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Launching a New Environment Court: Challenges and Opportunities

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National Environment Tribunal, Kenya

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SPEECH AND CONFERENCE PROCEEDING

Launching a New Environment Court: Challenges and Opportunities

JUSTICE DONALD KANIARU*

I. OPENING REMARKS BY PROFESSOR NICHOLAS ROBINSON

The presentation we're about to have is going to be a wonderful one. Those of you who do not know Donald Kaniaru should know him, because he is one of the great fathers and progenitors of environmental law across nations. He worked in the United Nations Environment Programme for many years and helped build up the initial courses for continuing judicial education and environmental law. They did not come out of Europe or North America or some other place. They came out of Africa. And the African courts have been quite forthright in developing environment[al] law.

In addition, he was very much involved with convening the UNEP Global Judges Symposium on the eve of the United Nations World Summit on Sustainable Development in Johannesburg in 2002.

So it is with great pleasure that I invite him here. This time, he is a new incarnation. He is inaugurating a new court and will

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speak to us about the challenges and opportunities of the creation of the environment court of Kenya. Donald.

II. SPEECH GIVEN BY JUSTICE DONALD KANIARU

Thank you. It is a great opportunity to have the young before us. That is the future, and therefore, we are investing in them, is what I want to pass as a message of an encouragement to them to do much better where we have done less.

Environmental courts and tribunals are a fact of life today. And the chapter 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 and including the capacity inherent in the country and its extent of land use, urbanization, commitment to sound environmental governance, and the existence of process[es] of implementing the principle of sustainable development.

The Rio+10 in the World Summit for Sustainable Development, 2002, was preceded by the Global Judges Symposium in Johannesburg, South Africa. That symposium later spurred regional and national judiciaries to harness their appetites for settling environmental disputes. These efforts present further opportunities to develop capacity-building systems that can and will be the basis of future courts and tribunals.

Regular reviews and exchanges of pertinent effort by environmental courts and tribunals will play an important part in the ongoing development of environmental law, as has already been articulated by the two previous speakers, Judge Antonio Benjamin and Judge Brian Preston, just minutes before me.

In this symposium, such material has been unveiled on the operations, eminence, laws, and regulations governing environmental courts and tribunals. In fact, many of us taking part in this symposium are living testimony of courts and tribunals that have, over the years, engaged in environmental issues.

The uniqueness of this assembly is its ability to inspire new momentum to work together, to share information, mobilize resources, and galvanize government and other players to create follow-up structures geared to engage the Rio+20 United Nations Conference to be held in Brazil next year. And our judge here [Hon. Antonio Benjamin] should play an important role in that respect.

In my remarks entitled “A New Environmental Court: Challenges and Opportunities,” I outline challenges and opportunities facing Kenya as it launches an environmental court. The court’s creation is mandated under Kenya’s new Constitution, promulgated in August 2010. This is the Constitution, the Document, which is green in respects unknown previously in the country’s laws, and so it introduces and strengthens the environmental processes, and so this is an important challenge that is before Kenya.

The details of the court’s jurisdiction and operations are to be worked out in national legislation to be enacted by Kenya’s Parliament in the course of this year.

So, I [am] talk[ing] about the birth of an environmental court, and this is a vivid, welcome event in family and community, nation, and region. When it is founded on the constitution of a nation, like is the case in Kenya, such joy is not an exception either.

In Africa it is the most eminent environmental court, in the superior court category, established by Article 162 paragraph (2)(b), which [provides] that the Parliament shall establish [a] court with the status of the High Court, to hear and determine disputes relating to the environment and the use and occupation of and title to land. So, its own title will probably be changing as Parliament enacts that law.

Before Kenya’s new Constitution came into force on August 27, [2010], the court structure was as follows: the Court of Appeal and the High Court as the superior courts, and the subordinate courts and tribunals of a quasi-judicial nature as subordinate courts. Appeals from the subordinate courts and tribunals, as decided by law, would then go to the High Court, and, as a point of law, might reach the Court of Appeal.

Environmental cases were heard by the land and environment division of the High Court, which, as a division, [was] set up administratively by the Chief Justice of the day and can be abolished that easily as well. The courts flowing from the Constitution are, of course, totally separate and operate in line with the Constitution and law enacted for the purpose.

