

## Environmental Litigation in Kenya: A Call for Reforms

Hon. Justice Oscar Amugo Angote<sup>1</sup>

### Abstract

*The establishment of the Environment and Land Court (ELC) in Kenya is novel. The ELC has dual jurisdiction to hear and determine land and environmental matters. Since it was established in the year 2012, there is no published data on the number of environmental matters that have been handled by the court as compared to land. However, the research carried out by individuals and institutions indicate that the court has handled fewer environmental cases as compared to land cases. Caseload grants a court an opportunity to settle disputes, develop the related law and jurisprudence. Based on this, this paper discusses the factors that have contributed to the low environmental caseload in the ELC and provides recommendations on how to improve the said caseload in the ELC.*

### 1.0 Introduction

Environmental litigation provides a mechanism for both private and public interest claimants a mechanism to enforce environmental law, determine environmental disputes, obtain compensation for environmental damage and in the end, conserve and protect the environment. As a result of the benefits associated with environment litigation in environmental governance, Kenya has continued through policy, legal and institutional reforms to provide mechanisms that seek to enhance environmental litigation. Yet, despite these fundamental reforms, environmental litigation in Kenya remains low as cases of environmental degradation continue to ravage the country.

While environmental litigation had since the colonial period been adjudicated by the general courts, the 2010 Constitution of Kenya changed this position by establishing a specialized Environment and Land Court (ELC) with dual jurisdiction to hear and determine environment and land matters<sup>2</sup>. In addition, with various provisions in the Constitution that seek to protect and conserve the environment, it was expected that the establishment of the ELC would enhance environmental litigation and in the end settle environmental disputes, develop environmental law and jurisprudence. Environmental litigation cannot be effective if litigants do not approach the ELC to claim redress for environmental violations. This paper, therefore, focuses on environmental caseload and the required reforms to increase the said caseload. The paper is divided in three parts. The first part, discusses environmental litigation prior to the establishment of the ELC by identifying the issues that undermined environmental caseload and the key reforms that were undertaken. The second part, analyses the current state of environmental litigation in the ELC by interrogating environmental caseload and the jurisprudence emanating from the court. The third part provides important reforms that would increase environmental litigation in Kenya.

This paper builds up on the findings of my Master of Laws (LLM) project '*The Role of the Environment and Land Court in Enforcing Environmental Law: A Critical Analysis of the Environmental Caseload*' submitted at the University of Nairobi in 2018.<sup>3</sup> The project sought to determine environmental caseload in the ELC since it was established and operationalized in 2012, and the impact of the environmental caseload on the functionality of the ELC. The key findings in the report were that: there is low environmental caseload in the ELC as most of the cases filed in the court concern land; and despite the few environmental cases filed in the ELC, the ELC has continued to make far reaching decisions in environmental matters.

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<sup>1</sup> LLM, University of Nairobi; Judge, Environment and Land Court, Kenya.

<sup>2</sup> Article 162(2) (b), Constitution of Kenya.

<sup>3</sup> Oscar Amugo Angote, *The Role of the Environment and Land Court in Enforcing Environmental Law: A Critical Analysis of the Environmental Caseload* (Masters of Laws Thesis, University of Nairobi 2018).

## 2.0 The Road Towards Increased Environmental Litigation in Kenya: Environmental Caseload Prior to the Establishment of the Environment and Land Court (ELC)

Concerns pertaining to environmental degradation such as overexploitation of natural resources, pollution, climate change, deforestation, loss of biodiversity and dumping of industrial waste in Kenya has continued to attract a lot of attention.<sup>4</sup> In order to protect the environment, Kenya has continued to undertake fundamental reforms such as strengthening the institutional, legal and policy framework on environmental governance. In the wake of environmental degradation, the courts have continued to play a great role in environmental protection by hearing disputes filed by parties. The courts have also continued to develop environmental law and jurisprudence through judicial pronouncements.

Environmental disputes in Kenya are not novel. They existed even during the precolonial period where traditional methods of resolving disputes were employed.<sup>5</sup> During the colonial period, and prior to the promulgation of the Constitution which established the ELC, environmental matters were handled by courts of general jurisdiction. Enforcement of environmental law by the general courts was characterized by a number of features that hindered environmental litigation and fewer number of environmental cases were brought before the courts.<sup>6</sup>

Firstly, the laws pertaining to the environment were scattered across various sectors, making environmental regulation difficult and leading to forum shopping.<sup>7</sup> Secondly, enforcement of environmental matters was 'strictly a private affair that was of less concern to the main branches of public law'.<sup>8</sup> People resorted to the law of contracts and tort in enforcing environmental law and seeking redress for environmental breaches. Thirdly, the legislative framework then vested the enforcement of environmental matters in public officials who were reluctant to act. In the famous case of *Wangari Maathai v Kenya Times Media Trust*,<sup>9</sup> the Court held that it was only the Attorney General who could sue on behalf of the public and the Plaintiff had no right to bring an action against the Defendant. It was therefore difficult for individuals to pursue environmental claims and seek for environmental justice. The implication of this strict rule of standing meant that the public officials could not file cases where the government violated environmental law. This had a negative impact on the number of environmental cases filed in the courts, thus denying the courts the opportunity to settle environmental disputes and protect the environment.

Fourthly, the courts applied the restrictive approach to standing in cases involving environmental matters.<sup>10</sup> The courts required the litigants to indicate their interest in environmental matters and prove the injury that they had suffered. This hindered environmental litigation even in the presence of environmental degradation and apparent environmental violations. Most of environmental matters are by their very nature public, and the requirement for personal injury meant that it was difficult for a person to prove that he had suffered injury due to environmental degradation. Fifthly, Migai notes that during this period, the law only provided for criminal penalties which were paltry and could not act as sufficient deterrent against environmental degradation.<sup>11</sup> This hindered civil litigation as the court could not order persons degrading the environment to pay damages or compensate those who had suffered injury due to their actions. Finally, the law did not provide for environmental impact assessment of development projects to mitigate their adverse impact on the environment.<sup>12</sup> This had a negative outcome on environmental litigation in Kenya, thus undermining the number of environmental cases that were filed in the general courts. As a host of the UNEP, Kenya had to reconsider

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<sup>4</sup> Pierre Failler, Patrick Karani and Wondwosen Seide, 'Assesment of the Environment Pollution and Its Impact on Economic Cooperation and Integration Initiatives of the IGAD Region' ) IGAD, National Environment Pollution Report, Kenya 2016).

