

Promoting Climate Litigation in Kenya for Sustainability

Kariuki Muigua

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Kariuki Muigua*

Abstract

Due to the impact that climate change is having on people's ability to make a living and the legal frameworks that have been put in place in response to this impact by both the worldwide environmental community and individual nations, there has been a discernible rise in the number of cases that fall under the category of climate litigation. Individuals, non-governmental organisations, and organized communities in various countries have been bringing lawsuits against their governments in court for claimed inaction or matters that expressly raise a question of fact or law connected to the causes or implications of climate change. This study makes the observation that although this trend may not yet have gained momentum in Kenya, it is only a matter of time as more and more people become aware of their environmental rights and expect more from the government and other actors in their reaction to climate change-related effects on their life. This paper also makes the observation that while this trend may not yet have gained traction in Kenya, it will do so soon. As part of the process of ensuring that sustainable development is brought to fruition, the author contends that encouraging climate litigation in Kenya may be a significant component in addressing this worldwide challenge.

1. Introduction

Climate change is defined in section 2 of the Climate Change Act 2016¹ to mean, “a change in the climate system which is caused by significant changes in the concentration of greenhouse gases as a consequence of human activities and which is in addition to natural climate change that has been observed during a considerable period.” There is however no universally accepted definition of a climate change-related dispute.²

In the past, many nations located in the Global South have not considered climate change to be one of their most significant challenges. Instead, they have prioritized more pressing issues, such

**PhD in Law (Nrb), FCI Arb (Chartered Arbitrator), LL. B (Hons) Nrb, LL.M (Environmental Law) Nrb; Dip. In Law (KSL); FCPS (K); Dip. In Arbitration (UK); MKIM; Mediator; Consultant: Lead expert EIA/EA NEMA; BSI ISO/IEC 27001:2005 ISMS Lead Auditor/ Implementer; ESG Consultant; Advocate of the High Court of Kenya; Senior Lecturer at the University of Nairobi, Faculty of Law; Member of the Permanent Court of arbitration (PCA) [August 2023].*

¹ Climate Change Act, No. 11 of 2016, Laws of Kenya, Government Printer Nairobi

² C. Mark Baker, Cara Dowling, Dylan McKimmie, Tamlyn Mills, Kevin O’Gorman, Holly Stebbing, Martin Valasek, “What are climate change and sustainability disputes? Key arbitration examples (Part 1 contractual disputes)”, in James Rogers, London; Cara Dowling, Vancouver (eds), *International arbitration report*, Norton Rose Fulbright – Issue 16 – June 2021, p. 40. < <https://www.nortonrosefulbright.com/-/media/files/nrf/nrfweb/publications/international-arbitration-report-issue-16.pdf?revision=40c8a703-6e1d-413c-8c7e-ac1201697383&revision=40c8a703-6e1d-413c-8c7e-ac1201697383>> accessed 7 August 2023.

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as the need for immediate economic development, the reduction of poverty, and energy security, as well as more immediate environmental challenges, such as the presence of hazardous waste and the availability of safe drinking water.³ Some authors have however observed that climate change is a "threat multiplier," which can increase human security issues such as food and water scarcity while also leading to (violent) conflict in climate-vulnerable countries.⁴ This is as a result of the fact that climate change's negative repercussions, such as water scarcity, crop failure, food insecurity, economic shocks, migration, and displacement, can exacerbate the risk of conflict and violence⁵. Environmental conflicts and disputes can be divided into two categories: first, access to environmental resources as a source of livelihood and as a foundation for economic activity, and second, conflicts over what are known as "side effects" of economic activity, such as biodiversity loss and pollution.⁶

The practice of taking legal action over climate change has been on the rise in national courts all around the world, with the majority of cases being claimed as breaches of human rights.⁷ Climate change mitigation is one of the key environmental goals of the United Nations' 2030 Agenda for Sustainable Development Goals (SDGs)⁸, as captured in Sustainable Development Goal 13, which aims to help countries attain resilience and adaptability.⁹

Although climate change litigation may refer to a wide variety of various procedures, in general, it is understood to refer to claims that specifically raise a question of fact or law related to the causes or implications of climate change. This definition holds true even though climate change litigation can refer to a wide variety of different actions.¹⁰ The 2020 Global Climate Litigation Report on Status Review defines "climate change litigation" to include cases that raise material

³ Setzer J and Benjamin L, 'Climate Litigation in the Global South: Constraints and Innovations' (2019) 9 *Transnational Environmental Law*.

