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Public Interest Litigation and Climate Change – An Example from Kenya

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Abstract

Addressing the environmental challenge that climate change poses requires a multipronged approach, of which the use of the law and legal tools is only one. Despite its limits, litigation provides measures to deter actions that cause climate change and also provides a framework for compensating victims of climate change action and punishing those responsible for climate change. Public interest litigation has been applied in the past in Kenya to address several environmental challenges and to provide relief not just to those who go to court but also to members of wider society. This article explores the importance and applicability of public interest litigation as a tool for addressing climate change and its impacts in Kenya, and argues for its utility. It opines that the Constitution of Kenya 2010, with its progressive environmental provisions and expansion of the framework for public interest litigation, provides a solid foundation for public interest litigation regarding climate change issues.

A. The Climate Change Challenge

Environmental problems remain a key challenge to Kenya's efforts towards sustainable development. One of these problems is climate change. The fact that global climate conditions have been changing beyond natural variability is now well established.[1] It remains one of the most critical threats facing the global community in the modern era. It is a global problem, but is experienced very differently in the so-called developed and developing

1 Okoth-Ogendo (2012).

worlds.[2] The Stern Report indicated that "while all regions will eventually feel the effects of climate change, it will have disproportionate harmful effects on the developing countries – and in particular poor communities who are already living at or close to the margins of survival."[3] The Intergovernmental Panel on Climate Change in its 2007 assessment report[4] finally settled the debate on the anthropogenic causes of climate change. It concluded that "warming of the climate system is unequivocal, as is now evident from observations of increases in global average air and ocean temperatures, widespread melting of snow and ice, and rising global average sea level."[5]

The impacts of changing global climate conditions are dire to the entire world. While the exact nature and scope varies across countries and continents, and affects different populations differently, there are common consequences. These include increased temperatures, threats to species, reduced crop productivity, changes in wind and its effect on precipitation patterns; sea level rises, coastal flooding and erosion, extreme weather events, and health impacts such as malnutrition and the spread of contagious diseases, as well as the concurrent impacts on economic and social well-being that these effects entail.[6]

For a long time, climate change was not a serious environmental issue in Kenya, at least not in public policy discourse. However, this has changed dramatically in the recent past, making climate change amongst the top environmental challenges confronting the country currently.

B. The Legal and Policy Framework Governing Climate Change

While climate change poses many complex and varied challenges to society, responding to these challenges requires a variety of tools and approaches ranging from scientific, social, economic, cultural, political and legal. The law exists to serve society, and has accordingly evolved to meet the changing needs and challenges of society.[7] With climate change this evolution involves the application of existing legal concepts, from some ancient doc-

2 Richardson et al. (2011:1).
3 Stern (2007:92).
4 IPCC (2007).
5 (ibid.:30).
6 Richardson (2011:3).
7 Lord et al. (2012:3).

trines generally to new emerging issues and the development of new legal concepts.[8]

The legal regime regulating climate change issues in Kenya span both international and national law. Kenya's constitution provides the framework for the legal system of Kenya. On the question of international law, the adoption of a new constitution in August 2010 explicitly addresses the relationship between international law and national law within Kenya. It provides for the supremacy of the constitution;[9] and consequently all other laws, including international law dealing with climate change, must be applied only to the extent that they do not contradict the constitution.[10]

Before the adoption of the constitution, there was debate on the place of international law within Kenya's legal sphere. The position adopted then was that international law was applicable in Kenya. As a dualist state, that application only came into effect after the international law had been domesticated through the preparation of a national law incorporating the content of the international law and the same having been taken to the Kenyan courts for discussion and adoption. This was followed by the ratification process by the executive. This position was given judicial affirmation in a case involving a conflict between the provisions of the Kenyan Constitution and the Treaty for the Establishment of the East African Community (EAC).[11] The Courts in that case, *Okunda v Republic*[12] ruled that the Constitution of the Republic of Kenya was superior to EAC laws, Importantly, on the relationship between national and international law, the courts held that –

> the provisions of a treaty entered into by the Government of Kenya do not become part of the municipal law of Kenya save in so far as they are made such by the law of Kenya. If the provisions of any treaty, having been made part of the municipal law of Kenya, are in conflict with the Constitution, then to the extent of such conflict such provisions are void.[13]

8 (ibid.).
9 Article 2(1), Constitution of Kenya (Government Printer, Nairobi, 27 August 2010).
10 Article 2(4), Constitution of Kenya, 2010.
11 Treaty for the Establishment of the East African Community, 1967.
12 1970 EA 453.
13 EAC: Republic (1970) EA 457 at 460. This was an appeal to the East African Court of Appeal from the decision of the Kenyan High Court in the case of *Okunda v Republic*.

The position above confirmed Kenya as a dualist country. On adoption of the constitution in 2010, it was provided first that general rules of international law would form part of the laws of Kenya.[14] This is based on the internationally recognised principle that customary international law is automatically applicable to all nations. On the question as to whether Kenya is dualist or monist, the constitution directs that "any treaty or convention ratified by Kenya shall form part of the law under [the] Constitution."[15] This provision has since been litigated in the Kenyan courts in a matter involving the relationship between Kenya's Civil Procedure Act, which provided for jailing of judgment debtors in case they failed to pay their debts and the provisions of the International Civil and Political Rights which disallows civil jail for matters whose cause action arise from contractual matters.