<sup>5</sup> Collins Odote and FA Away, *Traditional Mechanisms of Conflict Management* (Legal Education Foundation 2002); Collins Odote and Mo Makoloo, 'African Initiatives for Public Participation in Environmental Management' in C Bruch (ed), *The New "Public": Globalization of Public Participation* (Environmental Law Institute 2002).

<sup>6</sup> ACTS-UNEP, *The Making of a Framework Environment Law in Kenya* (ACTS-UNEP 2001).

<sup>7</sup> Migai Aketch, 'Land, the Environment and the Courts in Kenya' (Background Paper for the Environment and Land Law Reports 2006).

<sup>8</sup> Joel Kimutai Bosek, 'Implementing Environmental Rights in Kenya's New Constitutional Order: Prospects and Potential Challenges' (2014) 14 African Human Rights Law Journal 489, 490.

<sup>9</sup> (1989) 1KLR.

<sup>10</sup> *Nairobi Golf Hotels (Kenya) Ltd v Pelican Engineering and Construction Co. Ltd HCCC 706 of 1997.*

<sup>11</sup> Migai (n7) 19.

<sup>12</sup> Ibid.

its environmental legal framework to enhance environmental litigation and reflect the developments in environmental governance at the international level. In order to enhance environmental litigation, and to address the challenges above, Kenya enacted the Environmental Management and Co-ordination Act (EMCA)<sup>13</sup> whose date of commencement was 14<sup>th</sup> January, 2000. The enactment of the EMCA was seen as a milestone in protecting the environment and spurring environmental litigation.<sup>14</sup> The Act brought with it new impetus in environmental governance. First, the EMCA provided a coordinated legal and institutional framework in environmental governance.

Second, for the first time in history, EMCA provided for the general principles to guide environmental management in the country recognized at international level. These principles include the right to a clean and healthy environment<sup>15</sup> and the application of the principles of sustainable development.<sup>16</sup> This was expected to trigger civil litigation in environmental issues.<sup>17</sup>

Third, the EMCA adopted the liberal approach to the rule of standing in enforcing environmental law.<sup>18</sup> Under Section 3(4), any person can approach the court to enforce environmental law. Such a person is not compelled to show that the Defendant's action or inaction has caused or is likely to cause him any personal loss or injury. However, such an action should not be vexatious, frivolous and/or an abuse of the court process.<sup>19</sup> It was expected that this would result into a floodgate of environmental cases in the Court.

The EMCA further established the National Environment Tribunal (NET) as a specialized environmental tribunal. In 2002, the NET was operationalized as required under Section 125 of the EMCA to hear and determine appeals arising from the decisions of the NEMA, the Director General and Committees established under EMCA. The jurisdiction of NET is specific and limited to instances that arise under Section 129(1) of EMCA.<sup>20</sup> Any matter not falling under Section 129(1) of the Act was to be filed in the courts of general jurisdiction. Before the promulgation of the CoK, any person aggrieved by the decision or order of the NET would appeal to the High Court whose decision was final. Currently, such appeals are filed in the ELC.<sup>21</sup>

Due to the limited jurisdiction of the NET, courts of general jurisdiction continued to hear and determine environmental disputes not falling under Section 129 of the EMCA. Even with the enactment of the EMCA, environmental litigation remained minimal. The call for reforms in environmental governance featured promptly during the Constitutional review process and included the need to elevate environmental matters to a constitutional level. The Constitution of Kenya Review Commission (CKRC) argued, and correctly so, that the independence Constitution did not have provisions on environment and natural resources thus compromising environmental governance in the country<sup>22</sup> It was in CKRC's view that a provision in the Constitution on the environment and natural resources should be included in the Constitution to create a constitutional obligation to enhance and protect the environment. It also recommended the need to elevate the right to a clean and healthy environment from a statutory level to a constitutional status.<sup>23</sup>

During this period, the Ndung'u report had recommended for the establishment of the Land Division in the High Court due to the large number of land cases filed in the courts.<sup>24</sup> Whereas the implementation of the Ndung'u

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<sup>13</sup> Environmental Management and Co-ordination Act No. 8 of 1999

<sup>14</sup> Angela Mwenda and Thomas N Kibutu, 'Implications of the New Constitution on Environmental Management in Kenya' (2012) 8 Law, Environment and Development Journal 76.

<sup>15</sup> EMCA 1999, s 3.

<sup>16</sup> EMCA 1999, s 3(5).

<sup>17</sup> Jackton B Ojwang, 'The Role of the Judiciary in Promoting Environmental Compliance and Sustainable Development' (2007) 1(19) Kenya Law Review 19, 22.

<sup>18</sup> EMCA 199, S.3(4)

<sup>19</sup> Ibid.

<sup>20</sup> Section 129 of EMCA allows any person to appeal to the NET where they are aggrieved by the: refusal to grant or transfer of licence or permit; imposition of condition, limitation or restriction on licence; revocation, suspension or variation of licence; amount of money which he is required to pay as a fee; and imposition against environmental restoration order or environmental improvement orders. Upon appeal, NET can: confirm, set aside or vary the order or decision in question; exercise any of the powers which could have been exercised by the Authority in the proceedings in connection with which the appeal is brought; or make such other order, including orders to enhance the principles of sustainable development and an order for costs as it may deem just.

<sup>21</sup> Section 130 of the Environmental and Co-ordination Act No. 8 of 1999.

<sup>22</sup> CKRC, *Report of the Constitution of Kenya Review Commission* (2003)

<<http://katibainstitute.org/Archives/images/REPORT%20OF%20THE%20CONSTITUTION.pdf>> accessed 26 January 2018.

<sup>23</sup> Ibid.

<sup>24</sup> Government of Kenya, *Report of the Inquiry into the Illegal/Irregular Allocation of Land* (Government Printers 2004); Joseph Kicyah, 'Ndung'u Report on Land Grabbing: Legal and Economic Analysis' (IDS 2010); Ndung'u Commission.

