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# Environmental Courts and Tribunals: The Case of Kenya

Donald W. Kaniaru

*National Environment Tribunal, Kenya*

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## COMMENT

### **Environmental Courts and Tribunals: The Case of Kenya**

DONALD W. KANIARU\*

#### **I. INTRODUCTION**

Since Stockholm in 1972, the environment has become a crucial force behind humanity awakening to the urgency of ensuring its continued survival and well-being, which is dependent on safeguarding and sustaining precious and threatened environmental resources. Thus, at every level local, national, regional, and global environmental policies, laws, and governance have been put in place in the last four decades.

Critical underpinning of the environment meant that a bottom-up approach had to work simultaneously with a top-down approach, while arbitration of disputes or conflicts during the approach were also vital. However, a judiciary that was informed and sensitive to the developments that had taken place over the years was lacking. In the 1970s, environmental law was not taught or fully appreciated at law schools and other institutions as a discipline of any repute, resulting in senior legal minds not studying it because it was not offered at institutions of learning. Therefore, evolution of the judiciary is a key pillar of governance along with the two others, the Executive and the Legislature, which were – and still are – at different stages in the development of an environmental management path.

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\*Advocate of the High Court of Kenya. Chair, National Environment Tribunal, Kenya, 2005 to date; Former Special Senior Legal Advisor to the Executive Director, UNEP; Director, Division of Environmental Policy Implementation, and Division of Environmental Conventions UNEP.

The Stockholm United Nations Conference on the Human Environment (UNCHE),<sup>1</sup> occurring in June 1972, formed the basis for establishing the United Nations Environment Programme (UNEP).<sup>2</sup> During the Conference, the United Nations adopted the Declaration on the Human Environment (The Stockholm Declaration) that spurred global, regional, and national frameworks of binding and non-binding instruments in the decades following. This was the doing of the executive and legislative branches, to the near exclusion of the judiciary.

At global and regional levels, environmental treaties<sup>3</sup> were in force on major issues of global and regional concerns in diverse environmental areas (marine, terrestrial, atmospheric, chemical, species, wetlands, cultural heritage, etc.). These treaties were under the auspices of the United Nations (U.N.), its bodies like UNEP, U.N. Economic Commissions, and specialized agencies, including the U.N. Educational, Scientific and Cultural Organization (UNESCO), Food and Agriculture Organization (FAO), World Health Organization (WHO), International Maritime Organization (IMO), and other intergovernmental regional organizations. There were also major policy documents and declarations negotiated and concluded under the support of the U.N. In addition to the Stockholm Declaration<sup>4</sup> there were declarations of principles governing the sea-bed and the ocean floor, and the subsoil thereof, beyond the limits of national jurisdiction;<sup>5</sup> the World Charter for Nature in 1982; the Rio Declaration Principles adopted at the United Nations Conference

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1. For the report from this conference, see United Nations Conference on the Human Environment, June 5-16, 1972, *Report of the United Nations Conference on the Human Environment*, U.N. Doc. A/CONF.48/14/Rev.1.

2. G.A. Res. 27/2997, U.N. GAOR, 27th Sess. (Dec. 15, 1972).

3. Register of International Treaties and Other Agreements in the Field of the Environment, U.N. Doc. UNEP/Env.Law/2005/3 (Dec. 30, 2005), available at [http://hqweb.unep.org/law/PDF/register\\_Int\\_treaties\\_contents.pdf](http://hqweb.unep.org/law/PDF/register_Int_treaties_contents.pdf).

4. See United Nations Conference on the Human Environment, Stockholm, Sweden, June 5-16, 1972, *Stockholm Declaration*, U.N. Doc. A/CONF. 48/14 (June 16, 1972).

5. United Nations Convention on the Law of the Sea, G.A. Res. 2749 (XXV), 1970 (Principle One providing that "the sea-bed and ocean floor, and the subsoil thereof, beyond the limits of national jurisdiction (hereinafter referred to as the area), as well as the resources of the area, are the common heritage of mankind.").

on Environment and Development in 1992,<sup>6</sup> Forest Principles as Rio outcomes in 1992; the World Summit on Sustainable Development; Johannesburg Declaration on Sustainable Development in 2002;<sup>7</sup> and the Global Judges Symposium in 2002, to name but a few.

