

ESG Disputes and Sustainable Development in Kenya: Assessing the Role of Courts and Environmental Tribunals

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Abstract

This paper examines the nature of ESG disputes in Kenya and critically assesses the role of courts and environmental tribunals in their resolution. It considers the constitutional and statutory foundations for addressing ESG-related disputes, with particular attention to environmental rights, access to justice, corporate accountability and environmental governance. The article further analyses the extent to which judicial and tribunal processes can contribute to sustainable development through prevention of environmental harm, protection of affected communities, enforcement of legal obligations, promotion of transparency and accountability and the provision of effective remedies. It concludes by proposing measures to strengthen the capacity of courts and environmental tribunals to address ESG disputes and enhance their contribution to sustainable development in Kenya.

1. Introduction

Environmental, Social and Governance (ESG) considerations have moved from being predominantly voluntary considerations in investment and corporate decision-making to becoming increasingly relevant to regulation, corporate accountability and dispute resolution.¹ The growth of ESG has been driven by increasing concern about climate change, environmental degradation, human rights, social inequality, corporate transparency and the quality of governance.²

The Constitution of Kenya, 2010 entrenches environmental protection within the Bill of Rights and establishes a constitutional architecture that links environmental protection with sustainable development, public participation, accountability and intergenerational equity. Article 42 guarantees every person the right to a clean and healthy environment, while Article 69 imposes environmental obligations upon the State and every person. Article 70 provides a direct enforcement mechanism and

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¹ Muigua, K., 'Embracing Environmental, Social and Governance (ESG) Principles for Sustainable Development in Kenya' available at

<https://kmco.co.ke/wp-content/uploads/2023/08/ESG-BOOK-.pdf>

² Stuart L Gillan, Andrew Koch and Laura T Starks, 'Firms and Social Responsibility: A Review of ESG and CSR Research in Corporate Finance' (2021) 66 Journal of Corporate Finance 101889

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permits a person to approach a court where the right to a clean and healthy environment has been denied, violated, infringed or threatened.

The legal architecture is complemented by the Environmental Management and Coordination Act (EMCA), the Environment and Land Court Act, the Climate Change Act and sectoral legislation governing activities such as petroleum, mining and natural-resource utilisation.

This article consequently argues that courts and environmental tribunals are important components of Kenya's emerging ESG accountability architecture, but their contribution to sustainable development depends upon the strength of the wider regulatory and institutional framework in which they operate.

2. ESG Disputes within the Sustainable Development Framework

The Brundtland Commission famously defined sustainable development as development that meets the needs of the present without compromising the ability of future generations to meet their own needs.³ The concept subsequently became embedded in international development policy, most notably through the 2030 Agenda for Sustainable Development and its 17 Sustainable Development Goals.⁴

Sustainable development, however, is not simply an instruction to balance economic growth against environmental protection.⁵ It requires decision-making that recognises the interdependence of environmental integrity, economic development and social welfare.⁶

Kenya's constitutional framework reflects this integrated understanding. Article 69 requires the State to ensure sustainable exploitation, utilisation, management and conservation of the environment and natural resources, while Article 42 expressly protects the environment for the benefit of present and future generations.

3. Kenya's Legal and Institutional Architecture for ESG Disputes

3.1. Constitutional Foundations

Kenya's Constitution provides an unusually strong foundation for ESG-related accountability. Article 10 identifies sustainable development, good governance, integrity, transparency and accountability among the national values and principles of governance. These values are binding whenever State organs, State officers and

³ World Commission on Environment and Development, *Our Common Future* (Oxford University Press 1987).

⁴ United Nations General Assembly, *Transforming Our World: The 2030 Agenda for Sustainable Development*, UNGA Res 70/1 (21 October 2015).

⁵ *Case Concerning the Gabčíkovo-Nagymaros Project*, (Hungary v Slovakia), 1997 WL 1168556 (ICJ),

⁶ *Ibid*

public officers apply or interpret the Constitution or any law, or make or implement public policy decisions.

Article 42 establishes the right to a clean and healthy environment. Article 69 imposes specific obligations concerning environmental protection and sustainable natural-resource management, while Article 70 establishes an enforcement mechanism. Importantly, Article 70 (3) does not require an applicant to demonstrate that another person has suffered loss or injury before seeking environmental redress.

The constitutional framework is reinforced by Article 22 on enforcement of the Bill of Rights and Article 258, which permits proceedings where a person alleges that the Constitution has been contravened or threatened with contravention. Together, these provisions provide a significant basis for environmental and community litigation.