Report has remained elusive,<sup>25</sup> the Judiciary established the Environment and Land Division, as a division of the High Court, through Gazette Notice No. 301 of 2007. However, the Environment and Land Division was only established in Nairobi and Mombasa.<sup>26</sup> All land and environmental matters outside Nairobi and Mombasa were required to be filed in the appropriate High Court stations in the country in accordance with the provisions of the Civil Procedure Act. The general courts therefore continued to hear and determine environment and land matters in other areas.

It should be noted that the establishment of the Environment and Land Division in the High Court in Nairobi and Mombasa had been informed by the increased number of land cases, not environment, and the need to adjudicate those matters expeditiously. The drafters of the Constitution deemed it necessary to have a specialized court to handle land and environment disputes to create public confidence. It was expected that the specialized ELC would handle land and environmental disputes expeditiously and competently.<sup>27</sup> After the promulgation of the Constitution establishing the ELC under Article 162(2) (b) of the Constitution in August 2010, a task force was established by the Minister for Environment and Natural Resources to draft a legislation on the implementation of the provisions in the Constitution relating to land use, environment and natural resources.<sup>28</sup> It is this taskforce that spearheaded the enactment of the Environment and Land Court Act<sup>29</sup> (the ELC Act), which outlines the jurisdiction and the institutional framework of the ELC.

In addition to establishing the ELC as a specialized court, the promulgation of the 2010 Constitution brought with it a new impetus in environmental governance.<sup>30</sup> The Constitution put in place a new progressive and internationally accepted regime in environmental governance. The Constitution addresses the issues of environment in many articles such as its Preamble,<sup>31</sup> Article 10,<sup>32</sup> Article 42,<sup>33</sup> Article 48,<sup>34</sup> Article 69<sup>35</sup> and Article 70,<sup>36</sup> amongst others.

The Constitution also did away with the requirement to demonstrate *locus standi* before a party can file a suit alleging violation of the right to a clean and healthy environment.<sup>37</sup> Before the enactment of the Constitution, Kenyan courts had relied on the strict rule of standing to bar litigants from enforcement of environmental rights.<sup>38</sup> Any person can now approach the Court on grounds of public interest without demonstrating that they have incurred loss or any damage.<sup>39</sup> The Constitution therefore elevated substantive environmental rights which had earlier been recognized under EMCA, to a constitutional status.<sup>40</sup> Article 42 of the CoK, protects the right of every person to a clean and healthy environment. The Constitution also envisages a number of rights whose enforcement is geared towards environmental protection.<sup>41</sup> For example, Article 43 of the Constitution provides

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<sup>25</sup> African Centre of Open Governance (AFRICOG), 'Mission Impossible: Implementing the Ndung'u Report' (AFRICOG) [https://www.africog.org/reports/mission\\_impossible\\_ndungu\\_report.pdf](https://www.africog.org/reports/mission_impossible_ndungu_report.pdf) accessed 27 January 2018.

<sup>26</sup> Samuel Ongwen Okuro, 'The Land Question in Kenya: The Place of Land Tribunals in the Land Reforms in Kombewa Division' (A Paper Presented at the Codesria Tenth General Assembly Kampala Uganda 8th -12th December 2002) .

<sup>27</sup> Augustus Wafula, 'Jurisdiction of Environment and Land Court' <https://wafulaaugustus.wordpress.com/2013/02/20/jurisdiction-of-environment-and-land-court-kenya/> accessed 22 January 2018.

<sup>28</sup> Kenya Law, 'Kenya Gazette Notice No. 13880' <<http://kenyalaw.org/kl/index.php?id=3709>> accessed 24 January 2018.

<sup>29</sup> Environment and Land Court Act No. 19 of 2011.

<sup>30</sup> Robert Machatha Kibugi, 'New Constitutional Environmental Law in Kenya: Changes in 2010' (2011) 2 IUCNAEL eJournal 136-142.

<sup>31</sup> The preamble of the CoK provides that the people of Kenya, 'Respectful of the environment, which is our heritage and determined to sustain it for the benefit of future generations'.

<sup>32</sup> Article 10 of the CoK recognizes sustainable development as one of the national values and principles of governance binding all state organs, state officers, public officers and all persons when applying or interpreting the CoK, any law and when making and implementing public policy decisions.

<sup>33</sup> Article 42 provides that every person has the right to a clean and healthy environment.

<sup>34</sup> Article 48 of the CoK requires the State to ensure access to justice for all persons and where a fee is required, it should be reasonable and not impede access to justice.

<sup>35</sup> Article 69 provides the obligations of the State in respect of the environment

<sup>36</sup> Article 70 provides for the enforcement of the right to a clean and healthy environment; the orders that the court can grant and the fact that one need not have suffered any injury to file a petition alleging a breach of the right to a clean and healthy environment.

<sup>37</sup> Collins Odote, 'Public Interest Litigation and Climate Change: An Example from Kenya' in Oliver C Ruppel, Christian Roschmann and Katharina Ruppel-Schlichting (eds), *Climate Change: International Law and Global Governance* (Vol 1 Legal Responses and Global Responsibility, Nomos 2013) 805-830; Kenyan for Peace Truth and Justice (KPTJ), *A Guide to Public Interest Litigation in Kenya* (KPTJ, 2012).

<sup>38</sup> See *Wangari Maathai v Kenya Times Media Trust Limited* (1989) 1 KLR; *Nairobi Golf Hotels (Kenya) Ltd v Pelican Engineering and Construction Co Ltd* HCCC 706 of 1997.

<sup>39</sup> Article 70(3) stipulates that, 'an applicant does not have to demonstrate that any person has incurred loss or suffered injury'.

<sup>40</sup> Bosek (n 8).

<sup>41</sup> Kenya Water for Health Organization (KWHO), Human Rights Based Approach to Reforms in the Kenya Water Sector (Kenya Water for Health Organization 2009).

for the right to reasonable standards of sanitation; and to clean and safe water in adequate quantities which are related to environmental protection.<sup>42</sup>

The Constitution also requires that formalities relating to commencement of suits in respect of human rights violation should be kept to the minimum and if necessary, informal documentation be entertained by the court.<sup>43</sup> The court filing fees is not supposed to be charged for commencing such proceedings.<sup>44</sup> Further, the application of international environmental laws and principles, as recognized under Article 2(5) and (6) of the Constitution, has a direct effect on the Kenyan domestic legal order. International treaties and Conventions relating to environmental law and management can now be invoked by litigants and applied in court.<sup>45</sup> The ELC is therefore required to develop international environmental law jurisprudence through interpretation of the Conventions and international environmental laws and principles. Ideally, the implication would be to open a floodgate of environmental cases being filed in court in a country where environmental degradation and climate change is apparent.