The above policies and law (treaties and non-treaties) notwithstanding, growth of national environmental policies and laws implementing global thrusts and founded on solid ground and capacity building took root with national governments, civil society, and national institutions. Stakeholders devised ways to extend laws, giving them legal teeth, and ensuring their monitoring to sound effect, as well as provide transparency. No effect would mature unless legal mechanisms were in place, and judicial and quasi-judicial machineries were integrated in all the endeavors underway. This realization came to pass after a number of regional and global treaties were substantially in place. There were also globally embraced declarations whose principles were already severally integral to treaties, and acknowledged by governments as law at the national level. Given that situation, the judiciary could no longer be disregarded by governments. The courts interpret the law, and in so doing declare what the law is in issues before them. In a matter of time, environmental law, budding everywhere, would be challenged in courts. If the judiciary was ill-prepared or equipped, disastrous or adverse effects to legal developments might turn the tide against the previous gains achieved.

It was therefore time to engage judiciaries before cases headed to courts. With caution, UNEP initiated this process in October 1996 in Mombasa, Kenya. Seeing success at the end of the tunnel, UNEP worked with partners in subsequent endeavors in South Asia (Colombo, 1997) and South East Asia (Manila, 1998), culminating in the Johannesburg, South Africa, Global

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6. See *Report of the United Nations Conference on Environment and Development*, U.N. Doc. A/CONF.151/26/Rev.1 (Vol.1) (1993), <http://daccess-dds-ny.un.org/doc/UNDOC/GEN/N92/836/55/PDF/N9283655.pdf?OpenElement>.

7. Johannesburg Declaration on Sustainable Development, U.N. DEP'T OF ECON. AND SOC. AFFAIRS, [http://www.un.org/esa/sustdev/documents/WSSD\\_POI\\_PD/English/POI\\_PD.htm](http://www.un.org/esa/sustdev/documents/WSSD_POI_PD/English/POI_PD.htm) (last visited Mar. 1, 2012).

Symposium in 2002.<sup>8</sup> This was just prior to the World Summit on Sustainable Development, also in 2002.<sup>9</sup> Immediately thereafter, implementation efforts were spearheaded not only by UNEP but by partners IUCN, UNDP, and The World Bank, at regional and national levels.<sup>10</sup> In fact, the value of these exercises were such that several countries: Kenya, Uganda and Tanzania are members of the East African Community which has an organ in the East African Court of Justice, individually or in cooperation with others, had these organized for senior judges (Supreme Court, Court of Appeal, High Court) and Subordinate Courts. It must be appreciated, however, that capacity building (i.e. sensitizing judicial officers and the exchange and sharing of legal materials and expertise) are on-going as the old retire and the new join the judiciary. Such building must be done for new officers on appointment and intermittently thereafter. Those countries that have not engaged their entire judiciary are still set to do so and partners in donor governments and UN system may be amenable to support such efforts.

## II. COURTS AND TRIBUNALS

Environmental courts and tribunals are a fact of life today and their evolution is not closed for such new courts in different regions of the world. How such courts are established depends on the circumstances of each country, including the capacity inherent in the country and its extent of land use, urbanization, commitment to sound environmental governance, and existence of processes of implementing the principles of sustainable development.

The judiciary is not as active in Africa, as it is in Asia and the Pacific, and Latin America and the Caribbean (two comparable regions). In Asia and the Pacific there are active superior courts

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8. For additional information, see *Global Judges Symposium on Sustainable Development and the Role of Law*, DIV. OF POLICY DEV. AND LAW, U.N. ENV'T PROGRAM (2002), [http://www.unep.org/law/Symposium/Judges\\_symposium.htm](http://www.unep.org/law/Symposium/Judges_symposium.htm).

9. For more information on the summit, see *WORLD SUMMIT ON SUSTAINABLE DEVELOPMENT...LIVE!*, <http://www.un.org/events/wssd/> (last visited Mar. 17, 2012).