The case confirms the position that the adoption of the constitution has moved Kenya from a strict dualist position to one which only requires ratification of treaties for them to be applicable in Kenya. This is close to the monist approach, save that one should also take into account the procedures for ratification in light of the Constitution of Kenya 2010.

I. The Constitution

The Constitution of Kenya provides the legal basis for public interest litigation in climate change issues. Firstly, the constitution addresses environmental management as a constitutional issue. Preambles to a constitution sets the overall context within which the constitution is adopted and needs to be read and applied. Kenya's constitution, in its preamble, recognises the importance of the environment and acknowledges that the people of Kenya, by adopting the constitution, commit themselves to being "respectful of the environment, which is [their] heritage, and determined to sustain it for the benefit of future generations".[16]

Conserving the environment, including dealing with challenges posed by climate change, aims at promoting sustainability within the ecosystem. Since its elaboration by the World Commission on Environment and Development in 1987 as "development that meets the needs of the present without com-

14 Article 2(5), Constitution of Kenya, 2010.
15 Article 2(6), Constitution of Kenya, 2010.
16 Preamble of the Constitution of Kenya, 2010.

promising the ability of present generations to meet their own needs",[17] the concept of sustainable development has been the key organising principle for environmental management worldwide. It provides a basis for international and national instruments governing various aspects of the environment. For instance, the 1992 United Nations Framework Convention on Climate Change and the Kyoto Protocol both refer to sustainable development as an integral objective of combating climate change.[18] The Constitution of Kenya, in recognition of the importance of sustainable development, identifies it as a national value and principle of governance, applicable in all efforts at applying or interpreting the constitution, and any law or policy.[19] The principle of sustainable development.is therefore important for litigation relating to climate change issues.

The constitution further entrenches the right to a clean and healthy environment[20] as part of the fundamental human rights to which every Kenyan is entitled. Its inclusion in the Bill of Rights means that whenever individuals go to court to litigate on climate change issues arguing that climate change issues impact on their right to a clean and healthy environment, they can, just like in the case of all other human rights, go to court whether it is their right or the right of anybody else that has been violated.[21] In any case, the constitution stipulates that, in applications relating to the right to a clean and healthy environment, the traditional rules of *locus standi* have been relaxed since "an applicant does not have to demonstrate that any person has incurred loss or suffered injury".[22] Courts are further required to ensure that substantive justice is dispensed. This involves the chief justice making rules to address the strictures that have in the past hindered public interest litigation. Litigation of human rights issues required to be addressed include keeping formalities to a minimum and, if necessary, empowering courts to entertain proceedings based on informal documentation; and not charging fees to file applications and showing lack of regard to procedural technicalities.[23]

Although the constitution does not expressly mention the world climate change, the environmental obligations it places on the government and citi-

17 World Commission on Environment and Development (1987:43).
18 Beyerlin & Marauhn (2011:74).
19 Article 10, Constitution of Kenya, 2010.
20 Article 42, Constitution of Kenya, 2010.
21 Article 22, Constitution of Kenya, 2010.
22 Article 70(3), Constitution of Kenya, 2010.
23 Article 23(3), Constitution of Kenya, 2010.

zens arguably extend to addressing climate change. This includes provisions relating to land tenure, use of land and land reform,[24] provisions relating to working to achieve a tree cover of 10%,[25] especially looked at against the importance of forest conservation in combating climate change;[26] sustainable exploitation, utilisation, management and conservation of environment and natural resources; and eliminating processes and activities that are likely to endanger the environment.[27]

The judiciary plays a key role in dispensing justice in environmental matters. It is for this reason that the discourse on environmental management focuses on access to justice as one of the critical pillars in guaranteeing sustainable development.[28] In Kenya the judiciary was for a long time viewed as a hindrance to justice, including in the environmental field. Reform of Kenya's constitution consequently focused a great deal on reforms to the country's judiciary. The constitution has made tremendous progress in this regard, including the establishment of an independent Judicial Service Commission, creation of the office of a deputy chief justice, vetting of judicial officers, enhancement of the independence of the judiciary, and greater accountability of judicial officers.[29] This progress has already started bearing fruits, with the judiciary increasingly being reported as the most trusted public institution in Kenya. In the environment field, the positive jurisprudence emanating from the judiciary in recent years portends well for litigation in the environmental field. This is coupled with the requirements of the constitution for the establishment of a specialised court, with the status of the High Court, to deal with disputes relating to "the environment and the use and occupation of, and title to, land."[30] In furtherance to this provision, parliament in 2011 passed the Environment and Land Court Act,[31] providing for the establishment of Environment and Land Courts at the level of the High Court and their existence in all 47 counties into which Kenya is divided, following the adoption of a devolved system of government. The law defines

24 See generally Chapter Five of the Constitution of Kenya, 2010.
25 Article 69(1), Constitution of Kenya, 2010.
26 (ibid.).
27 (ibid.).
28 See Principle 10 of the Rio Declaration, 1992.
29 Akech et al (2011).
30 Article 162(2)(b), Constitution of Kenya, 2010.
31 Act Number 19 of 2011.

environmental matters to include climate change,[32] thus expressly making it possible to litigate climate change issues before these courts.

