

Challenges and opportunities in climate change litigation in Kenya

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Introduction

- ▶ Outline of presentation
 - i. Background
 - ii. Kenyan Laws (Constitution, legislation and international law)
 - iii. Case law
 - iv. Challenges and opportunities
 - v. Conclusion

i. Background

- ▶ National Environment Tribunal- EMCA section 129(4)- automatic stay
- ▶ Environment and Land Court (Article 162(2)(b) and Section 13 of the ELC Act.- similar status to the High Court
- ▶ 90 % cases are land and 10% environment
- ▶ Jurisdiction challenges
- ▶ Benson Ambuti Andega and others v Kibos Distillers Ltd SC Petition 3 of 2020
- ▶ Mohamed Ali Baadi and Others v Attorney General and Others-predominant purpose test.

Cont.

- ▶ Locus standi- Environment cases
- ▶ Wangari Maathai v Kenya Times Media Trust Ltd Civil Case 5403 of 1989; [1989] eKLR. (Wangari Mathaai case)- no direct link
- ▶ Albert Ruturi, J. K. Wanywela & Kenya Bankers Association v. The Minister of Finance & The Attorney-General and Central Bank of Kenya Nairobi High Court Misc. Civil Application No.908 of 2001.
- ▶ Khelef Khalifa El-Busaidy v Commissioner of Lands & 2 others Civil Case No. 613 of 2001; [2002] eKLR.
- ▶ Communist Party of Kenya v Nairobi Metropolitan Services & 3 others; National Environment Management Authority & another (Interested Parties) [2022] eKLR- another challenge to upgrading of Uhuru Park without an environmental impact assessment- Court stopped the upgrade pending the conclusion of an EIA



WANGARI MATHAAI UHURU PARK.



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- ▶ -Article 23- remedies one can seek in court for violation of rights
- ▶ Art 24- limitation of rights
- ▶ Art 42- right to a clean and healthy environment which includes the right:
 - a. To have the environment protected for the benefit of present and future generations through legislative and other measures, esp those in Art 69
 - b. To have obligations on environment fulfilled under Art 70

Cont.

Art 69- State obligations in respect of environment

Art 70-enforcement of environmental rights under Art 42-
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- (1) is being or likely to be violated or **threatened**-apply to court for redress in addition to other legal remedies available
- (2) Remedies - (i) prevent, stop or discontinue act; (ii) compel public officer to take measures to prevent or discontinue act (iii) provide compensation for the victim
- (3) **Applicant does not have to demonstrate a person incurred loss or suffered an injury.**

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▶ *Climate Change Act No. 11 of 2016*

- To provide a regulatory framework for enhanced response to climate change
- Provide mechanisms and measures to achieve low carbon climate development and enhanced connected purposes
- Commencement 27 May 2016
- **S2- Climate change duties-** statutory obligations binding both private and public entities to implement climate change actions consistent with the national goal of low carbon climate resilient development

Cont.

- ▶ S 4 read with Art 10 , 232(f) Const- guiding principles when enacting, applying or interpreting the Act and making public policy decisions
- ▶ S 13- National Climate Change Action Plan- consider public participation
- ▶ S 17-Monitoring compliance-NEMA-on behalf of the council
- ▶ S21-integration of climate change in national **education curricula** at all levels
- ▶ S 23 read with s 13 ELC Act- **jurisdiction** to enforce rights related to climate change and remedies.

Cont.

► Environmental Management and Coordination Act (EMCA)

- EIA regulations
- SEA- Section 57 A (2015 amendment) and Regulation 42 of EIA regulations 2003
- Section 129- National Environment Tribunal
- Section 129 (4)- automatic stay- precautionary principle
- Environmental justice see : **Mohamed Ali Baadi v. AG and 11 Others [2018]eKLR**

International law (Article 2(6))

- United Nations Framework Convention on Climate Change
- Paris Agreement
- Mitubel Welfare Society v Kenya Airports Authority and Others [2021] eKLR

Cont.

