

Alternative Dispute Resolution in Environmental Disputes: A Case of the Specialized Environment and Land Court in Kenya

By: Renson Mulele Ingonga¹

Abstract

One of the novel features of the 2010 Constitution of Kenya (CoK) in environmental governance is the establishment of a specialized court to hear and determine environmental and land matters under Article 162(2) (b). The Environment and Land Court (ELC) was established under Section 4 of the ELC Act and was operationalized in 2012 when judges of the ELC were appointed. In discharging its functions, Section 20 of the ELC Act provides that nothing prevents the ELC on its own motion and in agreement with the parties or at the request of the parties, to adopt and implement alternative dispute resolution (ADR) mechanisms and traditional dispute resolution (TDR) mechanisms in accordance with the CoK. Article 159 (2) (c) of the CoK requires that in exercising judicial authority, courts and tribunals should be guided by the principle of promotion of ADR and TDR mechanisms. This paper interrogates the role of the ELC in implementing Section 20 of the ELC Act when solving environmental disputes through ADR. This paper recognizes that, at the global level, proponents of specialized environment courts (ECs) argue that due to the complexity of environmental issues and the requirement that judges of ECs possess environmental knowledge and expertise, a specialized EC is in a better place to select the best ADR mechanism to a particular environmental dispute, unlike the general courts. Based on this argument, the ELC as a specialized court will play a pivotal role in establishing court annexed ADR mechanisms in solving environmental disputes. This paper recommends the need for the ELC to implement Section 20 of the ELC Act by encouraging environmental litigants to resolve environmental disputes through ADR.

1.0 Introduction

For the first time in history, Kenya has established a specialized court to hear and determine environment and land matters. The Environment and

¹Advocate of the High Court of Kenya, LLB (Moi), LLM (UON)

Land Court (ELC) is anchored in Article 162(2) (b) of the Constitution of Kenya (CoK). The ELC is the first court to be established in Africa at national level and the first in the world to be anchored in a Constitution. It is a court of superior record with the status of the High Court.² The ELC jurisdiction is entrenched in Section 13 of the ELC Act.³ It has the jurisdiction to hear and determine matters relating to: environmental planning and protection, climate issues, land use planning, title, tenure, boundaries, rates, rents, valuations, mining, minerals and other resources; compulsory acquisition of land; land administration and management; public, private and community land, choses in action or other instruments granting any enforceable interests in land; and any other disputes relating to land.⁴

The ELC Act further grants the ELC the mandate to enforce constitutional provisions relating to environment. They include Articles 42, 69 and 70 relating to the enforcement of the right to clean and healthy environment.⁵ The ELC has both appellate and supervisory jurisdiction over decisions made by local tribunals and subordinate courts on land and environmental matters. Section 130 of the Environmental Management and Coordination Act (EMCA) grants the ELC appellate jurisdiction to review the decisions and orders of the National Environment Tribunal (NET).⁶ In 2012, the ELC became operational. In hearing and determining environmental matters, the ELC is required to develop environmental law, solve environmental disputes and develop environmental jurisprudence.⁷

² The Supreme Court, the Court of Appeal and the High Court are also superior courts.

³ Government of Kenya, *Environment and Land Court Act (ELC Act) No. 19 of 2011*, (Government Printers 2011).

⁴ ELC Act 2012, s 13 (b).

⁵ ELC Act 2011, s 13(3).

⁶ NET has limited and specific jurisdiction to matters set out under Section 129(1) of the EMCA.

⁷ The general rules of international environmental law, treaties and conventions on international environmental law ratified by Kenya now form part of the Kenyan law in accordance with Article 2 (5) and (6) of the CoK 2010.

In discharging its judicial mandate, the ELC Act under Section 20 requires the ELC where appropriate on its own motion in agreement with the parties or at the request of the parties to adopt and implement ADR and TDR mechanisms in accordance with the Article 159(2) (c) of the CoK. Section 20 of the ELC Act provides that:

(1) Nothing in this Act may be construed as precluding the Court from adopting and implementing, **on its own motion, with the agreement of or at the request of the parties, any other appropriate means of alternative dispute resolution** including conciliation, mediation and traditional dispute resolution mechanisms in accordance with Article 159(2) (c) of the Constitution.

(2) Where alternative dispute resolution mechanism is a condition precedent to any proceedings before the Court, the Court shall stay proceedings until such condition is fulfilled.⁸

This paper examines the role of the ELC in adopting and implementing ADR in environmental disputes in accordance with Section 20 of the ELC Act. In any of its proceedings, the ELC Act requires the ELC to act expeditiously, without any undue regard to procedural technicalities and the use of ADR offers this opportunity.⁹

2.0 Benefits of Alternative Dispute Resolution Mechanisms in Environmental Disputes

ADR mechanisms refer to other alternative and appropriate methods of dispute resolution other than the traditional court litigation. They include but are not limited to arbitration, mediation, conciliation, negotiation and expert determination. ADR mechanisms have been recognized as fundamental in resolving environmental disputes and enhancing

⁸ Emphasis added.

