Chapter 15:
The role of the Environment and Land Court in governing natural resources in Kenya

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1 Introduction

Kenya's 2010 Constitution reformed the structure of the judiciary to enhance access to justice.[1] One of the innovations was the creation of a specialised court with the status of the High Court to "hear and determine disputes relating to the environment and use and occupation of, and title to land".[2] With the establishment of this court, Kenya joined countries that have adopted specialised courts and tribunals to respond to environmental challenges. The main goals in establishing specialised courts are two-fold. The first is as a case management tool to improve the quantity and quality of cases handled, when compared to general courts.[3] The second imperative is to develop an alternative jurisprudence that moves from the traditional 'legalistic' adjudications to a more 'problem-solving', 'therapeutic' or 'interdisciplinary' approach.[4] Consequently, environment courts and tribunals –[5]

> are looked to as one solution for fairly and transparently balancing the conflicts between protecting the environment and promoting development; for managing cases more efficiently and effectively; for supporting greater public information, participation, and access to justice; and for achieving more informed and equitable decisions.

The court has been operative for close to six years. While its adoption, set in the context of a progressive, transformative and 'green' constitutional architecture, was hailed as progressive, its rollout and performance have been a mixed bag. The country's environmental challenges continue and arguments about the inconvenience of a court dedicated to environmental and land matters abound. There is also concern about the quantity and quality of cases focussing on the environment dealt with by the court, and questions have been raised about the court's design. All these beg the question as to whether the court's presence is positive and its impact demonstrable, or whether the

1 See generally Akech et al. (2011); and Kameri-Mbote & Akech (2011).
2 Article 162(2), Constitution of Kenya (2010).
3 Ibid.
4 Nolan (2009); and Rottman (2000).
5 Pring & Pring (2009).

continued existence of the court as a mechanism for dealing with Kenya's intractable environmental challenges is an unnecessary inconvenience.

This chapter argues that while the existence of the court is essential for improved environmental governance, its utility has been hampered by structural and normative challenges. First, the operationalisation of the court has suffered a conceptual flaw occasioned by a misinterpretation by the judiciary of the nature of a specialised court, its status in the judicial hierarchy and its rationale. The second hindrance has been the attitude of the judges of the court and the quality of the natural resource governance jurisprudence it has produced.

Based on a review of key decisions on the functioning of the Environment and Land Court (ELC), the author argues that despite recent court decisions clarifying the position of the ELC as a specialised court and further granting magistrates courts powers to determine land and environmental matters, there is need to improve the quality of jurisprudence on land and environmental matters so as to promote sustainable management of natural resources and the environment in Kenya.

2 Courts and sustainable development realisation

From its early antecedents,[6] the sustainable development principle has gained tremendous traction, leading to its current central position in the global discourse. In 2015, the global community adopted the Sustainable Development Goals (SDGs)[7] to foster the realisation of sustainable development. Comprising of 17 goals and 169 clear targets, SDGs are geared toward transforming the world.[8]

Implementing sustainable development requires action at several levels and the involvement of many actors, including the judiciary.[9] The discussion on the role of the judiciary should be set within the broader context of the role of law in protecting the integrity of the environment. Ojwang[10] has argued that environmental integrity focuses on three interrelated issues: "prudence in the use of environmental resources – to the intent that they may, as the capital base for the economy, not be exhausted"; "effective control and management of social and economic activities – so that they may not generate harmful levels of pollution and waste";[11] and "ecological planning and management – so as to achieve and maintain an aesthetic and healthful arrangement of the structures, features, assets and resources surrounding us".[12]

6 Case Concerning *Gabcikovo Nagymaros*, ICJ Rep. 1997, 7.
7 UNGA (2015).
8 See <https://sustainabledevelopment.un.org/?menu=1300> (accessed 23-4-2018).
9 Preston (2005); and Kameri-Mbote & Odote (2009-2010).
10 Ojwang (2007: 19).
11 Ibid.
12 Ibid.

There are several steps and agencies involved in the process of ensuring environmental integrity. Laws as a set of rules are developed to define environmental goals and prescribe the necessary action to realise those goals. As one of the three arms of government, the judiciary plays the role of adjudicating disputes. This is a critical cog in the wheel of promoting a sustainable environment and natural resources management. The international recognition of the judiciary's critical contribution was acknowledged at the World Summit on Sustainable Development in Johannesburg in 2002.[13] Before the Summit, chief justices and senior judges met at the Global Judges Symposium on the Role of Law and Sustainable Development,[14] where they adopted a set of Principles on the Role of Law and Sustainable Development,[15] affirming that:[16]

> …an independent Judiciary and judicial process is vital for the implementation, development and enforcement of environmental law, and that members of the Judiciary, as well as those contributing to the judicial process at the national, regional and global levels, are crucial partners for promoting compliance with, and the implementation and enforcement of, international and national environmental law.

Further, the judges underscored that:[17]

> the fragile state of the global environment requires the Judiciary as the guardian of the Rule of Law, to boldly and fearlessly implement and enforce applicable international and national laws, which in the field of environment and sustainable development will assist in alleviating poverty and sustaining an enduring civilization, and ensuring that the present generation will enjoy and improve the quality of life of all peoples, while also ensuring that the inherent rights and interests of succeeding generations are not compromised.

These resolutions formed the launching pad for enhanced discourse on the judiciary's contribution to the realisation of sustainable development. Subsequent developments at the national and international level both clarified the content and normative character of sustainable development and the framework for their achievement. This culminated in the Rio+20 Declaration on Justice, Governance and Law for Environmental Sustainability[18] at the World Congress in Rio in 2012. The declaration recognised that since the Johannesburg Summit:[19]

> …the importance of the judiciary in environmental matters has further increased and resulted in a rich corpus of decisions, as well as in the creation of a considerable number of specialized

13 The Conference was convened by the United Nations in Johannesburg from 26 August to 4 September 2002. At the end, the Johannesburg Declaration on Sustainable Development was adopted, A/CONF.199/20. <http://www.un-documents.net/jburgdec.htm> (accessed 12-5-2018).