While Kenya is the first country to establish an environment court (EC) in Africa, by entrenching it in its Constitution in the year 2010, at the global level, specialized courts continue to mushroom. Australia is one of the earliest regions in the world to establish specialized ECs. The main ECs in Australia are: the New South Wales (NSW court);<sup>46</sup> Environment Court of New Zealand (New Zealand Court);<sup>47</sup> and the Queensland Planning and Environment Court (Queensland Court).<sup>48</sup> In the US, the Vermont Environmental Court (Vermont Court) was established in 1990 while the Hawaii Environmental Court was established in 2014.<sup>49</sup> China,<sup>50</sup> Philippine,<sup>51</sup> Sweden,<sup>52</sup> and India have also established specialized ECs.<sup>53</sup>

### **3.0 Environmental Litigation and Caseload in the Environment and Land Court (ELC): An Overview**

Despite the lack of public information from the ELC, the National Council for Law Reporting (NCLR) and the Judiciary distinguishing between purely land and environmental matters filed in the ELC, studies on the functioning of the ELC indicate that the ELC has not handled numerous environmental cases as it was expected because ‘most of the cases concern land’.<sup>54</sup> Otieno, in her study, indicates that very few cases at the ELC are purely of environmental nature.<sup>55</sup> The 2013 Land Development and Governance Institute’s (LDGI) report indicates that while 69% of the respondents filed their cases in the ELC, most of the cases related to land matters.<sup>56</sup> Odote has argued that in Kenya, land forms the basis of the livelihood of people and in this regard,

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<sup>42</sup> The rights to access to justice; fair administrative action; rights of minorities and marginalized groups in environmental governance; access to information; right to life are also related to environmental protection.

<sup>43</sup> Article 22 (3)(a) of the CoK.

<sup>44</sup> Article 22 (3)(c) of the CoK.

<sup>45</sup> For instance, the Rio Declaration on Environment and Development (Rio Declaration) sets out a number of principles which have further been codified under Section 18 of the Environment and Land Court Act (ELC Act) and Section 5 of EMCA.

<sup>46</sup> Paul L Stein, ‘The Role of the New South Wales Land and Environment Court in the Emergence of Public Interest Law’ (1996) 13, *Environmental Planning Law Journal* 179.

<sup>47</sup> George Pring and Catherine Pring, *A Practitioners Guide to the Land and Environment Court on NSW* (3<sup>rd</sup> edn, NSW Young Lawyers Environmental Law Committee 2009) 21.

<sup>48</sup> Bret C Birdsong, ‘Adjudicating Sustainability: New Zealand Environmental Court’ (2002) 29, *Ecology Law Quarterly* 1.

<sup>49</sup> Merideth Wright, ‘The Vermont Environmental Court’ (2010) 3(1), *Journal of Court Innovation* 201; Hawaii State Judiciary, ‘Hawaii State Judiciary Launches New Environmental Court’

<[http://www.courts.state.hi.us/news\\_and\\_reports/press\\_releases/2015/06/environmental\\_court\\_launches](http://www.courts.state.hi.us/news_and_reports/press_releases/2015/06/environmental_court_launches)> accessed 31 October 2017.

<sup>50</sup> Alex L Wang, ‘Environmental Courts and Public Interest Litigation in China’ (2010) 43 (6), *Journal of Chinese Law and Government* 4; Jin Zining, ‘Environmental Impact Assessment Law in China’s Courts: A Study of 107 Judicial Decisions’ (2015) 55, *Environmental Impact Assessment Review* 35; Zang Minchun and Zang Bao, ‘Specialized Environmental Courts in China: Status Quo, Challenges and Responses’ (2012) 30(4), *Journal of Energy and Natural Resource Law* 361.

<sup>51</sup> Rodrigo V Cosico, *Philippine in Environmental Laws: An Overview and Assessment* (Central Book Supply Incorporation 2012); Hilario G Davide and Sara Vinson, ‘Green Courts Initiative in Philippines’ (2010) 3(1), *Journal of Court Innovation* 121.

<sup>52</sup> Ulf Bjällås, ‘Experiences of Sweden’s Environmental Courts’ (2010) 3 (1), *Journal of Court Innovation* 177.

<sup>53</sup> Ria Guidone, ‘Environmental Courts and Tribunals: An Introduction to National Experiences, Lessons Learned and Good Practice Examples Special Courts’ (Forever Shabah, Legal Innovation Working Paper No1 2016).

<sup>54</sup> Justice 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) <<http://environmental-adjudication.org/assets/Uploads/General/Okongo-PPT2.pdf>> accessed 8 October 2017.

<sup>55</sup> Norah A Otieno, *Appraising Specialized Environmental Courts in the Attainment of Environmental Justice: Kenyan Experience* (Master’s Degree, Centre for Advanced Studies in Environmental Law and Policy University of Nairobi 2014).

<sup>56</sup> LDGI (n 65).

Hon. Justice Oscar Amuge Angote

most of the cases before the ELC will likely relate to land.<sup>57</sup> Angote also found that most of the judgments and rulings emanating from the ELC concern land.<sup>58</sup>

The majority of the public continue to perceive the ELC as solely a land court because land forms the basis of the people's livelihood. Okong'o has argued that,<sup>59</sup> environmental matters found their way in the ELC because of their proximity to land use and tenure.<sup>60</sup> So, it is not surprising that most of the matters filed before it concern land.<sup>61</sup>

The reforms leading to the enactment of the EMCA and the Constitution was meant to trigger environmental litigation and grant the ELC the opportunity to interrogate and resolve environmental disputes. That is why the Judiciary appointed judges who had more than ten years' experience and expertise in land and environmental law. However, more than a half decade later, environmental litigation in the ELC is still scanty. Yet, when the ELC was established as a specialized and distinct court from the High Court to hear and determine land and environmental matters under the new Constitution, it was expected that the ELC would play a great role in enhancing land and environmental governance through litigation.<sup>62</sup> In so doing, environmental litigation was to provide the ELC with sufficient cases and an opportunity to enhance environmental justice.<sup>63</sup>

#### a. An Overview of the Developing Environmental Law and Jurisprudence in the ELC

So far, the Environment and Land Court (ELC), through judicial pronouncements, has continued to develop environmental jurisprudence on key environmental issues such as: the rule of standing; public participation in environmental matters; the jurisdiction of the ELC; and the application of international environmental law and principles. If given more opportunities through environmental litigation, the ELC will play a greater role in protecting the environment through judicial pronouncements.