- ▶ Article 21 (obligations of the State-promote, protect, observe, respect and fulfil)
- ▶ Section 57A EMCA as well as Regulation 42 of EIA regulations, 2003 and Section 4 (Guiding values and principles) and section 13- National Climate Change Action Plan Climate Change Act

ii. Climate change policies, plans, programmes

- i. National Climate Change Action Plan (NCCAP 2013-2017)
- ii. Kenya Green Economy Strategy and Implementation Plan 2016-2030
- iii. Kenya's Nationally Defined Contribution submitted to UNFCCC

iv. Case law on climate change

- ▶ ***Republic v National Assembly & 5 others Ex-parte Greenbelt Movement & 2 others [2018] eKLR***
- ▶ Judicial Review challenging appointments to the National Climate Council- for representatives from the civil society and marginalized communities
- ▶ Procedural justice a pathway to substantial justice?
- ▶ Overtaken by events

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- ▶ *Save Lamu v. National Environment Management Authority and Another NET Appeal No. 196 of 2016*
- ▶ Parties- Appellants- community organization and 6 other members of the Lamu community
- ▶ Respondents-1. NEMA and 2. AMU power
- ▶ Subject - matter of appeal / cause of action- issuance of EIA license challenging the issuance of the EIA Licence as well as the process in obtaining the same for the establishment of a coal fired power plant 1050 MW in sea shore of Kwasasi, Lamu county

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- ▶ They prayed, for the following relief(s):-
 - ▶ a. The *setting aside* of the decision by the 1st Respondent (NEMA) to grant the 2nd Respondent (AMU Power) an EIA License;
 - ▶ b. That *a fresh EIA study be conducted based on specific and current information involving all stakeholders; and*
 - ▶ c. That *each party bears its own cost*

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- ▶ More than 10 witnesses -8 expert witnesses (International and Local experts)
- On Kenya's climate change commitment from someone who participated in the process of drafting climate change policies
- By scientist who provided evidence on air quality in EIA as well as referred to recent IPCC assessments in relation to climate change
- By a marine biologist on impact of climate change on mangroves etc.

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- ▶ Site visits for the experts to practically explain to the Tribunal Members the impacts of the environment.
- ▶ Hearings and cross examination of experts (applicants and respondents experts on the sites).

Cont.

Appellants' case:-

10 grounds of appeal including

-The Coal fired power plant's contribution to climate change and making the Project inconsistent with Kenya's low carbon development commitments;

Issue for determination- *whether NEMA erred in law by disregarding the Climate Change Act, 2016 as well as Kenya's international climate change obligations before issuing the license*

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- ▶ Complete ignorance of the Climate Change Act, 2016 - error of law
- ▶ EIA Regulation 16 requires an EIA study in mandatory terms to take into account *legal considerations*
- ▶ Amu Power own assessment, the project would emit approximately 8.8 metric tonnes of carbon dioxide into the atmosphere annually. That amount of carbon dioxide would increase Kenya's annual emissions from 73 metric tonnes to 81 metric tonnes, according to the EIA

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- ▶ Expert evidence on climate change (3 key witnesses- climate change expert, scientist, marine biologist)
 - i. Projected green house gas emissions from coal plant as high as 8.8 million tons of CO₂ per year
 - ii. Climate Change Act, 2016- emphasizes need for a low carbon development pathway
 - iii. National Climate Change Action Plan 2013-2017- low carbon development pathway and supports increased sources of energy through renewable energy

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- i. Kenya Green Economy Strategy and Implementation Plan 2016-2030- focuses on renewable energy, innovation and efficiency including reduced emissions in the energy sector.
- ii. Kenya's Nationally Determined Contribution (NDC) which has submitted to the UN Framework Convention on Climate Change places a commitment by the Country to abate GHG emissions by 2030 based on the BAU scenario- this did not anticipate the entry of coal power generation in the mix

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- ▶ The most recent (Fifth Assessment) of the Intergovernmental Panel on Climate Change, infrastructure developments and long-lived products that lock societies into greenhouse gas (GHG) emissions pathways may be difficult or very costly to change, reinforcing the importance of early action for ambitious mitigation.
- ▶ Lamu coal powerplant if implemented will impact Kenya's domestic and international commitment.

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► EIA

- no proper analysis of climate change impacts which consider alternatives forms of energy
- no comprehensive analysis of national low carbon commitments
- only adaptation measures for CC
- the carbon monoxide from the coal plant was too steep an incline for the country. He stated the trees proposed to be planted to mitigate the emissions would not be enough to offset the emissions

Cases relied on:

- ▶ South African HC case of *Earth Life Johannesburg v Minister of Environmental Affairs 65662/16* - para. 90 that a climate change impact assessment is necessary and relevant to ensuring that the proposed coal-fired power station fits South Africa's peak, plateau and decline trajectory as outlined in the NDC and its commitment to build cleaner and more efficient power stations than the existing ones.

