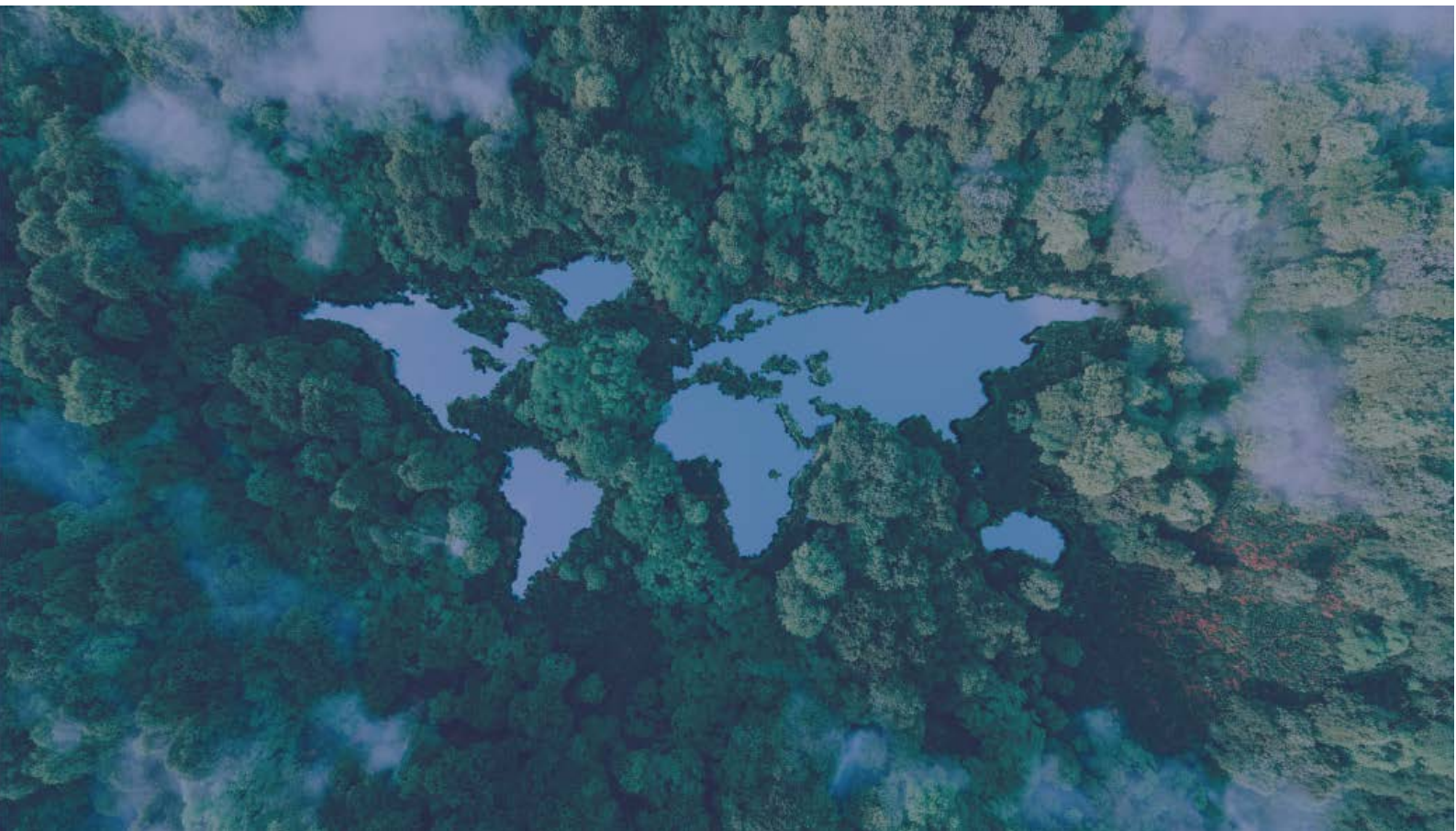




**British Institute of
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Comparative Law**

Global Perspectives on Corporate Climate Legal Tactics: Kenya National Report

Dr Omondi Owino





**British Institute of
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Executive Summary

The world strives to achieve decarbonisation and accelerate the transition to net zero by 2050. In this quest, corporate climate litigation has become an indispensable global tool of choice for victims seeking redress against corporate entities that are culpable for climate change impacts. This toolbox focuses on Kenya, and it analyses corporate climate litigation tactics and identifies substantive and procedural legal provisions germane to corporate climate change litigation in Kenya. The analysis is undertaken as part of the larger toolbox that offers a comparative perspective on corporate climate legal tactics across 16 other selected countries in the northern and the southern hemispheres.

The toolbox on Kenya derives insight from extant global best practices and has been validated by an international group of climate experts comprising scientists, judges, legal practitioners, and academicians. Further, the toolbox incorporates input from 3 knowledge exchange workshops across the 17 countries, focusing on causes of action; procedures and evidence as well as potential remedies available to litigants.