The issue of *locus standi* is now settled in environmental matters. Litigants do not need to prove any personal injury. Violation or a threat of violation of the right to a clean and healthy environment alone is sufficient for any person to move the ELC for enforcement of the right. In the case of *Safaricom Staff Pension Scheme Registered Trustees v Erdemann Property Limited & 5 others*,<sup>64</sup> and *Joseph K. Nderitu & 23 others v Attorney General & 2 others*,<sup>65</sup> the ELC affirmed that the Petitioners did not need to show personal interest or injury for them to have *locus standi*.

The ELC has further held that where other statutory disputes resolution mechanisms exist, litigants must exhaust them before invoking the jurisdiction of the ELC. The role of the ELC *vis a vis* other statutory dispute resolution mechanisms was affirmed by the court in the cases of *Koome Mwambia and another v Deshun Properties Company Limited and 4 others*,<sup>66</sup> *West Kenya Sugar Company Limited v Busia Sugar Industries Ltd and 2 Others*,<sup>67</sup> and *Republic v Senior Resident Magistrate's Court Ndhiwa & another; Ex parte Sajalendu Maiti [2016] eKLR*.<sup>68</sup>

The ELC has also had the opportunity to apply international environmental law and the general principles of environmental law. Public participation in environmental decision making is now mandatory as was held in the case of *Republic v Lake Victoria South Water Services Board and 2 others*,<sup>69</sup> where the ELC was called upon to determine whether the Migori Water Supply and Sanitation project undertaken by Lake Victoria South Water Services Board was illegal and in breach of the Constitution, the EMCA and the other statutes dealing with the regulation and management of water resources in Kenya. The ELC affirmed that public participation by those likely to be affected by the development projects that have a social and environmental impact is mandatory.

<sup>57</sup> Collins Odote, 'Kenya: The New Environment and Land Court' (2013) 4, IUCN Academy of Environmental Law E Journal 171.

<sup>58</sup> Angote (n 3) p. 41-42.

<sup>59</sup> Okong'o (n 54).

<sup>60</sup> Ibid p. 9.

<sup>61</sup> Otieno (n 55).

<sup>62</sup> Donald Kaniaru, 'Launching a New Environmental Court: Challenges and Opportunities' (2012) 29 (2), Pace Environmental Law Review 626, 628.

<sup>63</sup> Caiphos B Soyapi, 'Environmental Protection in Kenya's Environment and Land Court' (2019) 31(1) Journal of Environmental Law 151.

<sup>64</sup> *Petition No. 4 of 2017, In the Environment and Land Court at Machakos [2017] eKLR.*

<sup>65</sup> *Constitution Petition No. 29 of 2012, In the High Court at Nakuru [2014] eKLR.*

<sup>66</sup> *ELC Petition No. 1433 of 2013, Environment and Land Court at Nairobi.*

<sup>67</sup> *Bungoma Petition No. 6 of 2016, In the Environment and Land Court of Kenya at Bungoma.*

<sup>68</sup> *ELC Miscellaneous Application No.3 of 2016, In the Environment and Land Court at Kisumu.*

<sup>69</sup> *Misc. Civil. Appl. No. 47 of 2012, In the ELC at Kisii.*

The ELC has also had occasions to interrogate in detail the principle of sustainable development which requires the balancing of economic development *vis a vis* environmental sustainability. In some cases, the court has gone ahead to develop environmental law by filling up the gaps in the existing statutes. In the case of *Moffat Kamau & 9 others v Aelous Kenya Limited & 9 others [2016] eKLR*,<sup>70</sup> the court was presented with a scenario where there was no specific provision regarding whether a new EIA Study Report is required before an EIA variation license could be issued. The ELC, while, invoking Regulation 28 of the EIA Regulations<sup>71</sup>, held that where there is substantial change that goes to the gist of the project, it should be deemed as a new project which requires a new EIA license, meaning that a fresh EIA must be carried out. This gave the ELC an opportunity to develop the law in that regard

In the case of *Addax (K) Limited v National Environmental Management Authority and the Mastermind Tobacco Limited*,<sup>72</sup> the ELC, while interpreting environmental law, affirmed that appeals in environmental disputes should be filed within the prescribed time. In this case, the appeal to NET requesting that the EIA license be set aside had been filed eight months after the license had been issued. The court held that Section 129(2) of the EMCA and Rule 4(2) of the NET Rules<sup>73</sup> are clear that an appeal to NET must be made not later than 60 days after a decision is made or served, which the Respondent had not adhered to.

Further, the ELC has shown that it will endeavour to protect the right to a clean and healthy environment. For instance, in the case of *Ken Kasinga vs David Kiplagat & 5 Others*,<sup>74</sup> the court held that where there is non-compliance with the procedure for protecting the environment, then ‘an assumption ought to be drawn that the project is one that violates the right to a clean and healthy environment, or at the very least, is one that has potential to harm the environment.’<sup>75</sup>

These key decisions by the ELC is a clear indication that if more cases are brought before the ELC, it shall be in a position to develop not only environmental law and jurisprudence but also protect the environment.

#### **b. The reasons for the low environmental caseload in the Environment and Land Court**

Pring and Pring note that before establishing a specialized environmental court, a country must be able to calculate the current environment caseload or predict the future environmental caseload.<sup>76</sup> The justification is to sustain its functionality and operationalization. The caseload grants judges with the opportunity to not only resolve environmental disputes, but also develop the law and jurisprudence. While the establishment of the ELC was largely influenced by the backlog in land cases, future environmental caseload was predicted on the reforms brought about by the enactment of EMCA and the Constitution.