⁹ ELC Act 2011, s 19.

environmental justice.¹⁰ The Kenyan independence Constitution did not have provisions relating to the use of ADR.¹¹ In 2010, the CoK changed this position and formally recognized the fundamental role that ADR plays in settling disputes by entrenching the use of ADR and elevating the same to a constitutional status. In addition to Article 159(2) (c) of the CoK that requires courts and tribunals to be guided by the principle of ADR and TDR mechanisms, Article 189(4) of the CoK requires the national legislation to provide 'procedures for settling inter-governmental disputes by alternative dispute resolution mechanisms, including negotiation, mediation and arbitration'. The recognition of ADR in the CoK has legitimized it under the legal framework and ADR is now part of dispute resolution in Kenyan governance system.¹² Muigua argues that the incorporation of ADR mechanisms in the CoK will enhance access to justice as it will create awareness on the role of ADR in solving disputes other than litigation and empower the Kenyan people.¹³

The use of ADR in settling environmental disputes emanates from its ability to promote access to justice, reduce on backlog of cases, low costs and solve disputes expeditiously unlike the traditional litigation system.¹⁴

¹⁰ Kariuki Muigua, 'Legitimising Alternative Dispute Resolution in Kenya: Towards a Policy and Legal Framework' <<http://www.kmco.co.ke/attachments/article/156/LEGITIMISING%20ALTERNATIVE%20DISPUTE%20RESOLUTION%20MECHANISMS%20IN%20KENYA.pdf>> accessed 29 January 2015.

¹¹ FM Nyakundi, 'Development of ADR Mechanisms in Kenya and the Role of ADR in Labour Relations and Dispute Resolution (Master's Degree Thesis, University of Capetown 2015).

¹² Duncan Ojwang', 'Dismantling Kenya Jurist Stereotypes toward the Traditional Justice Systems: Can something good come from Article 159 (2) (C) of the Constitution?' (2015) 3(2) Institute of Chartered Arbitrators Journal of Alternative Dispute Resolution 192.

¹³ Kariuki Muigua, 'Empowering the Kenyan People through Alternative Dispute Resolution Mechanism' 2015) 3(2) Institute of Chartered Arbitrators Journal of Alternative Dispute Resolution 64.

¹⁴ Kariuki Muigua, 'Alternative Dispute Resolution and Article 159 of the Constitution' <<http://www.kmco.co.ke/attachments/article/107/A%20PAPER%20ON%20AD>

The characteristics associated with environmental ADR include: parties voluntarily agree to participate; direct participation of the parties in the process; parties can withdraw from the process; a facilitative approach is used by a neutral party with no decision making authority; and the decision and solutions reached are made by the parties.¹⁵ As a result of these characteristics, environmental ADR encourages constructive approaches to solving disputes, the stakeholders voluntarily participate in the dispute resolution giving them a sense of ownership of the decisions they make, and the court can be called upon to enforce such decisions, ultimately making them binding.¹⁶ This enhances the relationship of the parties involved in the ADR and it is easier to deliver benefits to the broader community.

It should be noted that environmental disputes deal with complex, technical and scientific issues that require that those solving environmental disputes possess expertise, experience and knowledge in environmental matters.¹⁷ Enforcing the complex environmental laws and interpreting the sophisticated environmental principles such as sustainable development requires a multi-faceted approach that goes beyond the traditional litigation.¹⁸ ADR presents such a multi-faceted approach. A specialized EC

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¹⁵ Joseph A Siegel, 'Alternative Dispute Resolution in Environmental Enforcement Cases: A Call for Enhanced Assessment and Greater Use' (2007) 24(1) *Pace Environmental Law Review* 187.

¹⁶ United States Environmental Protection Agency(EPA), *ADR Accomplishment Report* (EPA 2000); John S Andrew, 'Examining the Claims of Environmental ADR: Evidence from Waste Management Conflicts in Ontario and Massachusetts' (2001) 21(1) *Sage Journals*

¹⁷ Richard Macrory and Michael Woods, *Modernizing Environmental Justice: Regulation and the Role of an Environmental Tribunal* (University College London, 2003) 7.

¹⁸ Ellen Hey, *Reflections on an International Environmental Court* (Kluwer Law International 2002) 9; Jane Holder and Maria Lee, *Environmental Protection, Law and Policy* (Cambridge University Press 2007) 340.

is known to offer a multi-door courthouse.¹⁹ A multi-door courthouse is a concept developed by Professor Frank E Sander of the Harvard Law School in 1976 who proposed the need to link cases to appropriate and alternative forums to settle disputes rather than litigation.²⁰

Environmental ADR is not a futile process even when parties fail to reach an agreement. O'Leary and Husar argue that even where environmental ADR is not successful in resolving environmental disputes, it enhances better information exchange, enhances clarification of issues, it leads to better pre-trial preparation and exploration of options that would not otherwise have been considered.²¹ Pring and Pring summarize the benefit of environmental ADR mechanisms and provide that:

*The use of ADR, when appropriate, tends to produce a high settlement rate as well as innovative solutions to problems, potentially resulting in better outcomes for the parties and for the environment and reducing the number of cases which must have a full hearing. In addition, ADR can increase public participation and access to justice by including interested stakeholders in collaborative decision making or mediation prior to a judicial decision and can reduce costs to the parties and the courts.*²²

3. Legal Framework Governing the ELC Alternative Dispute Resolution in Environmental Disputes

Once an environmental suit has been filed in the ELC, the ELC can on its own motion and in agreement with the parties or upon the request of the parties adopt and implement ADR mechanisms in solving the environment. Where the ELC has referred environmental dispute to ADR

¹⁹ Ibid.

²⁰ Larry Ray and Anne L Clare, 'The Multi-Door Courthouse Idea: Building the Courthouse of the Future Today' (1985) 1(1) Journal of Dispute Resolution 7, 9.