In the Kenyan context, the toolbox presents an informed starting point for practitioners, policy makers and judges seeking to understand diverse aspects of corporate climate change litigation. The toolbox is comprised of 3 main parts that discuss causes of action for climate litigation; procedures; and possible remedies available to litigants.

Acknowledgements

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1. Causes of Action

This toolkit conceives a cause of action as “a group of operative facts giving rise to one or more bases for suing”.¹ In the context of climate change litigation, a prevailing factual situation should entitle an aggrieved party to a remedy in law against an entity. Climate change litigation can be either vertical² or horizontal.³ This toolkit analyses causes of action in respect of the latter form of climate action.

Globally, there is a clear trend on proliferation of climate cases against corporate entities arising from diverse causes of action.⁴ Whereas there is presently a dearth of climate change cases in Kenya, corporate climate litigation causes of action are discernible in the Constitution of the Republic of Kenya 2010; the Climate Change Act (CCA) 2016;⁵ diverse sectoral statutes; regulations; policies and other guidance documents.

A. Climate Change Law/Environmental Law Statutory Provisions

i. Climate Change Act

Kenya is one of the few countries in Africa that has enacted a Climate Change Act.⁶ The Act entered into force on 27.5.2016 and provides the regulatory framework for enhanced response to climate change and “mechanism and measures to achieve low carbon climate development.”⁷

The Act provides for climate change related duties for both the public and private sector.⁸ The National Climate Change Council, established under section 5 of the Act may impose climate change obligations on companies in the private sector.⁹ To this end the Council is mandated to adopt Regulations under the Act stipulating the nature and procedure for performance reporting and compliance by private entities. Consequently, the draft Climate Change (Duties and Incentives) Regulations 2021 contemplated under section 16(1) are pending enactment. The draft Regulations

¹ Garner, B. A. (2004) Black’s Law Dictionary (8th Edition) USA Thomson West Publishing Co.

² Climate action by private parties against a state and state entities.

³ Climate action instituted by private parties against companies; See Weller, MP., Tran, ML. Climate Litigation against companies. *Clim Action* 1, 14 (2022). <https://doi.org/10.1007/s44168-022-00013-6>

⁴ United Nations Environment Programme (2003) Global Climate Litigation Report: 2023 Status Review. Nairobi p. 50

⁵ Act No. 11 of 2016

⁶ C. Wambua ‘Evolving African Climate Change Law and Regulation’ (2019) 13(4) *CCLR* 257–269

⁷ See long title to the Act. The Climate Change (Amendment) Bill 2023 proposes to fundamentally amend the Climate Change Act to incorporate in its text regulation of carbon markets and trading.

⁸ Part V Climate Change Act - Duties Relating to Climate Change (ss.15-23).

⁹ Section 16(1) Climate Change Act.

identify different categories of private entities upon which climate change duties have been imposed.¹⁰

The National Environment Management Authority (NEMA) has the mandate of ascertaining compliance by private entities of their duties under the Climate Change Act.¹¹ Direct culpability for corporates may arise where such corporates fail to uphold their duties under the Act.¹²

Further, draft Regulations proposed under the Act include the draft Climate Change (Monitoring, Reporting and Verification) Regulations 2021 (hereinafter MRV Regulations). The MRV Regulations provide for monitoring, reporting and verification of greenhouse gas emission activities stipulated under Schedule 1 thereof.

Corporates involved in greenhouse gas emitting activities will be obligated to submit relevant reports under the draft MRV Regulations.¹³ Public and private entities operating in high emission sectors contemplated under schedule 2¹⁴ of the MRV Regulations, are required to commit “to reduce, limit the increase of, or enhance the removal or reduce the intensity of GHGs by a specified quantity and to be achieved by a specified date.”¹⁵ Private entities will be required to report annually on both mitigation¹⁶ and adaptation¹⁷ actions they have undertaken. The Climate Change Directorate¹⁸ is responsible for all verification activities under the draft MRV Regulations and prescribes how entities conduct verification processes.¹⁹

¹⁰ Draft Regulation 10. These include: (a) publicly listed companies; (b) producers of electricity for supply to the public; (c) categorized as Commercial and Industrial Consumers based on the latest Schedule of Tariffs for the Supply of Energy by the Energy and Petroleum Regulatory Authority; (d) refiners of oil and gas; (e) manufacturers of chemical products; (f) carrying out large-scale commercial farming, including forestry; (g) directly involved in a climate mitigation or adaptation project implemented for more than 2 years and whose budget is not less than KES 5,000,000.

¹¹ Section 17(1)(a)

¹² Draft Regulation 12(3) for instance requires corporate entities to demonstrate inter alia how the private entity has fulfilled its duties.