Over time, two critical problems afflicted Kenya's courts. One, corrupt practices that created the perception that justice was for sale. Very unfortunate. And [second], a backlog of unheard cases that ran into thousands. In fact, as of the last year, in 2009, 2010 [was] estimated [to have] one million cases backlogged. And for a small country, that is a major setback.

The new Constitution established a different structure of courts: to introduce a Supreme Court,¹ retaining the Court of Appeal and the High Court, and two new superior courts of equivalent status to the High Court – namely the Environment and Land Court² and Industrial Court³ dealing with employment and labor issues.

All three newly established courts – the Supreme Court, the Environmental and Land Court, and Industrial Court – are at various stages of operation. Both Acts were passed by Parliament on August 27, 2011, were assented to by the President on August 30, 2011, and came into effect the same day. For all practical purposes, the Industrial Court is operational using the judges in place before, but the same is not the case with the Environment and Land Court, whose judges are to be appointed in due time. The High Court is excluded from jurisdiction over matters falling under the Environment and Land Court and the Industrial Court, respectively.

We had struggled, in the High Court, to accept broader jurisdiction on these matters from tribunals, and even when legislation was passed – [which said that for] environment and other areas the question of limiting access to the tribunal and to

1. See The Supreme Court Act, No. 7 (2011), THE LAWS OF KENYA (2011).

2. See The Environment & Land Court Act, No. 19 (2011), THE LAWS OF KENYA (2011).

3. See The Industrial Court Act, No. 20 (2011), THE LAWS OF KENYA (2011).

the courts should not be done – the High Court had great difficulty in accepting such an approach. Those EMCA provisions are now upgraded into the Constitution.⁴

As a consequence, the court was denied jurisdiction in these matters in the Constitution, so they are excluded from the jurisdiction of the High Court.⁵ And therefore, the High Court itself contributed by donating two new courts of record, which are the superior courts equivalent to it, which was not the case before.

However, under the Constitution's transitional provisions and schedules, the High Court and the Court of Appeal continue to have jurisdiction over environment and employment issues until the new courts come into operation.

The new Constitution itself set an ambitious schedule of implementation, expecting new legislation to be brought in before Parliament and passed in time. Some fifty such or more legislations were slated in a period of one year⁶ to eighteen months.⁷ The provisions expect this legislation, and the legislation is extensive, because . . . the Executive has been structured and the Parliament [was] given a certain leeway and liberty to organize its own calendar and pass issues that judicially w[ere] more extensively hashed in this process.

The new Judicial Service Commission Chief Justice, with the limited time to either leave, as he [may] chose to do, or, if he doesn't leave, then he would accept to go to the Court of Appeal, where having been the head of the judiciary – this type of branch of governance there for eight years – to then suddenly have to

4. See CONSTITUTION, art. 35 (2010) (Kenya) (right of access to information); *id.* art. 42 (right to a clean and healthy environment); *id.* art. 70 (no requirement for *locus standi*).

5. See *id.* art. 165(5).

6. As of this writing, key legislation has been passed within one year. Acts relevant to the judiciary are the following: The Judicial Service Act, No. 1 (2011), THE LAWS OF KENYA (2011); The Vetting of Judges and Magistrates Act, No. 2 (2011), THE LAWS OF KENYA (2011); The Supreme Court Act, No. 7 (2011), THE LAWS OF KENYA (2011); The Environment & Land Court Act, No. 19 (2011) THE LAWS OF KENYA (2011); and The Industrial Court Act, No. 20 (2011), THE LAWS OF KENYA (2011).

7. Those other pieces of legislation slated for eighteen months are preoccupying different institutions before they engage Parliament. See CONSTITUTION, art. 261 (2010) (Kenya).

either go down or leave, it doesn't surprise any one of you that he chose to leave.

That in itself has meant, then, there was not a Chief Justice, and therefore, some of the progress that should have been made in certain areas slowed down, because the Judicial Service Commission, when established, itself decided – well, maybe then . . . it would wait, do small, small things and so on, until the Chief Justice is substantively in place.