14 UNEP (2005: 54).

15 See <https://www.eufje.org/images/DocDivers/Johannesburg%20Principles.pdf> (accessed 31-7-2018).

16 Ibid.

17 Ibid.

18 See <http://wedocs.unep.org/bitstream/handle/20.500.11822/9969/advancing_justice_governance_law.pdf?sequence=1&isAllowed=y.> (accessed 20-4-2018).

19 UNEP (2012).

> courts and green benches, and a lasting effect on improving social justice, environmental governance and the further development of environmental law, especially in developing countries.

The above developments eventually led to the evolution of the concept of the environmental rule of law and tremendous work by the United Nations Environment Programme (UNEP) on the environmental rule of law. While scholars have long been familiar with the concept of the rule of law and its place in orderly affairs in society, in the environmental field, the rule of law approach to environmental management was only recently recognised. In a description on the UN website, the essence of the concept is captured in the following terms:[20]

> Environmental rule of law is central to sustainable development. It integrates environmental needs with the essential elements of the rule of law and provides the basis for improving environmental governance. It highlights environmental sustainability by connecting it with fundamental rights and obligations. It reflects universal moral values and ethical norms of behavior, and it provides a foundation for environmental rights and obligations. Without environmental rule of law and the enforcement of legal rights and obligations, environmental governance may be arbitrary, that is, discretionary, subjective, and unpredictable.

The concept of the environmental rule of law was originally coined by the UNEP Governing Council in 2013, when, in Decision 27/9 on Advancing Justice, Governance and Law for Environmental Sustainability, it requested the executive director of UNEP to –[21]

> lead the United Nations system and support national Governments upon their request in the development and implementation of environmental rule of law with attention at all levels to mutually supporting governance features, including information disclosure, public participation, implementable and enforceable laws, and implementation and accountability mechanisms including coordination of roles as well as environmental auditing and criminal, civil and administrative enforcement with timely, impartial and independent dispute resolution.

The above decision was arrived at against the background acknowledgement that –[22]

> the violation of environmental law has the potential to undermine sustainable development and the implementation of agreed environmental goals and objectives at all levels and that the rule of law and effective governance play an essential role in reducing such violations…

The realisation of sustainable development is accordingly a cooperative endeavour and effective judiciaries are an integral component of the institutional architecture that every country must put in place, equip and utilise so as to ensure the realisation of sustainable development.

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20 See <https://www.unenvironment.org/explore-topics/environmental-governance/what-we-do/strengthening-institutions/promoting> (accessed:12-05-2018).

21 UNEP Governing Council Resolution 27/9 of 2013, at https://www.informea.org/en/decision/advancing-justice-governance-and-law-environmental-sustainability> (accessed 23-4-2018).

22 Ibid.

3 The evolution of the Environment and Land Court (ELC)

Until the adoption of the 2010 Constitution, environment and land matters were handled within the normal court structure. Consequently, the general complaints about courts as being too technical, case delays, executive influence and corruption that were the key drivers for judicial reform, also affected the disposal of land and environmental matters.

While environmental matters are largely public-spirited in nature, the traditional adjudicative process and philosophy are characteristically private rights focused. This hampers the performance of courts in environmental matters with many cases being dismissed on technicalities as a result of the failure of those seeking redress from courts to demonstrate their specific private rights under threat. The Kenyan Nobel Laureate and one-time assistant Minister for Environment became the point of reference in this restrictive approach by courts when her attempts to protect the county's most famous recreational park in the centre of Nairobi, Uhuru Park, was dismissed. The judge famously quipped that Professor Mathai:[23]

> has strong views that it would be preferable if the building of the complex never took place in the interests of many people who had not been directly consulted. Of course, many buildings are being put up in Nairobi without many people being consulted. Professor Wangari apparently thinks this is a special case. Her personal views are immaterial. The Court finds that the Plaintiff has no right of action against the defendant company and hence she has no locus standi.

This negative attitude by the judiciary on litigating environmental matters in the public interest has changed gradually starting with the enactment of a facilitative framework environmental law in Kenya: the Environmental Management and Coordination Act (EMCA). The Act was "enacted by Parliament after a lengthy but cordial debate, in 1999".[24] Its history, however, started much earlier and is traceable to the Stockholm Conference in 1972 and Kenya's hosting of UNEP.[25]

The Act sought to provide "an appropriate legal and institutional framework for the management of the environment in Kenya".[26] The implication from this preambular statement was that the hitherto existing framework was deficient. The deficiency arose from several factors including a sectoral and uncoordinated approach to managing the environment, a purely command and control legislative architecture and excessive executive discretion in enforcing environmental prescriptions. On the contrary, "EMCA is based on the recognition that improved coordination of the diverse sectoral initiatives is necessary for better management of the environment".[27]

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23 HCCC 5403 of 1989 reported in (2006) 1 Kenya Law Reports (Environment and Land) 170.
24 Okidi (2008: 126).
25 Ibid. See also Okidi & Kameri-Mbote (2001).
26 Preamble, Act Number 8 of 1999 Laws of Kenya.
27 Angwenyi (2008: 143).

From a dispute resolution standpoint, EMCA recognised the role of the court in environmental management. Section 3 provides the right and duty of every citizen to a clean and healthy environment, and grants access to courts for resolution of disputes in relation to violations of this right, stipulating that:[28]

> If a person alleges that the entitlement conferred under subsection (1) has been, is being or is likely to be contravened in relation to him, then without prejudice to any other action with respect to the same matter which is lawfully available, that person may apply to the high court for redress and the High Court may make such orders, issue such writs or give such directions as it may be deem appropriate.