10. I attended many, both as UNEP's Senior Legal Officer and Director.

in South Asia generally, with India in the lead since the days of Chief Justice P. N. Bhagwati of their Supreme Court. Also, the Philippines has many well-known judgments,<sup>11</sup> with their Supreme Court promulgating rules of procedure for the Environment.<sup>12</sup> Australia and New Zealand<sup>13</sup> have various specialized courts, including the notable Land and Environment Court of New South Wales<sup>14</sup> which has been in operation over thirty years. In the case of Latin America and the Caribbean, Brazil's *Supremo Tribunal Federal* and Costa Rica's Supreme Court are clear leaders, while the Caribbean has tribunals in the Republic of Trinidad and Tobago<sup>15</sup> and Guyana, their Environmental Appeals Tribunal having been established under its Environment Protection Act.<sup>16</sup>

In Africa, as is largely the case elsewhere, courts and tribunals - the former mainly deriving from the constitution of a country and the latter from specific statutes - are mechanisms that deal with specific dispute settlement instruments as defined in a particular statute. The method of settling could be as much or as little as a review, a reconsideration of a decision made on a matter, or a full-blown appeal of an administrative decision by a committee, individual, board, commission, "court" or a tribunal, manned by a variety of individuals, qualified as defined by the relevant statute(s). Provided such an instrument or mechanism does not issue from the constitution, it is really subordinate to superior courts established by, or under, the constitution.<sup>17</sup>

While the courts are formally established and operate with formality, the tribunals and other mechanisms in the same docket operate rather informally and without regard to these technicalities. Below these at a very local or village level, elders

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11. See *Oposa v. Factoran*, G.R. No. 101083 (S.C., July 30, 1993) (Phil.), available at [http://www.lawphil.net/judjuris/juri1993/jul1993/gr\\_101083\\_1993.html](http://www.lawphil.net/judjuris/juri1993/jul1993/gr_101083_1993.html).

12. Rule of Procedure for Env't Cases, A.M. No. 09-6-8 SC, O.G. (Apr. 29, 2010) (Phil.).

13. Resource Management Act 1991 (N.Z.)

14. *Land and Environment Court Act 1979*, No 204 (N.S.W.) (Austl.).

15. Environment Management Act, No. 3 (2000) (Trin. & Tobago).

16. Environmental Protection Act, No. 11 (1996) (Guy.).

17. The case of the Industrial Court in Kenya makes this clear. See discussion *infra* Part III.

deal with minor issues affecting communities or clans, in a purely informal manner. Where the elders' solution is agreeable, it ends the matter and the clan or community carries on their business accordingly. When no agreement is reached, a dissatisfied party can, and often would, pursue the matter in a formal setting: the tribunal or court. This type of structure actually functions at a local level and offers some stability, which is often taken for granted by those in authority.

The superior courts in different countries function in several different ways: Supreme Court or Court of Appeal being the highest courts, with two or more superior courts one level below. Some countries, such as the Republic of South Africa, Uganda, and several French-speaking countries have a Supreme Court, Constitutional Court, Court of Appeal, and a High Court. Other countries, such as Lesotho, Malawi, and Tanzania maintain a Court of Appeal (as the highest court) and a High Court this was the case with Kenya prior to the passage of the new Constitution of August 2010). Countries such as Kenya, with a specialized environment court – a first in Africa – have a Supreme Court, Court of Appeal, High Court, and specialized courts.<sup>18</sup>

Below the superior courts are subordinate courts and tribunals. The tribunals are a lasting feature, as Kenya has demonstrated in its restructuring and new laws following the promulgation of a new constitution. Rather than consolidating and reducing the number of tribunals, some new laws have incorporated new tribunals (e.g., the Political Parties Disputes Tribunal<sup>19</sup> and the Tourism Tribunal<sup>20</sup>). The tribunals cover several areas, including those related to commercial, economic, and procurement activities. Environmental tribunals (which are subordinate to superior courts) are known only in a few countries in Africa, with the vast majority of the fifty-four countries having only mainstream ordinary courts to deal with all disputes, regardless of their nature. The few countries with environmental tribunals are Mauritius, Tanzania, Lesotho, and Kenya. Of these four, the oldest is Mauritius, which is headed at a rather subdued

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18. CONSTITUTION, art. 162(2) (2010) (Kenya).