It is not easy to tell the environmental caseload in the ELC at a glance for a number of reasons. Firstly, since the ELC was established, there is no public statistical data distinguishing between purely environmental and land matters before the court, either from the judiciary or the National Council for Law Reporting (NCLR). Although the National Environment and Management Authority (NEMA) has partnered with the NCLR and the National Environmental Tribunal (NET) to avail to the public all the judgments on environmental law in soft, the NCLR is yet to provide the information as required.<sup>77</sup> In the State of the Judiciary and the Administration of Justice Reports that the Kenyan judiciary has continued to publish, it provides the ELC caseload without distinguishing between environment and land matters. All matters emanating from the ELC are categorized as ELC matters making it difficult to determine the extent of environmental litigation in the ELC.

Secondly, the filing system of cases in the ELC does not distinguish between environmental and land matters. All matters at the ELC are categorized as either Judicial Review, Appeals, ELC civil cases, ELC Petitions or Miscellaneous Applications. The lack of categorization of environment cases is a setback in determining the environmental caseload in the court. This is so because such cases cannot be prioritized in terms of hearing and

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<sup>70</sup> *Constitutional Petition No.13 of 2015, In the Environment and Land Court of Kenya at Nakuru [2016] EKLR (Wind Farm Project Case).*

<sup>71</sup> The Environmental (Impact Assessment and Audit) Regulations, 2003

<sup>72</sup> *Civil Appeals No 81 of 2013 and 1 of 2014, In the Environment and Land Court in Nairobi.*

<sup>73</sup> The National Environmental Tribunal Procedure Rules, 2003.

<sup>74</sup> *Petition No. 50 of 2013, In the Environment and Land Court at Nakuru ELC (unreported) para 73.*

<sup>75</sup> *Wind Farm Project Case*, n 30.

<sup>76</sup> George Pring and Cathreen Pring, *Environmental Courts and Tribunals: Guide for Policy Makers* (UNEP 2016)68.

<sup>77</sup> NEMA, ‘Environmental Cases’

<[https://www.nema.go.ke/index.php?option=com\\_content&view=article&id=36&Itemid=178](https://www.nema.go.ke/index.php?option=com_content&view=article&id=36&Itemid=178)> accessed 24 November 2017.

disposal, thus compromising the efficiency that is required in dealing with environmental cases. There is therefore a need for policy direction requiring that environment and land matters be distinguished during filing.<sup>78</sup> On the question of categorization of land and environment cases, Kenya can draw lessons from other countries which have specialized ECs. For example, in determining the environment and land cases, the North South Wales, Land and Environment Court (NSW LEC) of Australia classifies the matters that come before it, making it easy to distinguish the matters that are purely environmental and land.<sup>79</sup> The NSW LEC registry further compiles information on the caseload that the court has handled on each type of class. At a click of a button, a person litigating an environmental issue can easily determine the class of their dispute by visiting the court's website, making a call or sending an email to the court.

The low environmental caseload in the ELC can be attributed to a number of factors:

***i Public awareness and recognition of the ELC as an appropriate legal forum in solving environmental disputes***

The ELC is a new court. Therefore, there is need to educate the public as to its existence and dual jurisdiction. The lack of recognition of the ELC as the appropriate forum for filing environmental disputes is one of the reasons why the public continues to file environmental matters in the general courts, and especially the High court. In addition to the lack of public awareness as to the existence of the ELC, the ELC is not the only appropriate and legal forum to hear and determine environmental matters. In addition to the Alternative Dispute Resolution mechanisms envisaged under Article 159(2) of the Constitution,<sup>80</sup> the National Environmental Management Authority (NEMA), the NET, the Magistrates court, the Ministry of Environment and the County Governments also resolve environmental disputes that may not find their way to court.

Indeed, where the law is clear that disputes must be resolved by these alternative institutions, any aggrieved party must first exhaust these dispute mechanisms before invoking the ELC jurisdiction. There is therefore need for all institutions involved in environmental disputes resolution to provide statistical information to the public of the environmental cases they have handled. There is also need to create public awareness of all the institutions involved in environmental disputes resolution and their respective mandates to avoid forum shopping.

***ii Public awareness on what constitutes environmental matters and environmental law***

The ELC can only function well if litigants approach it and seek redress for environmental violations. The court cannot institute litigation on its own. Public awareness on what constitutes environmental matters has a great impact on environmental litigation as it puts the public in a position to recognize environmental violations and seek redress. Critics of specialized ECs have argued that it is difficult to distinguish between environment and non-environment matters.<sup>81</sup> This difficulty in distinguishing the two phenomena may in the end affect, not only the number of environmental cases filed, but also the statistics of purely environmental cases that have been filed and determined by the ELC. Critics of specialized ECs further provide that whilst environmental law is now firmly embodied in statutes, it lacks clear boundaries as to what constitutes purely environmental matters.<sup>82</sup> It is therefore important that the public understand, know and are in a position to recognize environmental violations. If litigants are able to distinguish between what constitutes an environmental matter from a land matter, they will be in a better position to understand which matter they will be pursuing at any particular point.

***iii Public awareness on the avenues created by the Constitution and EMCA***

The Constitution and EMCA provide various mechanisms to enhance environmental litigation. They include public interest litigation; the right to a clean and healthy environment; locus *standi* in environmental matters; the remedies to be granted by the court; the application of international environmental principles; the use of

<sup>78</sup> LDGI, *An Assessment of the Performance of the Environmental & Land Court* (16th Scorecard Report 2014).

<sup>79</sup> NSW LEC, 'Type of Cases'

<[http://www.lec.justice.nsw.gov.au/Pages/types\\_of\\_disputes/types\\_of\\_disputes.aspx](http://www.lec.justice.nsw.gov.au/Pages/types_of_disputes/types_of_disputes.aspx)> accessed 30 June 2018.

<sup>80</sup> Article 159 (2) (c) of the CoK provides that in exercising judicial authority, the courts and tribunals shall be guided by, inter alia, alternative forms of dispute resolution including traditional dispute resolution mechanism.

<sup>81</sup> *Wilderness Society v. Morton*, 479 F.2d 842 (D.C. Cir. 1973).

<sup>82</sup> Scott C Whitney, 'The Case for Creating a Special Environmental Court System: A Further Comment' (1973) 14, *William and Mary Law Review* 473.



ADR in environmental litigation; the obligations of the State towards environmental conservation; and the establishment of the ELC as a specialized forum to hear and determine environmental disputes. The constitutional provisions on environmental protection are not limited to the above-mentioned provisions because the Constitution is to be read as a whole document. Yet, lack of public awareness about these provisions is likely to hinder environmental litigation.