In addition to the High Court's powers, the Act also creates environmental offences, which according to Kenya's judicial structure are resolved by subordinate courts. By the time EMCA was enacted there were already complaints about the performance of courts in resolving environmental disputes. Consequently, EMCA established two other dispute resolution fora:[29]

> …the public complaints committee, which is in the nature of an environmental ombudsman, whose function is to receive complaints and petitions of a technical or non-technical character, and the National Environment Tribunal whose function is to review administrative decisions.

These two bodies provided quick and expeditious options for resolving environmental disputes but suffered from several challenges, notably the structuring of the public complaints committee (PCC) as a committee of the National Environmental Management Authority, yet it was supposed to also investigate the Authority.

While Kenya had a progressive law in the form of EMCA, the existing constitutional architecture did not deal with environmental issues. This was despite the recognition of the need to elevate environmental matters to the constitutional level and the existence of environmental provisions in several constitutions across the continent.[30] As a result, courts relied on the constitutional right to life, as it was the only avenue for addressing violations of environmental rights. This, however, happened in a single case before the adoption of the 2010 Constitution. In that case, the court held that:[31]

> Under Section 71 of the Constitution all persons are entitled to the right to life - in our view the right to life is not just a matter of keeping body and soul together because in this modern age that right could be threatened by many things including the environment. The right to a clean and healthy environment is primary to all creatures including man, it is inherent from the act of creating, the recent restatement in the Statues and the Constitutions of the world notwithstanding.

Environmental rights and management received extensive treatment in the 2010 Constitution.[32] Not surprisingly, the Kenyan 2010 Constitution has been labelled as a "green Constitution"[33] for elevating environmental management and the realisation of

28 Section 3(3), EMCA.
29 Mumma (2007: 259-260).
30 See Bruch et al. (2001: 187).
31 *Peter K. Waweru v. Republic* (2006) eKLR.
32 Odote (2012).
33 Kaniaru (2011-2012: 581).

sustainable development to constitutional status.[34] The establishment of the ELC by the Constitution as one of the two specialised courts within the judicial structure and its positioning at the level of the High Court was also trailblazing. Writing in the early days of the adoption of the Kenyan 2010 Constitution, one writer stated that:[35]

> How soon the court is in place and the type of results it turns out may well determine whether this lead is taken or not taken by the many African countries currently engaged in constitutional reviews in their phase of maturity since independence.

The court was operationalised by the enactment of the ELC Act in 2011 and the appointment of an initial 16 judges to the court in 2012. Consequently "(a) at the end of 2012, the ELC was fully operational. Many expect(ed) that the court will be able to develop a sound jurisprudence on environment and land matters and address the many challenges facing the country".[36]

The creation of the court was the culmination of increasing efforts to enhance the judiciary's role in environmental management and to facilitate its departure from the largely negative and restrictive reputation captured in the approach taken in the *Wangari Mathaai* case.[37] The initial efforts were made by UNEP in fulfilment of the declaration at the global Judges Symposium in Johannesburg in 2002, when a call was made for dedicated capacity building for judiciaries across the world. However, the turning point for Kenya was between 2005 and 2007, when the University of Nairobi partnered with the Institute for Law and Environmental Governance and the National Environment Management Authority to mount a capacity building programme for the judiciary on environmental law. Through a series of colloquia and symposia, all judges of the High Court and Court of Appeal and senior magistrates were introduced to the concepts and principles of environmental law, highlights of the national and legal framework governing environmental management and the role of the judiciary in promoting sustainable development.[38]

One of the experts at the training session for judges was the Chief Judge of the Land and Environment Court of New South Wales, the pioneer specialised environmental court in the world. In his presentation, Judge Preston shared the experience of their courts and courts in Asia and Pacific in promoting sustainable development.[39] He argued that "the role of the judiciary in relation to the law of sustainable development is thus of the greatest importance".[40] Consequently, "it is up to the judiciary to clearly define the circumstances of application and the means of implementation of the principles of sustainable development so that this body of law can continue to develop".[41]

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34 Ibid.
35 Ibid.
36 Odote (2013: 177).
37 HCCC 5403 of 189 reported in 1 Kenya Law Reports (Environment and Land) 2006, 164-171.
38 These fora run for three years and included several presenters. See for example, Okello (2006).
39 Preston (2005).
40 Preston (2005: 210).
41 Ibid: 211.

In the Kenyan context, these words challenged the judiciary leadership resulting in the Chief Justice establishing a division of the High Court responsible for land and environmental matters.[42] This laid the early foundations for the ELC. It also led to challenges relating to jurisdiction, when following the promulgation of the 2010 Constitution and the establishment of the ELC, the Chief Justice appointed a judge of the High Court and not one of the ELC to act as the presiding judge of the Court. This was changed following a case,[43] canvassing the jurisdiction of the court.

Kenya borrowed from the design of New South Wales to combine both environment and land matters. The Land and Environment Court of New South Wales was the first to be established as a specialised superior court of record focusing on land and environmental matters. The importance of land and the responsibility for the judiciary to be able to deliver on the constitutional imperative of sustainable development led to the creation of the Kenyan Environment and Land Court.[44] Land forms the backbone of the country and a direct nexus exists between land tenure and use, on the one hand, and environmental management on the other. Consequently, the manner in which the judiciary handles land and environment cases has direct and fundamental impacts on the majority of the population who rely on land for their livelihoods. The performance of the ELC is thus an important determinant of the judiciary's contribution to socio-economic development in the country. As Judge Brian Preston, the Chief Judge of the Land and Environment Court pointed out:[45]

> The judiciary has a role to play in the interpretation, explanation and enforcement of laws and regulations. …Increasingly, it is being recognised that a court with special expertise in environmental matters is best placed to play this role in the achievement of ecologically sustainable development.