The Constitution did also restructure the old Constitution with respect to the Office of the Attorney General, retaining that office as Legal Advisor to the Government and creating an Office of Public Prosecutions, previously integrated in the Office of the Attorney General. The Attorney General was to leave office by August 27, 2011, and his replacements were to be in office by then. Also split was the Office of Controller and Auditor General into the Controller and the Auditor General, also within that time. The Chief Justice was slated to vacate office by February 27, 2011, and the new Chief Justice was not in place until June 16, 2011. Therefore, [the] time to restructure the judiciary, affect vetting of judges and magistrates, recruit new judges – there were forty-two in the High Court out of seventy. The judiciary was under particular focus, of all the branches of government.

And because their first team – [the] Chief Justice [I] mentioned and another three senior officials, Attorney General and the Director of Public Prosecutions, and the Controller of Budget – Parliament said, “No, we cannot accept some of these, there are implications,” and so on, and those names were withdrawn. Subsequently, those positions of Chief Justice, Deputy Chief Justice, and those others – Controller and Director of Public Prosecutions – were advertised. As I left Nairobi for New York, there was a note in the press saying that, for example . . . there had been no applicant [for the Director of Public Prosecutions position] as of that date; however, as Attorney General Amos Wako left office after two decades in office, the appointment of the next Attorney General, Professor Githu Muigai, and the first Public Prosecutor, Keriako Tobiko, was affected.

The Judicial Service Commission was established pursuant to the new Act, Number 1 of 2011. But the Chief Justice was not

yet in place, and there were other challenges facing the judiciary. The directive from the Minister for Justice to appoint a task force that would have included both the ministries from which the Court would come – that is, environment and mineral resources and the labor ministry – plus the two courts that are acting as tribunals, which were there before: the National Environment Tribunal, which I have headed for the past six years and currently I am on the third term, and the Industrial Court, under the other task.

Putting the courts pursuant to Article 162(2) of the Constitution in place, though finally done within [a] one-year deadline, was potentially a challenge. This was because it had been expected that the Chief Justice would undertake the lead in this. Naturally, the Chief Justice – leaving in February – left this to the incoming Chief Justice, but his appointment took time. At th[at] point, the Executive changed gear and requested the pertinent ministries, namely Labor and Environment, to take [a] lead in the process by [the] end [of] April 2011. Mean[while], those tribunals have invoked a task force and, of course, the ministries concerned with those in the task force to develop this particular process.

What is happening, there have been another set of several tribunals . . . what task forces, to develop aspects of legislation that is or were altogether working on this. I am heading, as Chairman, a task force to operationalize the environment provisions in the country; and so from that perspective, we are actually holding together an approach that can then be fed into the other more formal process as soon as the Chief Justice can set that in motion.

So it is – you can see then – why we’re not celebrating a new court right now because of these technicalities and these difficulties unforeseen, even though the people who are involved should have known their country.

The issue to be noted is that under transitional provisions and schedules, the existing courts continue to deal with issues falling within Article 162(2) of the Constitution until the new courts are in place. Thus, the High Court and the Court of Appeal are still exercising traditional jurisdiction as before.

In the one environmental matter that went to the High Court not so long after the Constitution was put in place – to a three-judge bench – it was interesting that they overruled the National Environment Tribunal, which I chair. Incidentally, the Chair is nominated by the Judicial Service Commission and should be a person qualified to be judge of the High Court. They did not agree, . . . having decided that the appellant had jurisdiction to come before the Tribunal on the matter in issue.

Interestingly enough, this ruling was made in September, some three weeks after the Constitution came into force. The three-judge bench did not refer to the Constitution whatsoever. And therefore they ignored that, and in subsequent discussion, one senior advocate who practices before the Environment Tribunal wrote a scathing attack on this particular ruling and said it should not be followed as precedent, because it was contrary to law at this point in time. So you can see why the High Court had difficulties with the application of the law.

The environmental provisions in the new Constitution have culminated in the acknowledgment of an environmental right, [Article 42] in the Constitution . . . which is part of the Bill of Rights. It includes the right to a clean and healthy environment, which previously found expression in Environmental Management and Coordination Act, Number 8 of 1999, which in fact had preceded and pointed the way in the constitutional review process; and thanks to that, a new gift has been given to us in this new role.