19. The Political Parties Act, (2011) No. 11 §§ 39–44 (Kenya).

20. The Tourism Act, (2011) No. 28 §§ 87–97 (Kenya).

magistrate's level; limited information is available about its work in recent years. The Environmental Appeals Tribunal of Tanzania established in the Environmental Management Act,<sup>21</sup> despite containing sound provisions and a strong relationship to the judiciary (the Chief Justice appoints the registrar of this tribunal), has yet to come into force. Likewise, the Lesotho Tribunal, established in the Environment Act,<sup>22</sup> is not yet operational. Further, as of May 2011, Botswana<sup>23</sup> was working on an Appeals tribunal, which is not yet enacted. The Kenyan National Environment Tribunal, established in the Environmental Management and Coordination Act (EMCA)<sup>24</sup> has been operational since 2002 and has appointed two Chairs<sup>25</sup> to date. In other works, I have described the Tribunal articles and presentations.<sup>26</sup>

### III. KENYA PIONEERING NEW DIRECTIONS: WILL OTHERS FOLLOW?

Amid a sea of ordinary courts and tribunals that exclusively deal with environmental matters in Africa, Kenya has broken ranks and established specialized courts under its new Constitution of 2010.<sup>27</sup> These courts include the Industrial

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21. The Environmental Management Act, (2004) No. 20 Part XVII (Tanz.).

22. The Environment Act, (2008) No. 10 § XIV (Lesotho).

23. A copy of the draft was presented at a meeting the Task Force on Natural Resources held with the Botswana delegation and Ministry of Environment and Tourism on May, 2011. Draft Report, *Appeals Tribunal* (forthcoming 2012).

24. The Environmental Management Coordination Act, (1999) No. 8 §§ 125—136 (Kenya).

25. The Honorable Justice Florence N. Muchemi was Chair from 2002 to 2005. See The Environmental Management and Coordination Act, No. 8 (2002), KENYA GAZETTE SUPPLEMENT No. 642. I took over as Chair in 2005 and I continue to hold that position today. See the Environmental Management and Coordination Act, No. 58 (2007), KENYA GAZETTE SUPPLEMENT No. 7983.

26. See, e.g., Donald Kaniaru, *Environmental Tribunals as a Mechanism for Settling Disputes*, ENVIRONMENTAL POLICY AND LAW 459 (2007); Donald Kaniaru, Remarks at the University of Joensuu UNEP Course Series Seminar on Multilateral Environmental Agreements, National Environmental Governance, and the Role of National Environmental Tribunals (Aug. 2010) (on file with author).

27. CONSTITUTION, art. 162(2) (2010) (Kenya).



Court, which deals with employment and labor issues,<sup>28</sup> and the Environment and Land Court, which presides over issues related to the “environment and the use and occupation of, title to, land.”<sup>29</sup> Both of these courts are superior courts of record of the same status as the High Court, along with the Supreme Court<sup>30</sup> and the Court of Appeal.<sup>31</sup> These, along with the two previously-established superior courts, the Court of Appeal and the High Court, make a total of five superior courts of record. Under the Labour Institutions Act,<sup>32</sup> which has been repealed by the Industrial Court Act,<sup>33</sup> there was an Industrial Court (actually a tribunal) established by an ordinary act as opposed to flowing from the Constitution. Although its decisions were appealable to the Court of Appeal – then the highest court – it was in legal and practical terms subordinate to the High Court in that the latter could, in exercise of judicial review, hold back implementation of the decisions of that tribunal. The Industrial Court has now been upgraded to the status of the High Court, and its jurisdiction is defined under the Constitution and the Act.<sup>34</sup>

In the environmental field, broadly defined, there are numerous distinct tribunals, each with defined jurisdictions under their founding statutes. For example, the National Environment Tribunal (NET) exercises jurisdiction under several statutes<sup>35</sup> and is expected to embrace more.<sup>36</sup> These still leave out other appeal mechanisms.<sup>37</sup> Appeals to these other mechanisms

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28. The Industrial Court Act, (2011) No. 20 (2011) (Kenya).