4 Jurisdictional challenges

The question of jurisdiction has dogged the ELC since its establishment. To be fair, this jurisdictional issue is part of the rationale for the inclusion of both the employment and labour relations court and the ELC in the 2010 Constitution. Before the 2010 Constitution, the country had an Industrial Court to determine labour disputes. However, there continued to be a jurisdictional challenge between the High Court and the Industrial Court, with the High Court entertaining appeals from the Labour Court much to the disquiet of the labour movement, which argued that this reduced the utility of the Industrial Court. Consequently, the 2010 Constitution sought to put a stop to this.

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42 See <https://www.standardmedia.co.ke/article/2000074719/cj-shuffles-judges> (accessed 12-5-2018>.
43 *Karisa Chengo & 2 others v. R*, CA No. 44,45 and 76 of 2014.
44 Preston (2005); and Kameri-Mbote & Odote (2009-2010).
45 Preston (2008: 386).

For the ELC, the 2010 Constitution provides for the establishment of the court "with the status of the High Court"[46] and further that the jurisdiction and function of the court would be determined by the Parliament.[47] These provisions have raised operational challenges for the ELC. The main challenge resulted from the fact that by granting the court the jurisdiction to handle disputes relating to "the environment and the use and occupation of, and title to, land"[48] in a country where the majority of disputes relate to land, there was the fear that the ELC would be clogged. Secondly, the ELC could hear and determine disputes relating to the right to a clean and healthy environment.

A lot of debate revolved around what was meant by a court of the status of the High Court. Did this mean that it is part of the High Court or distinct from the High Court? The ELC Act gave the court several adjudicative functions relating to environment and land matters, including an original, supervisory and appellate jurisdiction. Clarifying its exact jurisdiction became controversial. How would one handle succession cases involving land? Were these land cases or succession cases? The importance of this issue derives from the importance of jurisdiction to the functioning of courts. The *locus classicus* for this was laid down years ago by the Kenyan Court of Appeal in the case of *Owners of Motor Vehicle "Lilian S" v. Caltex Oil Kenya Limited*[49] where it held:[50]

> Jurisdiction is everything. Without it, a court has no power to make one more step. Where a court has no jurisdiction, there would be no basis for a continuation of proceedings pending other evidence. A court of law downs its tools in respect of the matter before it the moment it holds the opinion that it is without jurisdiction**.**

Delineating the proper contours of the jurisdiction of the ELC would consequently help in its performance. As the Court of Appeal argued in *Karisa Chengo and others v. Republic*:[51]

> Land in Kenya is an emotive issue and for good reasons; agriculture is the backbone of the country's economy. In our view there was need to have expeditious disposal of land and environment matters and a specialized court would ensure that was done as well as provide jurisprudence on adjudication of land and environment disputes. The need therefore for preserving the objective of creating the specialized courts contemplated under Article 162(2) of the Constitution cannot be gainsaid. We have already stated that the matters handled by these courts are extremely important and sensitive which have an impact on socio-economic well being. Consequently, it is important to empower those courts in dealing with their mandate.

This case epitomises and also resolves the jurisdictional challenge of the ELC. However, the actual jurisdictional confusion was created by the actions of the former Chief Justice of the Republic of Kenya. In 2012, he issued practice directions clarifying the

46 Article 162(2), Constitution of Kenya.
47 Article 162(3), Constitution of Kenya.
48 Article 162(2)(b), Constitution of Kenya.
49 (1989) KLR 1653(CA).
50 Ibid.
51 Criminal Appeals Numbers 44, 45 and 76 of 2014.

jurisdiction of the ELC.[52] The first practice directions issued in September 2012 vested the Court with jurisdiction to hear succession cases. This was, however, corrected in November 2012, but the jurisdictional confusion would continue for much longer.

The rationale behind this confusion was the intention, for administrative convenience, to avoid drawing a fine distinction between judges of the High Court and those of the ELC. *Karisa Chengo v. Republic*[53] demonstrates this jurisdictional separation between the judges. On 4 October 2013, Dr. Willy Mutunga, the then Chief Justice gazetted[54] judges to hear and determine criminal appeals following his declaration of a service week to clear the backlog of criminal cases in the country between 14 and 18 October. Magistrates courts had convicted Karisa Chengo and others of the offence of robbery with violence. Their appeal was heard during the service week by a panel comprising a High Court judge and a judge of the ELC. The bench dismissed the appeal. He appealed to the Court of Appeal, which held that the panel lacked jurisdiction because of the inclusion of an ELC judge.

On subsequent appeal to the Supreme Court, the latter upheld the Court of Appeal decision, finally resolving the jurisdictional problem. It delved into the history of the establishment of the courts, especially the record of the committee of experts, which drafted the country's 2010 Constitution. In the words of the Supreme Court:[55]

> The Committee of Experts in its Final Report thus, adverted to three main factors in securing anchorage in the Constitution for the specialized Courts. These were, first, setting out in broad terms the jurisdiction of the ELC as covering matters of land and environment and of the ELRC as covering matters of employment and labour relations but leaving it to the discretion of Parliament to elaborate on the limits of those jurisdictions in legislations. Secondly, and more fundamentally, the establishment of the ELC was inspired by the objective of specialization in land and environment matters by requiring that ELC Judges were, in addition to the general criteria for appointment as Judges of the superior Courts, to have some measure of experience in land and environment matters. Lastly, the Committee of Experts ensured the insertion in the Constitution of a statement on the status of the specialised Courts as being equal to that of the High Court, obviously to stem the jurisdictional rivalry that had hitherto been experienced between the High Court and the Industrial Court.