3.2. Environmental Legislation

The Environmental Management and Co-ordination Act (EMCA) provides the principal statutory framework for environmental governance. Section 3 establishes the entitlement to a clean and healthy environment and permits a person, including a person acting on behalf of a group, class or in the public interest, to seek redress before the ELC. The available remedies include prevention of harmful activities, environmental audits, restoration and compensation.⁷

The Climate Change Act similarly provides a statutory basis for climate-related litigation. Section 23 permits a person to apply to the ELC where another person has acted in a manner that has or is likely to adversely affect mitigation or adaptation efforts. The provision also allows the court to prevent harmful conduct, compel public officers to act and provide compensation.⁸

These provisions demonstrate an important development: environmental and climate responsibilities are increasingly framed as enforceable legal duties rather than merely policy aspirations.

3.3. The Environment and Land Court

Article 162(2)(b) of the Constitution establishes courts with the status of the High Court to determine disputes relating to the environment and the use, occupation and title to land. Section 13 of the Environment and Land Court Act gives the ELC original and appellate jurisdiction over environmental and land disputes, expressly including environmental planning and protection, climate issues, mining, minerals and other natural resources.

⁷ EMCA, s 3.

⁸ Climate Change Act 2016, s 23.

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The ELC Act further provides that nothing in the Act prevents the Court from hearing applications concerning denial, violation or infringement of rights relating to a clean and healthy environment under Articles 42, 69 and 70. It also gives the Court broad remedial powers, including injunctions, damages, compensation, specific performance, restitution and declarations.⁹

The ELC is therefore capable of addressing ESG disputes in a manner extending beyond the narrow review of administrative licences. It can consider constitutional rights, environmental obligations, land rights and the conduct of public and private actors where those matters fall within its jurisdiction.

3.4. The National Environment Tribunal

Under section 129 of EMCA, a person aggrieved by specified decisions made by NEMA or its committees may appeal to the Tribunal within the statutory period. The Tribunal therefore provides a specialised avenue for challenging environmental licensing and related regulatory decisions.¹⁰

At the same time, section 129 creates an important jurisdictional boundary. It is primarily an appellate mechanism concerning specified NEMA decisions rather than a general forum for every environmental or ESG dispute. The distinction matters because ESG disputes may involve constitutional rights, land rights, administrative action and environmental harm simultaneously.

Kenyan jurisprudence has accordingly had to negotiate the relationship between the NET and the ELC. In *Philip Kiptanui Rugut v NEMA*, the ELC recognised the statutory 60-day limitation applicable to appeals under section 129 while also examining whether the constitutional and remedial dimensions of the dispute meant that the ELC remained the appropriate forum.¹¹

Similarly, courts have recognised that section 129 does not necessarily oust the ELC's constitutional jurisdiction where a genuine claim concerning Articles 42, 69 and 70 is advanced.¹² This demonstrates both the strength and complexity of Kenya's ESG adjudication framework.

⁹ Environment and Land Court Act 2011, s 13(3), (7).

¹⁰ EMCA, s 129(1) – (2).

¹¹ *Philip Kiptanui Rugut & 2 others v National Environment Management Authority & 3 others* [2019] KEELC 2402 (KLR).

¹² *Agatha Jeruto Kimaswai v Attorney General & 3 others* [2021] KEHC 4328 (KLR).

4. Courts as Instruments of ESG Accountability

4.1. Environmental Accountability

Kenyan courts have progressively treated environmental protection as an enforceable legal obligation rather than a purely administrative concern. In *Ken Kasing'a v Daniel Kiplagat Kirui*, the High Court recognised the constitutional and statutory entitlement to a clean and healthy environment and the corresponding right to seek judicial redress.¹³

More recent decisions have continued this approach. In *Millennium Gardens Management Ltd v Metricon Home Nairobi Co Ltd*, the ELC reiterated that Article 70 gives access to court in environmental matters and that section 3 of EMCA enables public-interest environmental claims.¹⁴

Nevertheless, the existence of a broad right does not guarantee effective environmental protection. Courts generally depend upon evidence presented by litigants, scientific expertise, regulatory records and the capacity of parties to pursue proceedings.¹⁵

4.2. Public Participation and Social Accountability

The social dimension of ESG is particularly visible in Kenyan jurisprudence concerning public participation. The *Mui Coal Basin* case remains important because it articulated the principle that public participation in environmental governance must be effective rather than merely formal. The Court emphasised that the appropriate participation mechanism will depend on the nature of the decision, but must include access to relevant information and genuine opportunities for affected persons to participate.¹⁶

The principle has subsequently been applied in numerous environmental and constitutional disputes. In *Githanga v County Government of Nakuru*, the ELC in 2026 reaffirmed the Mui Coal Basin principles, including the need for participation mechanisms to respond to the nature of the subject matter and for relevant information to be disseminated.¹⁷

But participation itself has limits. Public participation does not give every participant a veto over a project, nor does it require decision-makers to accept every view expressed. The more defensible legal standard is one of meaningful, informed and

¹³ *Ken Kasing'a v Daniel Kiplagat Kirui & 5 others* [2015] KEHC 1181 (KLR).