¹³ Regulation 10 requires a registered entity to submit an emissions report for a facility that is reportable facility of the registered entity.

¹⁴ Mitigation actions under schedule 2 include: 1. Increasing of renewables in the electricity generation mix of the national grid; 2. Making progress towards achieving a tree cover of at least 10% of the land area of Kenya; 3. Enhancement of REDD+ activities; 4. Development and promotion of clean, efficient, and sustainable energy technologies to reduce over-reliance on fossil and non-sustainable biomass fuels.

¹⁵ Regulation 14(2)

¹⁶ Regulation 16

¹⁷ Regulation 21(3)

¹⁸ The Climate Change Directorate is established under section 9 of the Climate Change Act 2016 as the “lead agency of government on national climate change plans and actions to deliver operational coordination.” The Directorate reports to the Cabinet Secretary in charge of the Ministry of Environment, Climate Change and Forestry.

¹⁹ Regulation 31

ii. Environmental Management and Coordination Act No. 8 of 1999

This Act establishes the legal and institutional framework for the management of the environment. Enacted in 1999, the EMCA makes passing mention of climate change but is bereft of substantive regulatory provisions.²⁰ Regulation of climate change by the dated Act was not envisaged. Section 56A was introduced by way of a comprehensive amendment in 2015 that sought to overhaul the Act, modernise it and bring it into conformity with the 2010 Constitution.²¹

There are advanced measures to repeal the EMCA through the EMCA Bill 2021 which is still pending before parliament.²² The 2021 Bill, for instance, proposes to address climate change inter alia by requiring the Cabinet Secretary responsible for the environment to establish criteria and procedures for measuring of air quality and greenhouse gas (GHG) emissions standards.²³

The EMCA protects the right of any person to a clean and healthy environment.²⁴ The liberal locus standi provisions in the Constitution were first enacted in the EMCA.²⁵ The Act allows any person desirous of enforcing the right to a clean and healthy environment “to bring an action notwithstanding that such a person cannot show that the defendant’s act or omission has caused or is likely to cause him any personal loss or injury.”²⁶

²⁰ S. 56A – provides for “Guidelines on Climate Change” and requires the Cabinet Secretary responsible for environment, “in consultation with relevant lead agencies, [to] issue guidelines and prescribe measures on climate change.”

²¹ S. 40 of the Environment Management and Coordination (Amendment) Act, 2015, No. 5 of 2015.

²² EMCA has served the country from 1999 to date. In this intervening period, Kenya and the world have undergone transformations that have impacted environmental management. The urgency of climate change has triggered a myriad of guidelines and treaties at the international level, aimed at slowing down global warming and addressing the devastating effects of climate change. At the national level, Kenya has experienced changes in governance and climate action initiatives.

²³ See clause 101 draft Environmental Management and Coordination Bill, 2021.

²⁴ S. 3(3) provides “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 the Environment and Land Court for redress and the Environment and Land Court may make such orders, issue such writs or give such directions as it may deem appropriate to—(a) prevent, stop or discontinue any act or omission deleterious to the environment; (b) compel any public officer to take measures to prevent or discontinue any act or omission deleterious to the environment; (c) require that any on-going activity be subjected to an environment audit in accordance with the provisions of this Act; (d) 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 (e) provide compensation for any victim of pollution and the cost of beneficial uses lost as a result of an act of pollution and other losses that are connected with or incidental to the foregoing.”

²⁵ See (n 38)

²⁶ S. 3(4)(a) & (b) EMCA

Frivolous or vexatious suits that amount to abuse of the court process are precluded under the Act.²⁷

Part IX of the Act requires NEMA to give effect to international treaties, conventions and agreements ratified by Kenya subject to the Treaty Making and Ratification Act, by initiating legislative proposals for consideration by the Attorney General.²⁸ Further, in the event of conflict between provisions of any law relating to management of the environment and EMCA, then the provisions of the EMCA shall prevail.²⁹

A litigant can, therefore, successfully anchor a climate change suit alleging despoilment of the environment that threatens or infringes the right to a clean and healthy environment. Similarly, corporate action that runs afoul of international treaties, conventions and agreements ratified by Kenya is impeachable under the EMCA.

iii. International Law

Articles 2(6) of the Constitution of the Republic of Kenya 2010 provides that “any treaty or convention ratified by Kenya shall form part of the law of Kenya”. In effect, this provision imports international climate law frameworks ratified by Kenya such as the Paris Agreement 2015 and makes such law applicable within the domestic realm. A company that operates within Kenya may, therefore, become directly liable for breach of international law that is applicable within the national realm. Kenya has an opportunity to enforce international climate obligations that have been translated into national climate obligations by dint of Article 2(6).