⁴ Froese, Rebecca, and Janpeter Schilling, "The Nexus of Climate Change, Land Use, and Conflicts." (2019).

⁵ 'Tackling the Intersecting Challenges of Climate Change, Fragility and Conflict' <<https://blogs.worldbank.org/dev4peace/tackling-intersecting-challenges-climate-change-fragility-and-conflict>> accessed 30 March 2022.

⁶ Arild Vatn, *Environmental Governance: Institutions, Policies and Actions* (Paperback edition, Edward Elgar Publishing 2016) 2.

⁸ UN General Assembly, *Transforming our world: the 2030 Agenda for Sustainable Development*, 21 October 2015, A/RES/70/1.

⁹ Ibid, SDG 13.

¹⁰ 'Climate Change Litigation in Africa: Current Status and Future Developments | White & Case LLP' (9 November 2021) <<https://www.whitecase.com/insight-our-thinking/climate-change-litigation-africa-current-status-and-future-developments>> accessed 7 August 2023.

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issues of law or fact relating to climate change mitigation, adaptation, or the science of climate change.¹¹

It has been noted that activist organisations have been utilising litigation to promote ambition in climate action.¹² These groups are adopting a longer term perspective that looks beyond the immediate victories and losses of specific lawsuits. In particular, environmental advocacy organisations are resorting to the judicial system in an effort to hasten the adoption of more stringent levels of mitigation ambition, new policies, as well as more efficient execution and compliance with current ones.¹³ This kind of lawsuit is helping to supplement the execution of the Paris Agreement at the national level, which is one of the ways in which it is contributing in novel ways to the governance of the global climate at the international level.¹⁴

The climate lawsuits that have been brought up to this point often fall into one or more of the following six categories: (1) climate rights; (2) domestic enforcement; (3) keeping fossil fuels in the ground; (4) corporate accountability and responsibility; (5) failure to adapt and the implications of adaptation; and (6) climate disclosures and greenwashing.¹⁵

There has been a recent surge in the number of people who are taking their governments to court over their failure to take measures to prevent climate change. A significant number of these cases are being brought (at least in part) on the basis of human rights legislation.¹⁶ However, it has been claimed that utilising human rights as a foundation for a lawsuit against a government in relation to climate change is not a foolproof strategy.¹⁷ It is not that straightforward to trace damage due to climate change to the actions or omissions of individual governments and identify these consequences as human rights breaches. In addition, there are concerns of admissibility and

¹¹ Burger M and Tigre MA, 'Global Climate Litigation Report: 2023 Status Review', p. 6.

¹² 'Climate Change Litigation in Africa: Current Status and Future Developments | White & Case LLP' (9 November 2021) <<https://www.whitecase.com/insight-our-thinking/climate-change-litigation-africa-current-status-and-future-developments>> accessed 7 August 2023.

¹³ Higham C, Setzer J and Bradeen E, 'Challenging Government Responses to Climate Change through Framework Litigation' (2022) < <https://www.lse.ac.uk/granthaminstitute/wp-content/uploads/2022/09/Challenging-government-responses-to-climate-change-through-framework-litigation-final.pdf>> accessed 8 August 2023.

¹⁴ 'Climate Change Litigation on the African Continent' (*Regional Programme Energy Security and Climate Change in Sub-Saharan Africa*, 21 June 2021) <<https://www.kas.de/en/web/climate-energy-africa/single-title/-/content/climate-change-litigation-on-the-african-continent>> accessed 5 August 2023.

¹⁵ Burger M and Tigre MA, 'Global Climate Litigation Report: 2023 Status Review', p. 13.

¹⁶ Dewaele J, 'The Use of Human Rights Law in Climate Change Litigation : Inquiring Human Rights Obligations of States in the Context of Climate Change; and the Use of Human Rights Law in Urgenda and Other Climate Cases' (Global Campus of Human Rights 2019) <<http://doi.org/20.500.11825/1295>> accessed 8 August 2023.

¹⁷ Ibid.