29. The Environment and Land Court Act, (2011) No. 19 (Kenya).

30. The Supreme Court Act, (2011) No. 7 (Kenya).

31. CONSTITUTION, art. 164 (2010) (Kenya).

32. The Labour Institutions Act, No. 12 (2007).KENYA GAZETTE SUPPLEMENT No. 109.

33. The Industrial Court Act, (2011) No. 20 (Kenya).

34. *Id.*

35. Environment Management and Coordination Act, (1999) No. 8 §§ 125–36 (Kenya); Forests Act, (2005) No. 7 § 63 (Kenya).

36. *See* Minerals and Mining Draft Bill 2012 and revised Wildlife Management, 2012 (Kenya), *available at* <http://www.kenyalaw.org/klr/index.php?id=98> (reaffirming the National Environment Tribunal as their tribunal).

37. *See* The Water Act, (2002) No. 8 § 87 (Kenya); The Energy Act, (2006) No. 12 § 107 (Kenya), *available at* [http://www.kenyalaw.org/kenyalaw/klr\\_app/frames.php](http://www.kenyalaw.org/kenyalaw/klr_app/frames.php)

remain with the High Court until the new specialized court on Environment and Land is operational; judges are appointed and the court takes over appeals and matters that previously went to the High Court. The new court would, pursuant to article 162(2)(b), exclusively deal with original, supervisory, and appellate jurisdiction, since the High Court has now been expressly denied jurisdiction on those matters by the Constitution.<sup>38</sup> In the exercise of its mandate and jurisdiction, this court would streamline and hopefully direct appropriate integration of environmental policies, principles, rights,<sup>39</sup> and laws that are spread over natural resources laws applicable to Kenya. This would include customary law, general international law, and treaties, to which the environment donates increasingly overwhelming numbers in bilateral and multilateral agreements.<sup>40</sup>

In addition, the Constitution contains Chapter V on Land and Environment, defining land and natural resources,<sup>41</sup> and with regards to enforcing human rights,<sup>42</sup> gives no option to courts and tribunals but to determine matters. It provides that “In applying a provision of the Bill of Rights, a court shall (a) develop the law to the extent that it does not give effect to a right or fundamental freedom; and (b) adopt the interpretation that most favours the enforcement of a right or fundamental freedom.”<sup>43</sup> This provision is in contradiction with the past Constitution, where it could be said that no relevant law had been enacted. Hence the issue could be ducked by the court, as it was in the province of the legislature to make law. This has, therefore, been redressed by forbidding any excuses in the future and providing an opportunity to keep abreast of environmental jurisprudence beyond national jurisdiction.

The judiciary, with five superior courts, subordinate courts, and tribunals, is one with a body established by an act of

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38. CONSTITUTION, art. 165(5)(b) (2010) (Kenya).

39. *Id.* art. 42; *see also id.* art. 69.

40. *See id.* art. 2.

41. *Id.* art. 260.

42. *Id.* arts. 19 to 59.

43. *Id.* art. 20(3).

parliament.<sup>44</sup> This branch is therefore under the management of the Judicial Service Commission;<sup>45</sup> the Chief Justice, Deputy Chief Justice, the Chief Registrar, and the respective Principal Judges, and no doubt it is expected to function coherently – in smooth cooperation rather than in competition between the delivery of services by the Judiciary and the determination of disputes. While initially this may be a challenge, it is in the interest of the Judiciary to regain its lost glory in the shortest time possible.