International law ratified by Kenya is applicable in Kenya provided they are relevant, and not in conflict with the Constitution, statutes, or a formal judicial pronouncement.³⁰ Consequently where corporates in Kenya breach provisions of international climate change law that possess a domestic character, such breach may constitute a cause of action against corporates in Kenyan courts.

Decision -/CP.21 on the adoption of the Paris Agreement, in Part V, expressly invites non-party stakeholders ‘to [among others] address and respond to climate change’ by scaling up their efforts and supporting actions necessary for reducing emissions and decreasing vulnerability to adverse climate change effects, and to document such efforts through Non-State Actor Zone for Climate Action (NAZCA).³¹ Although the NAZCA

²⁷ Ibid.

²⁸ S. 124

²⁹ S. 148

³⁰ Article 2(6); See also Supreme Court decision in *Mitu-Bell Welfare Society v Kenya Airports Authority & 2 others; Initiative for Strategic Litigation in Africa (Amicus Curiae)* (Petition 3 of 2018) [2021] KESC 34 (KLR) (11 January 2021) (Judgment)

³¹ UNFCCC, ‘Decision -/CP.21 on the Adoption of the Paris Agreement’ (FCCC/CP/2015/L.9/Rev.1, 2015)

creates no obligation for non-state actors, it underscores the significant potential they bear for reducing emissions.

Research attributes about 71% of global emissions between 1988–2015 to just 100 fossil fuel companies.³² It is possible that carbon majors may be sued in Kenya for historical contribution to climate change with nexus to present climate impacts. Where Kenya adopts national policies reflective of the goal under the Paris Agreement to limit the increase in the global temperature to 1.5°C, liability for carbon majors could arise from their failure to make ambitious commitments to cut their GHGs in conformity to domestic law.³³

B. Human Rights Law

i. Constitution of the Republic of Kenya 2010

The Constitution of Kenya 2010 was promulgated on 27.8. 2010 following a national referendum. Dubbed as one of the most progressive Constitutions on the African continent,³⁴ the Constitution has various provisions upon which corporate climate litigation can be anchored.

Article 42 of the Constitution enshrines the right to a clean and healthy environment for all persons as part of the Bill of Rights.³⁵ This provision benefits immensely from the safeguards attendant to interpreting and application of the Bill of Rights. The Constitution enshrines horizontal application of the Bill of Rights by providing that the Bill of Rights binds State organs and all persons.³⁶ Corporate entities can therefore be sued for action attributable to climate change which infringes the right to a clean and healthy environment. Enforcement of Article 42 is facilitated by both general and specific constitutional provisions.

It is noteworthy that UNGA Resolution A/76/L.75 passed on 28.7.2022 has recognized a clean, healthy, and sustainable environment as a human right. The right to a clean and healthy environment in Kenya can be enforced more specifically under Article 70 of the Constitution.³⁷ Article 70(3) dispenses with the requirement for proof of personal

³² Paul Griffin, 'The Carbon Majors Database: CDP Carbon Majors Report 2017' (2017) 14

³³ Article 4(1) Paris Agreement 2015

³⁴ C. Glinz, 'Kenya's New Constitution: A Transforming Document or Less than Meets the Eye?' (2011) 44 *Verfassung und Recht in Ubersee* 1, 60-80 p. 60.

³⁵ "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."

³⁶ Article 20(1)

³⁷ Article 42(b); Article 70(1) states that "If a person alleges that a right to a clean and healthy environment recognized and protected under Article 42 has been, is being or is likely to be, denied, violated, infringed or

injury or loss as a precondition for enforcing the right to a clean and healthy environment. Consequently, any public-spirited individual can institute a suit against companies for climate change liability by linking impugned company action to the infringement or threatened infringement of the right to a clean and healthy environment.³⁸ Remedies that the Environment and Land Court (ELC) may accord an aggrieved person are stipulated under Article 70(2) of the Constitution.³⁹

Complementary to the right to a clean and healthy environment, the Constitution enshrines procedural rights that are indispensable in the realization of the right to a clean and healthy environment, and which may provide basis for climate litigation. These include rights such as access to information;⁴⁰ fair administrative action;⁴¹ access to justice;⁴² and fair hearing.⁴³

A petitioner may also invoke infringement of substantive rights secured under the Constitution such as the right to life;⁴⁴ consumer rights;⁴⁵ or rights of minorities and marginalized groups.⁴⁶ Violation by an entity of the right to a clean and healthy environment contemplated under Article 42, may be accompanied by violation of several economic and social cultural rights ensconced in the Constitution.⁴⁷

The foregoing constitutional provisions provide a human rights springboard for climate change petitions against companies where such companies contravene or violate the Constitution and/or infringe constitutional rights.

threatened, the person may apply to a court for redress in addition to any other legal remedies that are available in respect of the same matter.”

³⁸ Article 70(3) provides - “For purposes of this Article, an applicant does not have to demonstrate that any person has incurred loss or suffered injury.”