Assigning leadership to the various ministries, and so on, will mean that we have to watch the situation very closely, be articulate, so that those favoring the old situation (lack of *locus standi*, where the jurisdiction was denied) do not unduly frustrate the advancement of progress in the area of environment.

By rooting the environmental court in the Constitution, frivolous challenges that previously thwarted hearing of environmental issues will be avoided, because the situation has really changed; and environmental courts would have original jurisdiction, of course judicial review, and appellate jurisdiction from subordinate courts and tribunals.

So these perhaps, then, might move in the direction that the Chief Judge of New South Wales' Land and Environment Court [Hon. Brian Preston] mentioned in his presentation.

We watched and admired the developments in that court very carefully, as well as other environmental courts and practices, such as outlined by Judge Antonio Benjamin, and by the Supreme Courts of India and the Philippines and all that. So I bless them.

[As for] the challenges and the opportunities of the environment court that Kenya would have to contend with – I mention a few. One of them is developing environmental law in the country. The court has a tremendous opportunity to apply the principle of sustainable development, which already finds expression in Article 10, paragraph (2)(d), as one of Kenya's national environments, which everyone – the government, the county governments, every public officer – has to apply and to address in their work in the whole country, so it's a major responsibility.

The court will also have the chance to harmonize interpretation and direction of different statutes on the environment and land use, environmental impact in Kenya, and to rationalize inconsistencies in policies; and to facilitate the application of environmental treaties, which have changed direction from the commonwealth traditional way, where there would have to be domestication, to the position currently that any treaty that is ratified by Kenya is an integral part of the law of the country.

So, they would have to go in the direction Brazil has gone or is going, as Judge Benjamin was mentioning, regarding the application of the heritage convention in that country.

Two, determining the scope of the court's jurisdiction and land use and titles. A major challenge will be on the extent of its jurisdictional land use and titles. Land is of deep cultural significance. In Kenya, as elsewhere, land was at the root of Kenya's struggle for independence. The colonial experience defined and ordered systems of land tenure. Kenya's many land use and related statutes date back to 1900 or earlier, and the legal regime incorporates English law and Indian law from the 1800s.

These are very complex. Several land-related statutes established quasi-judicial tribunals. There have been numerous land commissions and recommendations on land issues, as well as a multiplicity of policies adopted by Parliament. Disputes over alleged illegal allocation of land date back to the emergency days in 1952 to 1961 and since independence in 1963.

The backlog of matters pending in the jurisdiction system doubtless[ly] includes a significant number of land disputes, which obviously arise because for a long time we had expatriate judges on contracts; where they misunderstood or did not appreciate these laws, cases were delayed.

So you have a situation where . . . if a tribunal comes into being and wants to play safe, it could be very dangerous; because if these things don't move fast then people will be blaming [the] environment over some of these historical misfortunes, and this must be avoided at any cost.

All these factors call for legislation defining jurisdiction carefully. How far back claims in lands shall be adjudicated and whether matters of fact will be separated from matters of law, with the former being addressed by commissioners integrated in the court such as was explained by our senior colleague minutes ago. There are several High Court stations currently in existence in Kenya, some eighteen stations, and of course those handle everything that comes; and this station, the new legislation that established the Judicial Service Commission, and vetting contemplates a High Court in every county, and forty-seven of them have been introduced.

And if that is the case, then you have a certain element of difficulty there because how many judges would there be for the new court? That has to be determined and their spread and the opportunities given and who actually then receives all these cases or who sorts them out and is able to pass these up? This is quite an issue.

Whether issues of fact should be determined separately, as I've just mentioned, is another way. And of course, one opportunity is for Kenya to take advantage of courts such as New South Wales' Land and Environment Court, the New Zealand Environment Court, and even tough practices in types of rules of procedures – for example from the Supreme Court of the

Philippines which has been very innovative in that particular area, and, certainly, the rules of procedure that apply to the High Court in Kenya will not just be taken and applied to the new court. They must be revisited even though they just came into force just the other day. That is, December 2010.

And third, streamlining and re-evaluating the role of the judiciary, court, and judicial tribunals is another challenge. Kenya is replete with quasi-judicial tribunals to such an extent that almost every other statute incorporates a tribunal; a committee, which is appellate; a board, which is appellate; or other such mechanism.