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justiciability that need to be taken into consideration.¹⁸ It is worth pointing out that any challenges or crisis attributable to climate change could give rise to climate litigation due to the global scale of the problem of excessive greenhouse gas emissions and the various localized actions made by different parties that contribute towards resolving the issue.¹⁹ As a consequence of this, academics have contended with questions such as the following in an effort to give the concept of climate litigation in the literature some form:²⁰

- a) whether to include only cases that expressly raise issues of climate change policy or science, or whether to extend study to cases motivated by concerns over climate change issues (e.g., a challenge to a coal plant proposal on the grounds of its broader environmental or amenity impacts), or with consequences for addressing climate change (e.g., cases concerned with the costs of and compensation for extreme weather events like hurricanes), even if the litigation itself is not explicitly framed in terms of climate change;
- b) whether to focus on judgments issued by courts or to include other types of quasi-judicial decision-making processes and actions that lead to outcomes other than judgments, such as a settlement decision; and
- c) whether to include only cases with a pro-regulatory focus or also those brought by industry challenging climate regulatory measures.²¹

These factors thus make it relevant to discuss the concept of climate change litigation and how these challenges can be overcome, especially in the context of Kenya.

2. Justiciability of Climate Litigation in Kenya

The provisions of *Climate Change Act 2016* acknowledge the role of courts in upholding rights relating to climate change and spell out the role of the court in the following words: “a person may, pursuant to Article 70 of the Constitution, apply to the Environment and Land Court, alleging that a person has acted in a manner that has or is likely to adversely affect efforts towards mitigation

¹⁸ Ibid.

¹⁹ ‘Climate Litigation More than Doubles in Five Years, Now a Key Tool in Delivering Climate Justice’ (*UN Environment*, 27 July 2023) <<http://www.unep.org/news-and-stories/press-release/climate-litigation-more-doubles-five-years-now-key-tool-delivering>> accessed 15 August 2023.

²⁰ Peel J and Osofsky HM, ‘Climate Change Litigation’ (2020) 16 Annual Review of Law and Social Science 21.

²¹ Peel J and Osofsky HM, ‘Climate Change Litigation’ (2020) 16 Annual Review of Law and Social Science 21.

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and adaptation to the effects of climate change”.²² In such applications, the court may make an order or give directions to: prevent, stop or discontinue an act or omission that is harmful to the environment; compel a public officer to take measures to prevent or discontinue an act or omission that is harmful to the environment; or provide compensation to a victim of a violation relating to climate change duties.²³

Notably, Kenya’s Environment and Land Court Act, 2011²⁴ provides for the jurisdiction of the Environment and Land Court as including power to hear and determine disputes relating to climate issues.²⁵ Considering that this is still a relatively new concept in Kenya and that the law in Kenya envisages only ‘climate related issues’ litigation by both the Environment and Land Court and the Magistrate’s courts, as seen in the next section of this paper, the discussion herein will not be restricted to any special category of these cases in particular but all cases that relate to effects of climate change.

3. Promoting Climate Litigation in Kenya for Sustainability: Challenges and Prospects

It must be noted that while climate [change] litigation refers to a diverse body of legal proceedings, involving many different types of challenges, a specific subset of climate litigation consists of cases in which litigants challenge the ambition or implementation of a national or subnational government’s overall policy response to climate change.²⁶ The term ‘government framework litigation’ has been used to describe this group of cases.²⁷ The Government and its various agencies must thus be aware of these types of cases. For example, it has been documented that as of the 31st of July in 2022, at least 80 instances of framework litigation have been brought against governments from throughout the globe.²⁸ Only one year, 2021, saw the filing of little under half of these lawsuits.²⁹ Cases have been brought before the national courts of 24 countries, as well as

²² Section 23(1), Climate Change Act, 2016.

²³ Section 23(2), Climate Change Act, 2016. Government Printer, Nairobi

²⁴ Environment and Land Court Act, No. 19 of 2011, Laws of Kenya Government printer, Nairobi

²⁵ *ibid*, section 13(2)(a).

²⁶ Higham C, Setzer J and Bradeen E, ‘Challenging Government Responses to Climate Change through Framework Litigation’ (2022) <<https://www.lse.ac.uk/granthaminstitute/wp-content/uploads/2022/09/Challenging-government-responses-to-climate-change-through-framework-litigation-final.pdf>> accessed 8 August 2023.

²⁷ *Ibid*.

²⁸ ‘Governments Face Tide of Framework Litigation Cases | The Actuary’ <<https://www.theactuary.com/2022/09/21/governments-face-tide-framework-litigation-cases>> accessed 15 August 2023.

²⁹ *Ibid*.