³⁹ 70(2) On application under clause (1), the court may make any order, or give any directions, it considers appropriate—(a) to prevent, stop or discontinue any act or omission that is harmful to the environment; (b) to compel any public officer to take measures to prevent or discontinue any act or omission that is harmful to the environment; or (c) to provide compensation for any victim of a violation of the right to a clean and healthy environment.

⁴⁰ Article 35

⁴¹ Article 47

⁴² Article 48

⁴³ Article 50

⁴⁴ Article 26

⁴⁵ Article 46

⁴⁶ Article 56

⁴⁷ Article 43(1) of the Constitution secures every person’s right to “(a) to the highest attainable standard of health, which includes the right to health care services, including reproductive health care; (b) to accessible and adequate housing, and to reasonable standards of sanitation; (c) to be free from hunger, and to have adequate food of acceptable quality; (d) to clean and safe water in adequate quantities; (e) to social security; and (f) to education.”

C. Torts Law

The availability of specific environmental provisions upon which environmental suits can be anchored in Kenya, means that general common law causes of action based on torts such as negligence, nuisance, and trespass among others have generally been of low utility in pursuing environment related claims. A review of Kenyan environmental cases founded on torts reveals that such cases are few and far between.

Additionally, the suitability of torts as an avenue for challenging injurious climate change impacts is in doubt owing to the long and indeterminate causal chain of climate change. Under the tort of negligence for example, it becomes extremely difficult to attribute breach of duty of care resulting in harm from climate impacts exclusively to a single defendant or even a group of defendants. Similarly, an aggrieved person is likely to belong to a class of plaintiffs pursuing class action but who will find it difficult to trace personalized loss and or damage to a single defendant, or several defendants among of a class of diffuse defendants. These difficulties have been expressed as follows:

... nuisance and other traditional tort theories are overwhelmed by the magnitude and the complexity of the climate change conundrum. Built as it is on a paradigm of harm in which A wrongfully, directly, and exclusively injures B, tort law seems fundamentally ill-equipped to address the causes and impacts of climate change: diffuse and disparate in origin, lagged and latticed in effect, anthropogenic greenhouse gas emissions represent the paradigmatic anti-tort, a collective action problem so pervasive and so complicated as to render at once both all of us and none of us responsible.⁴⁸

The foregoing observation notwithstanding, the possibility of aggrieved parties invoking torts as a cause of action for climate change loss and or harm before Kenyan courts is not precluded. It will however be interesting to read the court's judgment considering the misgivings expressed herein.

The difficulties of employing torts as a cause of action to redress climate change damage in Kenya are aggravated by Kenya's liberal approach to standing expressed both under the Constitution⁴⁹ and the Climate Change Act.⁵⁰ An aggrieved party who is allowed to bring a climate change suit might succeed in proving causation but fail to prove personalized loss and/or damage which is a sine qua non for compensation.⁵¹

Considering the foregoing, the Kenyan jurisdiction is not yet responsive to the diverse heads of tortious liability contemplated under the toolkit questionnaire. These include public and private nuisance; negligent failure to mitigate or adapt to climate change;

⁴⁸ D.A. Kysar, 'What Climate Change Can Do About Tort Law' (2011) 41 *Envtl L* 1, 3-4.; See also D. Bullock Public Nuisance and Climate Change: The Common Law's Solutions to the Plaintiff, Defendant and Causation Problems (2022) 85(5) *MLR* 1136-1167 p.1137

⁴⁹ See (n 38)

⁵⁰ See (n 81)

⁵¹ See Bullock (n 48) 1165; See also Benson Ambuti case (n 140)

negligent or strict liability for failure to warn; trespass; impairment of public trust resources; fraudulent misrepresentation; civil conspiracy; product liability; insurance liability and unjust enrichment. The crystallization in future of these climate change causes of action premised on torts can however not be ruled out.

D. Company and Financial Laws

i. Code of Corporate Governance Practices for Issuers of Securities to the Public 2015

Boards and Directors are increasingly coming under sharp focus for climate adverse actions of their companies. In Kenya, the Capital Markets Authority (CMA) promulgated the Code of Corporate Governance Practices for Issuers of Securities to the Public 2015.⁵² The Code lays a potential basis for liability against a listed company that fails to disclose its implementation of environmental social and governance policies.⁵³ Similarly liability may be construed where the Board fails to protect, enhance, and invest in the wellbeing of the environment resulting in deleterious consequences.⁵⁴ The relevant provisions of the Code of Corporate Governance Practices for Issuers of Securities to the Public on director liability have been further codified under respective regulations, making them enforceable.⁵⁵ Construing corporate climate culpability against boards as well as against individual board members can be useful in broadening causes of action against corporates and initiating positive behavioral change.