The legal framework governing such an extent of multiplicity in this area is a challenge in itself, and a position would have to be made, quite quickly, how to proceed on these matters.

I give you a quick example that, for example, in [the] Environmental Management Coordination Act I mentioned already, it establishes the National Environment Tribunal. Judge Antonio Benjamin attended one of the sessions and participated and saw how flexibly we handled this, and the advocates there were very happy to see a Supreme Court judge from another country [Brazil] whose participation added value to their own institution. So that is that.

[In addition, we are dealing with] an appellate tribunal against administrative decisions on forestry issues under the Forests Act of 2005. In the past, forestry and environmental issues were under one Ministry of Environment, but that is not the case now. Appeals on administrative decisions from the National Environmental Management Authority [NEMA], by the director general of that authority, by committees that relate to that – and there are several – act at the local level district, and the promotion of the state level involved, and standards committees, . . . reviewing the legal notices that subsidiary legislation . . . that applies different aspects, because the act itself, EMCA, is a framework law.

That is one area. Tribunals in other areas are many, acting independently of each other. For example, under the Land Control Act (a committee); the Physical Planning Act (a committee); the Water Act (a water board), which is also an

appellate mechanism; and the Energy Act (a tribunal) as well. So we have these, and each tribunal has someone qualified in law either as chairman or as an assessor. And there are other professionals.

Incidentally, in my capacity as Chairman of the Task Force on Natural Resources legislation, I was saddled with a bill and policy on minerals and mining that had been before Parliament in 2009, and was told it's very urgent and important they should be looked at before it goes to Parliament. On its only review it was not ready. It hardly has taken into account all these issues, and in addition, it proposes another separate tribunal which was unnecessary. We need to borrow a leaf, at least, from the New South Wales Land and Environment Court, where mining issues are already integrated with environmental matters and related natural resources, which require to be sorted out as stated in Article 71 of the Constitution.

So these, or at least some of them, are policy matters, issues, which really don't belong to the Task Force that would be headed by the Chief Justice; but surely these other task forces that we are dealing with have to address this before we go forward.

Fourth, [as to] effective management of the High Court and Environmental Court, you appreciate that the new court and the High Court are at the same level. The difference is that there is substantial backlog of cases in the High Court which would have to be decided and, if not, as likely to be, not concluded, jurisdiction to move them to the new court should be provided.

The High Court has eighteen stations throughout the country and a mix of these cases in environment and land are, without doubt, in all the stations. The chances are that there is no single such list, and the Chief Registrar, Chief Justice, and the Principal Judge of the new court would have their task cut out on how to deal in an orderly and efficient way with this issue. You can immediately see, in this kind of area, where the World Bank, for example, the African Development Bank or somebody, could catch in the moment and say, "Look, they need help, let us assist them, sort out rapidly and electronically all the available material," so that when you pass them on, you pass them in an orderly fashion rather than introduce dispute thereafter.

But you can see it's a challenge. Nobody, perhaps, is saying, they are no – but on the other hand – no ordinary process of doing it is set out whether you bring all these into Nairobi and then distribute them or not. There is not enough judges or even agreement[s] on the number of judges of the Environment and Land Court. That is really quite a challenge, and we expect there will be co-location or regular availability of judges at a given point as needed.

But I think besides . . . jurisdiction corresponding to the lower court, so that the other processes of judicial review, then, would, at that point, you would decide whether one goes to the High Court or goes to the Environment and Land Court, because the High Court is denied jurisdiction in these matters.⁸

The issue of supervising the lower courts' joint supervision between the High Court and the new court would be ideal through registrars and principal and other judges. This would establish orderly fashion in sister courts.

Then, I see a very important process that Judge Brian Preston mentioned: that he is sitting in several courts at the same time. And I think I can see the need for cooperation between the High Court and the Environment and Land Court, because . . . with the possibility of assigning, in consultation with the Chief Justice and the principal judges, a judge where there may be no judge at all for a long while – so one might be gazetted to say, "all right, you have to deal with these issues, but when you're handling these issues you are really not a judge of the High Court, you are a judge of the court that you're assisting in." And this would be gazetted to avoid confusion, because I can imagine my own people saying, "well, is. . .you see, the Constitution says no, and these people are fixing these other people in the same place. What are they doing, are they defeating the process of justice or not?"