The Constitution established a clear and formal structure of the courts in Kenya. However the structure of tribunals and other such mechanisms is far from clear or streamlined. These entities are established under different statutes, and their functions, funding, personnel, and tenure differ markedly. In the new constitutional and legal order there is a question of whether these mechanisms could be adjusted in a manner to promote better coordination and management under a single tribunal with consolidated jurisdiction over all environmental, land use, and natural resource issues. Such a tribunal would be headed by an executive chairman with access to a broad range of expertise through panels that are capable of dealing with issues raised prior to any appeal in the specialized court. This would be the ideal situation. In practice, however, only one Act<sup>46</sup> has been repealed through section 31 of the Environment and Land Act.<sup>47</sup>

The question remains as to whether the environmental sector can lead the way. In a few bills, the existing National Environment Tribunal's jurisdiction will be expanded but other laws take no cognizance of this fact. Therefore there is potential for competition among tribunals because the exercise of jurisdiction is dependant on the founding statutes of each tribunal. Since the environment cannot be dissected into small compartments, coherence will be a challenge in the next phase of consolidating environmental laws, and every effort should be made to that end. The aim, which is also a challenge, should be

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44. CONSTITUTION, arts. 162-70 (2010) (Kenya).

45. Judicial Service Act, No. 1 (2010), KENYA GAZETTE SUPPLEMENT No. 80 § 3; *see also* CONSTITUTION, arts. 161, 171-72 (2010) (Kenya).

46. The Land Disputes Tribunals Act, (1990) No. 18 (Kenya).

47. Environment and Land Court Act, (2011) No. 19 (Kenya).

to streamline policies and laws in this broad area. Appeals to the Environment and Land Court would therefore be focused, as well as guide lower courts and enforcers of the law, on integration. Some examples of this integrated approach can be found in Canadian provinces – Ontario included – and the Scandinavian countries, which currently have environmental courts dealing with water issues.

#### IV.      THE ENVIRONMENT AND LAND COURT

This section will examine the Environment and Land Court, established under the Constitution,<sup>48</sup> and elaborated in an Act<sup>49</sup> of Parliament, as stipulated in the Constitution. At the 2011 International Symposium on Environmental Adjudication, I delivered a speech entitled, “*A New Environment Court: Challenges and Opportunities*,”<sup>50</sup> because at the time several matters of jurisdiction, functions,<sup>51</sup> and issues were under consultation and still undecided. These issues included the jurisdiction and functions of the court, the question of who was working on these matters, the name of the court, the number of judges, and the modalities of its operations. At that time, these issues were among the several unanswered questions that this paper sets out to clarify.

The constitutional provisions aforementioned have established the courts and their broad jurisdiction, namely “to hear and determine disputes relating to . . . the environment and the use and occupation of, and title to, land.”<sup>52</sup> The Constitution also provides that “Parliament shall determine the jurisdiction and functions of the courts contemplated in clause 2”<sup>53</sup> – that is,

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48. CONSTITUTION, art. 162(2)(b) (2010) (Kenya).

49. Environment and Land Court Act, (2011) No. 19 (Kenya).

50. Justice Donald Kaniaru, Address at the Pace Law School International Symposium on Environmental Adjudication (April 1, 2011) (transcript available through the International Judicial Institute for Environmental Adjudication), *available at* [http://www.pace.edu/school-of-law/sites/pace.edu.school-of-law/files/IJIEA/4-1-11\\_Transcript.pdf](http://www.pace.edu/school-of-law/sites/pace.edu.school-of-law/files/IJIEA/4-1-11_Transcript.pdf).

51. CONSTITUTION, art. 162(3) (2010) (Kenya).

52. *Id.* art. 162(2)(b).

53. *Id.* art. 162(3).

the two special courts which had to be established by August 27, 2011.