The code is applicable to both listed and unlisted companies. It sets out principles and specific recommendations on structures and processes companies should adopt to enhance good governance in their operations. Some provisions of the code are mandatory, and issuers⁵⁶ are obligated to implement them as a minimum standard. The mandatory provisions are codified by the Capital Markets (Securities) (Public Officers, Listing and Disclosures) Regulations 2002 and are enforceable.⁵⁷

Principle 5.3 of the code on the board and corporate citizenship provides that the “Board shall protect, enhance, and invest in the wellbeing of the economy, society and the environment.”⁵⁸ This recommendation is replicated in Schedule 1 of the 2002

⁵² The Capital Markets Authority is established under the Capital Markets Authority Act CAP 485A Laws of Kenya.

⁵³ See Recommendation 7.1.1(j), Code of Corporate Governance Practices for Issuers of Securities to the Public 2015.

⁵⁴ See Recommendation 5.3.3, Code of Corporate Governance Practices for Issuers of Securities to the Public 2015.

⁵⁵ See for instance the Capital Markets (Securities) (Public Officers Listing and Disclosures) Regulations, 2002 adopted under the Capital Markets Authority Act CAP 485A Laws of Kenya.

⁵⁶ Includes a company or other legal entity that offers securities to the public or a section thereof in Kenya.

⁵⁷ See (n 55).

⁵⁸ Recommendation 5.3.3, Code of Corporate Governance Practices for Issuers of Securities to the Public 2015.

Regulations intituled “Eligibility Requirements for Public Offering of Shares and Listing.”⁵⁹

Principle 7.1 of the code provides for “Timely and balanced disclosure.”⁶⁰ It requires the Board, among other areas of disclosure, to ensure that “the company discloses its environmental, social and governance policies and implementation” in its annual report and website.⁶¹ The question of whether corporate liability arises for non-disclosure of climate impacts in this respect is germane. This is because the code is silent on consequences of non-disclosure of deleterious climate impacts.

ii. National Securities Exchange Environment and Social Governance Disclosures Guidance Manual

In 2021, the Nairobi Securities Exchange (NSE) issued the Environment and Social Governance (ESG) disclosures guidance manual. The manual offers guidance to companies listed by the NSE on how “to effectively disclose sustainability impacts through Global Reporting Initiative (GRI) standards”.⁶² Several Kenyan companies and multinationals are already publishing annual sustainability reports. Notable examples include the Kenya Commercial Bank (KCB); Safaricom; East African Breweries Limited (EABL); and Lafarge Holcim. It is expected that companies in Kenya will increasingly adopt corporate sustainability reporting as they build capacity and integrate ESG criteria into their operation strategies.

The National Securities Exchange Environment and Social Governance Disclosures Guidance Manual though not enforceable per se, present a harbinger of cases against corporate entities where such corporates conceal or fail to make environment and social governance disclosures.

The Kenya policy environment engenders ESG through the Companies Act No. 17 of 2015 Laws of Kenya;⁶³ and the Public Procurement and Assets Disposal Act No. 33 of 2015 Laws of Kenya;⁶⁴

⁵⁹ Capital Markets (Securities) (Public Officers, Listing and Disclosures) Regulations 2002 adopted under the Capital Markets Authority Act CAP 485A Laws of Kenya.

⁶⁰ See also Fifth Schedule CO.F.00 - Capital Markets (Securities) (Public Officers, Listing and Disclosures) Regulations 2002.

⁶¹ Recommendation 7.1.1(i), Code of Corporate Governance Practices for Issuers of Securities to the Public 2015.

⁶² Nairobi Securities Exchange ‘ESG Disclosures Guidance Manual’ (Nairobi 2021).

⁶³ Section 143(1)(d) of the Act stipulates the duty of Directors to have regard to “the impacts of the operations of the company on the company and the environment”; Section 655(4)(b)(i) of the Act requires Directors reports for listed companies to include environmental matters including the impact of the business of the company on the environment.

⁶⁴ Section 3(i) - Private entities should be guided in their procurement and asset disposal by among other guiding principles, the promotion of local industry, sustainable development, and protection of the environment.

iii. Central Bank of Kenya Guidance on Climate Related Risk Management

The Central Bank of Kenya (CBK) issued Guidance on Climate-Related Risk Management in October 2021.⁶⁵ This guidance recognizes climate change as a fundamental risk to financial institutions and corporates. Businesses are required to integrate climate change related risk management into their business decisions and activities.

Through a three-pronged approach, the CBK guidance, requires corporates to integrate climate related risk into their operations. To this end, corporates are required to embed potential financial risks from climate change in their governance frameworks. Second, corporates should incorporate climate change financial risks into their conventional financial risk management practice. Third, they should adopt an appropriate framework for reporting climate change related financial risks.