So these are issues that I think we will be having an opportunity to review, and I am hoping that we are able to borrow, quite substantially, from the courts, such as are now older courts which have been tried and not found wanting, to try to settle . . . sort for us out.

8. See CONSTITUTION, art. 165(5) (2010) (Kenya).

I want to say – since we are not celebrating the establishment of the court right now but, rather, that there are other problems and issues that need to be considered. I want to conclude by saying that for over a decade and a half, some of us – and certainly we have been with Professor Nicholas Robinson from those days, from . . . a symposium, 1996, colloquium in 1997, when we had the first and second Judges events, and when Professor Robinson presented a very solid paper at Colombo, Sri Lanka, and from there on, we were partners in Manila in 1998, went to Mexico, and . . . and we were in Johannesburg. From Johannesburg, I'm glad to see Charles deLeva [World Bank], who just came in, another partner in the process. In London to Kuwait and all this, handling this particular process.

I think we've been engaged on the issues of sensitizing ordinary courts and judges in different fora, regions, and countries on these matters, and, I am, can state, without fear or any contradiction whatsoever, that I think . . . it has not been in vain for those over fifteen, sixteen years.

So, this symposium itself is a very important opportunity, and I do hope that when the Kenya process is in the consultations, when you . . . will be invited, you will give us, you will be available, so that you can share this tremendous experience that we . . . have today, and will be hearing during the course of this moment, of this symposium, so that we can learn more, and we can have an environmental court that will stand the test of time and that will stand up, really, to discharge its duties honorably. In these many years that I have been chairing the Environment Tribunal, it's interesting that nobody ever called me to say, "what's going on – how are you doing this?" or, "can it be bent this or that way?" When I started, some asked who the person was, where has he been and what he's done, and were content to say, "you stand absolutely no chance of bending any rules at all at the Tribunal."

Early in the Tribunal, I remember, an appellant with a matter before the Tribunal coming and asking to see the Chairman. It was a person who had tried to move back, and his daughter and one of my daughters were together in school, and they thought they should pursue that and reach me. I was told by the secretary that, "you have someone here," and I said, "wait

until there are about ten or so people and tell me.” When there were about ten or so people, I came out, opened the door a little bit, and said, “who wants to see the Chairman?” And they said, “yes.” I said, “you have a matter before us, you want to see me? Come with all the parties. You see me that date in open court.” They left, and nobody ever came to wait to see the Chairman thereafter in these many years. I think they got the message, and that was that.

This, I consider to be an important call to anchor future cooperation between the older courts, environmental courts, and those that I imagine now; and I think with the possibilities, Professor, that you are intent to put in place, it would be very useful mechanisms, and I think further discussions with Charles [deLeva] – who came in the nick of time – in terms of this valuable thing might make the whole difference to the teams and an opportunity of modifying these courts. So I’m glad you have included me in this process.

It’s always good to renew acquaintance[es] in view of such an important body, so I thank you, sir, for inviting me and look forward to comments and issues that my colleagues might put across. Thank you very much.

III. QUESTIONS AND ANSWERS

PROF. NICHOLAS ROBINSON:

Let me again also present you with the case studies that Oliver Houck has prepared in the environmental battles, and I want to congratulate you on the new Constitution and its provision for having the Environmental Bill of Rights.

As we face this awesome moment in which a country like Egypt is literally, as we sit here, rewriting its Constitution, trying to figure out how to structure a new kind of government, going through the same kinds of difficulties that the constitutional revisions in Kenya have had to go through, figuring out what kind of clause to put into the Constitution on the environment, it’s a seminal moment for us all, and the guidance that Kenya gives us in this exercise will be very useful, as indeed the provision for the Constitution in Brazil and other leading jurisdictions is useful.

The story of implementing the legislation in Kenya reminds me of the battle to get the Green Tribunal Act implemented in India, and in this disk we have a lot of materials and commentaries on the challenges that India faces. But its backlog of cases is also enormous.

I want to congratulate you as we get questions coming up for you from the participants in writing, ask you about the real challenge of creating an electronic database for this. I saw how every one of the case files, rather enormous number of case files, in Brazil, was turned into an electronic database, so that they could no longer work with paper, even for old decisions.