The Supreme Court also dealt with the double issue of status and jurisdiction clarifying that while the High Court and the ELC were of the same status, meaning same level, their jurisdictions were distinct. The ELC is a "special cadre of courts with sui generis jurisdiction".[56]

The above decision has settled a limitation on the ELC, which sadly had been administratively created by the judiciary. Another administrative hurdle was evidenced

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52 Practice Directions on Proceedings relating to the Environment and the use and Occupation of, and Title to Land *Gazette* Notice Number 13573, dated 20 September 2012 and published on 28 September 2012.
53 High Court Criminal Appeal Number 49 of 2012.
54 *Gazette* Notice Number 13601.
55 *Republic v. Karisa Chengo and others* Supreme Court Petition No. 5 of 2015.
56 Ibid.

by the decision to designate the head of the ELC as a Principal Judge when the courts were being operationalised. The designation was later changed to Presiding Judge.

The 2010 Constitution envisaged that the ELC would be a court with the same status as the High Court. It contemplated a clear system of administration of the judiciary where leadership would not be the preserve of the Chief Justice. The establishment of an independent Judicial Service Commission and provision for leadership of each court evidences this. The Chief Justice is the head of Supreme Court as its President, while the Court of Appeal also has a President. The High Court has a Principal Judge, elected by judges of the High Court from amongst themselves.[57] The link between the status of the ELC and its leadership is critical.

While the establishment of the court followed appreciation of the importance of land and environmental issues in the country's governance and development arena, its distinction from the High Court is still subject to debate within the judiciary.[58] When the 2010 Constitution was adopted, the Employment and Labour Relations Court and ELC were by dint of Article 162 created as separate superior courts with the same status as the High Court. It is important to point out that the Employment and Labour Relations Court had a successor in the Industrial Court. This had always operated as a separate court from the High Court. The only debate was whether it was inferior to the High Court or not. The ELC on the other hand, used to be a High Court Division. The 2010 Constitution placed these two courts at the same level and removed matters within their jurisdictions from the High Court.

When the enabling legislation was enacted, a Principal Judge was contemplated for both the Employment and Labour Relations Court and for the ELC. However, through an amendment in 2011, the term Principal Judge was replaced with Presiding Judge. The ELC Act provides that "The Presiding Judge shall have supervisory powers over the Court and shall report to the Chief Justice".[59]

It is important to debate the rationale for the change of the title for the head of the ELC from Principal Judge to Presiding Judge. While one may argue that this was to avoid confusing it with the Principal Judge of the High Court and also that there is nothing in a name, practice does not support this argument. If the head of the Employment and Labour Relations Court is designated as a Principal Judge and that court is of the same status as that of the ELC, why should the ELC have a Presiding Judge? Secondly, divisions of the High Court have presiding judges. For example, the civil division of the High Court has a Presiding Judge. Does the designation of the head of the ELC not make the court be seen as a division of the High Court?

57 Article 165(2), Constitution of Kenya (2010).
58 The jurisdiction challenge outlined above and the initial appointment of a head for the court and not election evidences this.
59 Section 6(3), ELC Act.

This is not a futile debate. Since its establishment, the status and jurisdiction of the ELC has been the subject of heated debate. Initially, the Chief Justice established a division of the High Court headed by a High Court before the Act operationalising the ELC was enacted. Then the court had three judges. When the fifteen judges of the court were hired by the Judicial Service Commission and appointed by the President, the High Court judge continued serving as the head of the ELC. This is despite her not being appointed as an ELC judge. Secondly, this happened despite the express provisions of the Environment and Land Court Act providing for the manner of appointing the Presiding Judge for that court. When the Court of Appeal ruled in the *Karisa Chengo* case, the High Court Judge was transferred to Machakos and a judge appointed under the ELC Act appointed as the ELC Presiding Judge, despite the provisions of the Act for elections.[60] This issue was only resolved when elections were held for the position in 2017.

The related question of the powers of the Presiding Judge versus those of the Principal Judge needs to be ventilated and resolved. The ELC Act does not define either the Principal or Presiding Judge. Before the 2012 amendments it had defined a Principal Judge. The 2012 amendment replaced Principal Judge with Presiding Judge. The High Court (Organization and Administration) Act[61] may help here but it is important to point out that this Act gives effect to Articles 165(1)(a) and (b) of the 2010 Constitution by providing for the organisation and administration of the High Court, which the ELC is neither a part nor a division of. The Act defines a Principal Judge as one elected under Article 165(2) of the 2010 Constitution, while a Presiding Judge is one appointed by the Chief Justice to preside over a station or division. Designating the head of the ELC as Presiding Judge therefore envisages that they are heading a division or station but not a court. Secondly, if one compares the provisions of Section 6 of the ELC Act, they are on all fours with Section 5(2) to (5) of the Employment and Labour Relations Act.[62] Curiously though, the head of the Employment and Labour Relations Court is designated "Principal" while that of ELC is "Presiding".

The designation has implications for both authority and management. While Section 6 of the ELC Act states that the Presiding Judge of the Court is answerable to the Chief Justice, the High Court (Organization and Administration) Act envisages that a Presiding Judge shall be answerable to the Principal Judge and shall rank lower in precedence than a Principal Judge.

A Principal Judge has support staff including a Chief Officer and such other staff as designated by the Chief Registrar,[63] while a Presiding Judge does not. Currently, the Presiding Judge of the ELC only has a secretary like other judges. In addition, the

60 Section 6, ELC Act.
61 Act No. 27 of 2015.
62 Chapter 234B, Laws of Kenya.
63 Section 6(5), Act No. 27 of 2015.

Presiding Judges do not have a distinct budget. This limits the discharge of their management responsibility and ability to supervise the performance of the court. Further, while Section 9 of the ELC Act provides for a Registrar of the Court to be appointed by the Judicial Service Commission, to date no substantive Registrar has been appointed. The court operates with a Deputy Registrar.