²¹ Rosemary O'Leary and Maja Husar, 'What Environmental and Natural Resource Attorneys Really Think About ADR: A National Survey' (2002) 16 National Resources and Environment Journal 262

²² George Pring and Cathreen Pring, *Greening Justice: Creating and Improving Environmental Courts and Tribunals* (Access Initiative 2009) 16.

and the environmental ADR mechanism is a condition precedent to any proceedings before the ELC, the ELC will stay the proceedings until when the condition is fulfilled.²³ This is aimed at maintaining the status quo and granting the parties time to come up with a settlement agreement.

Before delving and interrogating Section 20 of the ELC Act and the opportunities it offers in settling environmental disputes through ADR, it should be noted that as a specialized court, the ELC is expected to provide a better forum than the general courts in solving environmental disputes and enhance jurisprudence on the use of environmental ADR.²⁴ Preston argues that indeed specialized ECs provide 'centralization, specialization and the availability of a range of court personnel facilitate a range of alternative dispute resolution (ADR) mechanisms'.²⁵

ELC judicial authority to adopt and implement ADR is governed by a number of statutory, policy and regulatory framework that are important for discussion. They include the CoK, the Arbitration Act,²⁶ the Civil Procedure Act, the Civil Procedure Rules and the Mediation Rules. The choice of the ADR mechanism will require the ELC to abide by the legal framework in place governing it.

a) Constitution of Kenya

The CoK as the supreme law provides the legal basis upon which the ELC would invoke the use of ADR in settling environmental disputes under Article 159(2) (c). In adjudicating environmental disputes through ADR, the ELC is required to abide by the national values and principles of good governance such as public participation, inclusiveness, human rights,

²³ ELC Act 2011, s 20(2).

²⁴ C Stukenborg 'The Proper Role of Alternative Dispute Resolution (ADR) in Environmental Conflicts' (1994) 19 University of Dayton Law Review 1305.

²⁵ Brian J Preston, 'Characteristics of Successful Environmental Courts and Tribunals' (2014) 26 Journal of Environmental Law 365.

²⁶ Government of Kenya, *Arbitration Act No. 4 of 1995* (Government Printers 1995).

sustainable development and good governance as indicated in Article 10 of the CoK.

b) The Environment and Land Court Act No. 9 of 2011.

The ELC Act was enacted to give effect to Article 162(2) (b) of the CoK by establishing the ELC and providing for its jurisdiction, functions and powers. In any of its proceedings, the ELC Act requires the ELC to act expeditiously, without any undue regard to procedural technicalities.²⁷ Section 20 of the ELC requires the ELC where it deems appropriate to adopt and implement ADR and TDR mechanisms in accordance with the CoK. This can be done on its own initiative upon parties agreeing or the parties may request the ELC to refer the matters to ADR. In addition to abiding by the CoK, the ELC Act requires the ELC to abide by the procedure laid down in the Civil Procedure Act (CPA). This means that the ELC will abide by the CPA procedure on ADR mechanisms when adopting and implementing environmental ADR.

Section 18 of the ELC provides for the general principles that the ELC should be guided by when discharging its mandate such as adopting and implementing ADR. These principles include: sustainable development; judicial authority under Article 159 of the CoK (which includes the use of ADR); land policy under Article 60(1) of the CoK; national values and principles of good governance under Article 10 of the CoK; and the values and principles of public service under Article 232(1) of the CoK.

c) Civil Procedure Act Chapter 21 2010 and Civil Procedure Rules, 2010.

Section 19 of the ELC Act provides that the ELC in carrying out its functions is bound by the procedure laid down in the CPA. The overriding objective of the CPA is to 'facilitate the just, expeditious, proportionate and affordable resolution of disputes' in the CPA.²⁸ This overriding objective is also reflected under Section 3 of the ELC Act. The ELC shall, where it considers appropriate adopt and implement ADR in resolving

²⁷ ELC Act 2011, s 19.

²⁸ Civil Procedure Act 2010, s 1A.

environmental disputes in order to give effect to the overriding objectives.²⁹ Muigua argues that the overriding objective serves as 'a basis for the court to employ rules of procedure that provide for use of Alternative Dispute Resolution mechanisms, to ensure that they serve the ends of the overriding objective'.³⁰

The CPA and Civil Procedure Rules further provide provisions that guide the ADR mechanisms in place. Section 59C of the CPA allows the Court to refer a dispute to any other ADR mechanism on its own motion or where the parties agree to such a referral. This section does not specify the preferred mechanisms of ADR, thus giving parties a wide discretion to choose the appropriate ADR depending on the nature of the environmental dispute in place. Order 46 Rule 20 of the Civil Procedure Rules gives the ELC the power to adopt and implement ADR mechanisms in order to attain the overriding objectives under Section 1A and 1B of the CPA. The ELC, invoking Order 46 Rule 20 (2) of the CPA Rules can make any orders or issue directions that are necessary to facilitate the ADR adopted. The ELC plays a vital role in ensuring that the chosen ADR is well undertaken.

Section 59B of the CPA provides instances when the ELC can refer cases to mediation. This can be done upon the request of the parties concerned, where the ELC on its own motion deems it appropriate that the dispute can be effectively settled through mediation; or where there is a statutory requirement that the dispute be referred to mediation.³¹ When mediation is adopted as the appropriate environmental ADR mechanism, in addition to abiding with the Mediation Rules, the process must comply with the procedure laid down in the CPA and the Civil Procedure Rules. Mediation

²⁹ The ELC Act further requires that the parties and their duly authorized representatives assist the ELC to further the overriding objective and participate in its proceedings.