So, I think we need to look at how to take that software, and that process, and replicate it in countries with big backlogs [like] Kenya or India, which is even larger.

We don't need to reinvent the wheel. We need to quickly transfer some of these tools to courts around the world that need them, and this is an area where I think coming out . . . of the next year's deliberations for sustainable development at Rio+20, as you quite rightly point out, is an area where we could really achieve some leveraging. But on to the questions.

"Do you have alternative dispute mechanisms involving environmental issues that come before your tribunal?"

JUSTICE KANIARU:

Not explicitly, but what happens when parties want an opportunity to resolve the matters before the tribunal, we allow it, and they can come . . . and . . . file with us an agreement, and we have normally allowed that to go forward. Nothing has been illegal or anything has been within the law.

But I think when the Court is in place, these are matters that will be more explicitly included than was the case in the context of the National Environment Tribunal which was thirty-first – thirty-five, thirty provisions, but twelve – section 125 through 126, did not include that explicitly.

PROFESSOR ROBINSON:

You have a question here on the cultural setting.

“Do tribal cultures have inherently differing land use rights in Kenya, and how will they, or are they, integrated into the environmental courts?”

JUSTICE KANIARU:

The customary laws are part of the new legal process. Unless they are incompatible with the Constitution, they have a place. So, I think the customary law aspects have come in place. The statutes, the laws will not interfere unless there is something that is really not right, and I think – also, we have very strong land policy that . . . seems to lead the way. So, between that and the new Land Commission that has been put in as a constitutional commission – to regulate land use and other practices – I think that the situation may well be under control, yes.

But I think opportunity there has to rise for careful application of a culture for good practices and so on. Incidentally, in the Act that we are revising now – [the] Environmental Management and Coordination Act – the way sustainable development, principles of sustainable development, are defined include cultural practices as well.

NICHOLAS ROBINSON:

Question on one of your last points. “You mentioned corruption. Could you elaborate on the role specialized environmental courts can play in overcoming that problem?”

JUSTICE KANIARU:

Well, I think one . . . is that you have a number of people involved in the matter. The National Environment Tribunal – the court [has] three, at least three [members]: Chairman and another, and the other two members. So it’s not one individual who handles this.

More times than not, I had more than the three, because the process of training the people because it’s structured in a manner where some three-year terms – maybe when you come to a new law, maybe five – but terms expiring at different times. So

you have to do adequate training of the people so that when these leave, then those who are left are able to move forward quickly. I think the numbers are such that you eliminate the possibility of an individual being isolated and lured to corrupt practices.

I think the next question is certainly the process of appointment itself, being careful so that you are putting forth only the people whose integrity is unimpeachable. And I think this process is on the record, and the Judicial Service Commission is advertising posts. You probably have seen them, by the way. Anyone from the Commonwealth is also eligible to be appointed judge, in Kenya, so it doesn't have to be a Kenyan.

So, I think there is a process of transparency; the list is also put in the media and in the official gazette, and there is a process of confirmation by Parliament, and therefore, scrutiny is there, which was not the case before.

[Thus,] I think one probably doesn't have to worry too much about the past. Nobody wants to live by the past. They want the future to be there.

NICHOLAS ROBINSON:

We have two related questions which we will ask before we all go up to lunch.

"What were the motivations, the main motivations, for Kenya to want to launch this new, specialized environmental court, and are you aware of other initiatives in Africa along those lines?"

JUSTICE KANIARU:

I did hint at the situation. The High Court handled itself in a manner that was extremely limiting, and I think inflexibly; and the consequence really was that, then the country, this constitutional process was carried throughout the country, so the country would not agree to proceed in that direction, and therefore, had to really set up these other mechanisms. And with the corrupt practices and the issues of land and land use, and land-grabbing by individuals – cutting pieces of forest and dishing them to friends and the personalities and so on – was such that there was really no chance to proceed that way in the

new constitutional order. So, I think the motivation is simple: to really streamline things once and for all.

NICHOLAS ROBINSON:

Great. Well, I want to thank you again for opening our eyes to some of the extraordinary challenges the judiciary faces as we set up these new courts. It's not going to be so easy, but if we persevere, it will succeed.