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the General Court of the European Union, the European Court of Human Rights, the Inter-American Commission on Human Rights, the United Nations Committee on the Rights of the Child, the United Nations Human Rights Committee, and other UN Special Procedures.³⁰

The Hague District Court's decision in *Urgenda Foundation v State of the Netherlands (2015)* found that the Dutch government's emission reduction targets to be inadequate to safeguard Dutch citizens from the impacts of climate change, a ruling that has since been upheld by the Dutch Court of Appeal and then on December 20, 2019, by the Dutch Supreme Court [*State of the Netherlands v Urgenda (2019)*].³¹

The 2020 Global Climate Litigation Report on Status Review identified 5 key issues that may present challenges to future growth and development of climate litigation:

First, there has been a surge in the number of consumer and investor fraud cases that are being filed against businesses, saying that the businesses either neglected to disclose information concerning climate risk or misrepresented the information that they did disclose. Second, it seems that in recent years there has been an increase in the number of pre- and post-disaster claims that are based on the defendant's inability to adequately prepare for or manage the repercussions of severe weather occurrences. Third, the execution of court orders will present additional obstacles as more cases are brought forward and as some of those cases get an outcome. Fourth, as cases that attempt to assign blame for private actors' contributions to climate change and cases that argue for stronger government action to mitigate both progress and spread, courts and litigants will increasingly be called on to confront the law and science of climate attribution. This is because of the rising number of lawsuits that seek to assign responsibility. Last but not least, parties to legal disputes are increasingly taking their cases to international adjudicatory organisations. These entities may lack the capacity to implement their decisions, but their statements have the potential to modify and enrich judicial knowledge.³²

It has rightly been pointed out that in Global South countries where environmental law already exists, policymakers are confronted with a variety of obstacles that make enforcement difficult.³³ These obstacles include weak and fragmented institutions, poor legal foundations, and a lack of political will.³⁴ A number of Global South nations do not have the necessary resources,

³⁰ Higham C, Setzer J and Bradeen E, 'Challenging Government Responses to Climate Change through Framework Litigation' (2022).

³¹ Peel J and Osofsky HM, 'Climate Change Litigation' (2020) 16 Annual Review of Law and Social Science 21.

³² Burger M and Tigre MA, 'Global Climate Litigation Report: 2023 Status Review', p. 4.

³³ Hub ISK, 'Environmental Laws Impeded by Lack of Enforcement, First-Ever Global Assessment Finds | News | SDG Knowledge Hub | IISD' <<https://sdg.iisd.org/443/news/environmental-laws-impeded-by-lack-of-enforcement-first-ever-global-assessment-finds/>> accessed 15 August 2023.

³⁴ Setzer J and Benjamin L, 'Climate Litigation in the Global South: Constraints and Innovations' (2019) 9 Transnational Environmental Law.

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infrastructure, technology, or monitoring facilities to enable effective enforcement. In addition, environmental regulation could be out of date or might not take into account the constraints of the current technological, economic, or human resource landscape.³⁵ In addition, the creation of entirely novel agencies is often necessary for environmental regulation.³⁶ When they do exist, these organisations often have inadequate resources and fragmented institutional frameworks, which may cause administrators to work in isolation.³⁷

Some of the most significant difficulties that climate litigation may experience include determining whether or not the court has the jurisdiction to settle the dispute; locating the origin of an enforceable climate-related right or obligation; formulating a remedy that will lessen the plaintiffs' injuries; and, most importantly, marshalling the science of climate attribution.³⁸

It is commendable that courts and tribunals in Kenya have not shied away from their role in promoting climate change mitigation. For instance, in the case of *Save Lamu & 5 others v National Environmental Management Authority (NEMA) & another [2019] eKLR*³⁹, where the grounds of the appeal included, 'contribution to climate change and making the Project inconsistent with Kenya's low carbon development commitments', the National Environment Tribunal observed as follows:

16. The purpose of the Environment Impact Assessment (EIA) process is to assist a country in attaining sustainable development when commissioning projects. The United Nations has set Sustainable Development Goals (SDGs), which are an urgent call for action by all countries recognizing that ending poverty and other deprivations must go hand-in-hand with strategies that improve health and education, reduce inequality, and spur economic growth – all while tackling climate change and working to preserve our oceans and forests.

38. Climate Change issues are pertinent in projects of this nature and due consideration and compliance with all laws relating to the same. The omission to consider the provisions of

³⁵ Minneti J, 'Environmental Governance and the Global South' [2018] William & Mary Environmental Law and Policy Review, Forthcoming.