³⁰ Kariuki Muigua, 'Court Annexed ADR in the Kenyan Context' <<http://www.kmco.co.ke/attachments/article/106/Court%20Annexed%20ADR.pdf>> accessed 30 January 2018.

³¹ Civil Procedure Act, s59B.

is facilitated negotiation. The mediator is a third party whose role is to assist the parties reach consensus. Section 2 of the Civil Procedure Act defines mediation as ‘an informal and non-adversarial process where an impartial mediator encourages and facilitates the resolution of a dispute between two or more parties, but does not include attempts made by a judge to settle a dispute within the course of judicial proceedings related thereto’

The CPA establishes the Mediation Accreditation Committee (MAC) in order to: determine the criteria for the certification of mediators; propose rules for the certification of mediators; maintain registers of qualified mediators; enforce the code for ethics for mediators; and set up an appropriate training programmes for mediators.³² Taking into account that environmental matters involve a complex of legal issues that are technical and scientific, the ELC having judges with more than ten years’ experience in environment and land matters is in a better position to advise parties on the appropriate procedure involving environmental mediation. The ELC can further advise or propose to the parties’ mediators that possess experience and expertise in mediating on environmental issues. When referring parties to mediation, the ELC must ensure that the name of the mediator selected appears in the mediation registrar maintained in the MAC register.³³

The mediation should also be conducted in accordance with the Mediation Rules and no appeal will lie against an agreement reached by the parties during the mediation process. The role of the ELC is to enforce the said mediation agreement. In doing so, the parties in accordance with Section 59D of the Civil Procedure Act will reduce the mediation agreement into writing then register with the ELC for enforcement. Currently, the judiciary is undertaking a pilot project on the court annexed mediation.

³² Civil Procedure Act 2010, Section 59A (4).

³³ Civil Procedure Act 2010, s59B (2).

The Alternative Dispute Resolution Operationalization Committee (ADROC) oversees this project.

The CPA further governs the procedure in environmental arbitration which the ELC needs to take into consideration when referring parties to arbitration.³⁴ The procedure governing arbitration is found under Order 46 of the Civil Procedure Rules. It allows parties who are not under any disability agree that the matter they have filed in a suit be referred to arbitration. This should be done before a judgment is pronounced and the parties will agree on the appointment of the arbitrator. The decision of the arbitral award is binding and the court has no power to interfere with the decision of the arbitral tribunal.³⁵ Where an environmental dispute is brought before the ELC that was subject to an arbitration agreement, the ELC will have to refer the parties to arbitration first.

d) Arbitration Act No. 4 of 1995

In addition to the Civil Procedure Rules on arbitration, the environmental arbitration will also be governed by the Arbitration Act No.4 of 1995. The Arbitration Act defines arbitration as 'any arbitration whether or not administered by a permanent arbitration institution'.³⁶ Parties in an environmental dispute will agree to submit to arbitration and be bound by the decision of the arbitral tribunal. Where a suit involving an environmental dispute has been brought before the ELC which is subject to an arbitration agreement, then the ELC should stay the legal proceedings and refer the matter to arbitration in accordance with Section 6 of the Arbitration Act. This is to allow the parties to exhaust the arbitration process as indicated. The use of arbitration in environment disputes is not novel and the ELC should embrace it. In 1893 an arbitral award was awarded by an international arbitration tribunal in the *Pacific Fur Seal*

³⁴ Civil Procedure Act 2010, s59.

³⁵ Alvin Gachie, 'The Finality and Binding Nature of the Arbitral Award' (2017) 13(1) *The Law Society of Kenya Journal* 20.

³⁶ Arbitration Act 1995 (2009), No. 4 of 1995, Laws of Kenya.

Arbitration.³⁷ This case concerned a dispute between the US and the UK on whether the US would interfere with the fishing activities of the British on the high seas.³⁸ It was then referred to arbitration tribunal for settlement.

4. ELC Implementation of Section 20 of the ELC Act: Way Forward

ADR is globally recognized as a means of resolving disputes other than litigation.³⁹ The ELC specialization in dealing land and environmental matters offers it a great opportunity to make use of ADR in determining the disputes before it. The growing explosion of specialized ECs has been applauded for the role they play in enhancing the use of ADR in solving environmental disputes.⁴⁰ Specialized ECs are therefore expected to offer a forum for the use of ADR which enhances redress mechanisms enhancing the court's efficiency in settling environmental disputes.⁴¹ According to Pring and Pring, ADR is used in specialized ECs because it can 'reduce costs, reduce court caseload and backlog, shorten time to a decision, and, most importantly, achieve outcomes that actually creatively solve a problem beyond the application of existing legal remedies'.⁴² This calls for specialized ECs to incorporate ADR mechanisms such as 'ECT-annexed, facilitated negotiation and mediation'.⁴³ The ELC is not an exception.

The ELC as a specialized environment and land court should therefore offer a better forum in solving land and environmental disputes through both litigation and ADR than the previous courts of general jurisdiction.

³⁷ J Stanley Brown, 'Fur seal and the Bering Sea Arbitration' (1894) 26(1) *Journal of the American Geographical Society of New York* 326.

³⁸ Philippe Sands, 'Litigating Environmental Disputes Courts: Tribunals and the Progressive Development of International Environmental Law' (OECD 2008).