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- ▶ *Urgenda Foundation v. State of the Netherlands*, C/09/456689/HA ZA 13-1396
- ▶ *Asghar Leghari v Federation of Pakistan*, W.P. No. 25501/2015, filed by a farmer in public interest alleged that the government of Pakistan's inaction and delay in implementing the National Climate Change Policy and addressing vulnerabilities associated with climate change violates the fundamental constitutional rights to life and dignity

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- ▶ The court invoked the right to life and the right to dignity protected by the Constitution of Pakistan and international principles, including intergenerational equity and the precautionary principle, to call for a “move to Climate Change Justice.”

Cont.

► Respondents case:-

-No consideration of Climate Change Act- **27 May 2016**

-Paris Agreement entered into force on **4th November, 2016**, way after the ESIA study had been concluded and the ESIA License issued to the AP (EIA license issued in September 2016)

-the climate change impact assessment methodology was based on **desktop literature review**

-there was **insufficient data** to supply a complete picture of the **climate change implications**. (precautionary principle argument?)

-Admission that though the project would affect constitutionally protected marginalized communities, the EIA **did not assess their vulnerability or resilience to climate change as a result of the project**

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► NET held:

-The omission to consider the provisions of the Climate Change Act 2016 was significant even though its eventual effect would be unknown.

-In applying the precautionary principle where there is lack of clarity on the consequences of certain aspects of the project it behooves the Tribunal to reject it. On climate change issues this is of greater importance and made the provisions on climate change within the report incomplete and inadequate.

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► NET held:

-the 1st Respondent's (NEMA) approval of the ESIA Study and the consequent issue of the ESIA License and its conditions failed to meet the requirements of the law.

Orders

- ▶ Appeal allowed and decision of NEMA issuing EIA license on 7 September 2016 to the 2nd Respondent is set aside.
- ▶ If they consider a fresh EIA study they should do so and consider the Climate Change Act and the Energy Act.
- ▶ NEMA is to share its memorandum of reasons for reaching its decision whether for or against the project with the relevant parties and publish its decision on the grant or refusal to issue an EIA Licence accompanied with a summary of its reasons within 7 days of its decision. Such publication should be in a newspaper with nationwide circulation.
- ▶ Extra measure because the project is first of its kind in Kenya and East Africa.
- ▶ No order as to costs.





Site visit

Dr Obura witness





Hearing on grounds



Site visit



Site visit



The Greenbelt Movement and 4 Others v NEMA and Others Tribunal Appeal NET 19/2020

► Appellants

1. Greenbelt movement
2. The Wangari Maathai Foundation
3. Dandora Community Justice Center
4. Natural Justice
5. Katiba Institute

Repondents

1. NEMA
 2. China Road and Bridge Corporation (Kenya_
- IP- Kenya National Highway Authority

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- ▶ Judgment on 16 February 2022
- ▶ Facts
- ▶ Appellants challenged the EIA license issued to the China Road and Bridge Corporation (Kenya) for the construction of the proposed Nairobi Expressway covering 27 kms
- ▶ Appellants stated that the ESIA Report did not contain a climate impact assessment and the references to climate change made in the said report are inadequate and the Report should have incorporated the principles set out by the International Association of Impact Assessment

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- ▶ NET held
- ▶ EIA Report recognizes the Climate Change Act and states that it has considered the Climate Change Adaptations for Management options relating to green house gas emissions during the construction phase
- ▶ The EIA has mention of climate change but no analysis on impact of project on climate (para 99)
- ▶ S 20 CCA - NEMA shall integrate climate risk and vulnerability assessment into all forms of assessment and for that purpose liase with the relevant lead agencies for the technical advise

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- ▶ 102- Although the EIA Report states that the expressway shall pass through two distinct climatic zones, the report fails to do an analysis of the impacts created by the emissions of greenhouse gases on the sections affected by the expressway
- ▶ We find that the CC analysis was necessary prior to issuance of the license
- ▶ Order
- ▶ S 129(3)(c) of EMCA- NET made orders to preserve environment and sustainable development and hereby order the 2nd Respondent to carry out and complete the CC analysis within 18 months from date of judgment.





New cases - Pending

Pending case

Legal Advice Center/Kituo Cha Sheria and Another v AG and other ELC Petition 18 of 2022 Nakuru

- ▶ This case was filed by petitioners belonging to the Ilchamus and Tugen communities residing in Il Ngarwa and Bartum location at the shores of lake Baringo in Baringo county. The case concerns the climate change impacts of the rising waters of lake Baringo which in effect submerged schools, homes and hospitals. The marginalised communities are challenging the State for its failure to address the climate change effects or put in place measures that would have prevented the impacts of the rising waters of Lake Baringo. It also challenges the failure of the State to pass regulations in relation to the Climate Change Act.
- ▶ 3 Judge bench appointed by Hon. Chief Justice to determine the case

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- ▶ Mt Kenya Network Forum and indigenous People National Steering Committee on climate change (IPNSCCC) v AG and National Climate Council 2023

-The High Court in Milimani Nairobi has suspended President William Ruto's decision to nominate Emily Mwende Waita, John Kioli, Umar Omar and George Odera Outa as members of the National Climate Change Council (NCCC).