II. The National Climate Change Response Strategy

In the run up to 15th Session of the Conference of the Parties (COP15) held in Copenhagen in 2009,[33] there was heightened national action within Kenya on climate change. For the first time, the issue received extensive national attention, with political action being spearheaded by the office of the Prime Minister, and headlines in the mainstream media. Kenya also joined the raging debate pitting developing and developed countries against each other on whether focus should be on mitigation or adaptation. While "the integration of climate information into government policies is important because climate is a major driving factor for most of the economic activities in Kenya",[34] in the past this had not happened. Against this background, the government developed the National Climate Change Response Strategy.[35] The strategy aims at strengthening and focusing nationwide action towards climate change adaptation and Green House Gas (GHG) emission mitigation.[36] This is to be achieved by ensuring the commitment and engagement of all stakeholders, while taking into account the vulnerable nature of Kenya's natural resources.[37] To realise this mission, the strategy strives to achieve several objectives, including: enhancing the understanding of global climate change regimes and required action by Kenya so as to maximise beneficial effects of climate change; assessing evidence and impacts of climate change in Kenya; recommending robust adaptation and mitigation measures needed to minimise risks associated with climate change, while maximising opportunities; enhancing understanding of climate change and its impact nationally and in local regions; recommending vulnerability assessment, impact monitoring, capacity building framework needs, research and technological needs, and a conducive policy, legal and institutional

32 (ibid.:Section 13).
33 On the Copenhagen Accord see http://unfccc.int/meetings/copenhagen_dec_2009/meeting/6295.php, last accessed 26 March 2013.
34 Government of Kenya (2010).
35 (ibid.).
36 (ibid.:5).
37 (ibid.).

framework to combat climate change; and providing a concerted action plan and resource mobilisation plan, and a robust monitoring and evaluation plan to combat climate change.[38]

The strategy identifies key areas that are vulnerable to climate change, including water, agriculture, forestry, energy, wildlife, rangelands, coastal infrastructure, livestock, health and energy.[39] It then proposes adaptation measures to be undertaken just like it does to mitigation measures. The strategy consequently formed the country's first integrated response to climate change.[40]

III. The National Climate Change Action Plan

Following the adoption of the National Climate Response Strategy(NCCRS) in 2010, the country has a framework for policy response to the climate change challenge in Kenya. The strategy serves as the guide to policy making and implementation through "documented evidence of climate impacts on different economic sectors and proposed adaptation and mitigation strategies to enhance the country's climate change response."[41] In 2012, the government of Kenya, through the Ministry of Environment and Mineral Resources, led a process to develop a National Climate Change Action Plan. The action plan provides "Kenya's blueprint for dealing with climate change".[42] It provides the rational path for reducing the country's vulnerability to climate change and improving the country's ability to take the advantages that climate change offers,[43] and puts the country on a low-carbon climate resilient development pathway.[44] It also calls for the establishment of a National Climate Change Council and a Climate Change Secretariat to provide institutional mechanisms for addressing climate change impacts.

38 (ibid.:6).
39 (ibid.:50–64).
40 See, Troell & Odote (211:281).
41 Government of Kenya (2012b:4).
42 (ibid.).
43 (ibid.).
44 (ibid.).

IV. Kenya Vision 2030

The document, Kenya Vision 2030, was adopted in 2008 and is the country's long-term development blueprint. It aims to transform Kenya into "a newly industrializing, middle income country providing a high quality life to all its citizens in a clean and secure environment".[45] Vision 2030 identifies the challenges the country faces and proposes strategies for dealing with those challenges, thus propelling the country to its desired destination by 2030. The anticipated actions are grouped under social, economic and political pillars.

There is minimal reference to climate change in the document under the topic on environmental management as part of the social pillar. The Vision states that Kenya is signatory to the Kyoto Protocol, thus recommitting its obligations thereunder, including that of adaptation. It then discusses climate change and desertification, pointing out that climate change is having negative impacts on Kenya, including melting of glaciers on Mount Kenya and decline in water levels in the Athi and Tana Rivers and subsequent interruption of electricity generation. The Vision, however, indicates that Kenya's response to disasters as a result of climate change has largely focused on reaction, as opposed to disaster risk reduction.

To address environmental challenges, the country will, for the climate and the water relevant strategies, intensify conservation of strategic natural resources including water; insulate development from natural hazards, like El Nino and El Nina floods experienced in the past; build institutional capacity for environmental planning; and improve the impact of environmental governance. Specific short-term actions identified along these lines include attracting five clean development projects per year for five years; rehabilitating degraded catchment areas; intensifying research on impacts of climate change and developing appropriate policy responses; integrating climate change into development planning; establishing baseline on the state of the environment for future planning; and using economic and non-economic incentives and disincentives.

The policy recognises the challenge of climate change, but addresses it very marginally, especially within the context of adaptation measures.

45 Government of Kenya (2008:vii).

V. National Environment Policy and Law

Despite the numerous environmental challenges facing Kenya, the country does not have a National Environment Policy. This failure is particularly critical owing to the fact that the country has recognised, following international acknowledgement, that the environment is an overarching sector whose policy and legislative framework requires coordinated and integrated action. This is the basis upon which the country adopted a framework environmental law, the Environmental Management and Coordination Act in 1999.[46] The Act is useful for climate change response, including litigation. In the first instance, it identifies causes of environmental degradation and suggests action to deal with these causes, including conservation of wetlands, hilltops and rivers, environmental impact assessment, restoration and conservation – all important for dealing with climate change. The law also provides for an elaborate institutional mechanism for environmental management generally, which mechanism involves a National Environmental Management Authority and a National Environment Action Plan Committee, as well as institutions relevant for dispute resolution, being the Public Complaints Committee and the National Environment Tribunal. The Act remains the overall statute addressing environmental matters in Kenya and, in the absence of a specific climate change law, remains the main substantive law on climate change. Any litigation on climate change in Kenya will largely rely on its provisions, including the environmental management principles that it encapsulates. These principles include the principles of sustainable development: the polluter pays and the precautionary principle.[47]