³⁹ Jacqueline M Nolan-Haley, *Alternative Dispute Resolution in a Nutshell* (2nd edn West Nutshell Series 1992).

⁴⁰ Brian J Preston, 'Benefits of Judicial Specialization in Environmental Law: The Land and Environment Court of New South Wales as a Case Study' (2012) 29 (2) *Pace Environmental Law Review* 396.

⁴¹ *ibid.*

⁴² Pring and Pring (n 19) 61.

⁴³ George Pring and Cathreen Pring, *Environmental Courts and Tribunals: Guide for Policy Makers* (UNEP 2016).

This will increase public confidence and recognition of the ELC in settling environmental disputes. Implementation of Section 20 of the ELC Act must be one of the ELCs priority areas. So far, the use of ADR in solving land disputes by the ELC has been considered as effective in reducing case backlog and minimizing conflicts among communities.⁴⁴ In a study carried out by the Land Development Governance Institute (LDGI), it indicated that most people were of the view that the use of ADR fostered relationship and harmony in communities hence an effective means of solving land disputes.⁴⁵ However, the LDGI report further indicates that while ADR was effective and less costly, some respondents provided that in some cases, ADR was not effective. This was attributed to the lack of fair hearing and some respondents resorting to legal redress.⁴⁶ ADR should not be seen as an alternative to litigation but rather ADR and litigation should reinforce each. In so doing, the ELC will determine when it is appropriate to adopt ADR.

Unlike land disputes which are characterized by case backlog, justifying the use of ADR in reducing the case backlog, since the ELC was operationalized in 2012, the number of environment cases has been reported to be fewer than the land cases.⁴⁷ Low environmental caseload in the previous constitutional regime can be attributed to the rigidities of the previous environmental legal framework that barred environmental litigation. Environmental litigation was barred by the strict rule of standing which courts adopted. An environmental litigant had to prove individual

⁴⁴ Maureen Wangari Maina, 'Land Disputes Resolution in Kenya: A Comparison of the Environment and Land Court and the Land Disputes Tribunal' (Masters of Law Degree, University of Nairobi 2015).

⁴⁵ LDGI, *An Assessment of the Performance of the Environment and Land Court* (LDGI 16th Scorecard Report 2014); LDGI, *An Assessment of the Performance of the Environment and Land Court* (LDGI 12th Scorecard Report 2013).

⁴⁶ *ibid.*

⁴⁷ Samson Okong'o, 'Environmental Adjudication in Kenya: A Reflection on the Jurisdiction of the Environment and Land Court' (A presentation made at the Symposium on Environmental Adjudication in the 21st Century held in Auckland New Zealand on 11th April 2017).

interest in an environmental matter. Environmental matters that were of public nature were strictly enforced by public officers who were reluctant to act. In the case of *Wangari Maathai v Kenya Times Media Trust*,⁴⁸ the Court held that it was only the Attorney General who could sue on behalf of the public and the applicant lacked the *locus standi* in that matter. This changed with the enactment of EMCA,⁴⁹ which dispensed with the mandatory requirement to prove *locus standi*, and the promulgation of the 2010 CoK which has entrenched environmental public interest litigation,⁵⁰ removed procedural technicalities, widened the scope of standing and elevated the right to a clean and healthy environment to a constitutional level.⁵¹ As a result of the CoK provision on environment and the establishment of the ELC it is predicted that with time the number of environmental cases filed before the ELC will increase.

One of the characteristics of the ELC is the requirement that the judges appointed in the ELC must possess experience and expertise in land and environmental matters. Section 7(b) of the ELC Act requires that a person appointed as the Judge of the ELC must have at least ten years' experience as a distinguished academic or legal practitioner with knowledge and experience in matters relating to land environment'. The transfer of environmental matters from courts of general jurisdiction to specialized ECs have been informed by the complexity of environmental matters and laws requiring that judges who adjudicate environmental disputes possess knowledge and expertise in environmental issues. Due to the possession of environmental knowledge and expertise, the ELC is in a better position to select the best ADR mechanism to a particular environmental dispute where they deem necessary and appropriate, unlike the general courts.

⁴⁸ (1989) 1KLR.

⁴⁹ See section 3(4), EMCA, No. 8 of 1999 (Amended in 2015).

⁵⁰ CoK 2010, Article 22 and 258.

⁵¹ CoK 2010, Article 42

4.1 When can the ELC Invoke Section 20 of the ELC Act?

There are two instances that can trigger the ELC to invoke Section 20 of the ELC Act and refer environmental disputes to ADR. First, the ELC on its own motion can refer parties in an environmental suit to adopt and implement an ADR. Second, parties can request the ELC that the matter be referred to ADR.

a) The ELC referral

Section 20(1) grants the ELC power on *its own motion* to refer parties to ADR. In referring the parties to use ADR in solving the dispute in question, it is mandatory that the parties must agree to this. The term 'with the agreement of' connotes consensus. The drafters of the ELC Act may have anticipated a scenario whereby it would be useless for the ELC to order parties to use ADR, a process which they don't agree upon. This would lead to wastage of time and in some cases aggravate the dispute. This will also guard against the misuse of the discretionary power of the ELC to refer environmental matters to ADR against the will of the parties concerned. One of the characteristics of ADR is that the process is usually voluntary and allows the parties to negotiate. In agreeing with the Court's order for an out of court settlement, the parties submit to the ADR enhancing its enforcement.