³⁶ Ibid.

³⁷ Setzer J and Benjamin L, 'Climate Litigation in the Global South: Constraints and Innovations' (2019) 9 Transnational Environmental Law.

³⁸ Burger M and Tigre MA, 'Global Climate Litigation Report: 2023 Status Review', p. 4; Banda ML and Fulton CS, 'Litigating Climate Change in National Courts: Recent Trends and Developments in Global Climate Law' (2017) 47 Environmental Law Reporter.

³⁹ *Save Lamu & 5 others v National Environmental Management Authority (NEMA) & another [2019] eKLR*, Tribunal Appeal Net 196 of 2016.

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the Climate Change Act 2016 was significant even though its eventual effect would be unknown.

139. 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.

Notably, this approach is similar to one that was adopted in *EarthLife Africa Johannesburg v. Minister of Environmental Affairs & Others*, where the South African High Court determined that global climate change was a relevant consideration in the environmental review of plans for a new coal-fired plant.⁴⁰

Similarly, section 20 of the Climate Change Act 2016 provides that, “the [National Environment Management] Authority shall integrate climate risk and vulnerability assessment into all forms of assessment, and for that purpose liaise with relevant lead agencies for their technical advice.” Thus, as highlighted in the *Lamu case*, it is expected that the National Environment Management Authority and the other lead agencies should consider climate change issues while reviewing applications for issuance of various development licenses as legal requirement.

In addition, Section 9 of the Magistrate’s Act 2015⁴¹ reads as follows:-

9. A magistrate's court shall —

(a) in the exercise of the jurisdiction conferred upon it by section 26 of the Environment and Land Court Act and subject to the pecuniary limits under section 7(1), hear and determine claims relating to —

(i) environmental planning and protection, climate issues, land use planning, title, tenure, boundaries, rates, rents, valuations, mining, minerals and other natural resources;

While it is to be acknowledged that the judicial officers appointed to head environment and land courts are appointed on the basis of having relevant knowledge in the area, it must also be acknowledged that they may not always be well versed with all matters that come before them due to the evolving nature of the emerging matters in the area.⁴² Thus, there is need for not only

⁴⁰ Setzer J and Benjamin L, ‘Climate Litigation in the Global South: Constraints and Innovations’ (2019) 9 *Transnational Environmental Law* <https://www.researchgate.net/publication/338346001_Climate_Litigation_in_the_Global_South_Constraints_and_Innovations> accessed 8 August 2023.

⁴¹ Magistrates Courts Act, *Act No. 26 of 2015*, Laws of Kenya, Government Printer, Nairobi

⁴² May JR and Daly E, ‘Global Judicial Handbook on Environmental Constitutionalism’ (2019); Shelton D and Kiss AC, *Judicial Handbook on Environmental Law* (UNEP/Earthprint 2005); ‘Tilting Scales of Justice in Favour of

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engaging experts in the area but also continuous building of capacity of the judicial officers in the technical matters relating climate change.

It has been observed that government framework cases may concern the design and overall ambition of a government's response to climate change (58 'ambition cases'), or they may concern the adequacy of the implementation of a policy response (9 'implementation cases'). Some cases concern both (13 'ambition and implementation cases').⁴³ There is thus a need for continuous review of the existing legal and policy measures put in place by both the national and county governments to enhance their effectiveness. The implementing bodies should also continue building capacity. All levels of government should prepare for the possibility of being required by law to take action against climate change and work on establishing internal decision-making procedures that are congruent with the goal of mitigating the negative effects of climate change.⁴⁴

It has been posited that strategic litigation concerning climate change in the Global South might gain advantage from (i) access to justice in combination with the presence of progressive climate and/or environmental rights laws, and (ii) judicial opportunism.⁴⁵ When these factors are brought together, they have the potential to assist actors in the Global South in overcoming countervailing dynamics of significant capacity constraints in implementing environmental legislation and managing fragmented and under-resourced institutional structures.⁴⁶ As a result, they have the ability to contribute to progressive outcomes.⁴⁷ In countries that have taken progressive procedural as well as regulatory approaches to environmental protection and justice, this, it has been suggested, may lead to decisions that maintain or advance climate change protection, especially around climate change adaptation.⁴⁸

Climate in Kenya' <<https://www.unodc.org/easternafrika/Stories/tilting-scales-of-justice-in-favour-of-climate-in-kenya.html>> accessed 15 August 2023.