When the Environmental Management and Coordination Act (EMCA) was passed in 1999, a draft environmental management policy was drawn up. However, the draft was never passed. In recent years, the country embarked on a fresh initiative to develop a National Environment Policy. The process commenced in 2006 and culminated in a draft in 2012.[48] The 2012 policy was also produced taking into account the Constitution of Kenya, 2010. The policy identifies key issues and challenges affecting Kenya and includes climate change as one of these challenges. It argues that climate

46 Environmental Management and Coordination Act, Act Number 8 of 1999.
47 Section 3, Environmental Management and Coordination Act, Act Number 8 of 1999.
48 Government of Kenya (2012a).

change poses significant environmental implications for Kenya.[49] Increased frequency and intensity of extreme climate events continue to undermine the country's sustainable development.[50] In essence, the policy admits that climate change is real and bases its pronouncement on the IPCC reports and evidence of prolonged droughts and floods in Kenya. It consequently recommends several policy actions to address climate change, including implementation of the National Climate Change Strategy; strengthening of research capacity on climate change issues; development of an integrated early warning and response mechanism for disaster and climate risks; and the development and implementation of programmes and projects that encourage significant levels of investment and technology transfer for sustainable development.[51]

VI. The National Land Policy

How land is owned and managed is critical for climate change action and response. Evidence and impacts of climate change are felt on land. Actions to mitigate and adapt to climate change rely largely on land to be effected. Consequently, how land is managed and regulated impacts on climate change response strategies and action. Therefore, the lack of a policy framework for land in Kenya till 2009 was a gap in the country's regulatory regime for dealing with climate change. In August 2009, the country adopted, following a consultative process, the first ever National Land Policy since independence.[52] The policy addresses critical land issues, such as land administration, access to land, land use planning, restitution of historical injustices, environmental degradation, conflicts, unplanned proliferation of informal urban settlements, outdated legal frameworks, institutional frameworks, and information management.[53]

While the interface between land management and climate change response is clear, the country's national land policy does not mention the word climate change. Except for a single reference to the issue of desertification in the Arid and Semi Arid Lands as a driving factor for the development of

49 (ibid.:14).
50 (ibid.).
51 (ibid.:35f.).
52 See Government of Kenya (2009).
53 (ibid.:ix).

a policy, the National Land Policy notably excludes any mention of climate change and the impacts it might have upon land use planning and implementation.[54] Despite this lacuna in climate change action, the policy is still relevant. Its reform of the management and administration framework for land in Kenya and its recognition of the importance of addressing environmental peculiarities of specific lands, of addressing environmental impacts of land activities, and of ensuring sustainable land use and land use planning all provide a sound basis for climate change response as related to land and land-based activities.

C. Public Interest Environmental Litigation in Kenya: Antecedents

One of the hallmarks of the development of environmental law and litigation is the change of emphasis from private rights to public rights.[55] This change is particularly useful in protecting environmental interests, since by nature environmental issues lend themselves more easily to categorisation as public rights as opposed to private rights. Public interest litigation, an avenue through which public-spirited individuals bring matters to court seeking to litigate and enforce rights and seek protection on behalf of the larger society, is useful in the environmental field and especially in issues relating to climate change. Climate change mainly impacts on larger segments of societies and not particular individuals. It is for this reason that in causation, liability and *locus standi* may be very difficult questions when viewed from traditional private rights litigation. Despite this reality in Kenya, resort to public interest litigation is fairly new.

Kenya's environmental litigation framework can be discussed in three stages, i.e. the period before the enactment of the National Environmental Management and Coordination Act in 1999, the period up to 2002, and the period from 2002 onwards. In the period before the enactment of EMCA, Kenya's legal framework was sectorally based, scattered across over 77 statutes. The general approaches to the laws were command and control. Cases on environmental issues were generally locked out on the basis of lack of legal standing for the applicants. Courts adopted the position traditionally advocated in the famous English case of *Gouriet v Union of Post Office*

54 Troell & Odote (2011:279).
55 Makoloo et al. (2006).

Workers,[56] where the House of Lords took the position that generally it was the attorney general who has the right in law to bring cases to court where public rights, like the right to a clean and healthy environment, were concerned. The Court had held that –

> …. The jurisdiction of a civil court to grant remedies in private law is confined to the grant of remedies to litigants whose rights in private law have been infringed or are threatened with infringement. To extend that jurisdiction to the grant of remedies to unlawful conduct which does not infringe any rights of the plaintiff in private law is to move out of the field of private law into that of public law with which analogies may be deceptive and where different principles apply.[57]