The question that arises is when the ELC can invoke Section 20 (1) of the ELC Act to adopt and implement an ADR mechanism in resolving environmental disputes before it. The ELC can deploy ADR in two instances: early in the process; or any time during the trial but before it makes a final decision. Requesting the parties to adopt ADR early in the process is the most optimal.

Whilst the ELC Act requires that the ELC environmental ADR referral be discretionary, in some cases such a referral can be mandatory. Mandatory referrals arise where the law governing the dispute requires that such a matter be resolved through ADR. Arbitration agreement is the most common. Where an arbitration agreement between the parties in a suit

exists, the parties will be required to exhaust the dispute through arbitration.

b) Parties request for referral

It is trite law that where parties request for referral of an environmental dispute to ADR mechanism, the court should not refuse such a request unless it is in the Court's view that such a referral will inhibit justice. In requesting the referral of the dispute to ADR, the parties have an obligation to provide the ELC with sufficient reasons why they would want to refer the matter to ADR. This would caution against wastage of the ELC time and resources. However, in cases where not all parties in a suit request for referral to ADR, the ELC may refuse such a request until when all parties agree.

4.2 Adopting and Implementing of Environmental ADR in the ELC

The ELC has a number of ADR mechanisms which it can refer the parties to adopt which include arbitration, mediation, conciliation, negotiation etc. Whichever form of ADR the ELC adopts must be determined by the nature of environmental dispute in place and balancing of the interests of the stakeholders involved.

Molly and Rubenstein,⁵² provide that one of the key questions to be addressed in adopting environmental ADR is to determine where it can be placed within the existing conventional ADR. They provide that environmental ADR can be annexed to a dispute resolution entity such as the court or environmental regulatory mechanism. There are various ways in which the ELC can adopt and implement environmental ADR. ADR can either be supervised ADR (also referred to as court annexed ADR) or

⁵² Michael Stone Molly and Wendy Rubenstein, 'Principles of Alternative Environmental Dispute Resolution: Abstracted, Restated and Annotated' (University of Florida 2000).

judicial referral of a dispute to an appropriate ADR process.⁵³ The Land and Environment of New South Wales in settling environmental disputes adopts both in-house mechanism and external. In-house mechanisms include: adjudication; conciliation; mediation; neutral evaluation; and informal mechanisms which may result into a negotiated settlement.⁵⁴

The ELC can either adopt the court annexed ADR which is now part of the Kenyan legal system or refer the dispute to an appropriate ADR mechanism in agreement with the parties. Court annexed ADR is ADR process that is undertaken under the umbrella of the Court.⁵⁵ Currently, court annexed mediation is now recognized under the Kenyan judicial system and the ELC can refer parties to the same for environmental disputes settlement. The ELC can also refer parties to court annexed arbitration in tandem with the Arbitration Act, the CPA and the Civil Procedure Rules.⁵⁶

The ELC can also refer the parties to an appropriate ADR process. In this scenario the environmental dispute is referred to an ADR entity. Parties can either agree to refer the matter to the ADR entity referred to or may choose another ADR entity which in their view is appropriate. In Kenya, the ADR entities include the Chartered Institute of Arbitrators, Dispute Resolution Centre and Mediation Training Institute, Strathmore Mediation and Dispute Resolution Centre and the Nairobi Centre for International Arbitration. While parties are not forced to submit to these bodies and may choose an independent ADR expert, these bodies offer a forum through experience and expertise in solving disputes through ADR.

⁵³ Brian J Preston "The Land and Environment Court of New South Wales: Moving towards a multi-door courthouse - Part II" (2008) 19 ADRJ 144 at 149.

⁵⁴ Preston (n 37).

⁵⁵ The Judiciary, 'Court Annexed Mediation' <
<http://kenyalaw.org/kenyalawblog/wp-content/uploads/2016/04/Court-Annexed-Mediation-at-the-Judiciary-of-Kenya..pdf>> accessed 23 January 2018.

⁵⁶ Muigua (n 27).

Molly and Rubenstein provide that environmental ADR can be dedicated to an independent entity dealing solely with environmental disputes.⁵⁷ In Kenya, we do not have an independent ADR entity which deals with environmental ADR only. This initiative can be considered in future by environmental stakeholders.

4.3 Stay of Legal Proceedings in Environmental ADR.

Section 20(2) of the ELC allows the ELC to stay proceedings where ADR is a condition precedent to any proceedings before it. The essence of this provision is to ensure that where parties have agreed to resort to ADR in resolving environmental disputes, the ELC grants them the opportunity to reach a decision. If the aggrieved party wants to pursue their claims, then they must first exhaust the ADR mechanisms. Section 6 of the Arbitration Act requires the Court to stay legal proceedings where the dispute in question has been referred to arbitration.⁵⁸ Section 6(3) of the Arbitration Act is very categorical that, if a Court does not stay the legal proceedings where arbitration is a condition precedent to any proceedings before it, then such proceedings will be of no effect. This maintains the status quo ensuring that the matter is subject to the ADR process.

5. Way Forward

Environmental disputes involve a number of complex and technical issues. The ELC in referring parties to ADR will not only consider the benefits that accrue from ADR such as saving costs and time but must take into consideration a number of factors to ensure that ADR in itself is not futile and enhances the overriding objective of ensuring that the dispute is solved expeditiously and in a just manner.