The name of the Environment and the Land Court is explained in the Act.<sup>54</sup> The Act's five parts – Preliminary, Establishment and Constitution of the Court, Jurisdiction of the Court, Proceedings of the Court, and Miscellaneous Provisions – were enacted and assented to within the constitutional deadline of one year, and serve as a basis for how to appoint judges<sup>55</sup> to the court, and, in this respect, provide for qualifications, the process and functioning of the court throughout Kenya, and ensuring access of reasonable and equitable access to its services in every county<sup>56</sup> in Part two of the Act.<sup>57</sup>

The qualifications for appointment are set out in section 7(1)(b), and are derived from the Constitution. These qualifications are similar to those for other judges, but they should have “at least 10 years experience as distinguished academic or legal practitioner with knowledge and experience in matters relating to environment or land.”<sup>58</sup> Section 7(2) provides that “[t]he Chief Justice may on the recommendation of the Judicial Service Commission, transfer a judge who meets the qualifications set out at subsection (1) to serve in the court.”<sup>59</sup>

On jurisdiction, Part III, is extensive in sections thirteen through sixteen.<sup>60</sup> Jurisdiction is original, appellate, supervisory, and mandated to issue a range of orders and reliefs.<sup>61</sup> In other words, it governs all that the High Court did, or could do, in

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54. Environment and Land Court Act, (2011) No. 19 (Kenya).

55. *Id.* § 5 (“The Court shall consist of the Principal Judge and such number of judges as may be necessary for the efficient and effective discharge of the function of the Court.”).

56. *Id.* § 4(3). *See also* CONSTITUTION, art. 6 § 1 (2010) (Kenya).

57. *See* The Environment and Land Court Act, (2011) No. 19 §§ 5–7 (Kenya).

58. CONSTITUTION, art. 166(5) (2010) (Kenya); *see also* The Environment and Land Court Act, (2011) No. 19 § 7 (Kenya).

59. *Id.* § 7. The High Court at present has a complement of seventy judges spread out in eighteen stations. Clearly more judges are needed given the backlog of cases, complexity of environment and land matters, and their spread throughout the country. Recruitment of an initial thirty judges of the environment and land court is ongoing.

60. *See* The Environment and Land Court Act, (2011) No. 19 §§ 13–16 (Kenya).

61. *Id.*

disputes relating to the environment and the use and occupation of, and title to, land. Appeals from the court go to the Court of Appeal. Part IV, "Proceedings of the Court," is worth mentioning; it emphasizes that the court should be guided by a number of principles:

In exercise of its jurisdiction under this Act, the Court shall be guided by the following principles-

- (a) the principles of sustainable development, including;
  - (i) the principle of public participation in the development of policies, plans and processes for the management of the environment and land;
  - (ii) 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;
  - (iii) the principle of international co-operation in the management of environmental resources shared by two or more states;
  - (iv) the principles of intergenerational and intragenerational equity;
  - (v) the polluter-pays principle; and
  - (vi) the precautionary principle;
- (b) the principles of land policy under Article 60(1) of Constitution;
- (c) the principles of judicial authority under Article 159(2) of the Constitution;
- (d) the national values and principles of governance under Article 10(2) of the Constitution; and
- (e) the values and principles of public service under Article 232(1) of the Constitution.<sup>62</sup>

While the quorum of the court is a single judge,

any matter certified by the court as raising a substantial question of law —

- (a) under Article 165(3)(b) or (d) of the Constitution; or
- (b) concerning impact on the environment and land

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62. *Id.* § 18.

shall be heard by an uneven number of judges, being not less than three, assigned by the Principal Judge.<sup>63</sup>

Further, “[T]he court shall not be bound by the procedure laid down by the Civil Procedure Act,” which binds the High Court, “and shall be guided by the principles of natural justice.”<sup>64</sup>

The process of concluding the Act was tight and somewhat complex. It involved developing the text, its review by the lead agencies (Ministry of Justice, Environment, and Lands), consultations with the public, meetings with other entities (Parliamentary Oversight Committee, Constitution Implementation Commission, and its instituted consultations, Kenya Law Reform Commission, the Office of the Attorney General), and printing by the Government Printer. All these tasks had to be hastily accomplished and hence obvious mistakes were made as is apparent in the phrase missing in the printed version of the Act which, in Parliament, had not been amended.