Most significantly, the guidance underscores three kinds of climate risks to wit, physical risk,⁶⁶ transition risk⁶⁷ and liability risk. Liability risk is germane to this discussion because it is attributable to potential climate litigation against financial institutions for compensation for loss and damage resulting from impacts of climate change. Contemporaneously, liability risk may emerge where financial companies are impleaded before courts for activities with negative environmental impacts. Financial institutions in Kenya have started embracing financial de-risking measures to preempt climate change related financial loss. One approach is to adopt responsible lending which ensures that banks do not finance projects that carry unmitigated environmental risk which may result in adverse climate impacts.

The Central Bank of Kenya Guidance on Climate Related Risk Management, underscores liability risk as a veritable risk that financial institutions must confront. This risk may arise where financial institutions are considered as climate change abettors through the financing of projects with adverse climate impacts. Alternatively, financial institutions may be liable for non-disclosure of climate related impacts that may affect shareholders or clients.

The CBK guidance assigns responsibility for formulation and implementation of climate related financial risk management strategies, policies, guidelines, procedures, and the

⁶⁵ The guidance was issued under section 33(4) of the Banking Act and is applicable to all institutions licensed under the Banking Act. The guidance aims to guide banking institutions for maintenance of stability and efficiency in the banking and financial system.

⁶⁶ P. 4 – “refers to the impacts of climate and weather-related events and long-term progressive shifts of climate.”

⁶⁷ Ibid. “refers to the financial risk related to the process of adjustment towards a lower-carbon economy which can be prompted by, for example, changes in climate policy, technological changes or a change in market sentiment.”

setting of minimum institutional standards to the board of directors and senior management of an institution.⁶⁸

E. Consumer Protection Law

The Constitution of Kenya protects consumer rights by entitling consumers to: “goods and services of reasonable quality”; “the information necessary for them to gain full benefit from goods and services; “protection of their health, safety, and economic interests”; and “compensation for loss or injury arising from defects in goods and services”.⁶⁹ Article 46 applies to both public entities and private persons.⁷⁰ The Consumer Protection Act No. 46 of 2012 was enacted to give effect to Article 46 of the Constitution.

The Constitution and the Consumer Protection Act 2012 therefore provide a potential cause of action to victims of climate change damage against corporate entities. Liability can arise where goods and services resulting in climate change impacts are alleged to have injured the health, safety, and economic interests of consumers. Nondisclosure of information from harmful goods and services resulting in climate impacts could also avail consumers a cause of action. Where litigants prove their claims, they will be entitled to compensation for loss or injury suffered.

There were no judicial precedents in Kenya on climate change litigation predicated upon consumer rights at the time of developing the toolkit.

F. Fraud Laws

The Kenyan penal code criminalizes false statements by officials of companies.⁷¹ It provides that any person who “circulates or publishes, or concurs in making, circulating or publishing, any written statement or account which, in any material particular, is to his knowledge false, with intent thereby to” deceive, defraud, or induce a person to act in a certain way is guilty of a felony and is liable to imprisonment for seven years.

The Companies Act No. 17 of 2015 is silent on fraud as a cause of action upon which climate action can be anchored. The isolated provision of the penal code on fraud by companies bears in Kenya little potential for meaningful corporate climate change litigation.

⁶⁸ P. 7

⁶⁹ Article 46 Constitution of the Republic of Kenya 2010

⁷⁰ Article 46(3)

⁷¹ Section 329 Penal Code CAP 63 Laws of Kenya.

G. Contractual Obligations

Kenya is yet to record any climate change case that invokes contractual obligations as a cause of action. It will require great innovation or a comprehensive review of the Law of Contract Act CAP 23 Laws of Kenya for such an action to be viable.

H. Planning and Property Law

The substantive Act on planning in Kenya is the Physical and Land Use Planning Act No. 13 of 2019. The Act incorporates the need to combat climate change in physical and land use plans but does not address climate change substantively. General property laws in Kenya have low utility in supporting climate action against corporates.

I. Others

i. Invalid Environmental Impact Assessment

A company seeking to initiate sensitive projects out of character with the environment contemplated under the second schedule of the Environmental Management and Coordination Act (EMCA) are required to undertake an Environmental Impact Assessment (EIA).⁷²

A corporate entity should therefore submit the requisite project report before “financing, commencing, proceeding with, carrying out, executing or conducting or causing to be financed, commenced, proceeded with, carried out, executed or conducted by another person” of any project.⁷³ NEMA may, upon being satisfied as to the adequacy of an EIA study, evaluation or review report, issue to a proponent an EIA licence.⁷⁴

The Climate Change Act provides that NEMA shall “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.”⁷⁵ Where an EIA report fails to take into consideration climate vulnerability assessment, a project with potential climate change impacts undertaken in utter disregard of this requirement may be challenged inter alia for failing to conform to stipulated EIA procedures.⁷⁶

A project with potential adverse climate impacts that proceeds based on an invalid, or an inadequate EIA report may attract liability for the proponent implementing such a project. In the case of *Ken Kasing’ a v Daniel Kiplagat Kirui & 5 others* [2015] eKLR, the

⁷² The second schedule of the EMCA classifies projects into low risk, medium risk, and high risk.

