

Climate change
litigation and
adjudication: A case
study of Kenya

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Overview

- Introduction
- Kenya- Constitution and law
- Case law
- East African Court of Justice

Introduction

- Domestic laws- Constitution and legislation
- International law- Rio Declaration on Environment and Development- Principle 10 (Environmental justice- access to information and public participation)
- Case law

Kenya

1. Constitution

-Article 21- positive and negative obligations

Articles 42, 69 and 70

Articles 162 (2) - Environment and Land Court
(ELC)

Cont .

- ▶ 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-
 - (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.

Cont.

3. International law

What is the impact of international law in your country

-UN General Comments-

-UN Special Rapporteurs -on climate change and on environment and human rights

- **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

Case law



Cont .

- Locus standi- Environment cases

Before Constitution of 2010

i. *Wangari Maathai v Kenya Times Media Trust Ltd Civil Case 5403 of 1989; [1989] eKLR.* (Wangari Mathaai case)- no direct link

ii. *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 – no need

Cont.



Cont .

. 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











- ▶ *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

Cont.

-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.

- 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
- 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.

Site visit







Site Visit

- Lawyers, NET and community



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

• Respondents

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

Cont .

- ▶ 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

Cont .

- ▶ 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

Cont .

- ▶ 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.





Cont .

- 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

Cont.

- JE and Others (being minors suing through their next friend Legal Advice Center T/A Kituo Cha Sheria and Others v Tullow Kenya BV and Others
- -Environmental damage after closing of oil wells.