Kenyan courts in most environmental cases required that environmental matters be litigated by the attorney general as the custodian of the public interest. Private individuals were allowed to come to court only in situations where they had suffered injury greater than other members of the public or in cases where they had a personal proprietary interest in the matter. This position is aptly demonstrated by two judgments of the High Court of Kenya against Kenya's renowned environmentalist and a Nobel laureate, the late Professor Wangari Maathai. In the first case, *Wangari Maathai v Kenya Times Media Trust,*[58] Maathai as the coordinator of an environmental pressure group and civil society organisation, the Green Belt Movement, went to court to challenge the decision made by the government to allow the ruling party KANU to construct a multi-storey complex in the main public recreational park in the city of Nairobi. Wangari complained that the construction would deny Nairobi residents space that they had hitherto used for recreational purposes and would therefore interfere with their environmental rights. She further argued that this was taking place without any consultation of the public. The court, however, dismissed her application on the basis that she could not demonstrate the personal harm that the decision was having on her as a person. The court ruled that in such matters, only the attorney general could bring an action on behalf of the public and not Professor Wangari, since she lacked *locus standi.* The court's ruling declared that Professor Wangari –

56 (1978) AC 435.
57 (ibid.).
58 HCCC 5403 of 1989 reported in 1 Kenya Law Reports (Environment and Land) 2006, 164–171.

> 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*."[59]

The same position was followed in the second case of *Wangari Maathai and 2 others v City Council of Nairobi and 2 others*.[60] The case involved a suit by Professor Wangari Maathai against the sub-division, sale and transfer of a piece of land by the City Council of Nairobi to private individuals. She and her co-applicants further sought an injunction to restrain the beneficiary of the allocation by the City of Council of Nairobi from carrying out construction on the disputed land. The Court dismissed the application on the grounds that Wangari Maathai and her co-applicants had no *locus standi,* since their basis of complaint was a public right which could only be litigated either by the attorney general or with his express permission, through a relator action. The words of Justice Ole Keiwua were:

> But in the present case, the transgressions of those limits inflicts no private wrong upon these plaintiffs and although the plaintiffs, in common with the rest of the public, might be interested in the larger view of the question yet the Constitution of the country has wisely entrusted the privilege with a public officer, and has not allowed it to be usurped by private individuals. That it is the exclusive right of the Attorney General to represent the public interest even where individuals might be interested in the larger view of the matter. It is not technical, not procedural, not fictional. It is constitutional."[61]

With very few exceptions, this approach was the one obtaining within the Kenyan justice system until the enactment of the EMCA in 1999. With this enactment the Kenyan legal framework expanded the frontiers of justice, it being recognised in law that public-spirited individuals and groups could go to court to champion the protection of the environment without having to demonstrate personal interest or injury. Section 3 of EMCA provided that "every person in Kenya is entitled to a clean and healthy environment and has the duty to safeguard and enhance the environment."[62] Through this provision a clean environment became an entitlement of everybody in

59 (ibid:170).
60 HCCC No. 72 of 1994 reported in 1 Kenya Law Reports (Environment and Land) 2006, 188–193.
61 (ibid.:191).
62 Act Number 8 of 1999, Section 3(1).

Kenya. Interestingly, the right was not just restricted to citizens, but to anybody within the borders of the country. The provision encapsulated not only the right to a clean and healthy environment, but also, following on the famous jural relations advanced by Hohfeld[63], captured the correlative of rights, being duties. Thus, people had both the right to a clean and healthy environment and the duty to protect the right to a clean and healthy environment. By this enactment, everybody henceforth had a legal right to go to court as part of meeting their duty to ensure a clean and healthy environment.

The provision mentioned above was buttressed by the express recognition that any person who felt that the entitlement under Section 3(1) of EMCA "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."[64] To address the specific past obstacles through the *locus standi* rule, EMCA stipulated that a person approaching court to litigate the right to a clean and healthy environment would "have the capacity to bring an action notwithstanding that such a person cannot show that the defendant's act or omission has caused or is likely to cause him any personal loss or injury".[65] These provisions relaxed the rules of standing for environmental matters, including climate change cases. However, the cases that went to court in reliance of this provision were initially not all decided in favour of a relaxed rule of standing. While in some instances the court held that "EMCA says that the plaintiff does not need to show that he has a right or interest in the property environment or land alleged to be invaded"[66] in some cases the old position of requiring personal interest as a basis of granting standing was still evident in some judgments. A typical example of this latter position was a case by the Law Society of Kenya seeking to challenge an irregular allocation by the commissioner of Lands of a court building in Eldoret Town to a private individual. However, in dismissing the application, the judge took the position that the dispute, being about public land, could only be litigated by the attorney general as the custodian of public interest. The judge stated as follows:

63 Hohfeld (1913).
64 EMCA, Act Number 8 of 1999, Section 3(3).
65 (ibid:Section 3(4)).
66 *Nzioka and 2 others v Tiomin Kenya Ltd HCC* Number 97 of 2001 reported at 1 Kenya Law Reports(Environment and Land) 2006, 423–440.

> ... for a party to have *locus standi* in a matter he ought to show that his own interest particularly has been prejudiced or about to be prejudiced. If the interest in issue is a public one, then the litigant must show that the matter complained of has injured him over and above injury, loss or prejudice suffered by the rest of the public in order to have a right to appear in court and to be heard in the matter. *Otherwise public interest are litigated upon by the Attorney General or such other body as the law sets out in that regard*.[67] (emphasis supplied)