¹⁴ *Millennium Gardens Management Limited v Metricon Home Nairobi Company Limited & others* (Environment and Land Petition E121 of 2023) [2024] KEELC 6040 (KLR), paras 154–156.

¹⁵ *Ibid*

¹⁶ *Mui Coal Basin Local Community & 15 others v Permanent Secretary Ministry of Energy & 17 others* [2015] KEHC 473 (KLR).

¹⁷ *Githanga & another v County Government of Nakuru & 4 others* (Environment and Land Petitions E013 & E008 of 2024 (Consolidated)) [2026] KEELC 585 (KLR).

inclusive participation. This distinction is crucial for sustainable development because it allows communities to influence development decisions without converting participation into an absolute prohibition on development.¹⁸

4.3. Community Rights, Natural Resources and Environmental Justice

Community rights provide perhaps the strongest illustration of the relationship between ESG and environmental justice. In *Friends of Lake Turkana Trust v Attorney General*, the ELC considered environmental and constitutional concerns arising from the Gibe III dam and its potential effects on Lake Turkana and communities dependent upon it. The case illustrates how environmental disputes may simultaneously implicate livelihoods, community rights, access to information and the broader question of how development benefits and environmental costs are distributed.¹⁹

The wider African jurisprudence reinforces this connection. In the *Endorois* decision, the African Commission on Human and Peoples' Rights found violations arising from the displacement of the Endorois community from ancestral lands and the failure to provide adequate consultation, compensation and benefit sharing.²⁰ The decision is particularly relevant to ESG because it demonstrates that environmental and development decisions cannot be separated from community rights.

The *Ogiek* case similarly demonstrates the relationship between conservation, land rights and sustainable development. In 2017, the African Court on Human and Peoples' Rights found Kenya responsible for violations of the rights of the Ogiek community. The Court subsequently ordered substantial compensation and measures concerning ancestral land, consultation, participation and community development.²¹

Importantly, the *Ogiek* litigation also illustrates a central limitation of adjudication: obtaining a judgment does not necessarily guarantee implementation. The African Court was still addressing compliance with its judgments in 2024 and 2025.²²

This is a crucial lesson for ESG litigation. A judicial decision may establish rights, clarify standards and provide remedies, but sustainable development ultimately

¹⁸ *Mui Coal Basin Case Op. Cit.*

¹⁹ *Friends of Lake Turkana Trust v Attorney General & 2 others* [2014] KEELC 511 (KLR)

²⁰ *Centre for Minority Rights Development (Kenya) and Minority Rights Group International on behalf of Endorois Welfare Council v Kenya*, Communication No 276/2003, African Commission on Human and Peoples' Rights (2010).

²¹ *African Commission on Human and Peoples' Rights v Republic of Kenya*, Application No 006/2012, African Court on Human and Peoples' Rights, Judgment of 26 May 2017; Reparations Judgment of 23 June 2022.

²² African Court on Human and Peoples' Rights, 'African Court Sets Deadline for Kenya to Comply with the *Ogiek Judgment*' (12 November 2024); African Court on Human and Peoples' Rights, 'African Court on Human and Peoples' Rights Concludes Compliance Hearing in Application No 006/2012' (4 June 2025).

requires implementation by governments, regulators, corporations and communities.²³

5. Recommendations and Way Forward

5.1. Strengthen ESG Disclosure and Prevent Greenwashing

ESG disclosures should be accurate, material, transparent and capable of verification.²⁴ This is particularly important because the usefulness of ESG reporting depends upon the reliability and comparability of the information disclosed. The OECD Guidelines recognise disclosure as an important component of responsible business conduct, while the NSE ESG Disclosures Guidance Manual establishes a framework for ESG reporting by listed companies in Kenya.²⁵

Stronger disclosure requirements would also improve the evidentiary foundation for future disputes by enabling regulators, investors, communities and courts to compare corporate representations with actual environmental and social performance. The development of more reliable disclosure systems can therefore serve both a preventive governance function and an evidentiary function when disputes arise.²⁶

5.2. Strengthen the National Environment Tribunal

The National Environment Tribunal (NET) should be adequately resourced with technical expertise, research capacity and efficient procedures. The Tribunal's statutory role is particularly important because section 129 of EMCA provides a specialised avenue for challenging specified decisions of the National Environment Management Authority (NEMA), including decisions concerning environmental licences and certain enforcement measures.

Its specialised environmental function is valuable precisely because environmental and ESG disputes can involve complex scientific and technical issues.²⁷ Strengthening the Tribunal would enable it to perform its specialised statutory function more effectively while maintaining the institutional safeguards necessary for environmental adjudication.