⁴³ Higham C, Setzer J and Bradeen E, 'Challenging Government Responses to Climate Change through Framework Litigation' (2022) < <https://www.lse.ac.uk/granthaminstitute/wp-content/uploads/2022/09/Challenging-government-responses-to-climate-change-through-framework-litigation-final.pdf>> accessed 8 August 2023.

⁴⁴ Ibid.

⁴⁵ 'Enhancing Access to Justice to Tackle Climate Change and Pollution and Protect Biodiversity | UNECE' <<https://unece.org/climate-change/news/enhancing-access-justice-tackle-climate-change-and-pollution-and-protect>> accessed 15 August 2023; Wright RG, 'The Proper Role of Judicial Opportunism in Constitutional Rights Scrutiny' (2023) 26 Richmond Public Interest Law Review 49; Carnwath, Lord, CVO, 'Judges and the Common Laws of the Environment—At Home and Abroad' (2014) 26 Journal of Environmental Law 177.

⁴⁶ Ibid.

⁴⁷ Setzer J and Benjamin L, 'Climate Litigation in the Global South: Constraints and Innovations' (2019) 9 Transnational Environmental Law.

⁴⁸ Ibid.

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Access to justice is contingent upon the fulfilment of certain preconditions, one of which is the physical presence of a court.⁴⁹ In order for litigants to be given the right of access to courts, whether individually, collectively, or as a third party or *amicus curiae*, the criteria pertaining to standing, which differ from jurisdiction to jurisdiction, must be followed.⁵⁰ Luckily for Kenyans, the 2010 Constitution of Kenya is very progressive and the courts have been implementing the same as captured in the case of *Martin Osano Rabera & another v Municipal Council of Nakuru & 2 others* [2018] eKLR⁵¹, where the Court stated as follows:

48. I have considered the petition, the evidence both in support and opposition to it and the submissions. That a clean and healthy environment is a fundamental prerequisite for life is not a matter that needs belabouring. It is for this reason that the drafters of the Constitution of Kenya, 2010 saw it fit to provide for the right to a clean and healthy environment at **Article 42** within the Bill of Rights. Needless to state, Kenyans voted overwhelmingly in favour of the draft, thus giving their seal of approval to its provisions. **Article 42** states as follows:

Every person has the 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, particularly those contemplated in Article 69; and

(b) to have obligations relating to the environment fulfilled under Article 70.

49. A duty to have the environment protected for the benefit of present and future generations is imposed on both the State and every person under Article 69 which among others requires the state to ensure sustainable exploitation, utilisation, management and conservation of the environment and natural resources, and ensure the equitable sharing of the accruing benefits; to establish systems of environmental impact assessment, environmental audit and monitoring of the environment and to eliminate processes and activities that are likely to endanger the environment. Under the same article, every person has a duty to cooperate with State organs and other persons to protect and conserve the environment and ensure ecologically sustainable development and use of natural resources. In short, the obligation to ensure a clean and healthy environment imposed on everybody – from the state to all persons be they natural, juridical, association or other group of persons whether incorporated or not.

50. So as to further safeguard environmental rights and to facilitate access to court for purposes of enforcing the right secured by Article 42, Article 70 of the constitution provides that if a person alleges that a right to a clean and healthy environment recognised and protected under Article 42 has been, is being or is likely to be, denied, violated, infringed or threatened, the person may apply to court for redress in addition to any other legal remedies that are available in respect to the same matter and that he does not have to demonstrate that any person has incurred loss or suffered injury.

⁴⁹ Rashid NM, 'Access to Justice' (*United Nations and the Rule of Law*) <<https://www.un.org/ruleoflaw/thematic-areas/access-to-justice-and-rule-of-law-institutions/access-to-justice/>> accessed 15 August 2023.

⁵⁰ Setzer J and Benjamin L, 'Climate Litigation in the Global South: Constraints and Innovations' (2019) 9 *Transnational Environmental Law*.

⁵¹ *Martin Osano Rabera & another v Municipal Council of Nakuru & 2 others* [2018] eKLR, Petition No. 53 of 2012.