First, it should be noted that the application of ADR in environmental matters in itself can be very complex. A successful environmental ADR will require the ELC to take into consideration stakeholders' engagement, sustainable development and providing a clear mandate. This means that

⁵⁷ Ibid.

⁵⁸ Government of Kenya, *Arbitration Act No. 4 of 1995* (Government Printers 1995).

the ELC in implementing environmental ADR will be required to involve other stakeholders in a collaborative and facilitative decision making.⁵⁹ Stakeholders will involve the public, environmental agencies, business community, civil society and many others. The essence is to ensure that the interest of every party is well represented and enhances public participation.

Second, the ELC needs to consider the expertise of those involved in the ADR. It is sensible and reasonable to ensure that the third parties involved in the dispute possess expertise and understanding of the dispute in question. The role of ADR is to solve a dispute expeditiously and expertise is fundamental.

Third, the ELC should consider the nature of the dispute. In some cases, the harm occasioned by environmental violations will continue to deteriorate the environment if urgent measures are not taken in place. It is no doubt that litigation may take long, undermining the essence of solving environmental disputes expeditiously. The nature of the environmental dispute will also be determined by the scientific and technical expertise required in resolving the dispute. Where the enforcement of the dispute will be a challenge through the ADR, then the ELC will require that where a settlement has been reached, be written down and deposited with the ELC registry for enforcement.

Fourth, the ELC must consider the parties involved and their bargaining power. In most cases, environmental disputes such as environmental degradation as a result of development projects involve the public. The public may lack the bargaining power or it may be weak during settlement negotiations or they may not understand the impact of the said developments to environment. In this case where an environmental dispute arises between private companies and the community at large, the

⁵⁹ Richard Macrory and Michael Woods, *Modernizing Environmental Justice: Regulation and the Role of an Environmental Tribunal* (University College London, 2003) 7.

ELC must ask itself whether referring the dispute to ADR is the most appropriate option or not. In so doing it should consider the benefits that will accrue from ADR.

Fifth, the ELC should consider the impact of the dispute on environmental protection and conservation. The principles of sustainable development should inform its decision to adopt and implement environmental ADR. The CoK recognizes sustainable development as a national value and principle of governance which every state organ, state officers and public officer must abide in the application and interpretation of the CoK; enacting, applying or interpreting any law; and making or implementing public policy decisions.⁶⁰ The ELC Act and EMCA further require the ELC in exercising its mandate to be guided by the principle of sustainable development.⁶¹ The principles of sustainable development include: the principle of public participation in the development of policies, plans and processes for the management of the environment and land; the cultural and social principles traditionally applied by any community in Kenya for the management of the environment or natural resources in so far as the same are relevant and not inconsistent with any written law; the principle of international co-operation in the management of environmental resources shared by two or more states; the principles of intergenerational and intragenerational equity; the polluter-pays principle; and the precautionary principle.⁶²

In addition to the above factors which the ELC should consider in deciding whether environmental ADR is the most appropriate, the ELC should be innovative in adopting environmental ADR. Depending on the nature of the environmental dispute in question, the ELC should be able to determine the appropriate ADR mechanism that will settle the dispute in question. In most environmental ADR, mediation has been accepted as the most effective. In mediation, a neutral third party uses the facilitative

⁶⁰ CoK 2010, Art 10.

⁶¹ ELC Act 2011, s 18(a); EMCA 1999, s 3(5).

⁶² Ibid.

approach to enable the parties reach a consensus and settle the disputes. It ensures that the decision reached is voluntary and this makes it easy for parties to abide by the agreed decision. Environmental arbitration should be invoked where the same is provided in law or the parties have in place an arbitration agreement. The ELC should not only limit itself to mediation, arbitration and conciliation, but endeavour to adopt and implement other methods of ADR. The guiding principle should be to choose an ADR mechanism that is most appropriate to the particular environmental dispute. In choosing the appropriate mode of ADR, the ELC should take into consideration the specific characteristics of environment disputes.

While the CoK provides a legal basis upon which environmental ADR can be invoked, there is need for continued education and awareness on the role of environmental ADR in settling environmental disputes. The judiciary, the ELC, civil society and educational institutions play a key role in creating awareness on the place of ADR on settling environmental disputes. This will enable the environmental litigants to appreciate and recognize the role of environmental disputes.

There is need for the ELC to coordinate and cooperate with ADR institutions in the country. This kind of collaboration is very fundamental as such entities possess the required expertise in ADR.

6. Conclusion

Environmental matters involve a complex number of legal, scientific and technical issues. Environmental disputes also involve a number of stakeholders whose interests need to be protected. In some cases, due to the nature of environmental dispute, if not settled in time, it may cause more harm making the use of ADR inevitable. The ELC as a specialized court with judges possessing expertise and knowledge in environmental matters offers a forum for adopting ADR mechanisms. The judicial expertise and knowledge in environmental matters and litigation puts the judges in a better position to choose the best ADR mechanism for a

particular dispute as environmental matters involve a complex of legal, scientific and technical issues. The ELC should grab this opportunity and invoke Section 20 of the ELC Act where appropriate in solving environmental disputes.