The Ministry of Justice set out the roles for these various organs in the process of implementation, origination of the draft Bill, and consultations thereafter, and this changed severally because of the delays in initiating the review. Article 262 of the Constitution, Sixth schedule, section 24(1) provides that “The Chief Justice in office immediately before the effective date shall, within six months after the effective date, vacate office and may choose either to retire from the judiciary . . . .” Here, the then-Chief Justice opted to retire on February 27, 2011. Consequently, the judiciary leading the process slowed down, and the Chief Justice was only appointed in May 2011. The resulting processes fell short in the four steps herein: (1) there were inevitable delays within the judiciary; (2) in parallel with Ministries of Environment and Lands, each works on the “Environment Court” and “Land Court” respectively while only one court is actually created in article 162(2)(b); (3) then an agreed approach with Ministry of Lands proceeded on the basis of draft prepared by Ministry of Environment – a Task Force, that was presented to stakeholders, and thereafter further

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63. *Id.* § 21(2).

64. *Id.* § 19(2).

consultations with senior officials from Ministry of Lands;<sup>65</sup> (4) then Cabinet review and submission to Constitution Implementation Committee, and Attorney General, after which the Constitution Implementation Committee took the process through its own driven process and finally the Attorney General presented it to Parliament. This was a frantic process, with Parliament extending time into the night to consider and pass the near 15 bills it considered. The key then was to meet the constitutional deadline, and in the process, errors crept into several texts of Acts of Parliament, including on the court. As a result, the Speaker of the National Assembly (Parliament) directed the Clerk of the National Assembly and offices of the Attorney General and others originating Bills to scrutinize these Bills passed in a rush to ensure their accuracy.

Curiously, the brief Act hardly reflects the amount of work that went into the proposed law. An earlier draft took into account extensive review of Kenyan substantive and procedural law; laws and experiences shared from other jurisdictions (Australia (New South Wales); New Zealand, the United States (Vermont); Philippines; Brazil), as well as essentially having rules and regulations in place so that the court would simply takeoff, engaging itself with substantive work with the appointment of judges. The report of the Minister of Environment can still be useful in the further work that the court undertakes, in particular in developing rules and regulations.

## V. CONCLUSION

Looking back, the expectation that the completion of instituting constitutional laws would proceed like clockwork was too optimistic, and disregarded the political dynamics of the country, the inherent shuffling of human resources, and the extent of changes and inertia that would be engendered in the

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65. The Ministry of Environment had established a Task Force for Drafting Legislation Implementing Land Use, Environment, and Natural Resource Provisions of the Kenya Constitution to deal with such issues and it did a lot on this, advertised stakeholders meeting on July 20, 2011, and spent a week with Senior Lands officials and agreed on text that went to the Constitution Implementation Committee and Attorney General, and later became the basis of the Act. I chaired the Task Force of experts.



process. Whether this will be factored and improved upon in the efforts to turn out results in meeting deadlines of eighteen months, two years, etc., in Schedule Five, a process that is underway, remains to be seen. But with reduced Ministries, called Cabinet Departments, to half the number at present, the reality of reduced competition among bureaucrats and political interests would have emerged and hopefully tamed.

The Environment and Land Court has yet to take off, but the urgency and final considerations may rest in the hands of the judiciary to settle the number of judges - how many initially and how to advertise<sup>66</sup> and set in motion filling of vacancies. This should not be unduly delayed as it may otherwise turn into another frustrating process, rightly or wrongly, attributable to a new judiciary that is boldly sorting out the past, and laying the foundation of the judiciary that Kenyans wanted, and worked for in the establishment of the current constitutional order, effective in August 2010.

Kenya, as the country hosting the United Nations Environment Program, is seen as a leader in various environmental matters. Kenya has now pioneered a relatively substantive green Constitution, with new institutions, such as the Environment and Land Court. How soon the court is in place and the type of results it turns out may well determine whether this lead is taken or not taken by the many African countries currently engaged in constitutional reviews in their phase of maturity since independence.<sup>67</sup>

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66. An invitation of applicants to fill thirty vacancies of judges of the court has been advertised in the Kenya Gazette Vol. CXIV – No. 20, Gazette Notice No. 3223 of March 16, 2012.

67. I have recently visited a number of African countries and shared the new Constitution. It turned out these countries were set to review their existing constitutions. This is also the case in other countries not visited.