#### ***iv The jurisdiction of the ELC***

Preston notes that in order to increase public confidence and trust in specialized ECs as the appropriate forum to resolve environmental disputes, the EC needs to exhibit centralized and comprehensive jurisdiction to avoid forum shopping.<sup>83</sup> In order to increase the case volume of environmental matters, Pring and Pring have indicated that the jurisdiction of a specialized court should be centralized and with a wide geographical scope. In Kenya, the ELC's jurisdiction is anchored in the Constitution and the ELC Act. The question on the jurisdiction of the ELC was raised in case of *Malindi Law Society v Attorney General & 4 others*<sup>84</sup> and *Law Society of Kenya Nairobi Branch v Malindi Law Society & 6 Others*<sup>85</sup> where the High Court and the Court of Appeal was called upon to determine whether magistrates can hear and determine environment and land cases. These cases were informed by the Statute Law (Miscellaneous Amendments) Act 2015, amending the ELC Act, requiring the Chief Justice 'by notice in the Gazette, to appoint certain magistrates to preside over cases involving environment and land matters of any area of the country.'<sup>86</sup> The High Court held that the magistrates' court had no jurisdiction.

On appeal, in the case of *Law Society of Kenya Nairobi Branch v Malindi Law Society & 6 Others Nairobi Civil Appeal No. 287 of 2016*, the Court of Appeal held that the Magistrates court can hear and determine environmental matters as a court of first instance limited by its pecuniary jurisdiction. It was the decision of the Court of Appeal that the ELC does not have exclusive jurisdiction to hear such matters. Whereas this decision was mainly informed by the high caseload of land matters, it affects the adjudication of environmental matters. In most cases, environmental matters cannot be valued in monetary terms. Indeed, other than the issue of pursuing damages, environmental degradation is not capable of being valued. In the absence of guidelines on how environmental matters should be valued, this is likely to pose a challenge when it comes to filing of environmental matters in the magistrate's courts.

On the other hand, if the magistrates' courts can hear and determine environmental matters, this can increase environmental litigation because magistrates' courts are easily accessible to people than the ELCs which are located in 26 counties only. However, this undermines the creation of a specialized ELC which require that judges must have experience in land and environment matters, thus hindering the much anticipated development of jurisprudence.

#### ***v Public attitude and apathy towards environmental matters and environmental litigation***

Due to the public nature of environmental matters, Kenyans are more unlikely to file environmental cases because, in their view, they are not directly affected by environmental degradation. Environmental matters by their very nature affect the wider public and essentially constitute public interest litigation. For instance, due to the political nature of environmental matters that involved the Mau Forest eviction, individuals are likely to shun away from pursuing such cases. Or, waiting upon another person to institute such matters.

#### ***vi Accessibility of the ELC and the cost of litigation***

The establishment of the ELC stations across the country has been slow. Indeed, out of the 47 Counties in the country, only 26 Counties have an ELC court. In some areas, one ELC judge handles environmental matters in more than one County. Due to the uneven distribution of the ELCs in the country, physical inaccessibility of

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<sup>83</sup> Brian J Preston, 'Characteristics of Successful Environmental Courts and Tribunals' (2014) 26 *Journal of Environmental Law* 365, 377; 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.

<sup>84</sup> *Malindi High Court Constitutional Petition No. 3 of 2016, [2016] eKLR.*

<sup>85</sup> Nairobi Civil Appeal No. 287 of 2016.

<sup>86</sup> ELC Act, s 26(3).

the ELC by the public is likely to discourage individuals from pursuing environmental matters. Further, litigation in Kenya is generally costly. Court filing fees pose a great impediment in the filing of cases in the ELC. Whereas environmental litigants can invoke public interest litigation, they still have to pay for filing fees. In the NET, as a result of most environmental matters being in the public interest, there is no requirement for paying the filing fees. That should be emulated in the ELC.

#### **4.0 A Call for Reforms**

For the ELC to continue functioning effectively, it will be dependent on it being presented with sufficient cases, effective litigation of the said cases and the court's ability to appreciate and determine the matters effectively. The essence of enhancing environmental litigation is to ensure that the ELC is granted an opportunity to resolve disputes, develop jurisprudence and the law.

Despite the few environmental caseloads before it, the ELC has continued to develop the law and jurisprudence by making far reaching judicial pronouncements. These decisions have revolved around the protection of the right to a clean and healthy environment, the non-application of the strict rule of standing, the need for public participation in environmental decision making, amongst other environmental principles. To enhance environmental litigation, whose effect will improve environmental governance in the country, there is need for key reforms to be undertaken both by the judiciary and the national government through its organs.

##### ***a. Enhanced public awareness on the environmental matters and the role of the ELC in settling environmental disputes.***

The Judiciary and the national government should enhance and create public awareness of what environmental matters are and the jurisdiction of the ELC and the other institutions dealing with environmental governance. The ELC needs to make use and strengthen the Court Users Committees (CUC) and open court days to inform the public on its role in environmental litigation. This will be key in ensuring that the public does not continue perceiving the ELC as a land court alone. Public awareness of environmental matters and the role of the ELC in environmental governance can also be undertaken by other stakeholders. The civil society must continue playing its role in advocacy and public interest litigation in environmental matters. Faith based organizations should also enhance advocacy and public awareness on environmental issues at the grassroots levels. The media in Kenya plays a great role in bringing to the attention of the public environmental matters. For instance, through investigatory journalism, the media in Kenya brought to the limelight the "Lead Case" in Mombasa. The media should continue to increase coverage on the role of the ELC in conservation and protection of the environment.

The institutions of education need to integrate environmental governance into the learning process. This will change the attitude of the younger generation on environmental conservation and litigation. The Ministry of Education, in conjunction with the other environmental stakeholders should strive towards developing a curriculum from the lowest level of the education system that seeks to integrate environmental matters. The County Governments should be proactive in environmental issues, including putting in place sound environmental governance structures and be active players in helping to realize the mandate of the ELC in Environmental matters. Further, the national government agencies involved in environmental governance like NEMA should be at the forefront in the protection of the environment and use its resources, both human and financial, in filing cases in the ELC. NEMA, as an enforcement agency, needs to strengthen its enforcement tools and create awareness to the public of the mandate of the ELC.