The third epoch starting from around 2005 has seen the High Court interpret the rule of *locus standi* progressively and in accordance with the provisions of EMCA. Courts have increasingly asserted and sought to protect the rights of every person to litigate in favour of the environment. Two cases demonstrate this progressive thinking.[68] The first case, relevant for climate change discussions involved members of a local community filing a case against the government owing to the latter's decision to introduce an invasive weed in their location, causing them serious environmental harm. In the case, *Samson Lereya and 800 others v the Attorney General and 2 others*[69]*,* the applicants' suit was struck down on a technicality. They had sought orders to compel the government to eradicate an invasive weed, *Prosopis juliflrora*, that they averred had been introduced with the approval of government in the Marigat Division by the Food and Agriculture Organisation in 1983 so as to control desertification. However, the weed had spread for over twenty years and continued to cause harm to human beings, livestock and the environment. While the original suit was struck down on the basis of a technicality, namely for want of notice to government in accordance with the law, the court was unwilling to hold that the applicants lacked *locus standi*. The Court dismissed this objection, reasoning that some of the cases cited before them in support of this objection were decided –

> before the enactment of the Environmental Management and Coordination Act. There was at the time no specific statutory provision in Kenyan law addressing the issue of *locus standi* in matters environmental. The Environmental Management and Coordination Act subsequently filled the gap…. … on the basis of section 3(3) and (4) of the Environmental Management and Coordination Act, we hold that the preliminary objection based on the ground of lack of *locus standi* has no merit and it is hereby … dismissed.[70]

67 *Law Society of Kenya v Commissioner of Lands & two others* HCCC 464 of 2000 reported in 1 Kenya Law Reports (Environment and Land) 2006, 456–462 at 461.

68 For a more exhaustive discussions See, Makoloo et al. (2006).

69 HCCC number 115 of 2006 reported in 1 Kenya Law Reports (Environment and Land) 761–771.

70 (ibid:770).

D. The Framework for Future Public Interest Litigation

The enactment of a new constitution in Kenya sought to give strong foundation to the emerging jurisprudence in Kenya supportive of public interest litigation in environmental cases. This jurisprudence, demonstrated aptly by the *Lereya* case in the context of *locus standi,* is also supported by the second Kenyan case, that of *Waweru v Republic.*[71] Peter K. Waweru and others, all property owners in Kiserian, a small town on the outskirts of the capital city of Nairobi, had been charged under the Public Health Act[72] with the twin offences of discharging raw sewage into a public water course and failing to comply with a statutory notice from a public health authority. The applicants filed a constitutional reference challenging the charge on the grounds of discrimination, arguing that they had been selected from many other landlords who similarly discharged sewage. They further argued that complying with the health requirements would be cost prohibitive and was a task to be undertaken by the local county council. The court upheld their arguments and dismissed the charges against them.

The court in the *Waweru* case further discussed the implications of the offending action on sustainable development and held that the actions were against the right of the residents to a clean and healthy environment.[73] The case was brought under the former constitution, when there were no provisions relating to the environment. All that existed was the right to life, which was argued to include the right to a clean and healthy environment following the jurisprudence of the Pakistan case of *Shehla Zia v Wapda.*[74] The Judges held that, just like in Pakistan, "it is quite evident from perusing the most important international instruments on the environment that the words life and the environment are inseparable and the word life means much more than keeping body and soul together."[75] The *Waweru* case has provided a sound jurisprudential basis for the Kenyan courts in addressing environmental cases.[76] It provides a good precedent for public interest litigation in climate change cases. It is thus arguable that a court could consider that

71 1 Kenya Law Reports (Environment and Land) 2006, 677–700.
72 Chapter 242, Laws of Kenya.
73 1 Kenya Law Reports (Environment and Land) 2006, 677–700 at 687.
74 PLD 1994 SC 693.
75 1 Kenya Law Reports (Environment and Land) 2006, 677–700 at 691.
76 Kameri-Mbote & Odote (2012:311).

climate change threatens the right to life and the right to a clean environment.[77]

This is buttressed by very robust provisions in the constitution protecting the environment, including the inclusion of the right to a clean and healthy environment[78] as part of the Bill of Rights, the placing of obligation in respect of the environment on the state,[79] and the relaxation of the rules of *locus standi*.[80] In addition, the institution of the judiciary has undergone fundamental reforms since the enactment of the Constitution of Kenya, through a referendum on 4 August 2010. With this constitutional and legal framework, time is ripe for public interest cases to be brought before the Kenyan courts, seeking to argue climate change related matters. Such litigation will, however, require identifying appropriate parties to such an action, the nature of the relief sought and the challenging question of liability. These matters are generally a great hurdle in most public interest cases, but take on new significance owing to the complex nature of climate change matters.

E. The East African Community Landscape

Kenya is a member of the East African Community and as such duty bound to adhere to the EAC Treaty.[81] The treaty identifies environmental management as one of the key areas of cooperation[82]: "The Partner States recognize that development activities may have negative impacts on the environment leading to the degradation of the environment and depletion of natural resources and that a clean and healthy environment is a prerequisite for sustainable development".[83] The EAC has consequently taken deliberate steps to address the environmental challenges facing the region.[84] These challenges include climate change.[85]

77 (ibid.).
78 Article 42, Constitution of Kenya, 2010.
79 Article 69, Constitution of Kenya, 2010.
80 Article 70, Constitution of Kenya, 2010.
81 Treaty for the Establishment of the East African Community, 1999, amended 2007 (EAC Treaty).
82 (ibid.:Chapter 19).
83 (ibid.:Article 111).
84 See Jarso (2012).
85 See generally Wabunoha (2008:485ff.).