The leadership of the ELC needs to be enhanced bearing in mind both its unique status and that judges of the court are spread throughout the country. They sit in the same stations with their High Court colleagues, but are not part of the High Court in organisation and administration.

5 Linkages to lower courts and tribunals

The ELC has supervisory and appellate jurisdiction over lower courts and tribunals. However, questions have continued to abound as to the implications of this on the benefits of specialisation which these courts were expected to herald with their establishment. While tribunals by their nature provide for expedited disposal of cases, the ELC was established with the same rationale. Questions, therefore, arise on the necessity for having both the ELC and the National Environment Tribunal (NET) established under the Environment Management and Coordination Act.[64] The retention of the NET when the ELC was adopted was not, and has not been, properly thought through, especially considering ongoing efforts to reform tribunals in the country to bring them within the ambit of the judiciary and rationalise their numbers. NET also experienced challenges when at the end of 2017 both the Judiciary Service Commission and the Ministry of Environment had a back and forth regarding the powers over appointment and supervision of the tribunal. With a specialised court, and innovations on its procedures, there is a need to reconsider the necessity for and continued relevance of the NET, which is centralised in Nairobi, while there are ELC courts across the country.

The second aspect relates to the role and jurisdiction of Magistrates Courts over environmental matters. Because of a lack of initial clarity over the jurisdictional powers of the ELC, controversy also arose as to whether Magistrates' Courts could handle environmental matters. This, in my view, is one place where the controversy was unwarranted. First, accorded the status of the High Court implied that there would be matters that would not necessarily need to be brought to the ELC. In addition, Kenya's environmental management approach combines both civil and criminal tools. Criminal enforcement of environmental law is necessary to protect the integrity of the regulatory system, prevent harm to the environment, protect public health and welfare, and to punish culpable violations. Clarity on the criminal jurisdiction in environmental cases

64 Odote (2013: 177). See also Mcleod (1997); and Stein (1997).

is therefore as necessary as in civil cases. The ELC does not have a jurisdiction to handle criminal matters. Magistrates Courts are consequently relevant in the resolution of environmental disputes in criminal cases.

Despite this, and because of conflicting interpretations on the role of Magistrates' Courts in environmental matters, amendments were made to the law in 2015 to clarify the jurisdiction of Magistrates' Courts in environmental matters. First, the ELC Act was amended by introducing Section 26(3), which provided that "(t)he Chief Justice may, by notice in the Gazette, appoint certain magistrates to preside over cases involving environment and land matters of any area of the country".[65] Section 26(4) of the same Act also provided that subject to Article 169(2) of the Constitution, the magistrate appointed under sub-section (3) shall have jurisdiction and power to handle:[66]

> (a) disputes relating to offences defined in any Act of Parliament dealing with environment and land; and
>
> (b) matters of civil nature involving occupation, title to land, provided that the value of the subject matter does not exceed the pecuniary jurisdiction as set out in the Magistrates' Courts Act.

In addition, a new Magistrates' Court Act[67] was enacted in the same year. The Act included a comprehensive section focusing on the jurisdiction of environment and land matters by Magistrates' Courts. It stated that Magistrates' Courts:[68]

> in the exercise of the jurisdiction conferred upon it by section 26 of the Environment and Land Court Act (Cap. 12A) and subject to the pecuniary limits under section 7(1), hear and determine claims relating to – (i) environmental planning and protection, climate issues, land use planning, title, tenure, boundaries, rates, rents, valuations, mining, minerals and other natural resources; (ii) compulsory acquisition of land; (iii) land administration and management; (iv) public, private and community land and contracts, choses in action or other instruments granting any enforceable interests in land; and (v) environment and land generally.

These amendments, however, became the subject of court disputes involving members of the Law Society of Kenya (LSK). In a suit filed by the LSK Malindi Branch, the lawyers argued that this section was unconstitutional. A three-judge bench in Malindi heard the case and held the amendments unconstitutional. At this stage, the LSK Nairobi Branch, which had not been a party to the proceedings at the initial stage, sought to join the case by filing an appeal against the judgment. While they were allowed to prosecute the appeal, the case raised two interesting procedural issues. The first was the fact that a party that was not part of the proceedings at all in the initial case could file an appeal against such a decision. This precedent had the potential of encouraging people to sit out litigation until judgment is delivered even if they feel they will be affected by such a decision, only to wake up and argue that they are unhappy with the decision and must appeal it; yet they could have ventilated their concerns at the trial

65 Act No. 5 of 2015.
66 Act No. 25 of 2015.
67 Act No. 26 of 2015.
68 Section 9(a) Act No. 26 of 2015.

stage. Secondly, although the LSK has branches in several parts of the country, it is one statutory body established in law. In addition, as a representative body of lawyers in the country, it is assumed that there is consultation before they take a position on a public matter. This litigation pitted two branches against each other, with the parent body in the midst of both of them. The courts, by allowing the appeal, also ignored this aspect of corporate governance.

Substantively on the issue of jurisdiction of the Magistrates' Courts, the Court of Appeal held that that the courts had jurisdiction over environment and land matters, arguing that:[69]

> In our view, conferring jurisdiction on magistrates' courts to hear and determine does not diminish the specialization of the specialized courts considering that appeals from the magistrates' courts over those matters lie with the specialized courts. As urged by Mr. Kanjama, under the doctrine of judicial precedent, the decisions of the specialized courts would bind the magistrates' courts and the specialized courts would therefore undoubtedly imprint the "specialized jurisprudence" on the magistrates' courts.