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51. Provisions similar to those at **Article 42** are found at **Section 3** of the **Environmental Management and Co-ordination Act, 1999** (EMCA). Under **Section 3 (3)** of EMCA, if a person alleges that the right to a clean and healthy environment has been, is being or is likely to be denied, violated, infringed or threatened, in relation to him, then without prejudice to any other action with respect to the same matter which is lawfully available, that person may on his behalf or on behalf of a group or class of persons, members of an association or in the public interest may apply to this court and this court may make such orders, among others, to prevent, stop or discontinue any act or omission deleterious to the environment; to compel the persons responsible for the environmental degradation to restore the degraded environment as far as practicable to its immediate condition prior to the damage; and to provide compensation for any victim of pollution and the cost of beneficial uses lost as a result of an act of pollution and other connected losses.

52. I have outlined all these provisions to underscore the importance placed by the constitution and statute law on protection of the right to a clean and healthy environment and conservation of the environment generally.

The human rights approach to solving human problems is at the core of the 2030 Agenda for Sustainable Development.⁵² In order for the world to continue to serve the requirements of the present and future generations, everyone has a responsibility to prevent it from degrading, especially via sustainable production and consumption, the management of its natural resources, and urgent action on climate change.⁵³ Sustainable development must take into account the relationship between human rights and environmental protection. Sustainable Development is contingent upon upholding peoples' rights to a secure environment where they can thrive.⁵⁴

According to the Swedish International Development Cooperation Agency, the following are key questions to ask when applying the Human Rights-Based Approach:⁵⁵

- a) Participation: Do all relevant stakeholders engage actively, in a way which allows rights holders to contribute meaningfully and influence outcomes?
- b) Link to human rights obligations: How are relevant human rights standards and recommendations from international and regional human rights mechanisms identified and used in formulating objectives and to advance processes and outcomes?
- c) Accountability: Who are the duty bearers at different levels, and do they have sufficient capacity and interest to be accountable to rights holders?
- d) Are there mechanisms for participation and complaints in place for rights holders, civil society and other stakeholders to hold the duty bearers to account?

⁵² 'OHCHR and the 2030 Agenda for Sustainable Development' (*OHCHR*) <<https://www.ohchr.org/en/sdgs>> accessed 15 August 2023.

⁵³ United Nations, 'Support Sustainable Development and Climate Action' (*United Nations*) <<https://www.un.org/en/our-work/support-sustainable-development-and-climate-action>> accessed 15 August 2023.

⁵⁴ Choondassery Y, 'Rights-Based Approach: The Hub of Sustainable Development' (2017) 8 *Discourse and Communication for Sustainable Education*.

⁵⁵ Cybercom, 'Human Rights Based Approach' (*Sida*) <<https://www.sida.se/en/for-partners/methods-materials/human-rights-based-approach>> accessed 15 August 2023.

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- e) Non-discrimination and equality: Are rights holders and the root causes of the non-realisation of their human rights identified and taken into account, particularly those most subject to discrimination and marginalisation?
- f) Empowerment and capacity development: How does the intervention contribute to the empowerment of rights holders to claim their rights, as well as capacity development of duty bearers to uphold their responsibilities, and of other relevant stakeholders to contribute to positive outcomes? and,
- g) finally, transparency: What measures are put in place to ensure that all stakeholders are able to access relevant information and knowledge regarding the intervention?⁵⁶

Respecting human rights and providing equal opportunity for everyone in society is a key component of sustainability.⁵⁷ With an emphasis on reducing poverty, it necessitates an equal distribution of resources.⁵⁸ There is a focus on local communities, including preserving and enhancing their life support systems, acknowledging and respecting other cultures, and averting all forms of exploitation.⁵⁹ Hence, social outcomes comprise social capital, trust, increased equity, and raised living standards.⁶⁰

4. Conclusion

The 2020 Global Climate Litigation Report on Status Review rightly points out that:

In conclusion, the number of lawsuits concerning climate change is growing, the number of legal theories is expanding, and it has become abundantly clear that climate cases can contribute significantly to meaningfully compel governmental actors and corporate actors to pursue more ambitious climate change mitigation and adaptation goals. Climate litigation will continue to have an important role to play as the international community moves deeper into the third decade of this millennium. This is a crucial decade in which nations must change their course to drastically reduce emissions of greenhouse gases, enact reforms to achieve the United Nations Sustainable Development Goals, and also respond to and recover from the COVID-19 pandemic.⁶¹

⁵⁶ Ibid.