In addressing climate change, EAC has adopted protocols, made decisions and taken practical action that recognise that, as a region, the effects of climate change require collaborative efforts amongst the partner states.[86] In 2010, following a directive of the Summit of the Heads of State of the East African Community, the EAC developed an EAC Climate Change Policy.[87] The policy recognises that climate change has adverse effects which are already being felt in the East African region[88] and that these effects will make life in the future even more uncertain within the region.[89] It recognises national action already being taken to respond to these negative effects, underscoring the fact that four of the east African countries, namely Burundi, Rwanda, Uganda and Tanzania already have developed National Adaptation Programmes of Action, while Kenya has a Climate Change Response Strategy.[90] In addition, partner states have identified mitigation options to help reduce global greenhouse emissions while enhancing economic development.[91] The policy recognises the requirement for regional policy and action to address climate change, captured in both Article 112(f) and (m) of the EAC Treaty, which calls for cooperation in the management of the environment, disaster preparedness and management, and protection and mitigation measures especially for the control of natural and man-made measures. Further, Articles 23v and 24 of the Protocol on the Environment and Sustainable Management of Natural Resources call for joint action to address climate change within the EAC. This is the background against which the EAC Climate Change Policy has been developed to provide a framework for adaptation and mitigation measures to respond to the climate change challenge within the region.

The East African Community Treaty has established a judicial organ, the East African Court of Justice,[92] as an avenue for resolving disputes within the region. The court comprises a First Instance Division and an Appellate Division. The jurisdiction of the court is however fairly limited, with the court having the right to listen to cases relating to interpretation and appli-

86 See Seitz & Nyangena (2009).
87 See EAC (2011).
88 (ibid.).
89 (ibid.).
90 (ibid.).
91 (ibid.).
92 Article 23 EAC Treaty.

cation of the Treaty.[93] Questions relating to the environment can consequently be entertained by the court if they relate to the application and interpretation of the Treaty. In addition, the provision that the jurisdiction of the court may be extended to such original, appellate, human rights and other jurisdiction as shall be determined by the council and supported by the partner states through a protocol[94] offers a window for granting explicit and wider jurisdiction to the court to hear climate change cases. As it is, the Court has listened to very few cases, none of them dealing with environment, let alone climate change. However such prospects exist.

Except for the East African Court of Justice, which has not had occasion to determine a case of an environmental nature since its establishment, the national courts of East Africa have demonstrated their contribution and approach to sustainable development in general and to sound environmental management in particular.[95] While the courts have not had occasion to litigate many cases relating to climate change, their judgments in public interest cases on the environment signal their progressive jurisprudence,[96] a jurisprudence that can be relied on in public interest litigation on climate change. This is supported by the emerging legal and policy framework that the East African countries are developing to respond to climate change issues.

Uganda's constitution, just like Kenya's constitution, expressly contain references to sound management of the environment. The National Objectives and Directive Principles of State Policy of the Ugandan Constitution stipulate that "the State shall protect important natural resources, including land, water, wetlands, minerals, oil, fauna and flora on behalf of the people of Uganda"[97] and also provides directive principles focusing on environmental management, which principles require the state to promote sustainable development and public awareness of the need to manage land, air and water resources in a balanced and sustainable manner for present and future generations.[98] In addition, the Ugandan Constitution gives every person the right to a clean and healthy environment[99] and the right to apply to court for

93 Article 27 EAC Treaty.
94 Article 27(2) EAC Treaty.
95 Kameri-Mbote & Odote (2009:34).
96 See generally Kameri-Mbote & Odote (2009).
97 Constitution of Republic of Uganda 1995, directive principle XIII.
98 (ibid.:principle xxvii).
99 Article 39 Constitution of Republic of Uganda, 1995.

redress in case the right is violated.[100] The country also has a National Environmental Act,[101] which provides the overall framework for management of the environment and natural resources in Uganda. This law is useful for dealing with climate change issues and litigation thereof.[102]

Uganda ratified the United Nations Framework Convention on Climate Change (UNFCCC) in 1993 and in 2007 prepared its national adaptation programme of action which sets out the country's priority activities that respond to the adaptation requirements to climate change in Uganda. Recently the country has commenced a process to develop a national climate change policy so as to provide a focused policy response and framework to the climate change challenge. This process has been spearheaded by the Climate Change Unit in the Ministry of Water and Environment.

The Ugandan judiciary has been the most progressive in East Africa in addressing environmental cases in the public interest. The case of *Environmental Action Network Ltd v Attorney General and National Environmental Management Authority,*[103] in which a public interest organisation filed a case in court against second-hand smoking as violating the right to a clean and healthy environment of non-smokers in Uganda and where the court overruled an argument by the respondents that applicants did not have *locus standi* to file the matter, stating that the organisation had the right to file a public interest case even if it had no direct interests, represents the majority position of the Ugandan courts. Thus, the Ugandan judiciary, in its decisions, has promoted public interest litigation and has provided a useful basis for litigating climate change cases in appropriate circumstances.

Tanzania's constitution does not have a provision including the right to a clean and healthy environment. Its Fundamental Objectives and Directive Principles of State Policy,[104] part of the constitution, urges the government and its agencies to direct their policies and programmes towards ensuring "that public affairs are conducted in such a way as to ensure that the national resources and heritage are harnessed, preserved and applied toward the

100 Article 50 Constitution of Republic of Uganda, 1995.

101 Chapter 153, Laws of Uganda.

102 For a discussion of the legal and policy framework for climate change see Thadeus (2008).

103 *Environmental Action Network Ltd v Attorney General and National Environmental Management Authority (NEMA),* Application No. 39 of 2001, available at http://www.tobaccocontrollaws.org/files/live/litigation/235/UG_The%20Environmental%20Action%20Netwo.pdf, last accessed 04 April 2013.