²³ Muigua, K., *'Embracing Environmental, Social and Governance (ESG) Tenets for Sustainable Development in Kenya'* Op. Cit

²⁴ Muigua, K., *'The Need and Benefits of ESG Reporting in Kenya'* available at <https://thelawyer.africa/2022/06/04/benefits-of-esg-reporting-in-kenya/>

²⁵ OECD, *OECD Guidelines for Multinational Enterprises on Responsible Business Conduct* Op. Cit 27-31; Nairobi Securities Exchange Op. Cit, 27-30

²⁶ United Nations Office of the High Commissioner for Human Rights Op. Cit principles 15–21; OECD, *OECD Guidelines for Multinational Enterprises on Responsible Business Conduct* Op. Cit 27-31

²⁷ Muigua, K., *'Embracing Environmental, Social and Governance (ESG) Tenets for Sustainable Development in Kenya'* Op. Cit

5.3. Enhance Community Access to Justice

Affected communities should have meaningful access to environmental information, expert assistance, legal representation, affordable dispute-resolution mechanisms and effective remedies. These considerations are consistent with the broader environmental justice principle that access to information, participation in decision-making and access to judicial and administrative remedies are interconnected components of effective environmental governance.²⁸

The experience of environmental and community-rights litigation in Kenya demonstrates why this broader conception of access to justice is necessary. In *Friends of Lake Turkana Trust v Attorney General*, for example, the dispute involved environmental protection, community interests and participation in decisions concerning a major development project.²⁹

5.4. Use Technology to Strengthen ESG Evidence and Enforcement

Digital platforms, satellite imagery and artificial intelligence can facilitate monitoring and reporting, particularly where environmental impacts occur in remote areas. Properly deployed, such technologies can assist in identifying land-use changes, monitoring environmental degradation and improving the availability of ESG information to regulators and affected communities.³⁰

However, technological evidence must be accompanied by appropriate standards concerning reliability, verification, privacy and admissibility. Technology should therefore strengthen—not replace—human participation, regulatory judgment and judicial oversight. The promise of technological governance should be approached with caution so that technological capacity does not become a substitute for institutional accountability.³¹

6. Conclusion

ESG disputes represent an important emerging dimension of sustainable-development governance in Kenya. Their significance lies in the way ESG provides a

²⁸ Muigua, K., 'Re Examining Environmental Social And Governance ESG And Human Rights' available at <https://kmco.co.ke/articles-publications/re-examining-environmental-social-and-governance-esg-and-human-rights/>

²⁹ *Friends of Lake Turkana Trust v Attorney General & 2 others* [2014] KEELC 511 (KLR)

³⁰ Muigua, K., 'Innovative Technology And Artificial Intelligence (AI) In Environmental Governance: Enabling Real-Time Monitoring, Predictive Modelling And Evidence-Based Decision-Making' available at <https://kmco.co.ke/articles-publications/innovative-technology-and-artificial-intelligence-ai-in-environmental-governance-enabling-real-time-monitoring-predictive-modelling-and-evidence-based-decision-making/>

³¹ Henrik Skaug Sætra (ed), 'Technology and Sustainable Development: The Promise and Pitfalls of Techno-Solutionism' (Routledge 2023)

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framework through which existing legal obligations and sustainability expectations can be examined across environmental, social and governance dimensions.³²

As discussed in this paper, Kenya possesses a substantial constitutional and statutory foundation for addressing these disputes. Articles 42, 69 and 70 of the Constitution establish environmental rights and obligations and provide a basis for environmental redress. EMCA provides a statutory framework for environmental governance and enforcement,³³ while the Climate Change Act 2016 provides a specific avenue for proceedings concerning conduct likely to adversely affect climate-change mitigation or adaptation.³⁴ The ELC has broad jurisdiction over environmental and land matters,³⁵ while the NET provides specialised review of specified environmental regulatory decisions.³⁶

Ultimately, the contribution of ESG disputes to sustainable development should be assessed not by the volume of litigation but by whether adjudication contributes to behavioural change, protection of rights, improved governance, prevention of environmental harm and development that takes account of the interests of both present and future generations.³⁷ This approach is consistent with the conception of sustainable development as development that meets present needs without compromising the ability of future generations to meet their own needs, as well as Kenya's constitutional commitment to environmental protection for the benefit of present and future generations.³⁸

³² United Nations, *Transforming Our World: The 2030 Agenda for Sustainable Development*, UNGA Res 70/1 (25 September 2015)

³³ EMCA, s 3.

³⁴ Climate Change Act 2016, s 23.

³⁵ Environment and Land Court Act 2011, s 13.

³⁶ EMCA, s 129.

³⁷ World Commission on Environment and Development, *Our Common Future* (OUP 1987) Op. Cit.

³⁸ United Nations., 'Sustainable Development' Available at

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