##### ***b. Categorize environment and land matters in the ELC***

The hearing of environmental matters in priority to other matters by the ELC can only be achieved if the ELC registries distinguish land cases from environmental cases. All the ELC registries should have two registers and registries, one for land matters and the other for environmental matters. The two registers and registries will enable the ELC identify with precision the matters concerning the environment and allocate them dates on a priority basis. Such a system will not only see an improvement in the number of environmental cases, but will also assist the court in rating itself on its role in promoting environmental governance. Just like the High Court

which has several divisions like the family, commercial and criminal divisions, it is imperative that the ELC creates land and environment divisions to enhance environmental governance in the country.

***c. The ELC to expedite resolving environmental matters***

The ELC should seek and endeavor to finalize environmental cases within a reasonable time. The ELC should avoid granting many adjournments in environmental matters. There is need to provide timelines within which environmental matters should be determined depending on the nature of the case. The ELC should also adopt ADR mechanisms and traditional dispute resolution mechanisms, where applicable, as a method of resolving environmental disputes faster. The use of ADR mechanisms such as arbitration, reconciliation, mediation and traditional dispute resolution mechanisms are well entrenched not only in the Constitution, but also in the statutory framework such as section 20 of the ELC Act.

***d. Increase the number of ELC judges and ELC Stations.***

This is a policy decision which is dependent on whether the judiciary has the funds to increase the number of the ELC Judges or not. It is therefore upon the government, in collaboration with the judiciary, to channel more resources to enhance capacity building of the ELC. There is also a need to carry out a survey in each ELC station to determine the capacity required before channeling resources to those stations.

***e. Enhanced collaboration and coordination between ELC and the various organs that are involved in the environmental governance.***

The civil society and environmental public interest litigators can influence environmental protection by bringing to the attention of the ELC environmental issues. The ELC must seek to improve its working relationship with other government agencies, religious organizations, the civil society and environmental public interest litigators, including lawyers, involved in environmental governance by having joint workshops and exchanging information on the emerging issues in environmental law.

***f. Training of the Judges and Magistrates***

Judges and magistrates need to be trained on environmental law, not only at the national level but also at the international level. This can be done through informal, formal and refresher courses. To enhance cohesiveness, uniformity and synergy in environmental governance, there is need to involve the legal practitioners and legal scholars, both from within the country and without, in trainings on environmental litigation and adoption of best practices. This calls for deliberate training programs and partnerships between the Judiciary, the Bar and the legal scholars and provide an incentive system to encourage Public Interest Litigation.

***g. Waive court filing fees***

Very few litigants are able to afford environmental lawyers and the court filing fees. Where an environmental concern exists, there is need to grant to public spirited individuals incentives of filing the cases by scrapping of the court filing fees.

***h. Simplification of the ELC procedures***

Unlike the current Civil Procedure Rules, which the ELC uses, there ought to be a simplification of the ELC procedures to make it easier for the public to file environmental matters. The ELC should have separate, distinct and simplified procedures governing the filing and hearing of environmental disputes. New environmental procedural rules should be enacted and applied by the court in a manner that is responsive to the unique aspects of environmental litigation.

***i. The ELC must be seen as a separate court from the High Court***

The current administrative arrangement tends to suggest that the ELC is an appendage of the High Court, while in actual sense, the ELC is a distinct, specialized superior court established by the Constitution. The ELC should therefore be treated as such to enable the public to recognize it as an independent specialized court. Currently,

all the 26 ELC stations are in the same locality, both physically and administratively, with the High Court, with the High Court Judges being the presiding judges of those stations (for the High Court, the ELC and the ELRC). Indeed, although the High Court has one overall Principal Judge, with Presiding Judges in all the stations, the ELC has one Presiding Judge based in Nairobi. Considering that none of the ELC Judges is heading any of the stations, an assumption arises that the ELC is subservient to the High Court, thus compromising the courts' visibility in terms of its distinct nature as a specialized court. This perception by the litigants has informed some of them to file environmental matters in the High Court on the assumption that it is the superior court in a particular station. It is therefore recommended that each ELC should have a separate courtroom, a registry or registries, a Deputy Registrar and members of staff. The ELC should have an overall Principal Judge, Presiding Judges in all the stations where the court is located and Deputy Registrars to enhance efficiency and visibility, thus encouraging more litigants to file environmental disputes in the court.

***j. Enhance and support public interest litigation in environmental matters***

The court should encourage public interest litigation in environmental matters by not punishing unsuccessful litigants in public interest litigation with costs.

***k. Clarify the jurisdiction of the magistrates' court in environmental litigation***

Considering the likely confusion that the issue of granting magistrates the jurisdiction to handle environmental matters, and in view of the fact that a violation of the right to a clean and healthy environment may not be capable of being measured or valued, for the purpose of developing the law and jurisprudence in environmental governance, the magistrates ought not to have been given the jurisdiction to hear environmental disputes. All disputes relating to the environment should be heard by a specialized court, which in this case is the ELC and the relevant specialized Tribunals. The hearing of environmental matters by the magistrates' court, which is not specialized, defeats the spirit of the Constitution which contemplated the hearing of environmental disputes by the ELC and other specialized bodies like the NET. The public's confidence in filing environmental disputes will improve significantly if the jurisdiction of ELC is comprehensive and centralized.

## **5.0 Conclusion**

The implication of the low environmental cases in the Environment and Land Court (ELC) not only undermines the operationalization of the ELC as an environmental court, but also makes the ELC look like it is solely a land court. A court can only function effectively if it has enough cases. It is through caseload that the court gets the opportunity to resolve disputes, enforce the law and develop jurisprudence. As a result of the benefits associated with environmental litigation in environmental governance, Kenya has continued, through policy, legal and institutional reforms, to provide mechanisms that seek to enhance environmental governance and management in the country.

The elaborate policy, legal and institutional reforms that Kenya has put in place should enable the citizenry to file cases in the the Environment and Land Court (ELC) with a view of enforcing environmental law, and in the process protecting the environment. However, this can only be actualised if the policy makers and non State actors sensitive the public on the role of the Environment and Land Court (ELC) in settling environmental disputes; prioritising the hearing and determination of environmental disputes; waiving the court filing fees while filing environmental matters in the ELC and giving the ELC comprehensive and centralized jurisdiction in dealing with environmental disputes. These reforms will go along way in protecting the environment which is under threat due to human activities.