Bibliography

1. Brown JS, 'Fur seal and the Bering Sea Arbitration' (1894) 26(1) *Journal of the American Geographical Society of New York* 326.
2. Gachie A, 'The Finality and Binding Nature of the Arbitral Award' (2017) 13(1) *The Law Society of Kenya Journal* 20.
3. Government of Kenya, *Arbitration Act No. 4 of 1995* (Government Printers 1995).
4. Government of Kenya, *Arbitration Act No. 4 of 1995* (Government Printers 1995).
5. Government of Kenya, *Environment and Land Court Act (ELC Act) No. 19 of 2011*, (Government Printers 2011).
6. Hey E, *Reflections on an International Environmental Court* (Kluwer Law International 2002) 9; Jane Holder and Maria Lee, *Environmental Protection, Law and Policy* (Cambridge University Press 2007) 340.
7. Judiciary, 'Court Annexed Mediation' <<http://kenyalaw.org/kenyalawblog/wp-content/uploads/2016/04/Court-Annexed-Mediation-at-the-Judiciary-of-Kenya..pdf>> accessed 23 January 2018.
8. LDGI, *An Assessment of the Performance of the Environment and Land Court* (LDGI 16th Scorecard Report 2014); LDGI, *An Assessment of the Performance of the Environment and Land Court* (LDGI 12th Scorecard Report 2013).
9. Macrory R and Woods M, *Modernizing Environmental Justice: Regulation and the Role of an Environmental Tribunal* (University College London, 2003) 7.
10. Macrory R and Woods M, *Modernizing Environmental Justice: Regulation and the Role of an Environmental Tribunal* (University College London, 2003) 7.
11. Maina MW, 'Land Disputes Resolution in Kenya: A Comparison of the Environment and Land Court and the Land Disputes Tribunal' (Masters of Law Degree, University of Nairobi 2015).
12. Molly MS and Rubenstein W, 'Principles of Alternative Environmental Dispute Resolution: Abstracted, Restated and Annotated' (University of Florida 2000).
13. Muigua K, 'Court Annexed ADR in the Kenyan Context' <<http://www.kmco.co.ke/attachments/article/106/Court%20Annexed%20ADR.pdf>> accessed 30 January 2018.
14. Muigua K, 'Legitimising Alternative Dispute Resolution in Kenya: Towards a Policy and Legal Framework' <<http://www.kmco.co.ke/attachments/article/156/LEGITIMISING%20ALTERNATIVE%20DISPUTE%20RESOLUTION%20MECHANISMS%20IN%20KENYA.pdf>> accessed 29 January 2015.

15. Muigua M, 'Alternative Dispute Resolution and Article 159 of the Constitution' <<http://www.kmco.co.ke/attachments/article/107/A%20PAPER%20ON%20ADR%20AND%20ARTICLE%20159%20OF%20CONSTITUTION.pdf>> accessed 29 January 2015.
16. Muigua M, 'Empowering the Kenyan People through Alternative Dispute Resolution Mechanism' 2015) 3(2) Institute of Chartered Arbitrators Journal of Alternative Dispute Resolution 64.
17. Nolan-Haley JM, *Alternative Dispute Resolution in a Nutshell* (2nd edn West Nutshell Series 1992).
18. Nyakundi FM, 'Development of ADR Mechanisms in Kenya and the Role of ADR in Labour Relations and Dispute Resolution (Master's Degree Thesis, University of Capetown 2015).
19. Ojwang' D, 'Dismantling Kenya Jurist Stereotypes toward the Traditional Justice Systems: Can something good come from Article 159 (2) (C) of the Constitution?' (2015) 3(2) Institute of Chartered Arbitrators Journal of Alternative Dispute Resolution 192.
20. Okong'o S, 'Environmental Adjudication in Kenya: A Reflection on the Jurisdiction of the Environment and Land Court' (A presentation made at the Symposium on Environmental Adjudication in the 21st Century held in Auckland New Zealand on 11th April 2017).
21. O'Leary R and Husar M, 'What Environmental and Natural Resource Attorneys Really Think About ADR: A National Survey' (2002) 16 National Resources and Environment Journal 262.
22. Preston BJ, 'The Land and Environment Court of New South Wales: Moving towards a multi-door courthouse - Part II (2008) 19 ADRJ 144.
23. Preston BJ, 'Benefits of Judicial Specialization in Environmental Law: The Land and Environment Court of New South Wales as a Case Study' (2012) 29 (2) Pace Environmental Law Review 396.
24. Preston BJ, 'Characteristics of Successful Environmental Courts and Tribunals' (2014) 26 Journal of Environmental Law 365.
25. Pring G and Pring C, *Environmental Courts and Tribunals: Guide for Policy Makers* (UNEP 2016).
26. Pring G and Pring C, *Greening Justice: Creating and Improving Environmental Courts and Tribunals* (Access Initiative 2009) 16.
27. Ray L and Clare AL, 'The Multi-Door Courthouse Idea: Building the Courthouse of the Future Today' (1985) 1(1) Journal of Dispute Resolution 7.

28. Sands P, 'Litigating Environmental Disputes Courts: Tribunals and the Progressive Development of International Environmental Law' (OECD 2008).
29. Siegel JA, 'Alternative Dispute Resolution in Environmental Enforcement Cases: A Call for Enhanced Assessment and Greater Use' (2007) 24(1) *Pace Environmental Law Review* 187.
30. Stukenbor C, 'The Proper Role of Alternative Dispute Resolution (ADR) in Environmental Conflicts' (1994) 19 *University of Dayton Law Review* 1305.
31. United States Environmental Protection Agency (EPA), *ADR Accomplishment Report* (EPA 2000); John S Andrew, 'Examining the Claims of Environmental ADR: Evidence from Waste Management Conflicts in Ontario and Massachusetts' (2001) 21(1) *Sage Journals*.