The above decision followed an earlier judgment by Justice Lenaola in the High Court even before the 2015 amendments. Although his decision was just one of the contending views then, the above sentiments by the Court of Appeal have now settled the law and agreed with his position that:[70]

> In that context, looking at Section 13 (1) of the Act it is clear that Parliament did not intend that the Environmental and Land Court should have exclusive jurisdiction to hear and determine matters related to the environment, and the use and occupation of, and title to land. …It therefore follows that the Magistrates' Courts have jurisdiction to determine matters falling within the jurisdiction of the Environment and Land Court Act and their decisions will be subject to appeals preferred to the Land and Environment Court. I would not attribute any other meaning to the above provisions. Sadly, therefore I do not think that the Applicants can sustain the argument that the Environment and Land Court has exclusive jurisdiction to hear and determine disputes, actions and proceedings concerning land and the environment because the law does not bear them out.

6 A review of emerging jurisprudence

As the Court of Appeal alluded to, it is imperative that the ELC imprints its specialised jurisprudence. This will give guidance to Magistrates' Courts, clarify many legal issues and help assert the role of the court in the management of environmental matters. Since its establishment, the courts have made numerous judgments in both environmental and land cases. While there is no comprehensive statistics on the cases handled to date and how many of these are land matters versus environmental mattters, anecdotal and preliminary review of the cases demonstrates that the majority of the

69 *Law Society of Kenya (Malindi Branch) v. Malindi Law Society of Kenyan and others* Malindi Civil Appeal, 287 of 2016.

70 *Edward Mwaniki Gaturu & another v. Hon. Attorney-General & 3 others* (2013) eKLR.

decisions from the court are land, and even for these there is a disproportionate high number addressing itself to injunctive and preliminary relief.

There are, however, several cases that signal that the court is alive and is setting a positive trajectory with its jurisprudence on environmental matters.

6.1 Environmental impact assessment (EIA)

The ELC has dealt with the question of EIA as a tool for environmental management. The EMCA clearly provides that EIA exists to help ensure that in designing and undertaking development projects, environmental considerations are taken into account and integrated in the entire process. It provides for an elaborate process of identifying negative environmental and social impacts of any proposed projects, determining what mitigation measures are necessary and whether if such action is undertaken, the project could proceed without negatively impacting on the environment.

While EIA has been subject of several cases before the ELC, the jurisprudential approach by the court is demonstrated by the case of *Kwanza Estates Limited by Kenya Wildlife Services.*[71] The case arose out of the action of the defendant to construct public toilets, which the plaintiff, a registered owner of land in Wakame where he had constructed a resort, argued was causing adverse environmental effects to his resort hence devaluing the property. In determining whether to grant an injunction against the construction of the toilets, the court was guided by the place of EIA in sustainable development since the plaintiff had complained that no EIA was undertaken before the toilet was constructed. The court held that while "it is in the public interest that every public beach must have toilets accessible to the members of the public",[72] compliance with EIA processes was necessary. In the courts' words the "protection of the environment for the benefit of the present and future generations is supposed to be done in a structured manner".[73] On EIA, the court held that its necessity was justified, both on the need to ensure sustainable development and due to the need to comply too with the constitutional stipulation of public participation, which would be actualised by conducting an EIA and compiling a report for approval by the NEMA. The court ruled that EIA was an important process, pointing out that:[74]

> EIA is a tool that helps those involved in decision making concerning development programmes or projects to make their decisions based on knowledge of the likely impacts that will be caused on the environment. Where the impacts are negative and likely to result in significant harm, decisions markers will be able to decide what kind of mitigating measures should be taken to eliminate or minimize the harm. The projects that are potentially subject to EIA are specified in the

71 2013 eKLR.
72 Ibid.
73 Ibid.
74 Ibid.

> second schedule of EMCA and they include an activity out of character with its surrounding, any structure of a scale not in keeping with its surrounding and change in land use…

Consequently, for failing to demonstrate that there had been public participation, the court granted an injunction against the construction arguing that this was a denial of public participation. In the courts' view, it prevented them from raising any concerns they had with the proposed project:[75]

> The importance of public participation in decision making in environmental matters is highlighted by the requirement that EIA study report be published for two successive weeks in the Gazette and in a newspaper circulating in the area of the project and the public to be given a maximum of sixty days for submissions of oral or written comments on the same. EIA process gives individuals like the Plaintiff in this case, a voice in issues that may bear directly on their health and welfare and entitlement to a clean and healthy environment.

6.2 Relationship between NEMA and lead agencies

Environmental enactments adopt a framework approach to deal with the sectoral and uncoordinated approaches of the past. EMCA is designed as a framework law with NEMA designated as the agency to coordinate environmental management. In practice though, turf wars are discernible between NEMA and sectoral agencies established under sectoral environmental laws, in regulations promulgated under these laws and in the implementation of the institutions' environmental mandate.[76] The relationship between NEMA and lead agencies was addressed in the case of *Republic versus National Environmental Management Authority and another Ex parte Phillip Kisia and Another.*[77] NEMA charged the Nairobi City Council Town Clerk for failing to perform environmental obligations. The court held that lead agencies have an obligation to cooperate with NEMA in environmental management but –[78]

> the buck stops with NEMA as regards environmental matters. NEMA assists and guides lead agencies in the preservation and protection of the environment but when a lead agency fails to comply with the directives given by NEMA then NEMA has no option but to engage the powers granted to it by EMCA.