⁵⁷ Kaltendorf M, Markus K and Kuhn H, *Sustainable Development Goals and Human Rights* (2020); Yimbesalu J and Zakus D, 'The Sustainable Development Goals as Human Rights' (2019); Bexell M, Hickmann T and Schapper A, 'Strengthening the Sustainable Development Goals through Integration with Human Rights' (2023) 23 *International Environmental Agreements: Politics, Law and Economics* 133.

⁵⁸ Ibid; 'Human Rights Principles' (*United Nations Population Fund*) <<https://www.unfpa.org/resources/human-rights-principles>> accessed 15 August 2023.

⁵⁹ Popova O, 'Inclusive Development: A New Concept or an Update of the Sustainable Development Concept?' [2020] *Economy and Forecasting* 128.

⁶⁰ de Man A, 'The Sustainable Development Goals and the Rights-Based Approach to Development: Compatible or Missing the Point?' (2019) 19 *African Human Rights Law Journal* 445, p. 3; Banik D, 'Legal Empowerment as a Conceptual and Operational Tool in Poverty Eradication' (2009) 1 *Hague Journal on the Rule of Law* 117.

⁶¹ Burger M and Tigre MA, 'Global Climate Litigation Report: 2023 Status Review', p. 5.

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The concept of a rights-based approach to climate litigation is arguably consistent with the 2030 Agenda for Sustainable Development.⁶² It is worth pointing out that the interconnectedness among these rights was also captured in 2022, when the United Nations General Assembly (UNGA) adopted a resolution declaring a clean, healthy & sustainable environment as a human right.⁶³ They acknowledged that the right to a clean, healthy and sustainable environment is related to other rights and existing international law.⁶⁴ It was also affirmed that the promotion of the human right to a clean, healthy and sustainable environment requires the full implementation of the multilateral environmental agreements under the principles of international environmental law.⁶⁵

Due to the "triple planetary catastrophe" of human-caused climate change, widespread biodiversity loss, and unchecked pollution currently threatening to cross the planetary boundaries necessary to live securely on Earth as well as air pollution, polluted water, pollution from plastics, and chemical pollutants, all of which can jeopardise the right to life, dignity, and health, the U.N. responded to the calls to establish a right to a clean, healthy, and sustainable environment.⁶⁶

As a result, more work has to be done in the implementation, monitoring, and assessment of the Sustainable Development Goals to guarantee that the full range of benefits offered by a rights-based approach is realized, especially as far as climate justice is concerned.⁶⁷ Even as the debate on what climate justice entails and the best approaches to the same continue, Kenyans must continually be encouraged to utilise the human-rights approaches and the courts and tribunals must remain proactive in addressing matters relating to climate change, as a prerequisite for realisation of Sustainable Development agenda.

⁶² Mahadew, R., "A Human-Rights-Based Approach to Climate Change." *Revue juridique de l'Océan Indien* 31 (2021): 155-168.

⁶³ United Nations General Assembly, *The Human Right to a Clean, Healthy and Sustainable Environment: resolution* / adopted by the General Assembly, UN. General Assembly (76th sess.: 2021-2022); 'In Historic Move, UN Declares Healthy Environment a Human Right' (*UNEP*, 28 July 2022) <<http://www.unep.org/news-and-stories/story/historic-move-un-declares-healthy-environment-human-right>> accessed 15 August 2023; 'UN General Assembly Declares Access to Clean and Healthy Environment a Universal Human Right | UN News' (28 July 2022) <<https://news.un.org/en/story/2022/07/1123482>> accessed 15 August 2023.

⁶⁴ United Nations General Assembly, *The Human Right to a Clean, Healthy and Sustainable Environment: resolution* / adopted by the General Assembly, UN. General Assembly (76th sess.: 2021-2022), para. 2.

⁶⁵ *Ibid*, para. 3.

⁶⁶ 'The UN Just Declared a New Human Right' (*World Economic Forum*, 9 August 2022) <<https://www.weforum.org/agenda/2022/08/the-un-just-declared-a-universal-human-right-to-a-healthy-sustainable-environment-here-s-where-resolutions-like-this-can-lead/>> accessed 15 August 2023.

⁶⁷ de Man A, 'The Sustainable Development Goals and the Rights-Based Approach to Development: Compatible or Missing the Point?' (2019) 19 *African Human Rights Law Journal* 445.

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Promoting Climate litigation in Kenya for sustainability is thus a venture that is worth pursuing.

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