104 Part II Constitution of the Republic of Tanzania, 1997.

common good and the prevention of the exploitation of one man by another." [105] The country also has an Environmental Management Act.[106]

While Tanzania's constitution does not include the right to a clean and healthy environment, its courts have interpreted the right to life expansively to include the right to a healthy environment.[107] In addition the courts have ruled in favour of public interest litigation in environmental cases. In the case of *Christopher Mitikila v the Attorney General*[108] the court observed as follows:

> The relevance of public litigation in Tanzania cannot be overemphasized. Having regard to our socio-economic conditions, these developments promise more hopes to our people than any other strategy currently in place. … Public interest litigation is a sophisticated mechanism which requires professional handling. By reason of limited resources that the vast majority of our people cannot afford to engage lawyers even where they are aware of the infringement of their rights and the perversion of the constitution. Other factors could be listed but perhaps the most painful of all is that over the years since independence Tanzanians have developed a culture of apathy and silence.
> Given all these and other circumstances, if there should spring up a public spirited individual and seek the Court's intervention against legislation or actions that pervert the constitution, the Court, as a guardian and trustee of the Constitution and what it stands for, is under an obligation to rise-up to the occasion and grant him standing.[109]

The only focused policy efforts on climate change in Tanzania is the National Adaptation Programme of Action. This is supplemented by sectoral policies including the National Environment Policy, the National Energy Policy and the National Land Policy[110]

Rwanda's engagement on climate change issues traces back to 1992 when the country participated in the United Nations Conference on Environment and Development, where the UNFCCC was adopted. It then ratified the Convention in 1998 and the Kyoto Protocol in 2003. In 2006 it completed its national adaptation programme of action.[111] In 2009 it established the

105 (ibid.:Article 9(1)(c)).
106 Chapter 191, Laws of Tanzania.
107 *Joseph D. Kessy v Dar es Salaam City Council* High Court at Tanzania, Civil Case Number 29 of 1998.
108 Tanzanian Civil Suit Number 5 of 1993.
109 (ibid.).
110 Shemdoe & Mwanyoka (2012).
111 For an overview of these developments, see generally Government of Rwanda (2010).

Climate Change and International Obligations Unit within the Rwanda Environmental Management Authority to coordinate climate change action within Rwanda.[112] The Country has also adopted a Climate Change Policy.

Burundi is one of the four least developed countries (LDCs) within EAC. It ratified the UNFCCC in 1997 and the Kyoto Protocol in 2001. As is required of LDCs, Burundi prepared and finalised its National Adaptation Programme of Action for Climate Change in 2007.[113]

The EAC landscape demonstrates ongoing efforts to develop a legal and policy environment to take adaptation and mitigation action against climate change. However, the legal and policy regime is still in its infancy. Courts will consequently have to rely on general environmental law provisions to provide relief in litigation before East African courts.

F. Conclusion

Climate change is an emerging challenge in Kenya and the wider East African region. Responding to it requires concerted policy and practical action. Litigation may not always be the best solution. Indeed, in the environmental field, greater focus should be on measures geared towards encouraging voluntary action to ensure conservation and sustainable management of the environment. However, it does not always happen that such action results in positive outcomes. At the international level, debates between developed and developing countries have dogged efforts to agree on a post-Kyoto protocol. In addition, there is a growing divide within many countries even in the industrialised world[114] between victims of climate change and those who sit pretty, oblivious of the impacts that climate change portend for less fortunate countries. There is consequently a need for expanding the options and frontiers for seeking solutions to the challenges posed by climate change.

Litigation will provide useful avenues for achieving climate change justice. While in Kenya there has been no climate change case brought to courts thus far, the recent trends in public interest litigation in the environmental field, coupled with the adoption of a modern and progressive constitution, offers opportunities for using litigation as a tool to address climate change

112 (ibid.).
113 See Republic of Burundi (2007).
114 See for instance Arrighi et al. (2003).

problems and ensure justice for those affected by climate change. Successful litigation in the climate change arena will require innovation in overcoming the question of liability, with special focus on causation.[115]

The judiciary in Kenya and the rest of East Africa will require appreciating fully the technical nature of environmental issues. Colloquia held in Kenya for the judiciary in 2005–2007 and the recent establishment of a Judicial Training Institute for continuous training of judges are two avenues for creating awareness amongst the judiciary on the science and law of climate change. It is only through such awareness that the bench will play an effective role in supporting public interest litigation on climate change issues.

Owing to the transnational nature of climate change causes and impacts, greater regional efforts to support climate change legal response, including litigation, is essential. The EAC is starting to grapple with policy and legal responses to climate change. Greater synergies of ongoing national efforts will be necessary. This will involve sharing best practices; encouraging litigation within the five partner states on climate-change-related issues; and more fundamentally discuss possibility of expanding the jurisdiction of the East African Court of Justice to deal with environmental issues, including climate change.

While litigation is a useful tool, the challenges of climate change require multifaceted and multi-stakeholder approaches. Using the media to create awareness and highlight climate change issues; greater engagement by civil society; parliamentary action; and incisive research are a few avenues that should be explored and enhanced in Kenya as ways of dealing with climate change.

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115 See generally Lord (2012).

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