6.3 Access to information and public participation

Procedural rights are critical to realising the right to a clean and healthy environment. ELC has demonstrated the importance of procedural rights, making decisions, which underscore that failure to involve the public in environmental decisions or to provide

75 Ibid.
76 Akech (2008: 334).
77 2013 eKLR.
78 Ibid.

access to environmental information, are a violation of environmental rights and hinder sustainable environmental and natural resources management. Consequently, courts will give relief to enforce these guarantees.

Two cases demonstrate this approach. *Joseph Leboo & 2 others v. Director Kenya Forest Services & Another*[79] involved an application by Lembus Council of Elders Committee Members against the Director of Kenya Forest Service and the Baringo County Forest Coordinator, for alleged illegal allocation of rights to pre-qualified and unqualified saw millers to harvest timber and fuel materials from Lembus forest, without involving the community and against the laid down procedure. The court held that public participation is a key prerequisite for sound environmental management. The second case, *Friends of Lake Turkana v. Attorney General and others*[80] related to an alleged memorandum of understanding between the Government of Kenya and the Government of Ethiopia, entered into in 2006, to purchase of 500 MW of electricity from Gibe III as well as an $800 million grid connection between Kenya and Ethiopia. To generate electricity, the Ethiopian Government constructed dams on River Omo, a principal source of water for Lake Turkana. A civil society organisation – Friends of Lake Turkana – sued, arguing that the construction of the dam would adversely affect the environment and Lake Turkana. The failure of the Government of Kenya to provide access to information on the nature of agreement with the Government of Ethiopia was also raised. The court held that access to information was important for public participation and monitoring government actions.

6.4 The precautionary principle and environment management

Section 3 of the EMCA incorporates international environmental law principles as subsets of the principle of sustainable development and requires courts to rely on them in the management of the environment. One such principle is the precautionary principle,[81] captured in the Rio Declaration as follows:[82]

> In order to protect the environment, the precautionary approach shall be widely applied by States according to their capabilities. Where there are threats of serious or irreversible damage, lack of full scientific certainty shall not be used as a reason for postponing cost-effective measures to prevent environmental degradation.

The principle was popularised in the famous case of *Shehla Zia v. WAPDA*[83] where the court held that in appropriate cases it would grant injunctions in instances of threat to environment even if the state of scientific knowledge was uncertain. This approach

79 Ibid.
80 2014 eKLR.
81 Preston (2005).
82 Principle 15, Rio Declaration.
83 Supreme Court of Pakistan, *Shehla Zia v. WAPDA*, PLD 1994 SC 693 (12-2-1994).

was approved by the ELC in a case involving the decision of the Cabinet Secretary for environment and natural resources to ban plastic bags. In the case of *Kenya Association of Manufacturers v. Cabinet Secretary for Environment for Natural Resources*[84] the court held that:[85]

> At this stage of determining whether the applicant has established a prima facie case or not, the court's role will entail an examination of the relevant legal framework to establish if the 1st Respondent had the requisite powers to issue the legal notice. Section 3 of the Act echoes the constitutional framework on the right to a clean environment. It also provides a broad framework on environmental governance principles and access to justice in environmental disputes. One of the environmental governance principles emphasised by this legal framework is the principle of public participation in the development of policies, plans and processes for the management of the environment and natural resources. The other key principle set out in this section is the precautionary principle. This principle requires that where there are threats of damage to the environment, whether serious or irreversible, immediate, urgent and effective measures be taken to prevent environmental degradation notwithstanding the absence of full scientific certainty on the threat to the environment.

7 Conclusion

From the review, the ELC is setting a path which favours sustainability in the management of natural resources and which demonstrates the benefits of a specialised environmental court.[86] However, several issues need to be resolved to enhance the role of the court in sustainable natural resources management.

First is the quantity and quality of jurisprudence. There are very few substantive cases on the environment that have established sound jurisprudence from the court. The majority of the cases revolve around temporary relief. While these signal sound knowledge of environmental law, the lack of depth and analytical focus needs to be addressed going forward. The plans by the Judiciary Training Institute to develop a bench book on environmental law is a useful starting point for providing the foundations for a rigorous analysis of the emerging jurisprudence and challenging the courts to explore and provide guidance on critical and emerging environmental challenges. The success of this will, however, require that many more environmental cases are brought before the ELC. In an adversarial system like Kenya's, courts can only make judgments based on matters brought before them.

It is also important that the relationship between NET and ELC be revisited. Additionally, the use of experts in environmental matters should be considered so that courts can benefit from scientific advice in their determinations. This will improve both the substantive investigation of issues and the quality of judgments.

84 2017 eKLR.
85 Ibid.
86 Preston (2005).

On the issue of jurisdiction, despite the clarification by the courts, there are still the outstanding issues: how to determine which case is environmental and which is land; and relatedly, how to deal with issues of mixed jurisdiction. How does one determine the jurisdiction in a case having both land and environmental issues and other questions of law? This arises both in the context of constitutional issues and normal civil litigation. The case of *Tasmac Limited v. Shalin Chitranjan Gor*[87] had elements of land and company law and the court held that either the High Court or the ELC had jurisdiction. This approach has the potential of encouraging forum shopping, as it does not clarify jurisdictional competence. Judge Ngugi in *Suzanne Achieng Butler v. Redhill Heights Investments Limited and Another*[88] adopted a better approach. He argued that the consideration of competence should be based on the "predominant purpose test" entailing the determination of the predominant purpose of the transaction and the gravamen of the dispute. Thus, while a case may involve several issues, the approach is to determine what is at the heart of the dispute. In this way, it will be possible to determine which court has jurisdiction as opposed to the first court to be approached as happened in *Tasmac.*

In the final analysis, the ELC has made movement, although baby steps, in its quest to enhance sustainable development in the country.

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87 *Tasmac Limited v. Shalin Chitranjan Gor* 2014 eKLR.

88 High Court Kiambu Commercial case No. 2 of 2016.

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