-The interim order issued by Justice Mugure Thande bars the nominees from being appointed, gazetted or holding offices as members of NCCC pending the hearing of a petition challenging their recruitment process.

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- ▶ The petitioners claim that the said nominations by the President failed to meet to the required legal threshold on transparency, competitiveness, merits and public participation.
- ▶ They also contend that the civil society organisations working on climate change in Kenya were excluded in the selection of the members of the council.
- ▶ "It is not clear who amongst the nominees is the representative of the largest civil society organisation working on climate change as it is envisaged in the Council Act or what process was used to select the representative for the civil society as required by the law and the Constitution and whether there was any form of public participation in the selection of the said individuals in accordance with the Public Participation Act, " reads the court papers.
- ▶ The petitioners also claim the positions were not advertised as required by law.

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- ▶ Five petitioners have filed a petition and they want court to order government to declare Climate Change a national disaster. The five, argue that the government is doing too little to prevent dangerous climate change occurring.
- ▶ The petitioners are also seeking an order compelling the government to limit the volume of greenhouse gas emissions in the country from manufactures as well as an order instructing the government to act more ambitiously to ensure realization of abating greenhouse gas emissions by 30% by the year 2030.
- ▶ It is their argument that the most immediate and serious threat in Kenya is that of water, food and energy security adding that greenhouse gas emissions are contributing to dangerous climate change from which state has responsibility to protect.
- ▶ In a climate action suit against the government, the five argue that the government through its agencies have violated citizens right and that the state has failed to implement the NCCAO , NAP which pose a threat to their fundamental rights.
- ▶ “The respondents have failed to implement any tangible action on the ground to harvest , store and save water as well as cushion vulnerable communities and the over 4 million Kenyans facing food insecurity and water scarcity from the raging effects of climate change of which the drought and floods in Kenya are part of those retrogressive effects,” reads court papers.

- ▶ They further argue that climate change is causing hunger episodes among school going children especially in rural areas and those in Arid and Semi-Arid Lands which also affect their right to education due to chronicle malnutrition hence school going children in the affected areas threatening and infringing on their right to education.
- ▶ In the court papers they claim that the effects of climate change is causing waterborne diseases like diarrheal diseases and cholera which also affect their right to health and threatens their right to safe water and by extension right to life.
- ▶ They also submit that the decrease in agricultural production has ramifications on food prices and can exacerbate food insecurity and under nutrition this offending the petitioners and Kenyas right to free hunger and to have adequate quality food.

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- ▶ Similarly they contend that their right to health is implicated by among other environmental factors which causes direct injury and mortality from climate change.
- ▶ “That the right to food and right to health are co-related and that effects of climate change for example reduction in rainfall causes food insecurity that is much needed for quality health care as chronic under nutrition increases,” reads court papers
- ▶ The petitioners argue that the present generations if Kenya s especially the younger generation will have to deal with the adverse effects of climate change in their lifetime if greenhouses gas emissions are not reduced.
- ▶ They want the government to start reduction efforts at an early stage as possible to limit the total emissions in this period since delaying the reduction as the government of Kenya is doing will lead to greater risks of climate change.
- ▶ Even though the county government have tried to develop county Integrated Development Plans, the counties have failed to develop tangible County Integrated Development Plans, and the said plans have remained proverbial paper rights which are largely unfulfilled in matters climate change .

Other cases

-Evidence of IPCC reports on the role of indigenous communities in climate change - cases touching on community land rights of indigenous forest dwelling communities in Kenya

(African Court decision recognizing the Mau Ogiek as an indigenous group living within the forest)

-Right to food cases

-Lack of regulations under the Act

v. Key opportunities and challenges

- ▶ Training of lawyers and collaborative efforts
- ▶ Amendment of crucial laws- Section 129(4) EMCA
- ▶ Disobedience of the law, disregard of the rule of law
- ▶ Experts (lawyers and court)
- ▶ Site visits
- ▶ Resources
- ▶ -Time
- ▶ -Human Resource
- ▶ -Plenty of Research

Cont.

- ▶ <https://www.youtube.com/watch?v=VhoGgbVqmBQ>
- ▶ <https://www.youtube.com/watch?v=70ZF31gWNes>