisdiction over tribunals,[25] which would include NET.

All courts in Kenya are required to be guided by the general principles of environmental management including: sustainable development; public participation; international cooperation; intergenerational equity; intra-generational equity; polluter pays principle;

[23] *Environment and Land Court Act*, section 13.
[24] On the benefits and disadvantages of specialized environmental courts, see: G. Mcleod, 'Do We Need an Environmental Court in Britain' and P. Stein, 'A Specialist Environmental Court: An Australian Experience' in D. Robinson & J. Dunkley, *Public Interest Perspectives in Environmental Law* (1997) Wiley Chancery, London, at 275-292 and 255-274 respectively.
[25] *Environment and Land Court Act*, section 13.

precautionary principle; and the social and cultural principles traditionally applied by communities to manage the environment in Kenya. In addition, the courts must apply the constitutional principles governing land policy,[26] national values and principles of governance, values and principles of public service and principles of judicial authority. The courts are also required, in accordance with the *Constitution*, to promote the use of alternative dispute resolution (ADR) mechanisms.[27] This is important due to the reliance of ADR by many communities to resolve environmental matters.

Expectations and Challenges

At the end of 2012, the ELC was fully operational. Many expect that the court will be able to develop a sound jurisprudence on environment and land matters and address the many challenges facing the country. There will be need for the Chief Justice to clarify in practice notes, or for the courts to determine through their judgments, the exact purview of their jurisdiction. How the courts handle matters before them will determine whether Kenya's ELC joins the league of progressive specialized ones like that of New South Wales and eventually deliver effective justice by avoiding the pitfalls of non-specialized courts in the manner they handle environmental and land issues affecting development and future sustainability.[28] In the Kenyan context, it is still too early to judge. However, the introduction of the ELC marks an important development for the country in 2012.

[26] Constitution of Kenya, article 60(1).
[27] *Environment and Land Court Act*, section 20.
[28] G. Pring & C. Pring, *Greening Justice: Creating and Improving Environmental Courts and Tribunals* (2009) TAI.