⁷³ S. 58(1) EMCA

⁷⁴ S. 63 EMCA

⁷⁵ S. 20 Climate Change Act

⁷⁶ Regulation 7(4)(o) of the Environmental (Impact Assessment and Audit) Regulations, 2003 provide for the integration of climate change vulnerability assessment and relevant adaptation and mitigation actions in the preparation of an EIA project report.

court awarded nominal damages jointly against Respondents to acknowledge infringement of his rights where the Respondents were held liable for procedural flaws in undertaking an EIA in respect of a Base Transceiver Station (BTS).⁷⁷

⁷⁷ **Sila Munyao J** at p. 73 stated “I am prepared to hold that where a procedure for the protection of the environment is provided by law and is not followed, then an assumption ought to be drawn that the project is one that violates the right to a clean and healthy environment, or at the very least, is one that has potential to harm the environment.”

2. Procedures and Evidence

A. Actors Involved

i. Claimants

The Climate Change Act allows an aggrieved person to apply to the ELC “alleging that a person has acted in a manner that is likely to affect efforts towards mitigation and adaptation to effects of climate change”.⁷⁸ The ELC may then remedy the alleged contravention as contemplated under section 23(2) of the Act.⁷⁹ In invoking the jurisdiction of the ELC under the Climate Change Act,⁸⁰ an applicant does not have to demonstrate that they have incurred loss or suffered injury.⁸¹ These provisions expose corporate entities to litigation from any person alleging that such corporate entities have acted “in a manner that is likely to affect efforts towards mitigation and adaptation to effects of climate change.”⁸²

Article 22(1) of the Constitution allows every person alleging the infringement or threatened violation of a right secured in the Bill of Rights to institute court proceedings. The requirement for locus standi (the right to appear in a court or institute court proceedings) in enforcing the Bill of Rights is significantly enlarged under the 2010 Constitution. Beyond a person acting in their own interest, potential litigants include: “a person acting on behalf of another who cannot act in their own name;”⁸³ “a person acting as a member of, or in the interest of, a group or class of persons;”⁸⁴ “a person acting in the public interest;”⁸⁵ or “an association acting in the interest of one or more of its members.”⁸⁶

By dint of Article 258 of the Constitution, every person can institute court proceedings to enforce climate liability against companies, where acts by companies are alleged to be contravening or are likely to contravene the Constitution. Like Article 22(2) of the Constitution on enforcement of the Bill of Rights,⁸⁷ Article 258 confers standing not only upon a person acting in their own interest but also, “a person acting on behalf of

⁷⁸ Section 23(1)

⁷⁹ Where an application is made under sub-section (1), the Court may make an order or give directions that it considers appropriate to—(a) prevent, stop or discontinue an act or omission that is harmful to the environment; (b) compel a public officer to take measures to prevent or discontinue an act or omission that is harmful to the environment; or (c) provide compensation to a victim of a violation relating to climate change duties.

⁸⁰ The ELC by dint of section 13(2)(a) has express jurisdiction to adjudicate climate change issues.

⁸¹ Section 23(3)

⁸² Section 23(1) Climate Change Act

⁸³ Article 22(2)(a)

⁸⁴ Article 22(2)(b)

⁸⁵ Article 22(2)(c)

⁸⁶ Article 22(2)(d)

⁸⁷ See (n 83); (n 84); (n 85) and (n 86)

another who cannot act in their own name;”⁸⁸ “a person acting as a member of, or in the interest of, a group or class of persons;”⁸⁹ “a person acting in the public interest;”⁹⁰ or an association acting in the interest of one or more of its members.⁹¹ Relieving a potential litigant of the obligation to demonstrate locus standi as a precondition to filing a climate change suit makes it possible for anyone and everyone to implead corporates for before Kenyan courts climate change damage.

The term “person” encompasses climate action by natural persons, juristic persons and even Non-Governmental Organizations (NGOs).⁹²

ii. Defendants

Corporates operating in Kenya are potential defendants in climate change actions. Litigation against corporates can arise from failure by such corporates to discharge their duties stipulated under the Climate Change Act and further prescribed by the proposed draft Climate Change (Duties and Incentives) Regulations 2021⁹³ as well as the proposed draft MRV Regulations 2021 both which are yet to enter into force.

Where the acts of a corporate entity are likely to affect efforts towards mitigation and adaptation to effects of climate change, the Climate Change Act allows any person to invoke the jurisdiction of the Environment and Land Court. As already stated, such a person is not required to demonstrate any loss and/or injury.⁹⁴

⁸⁸ Article 258(2)(a)

⁸⁹ Article 258(2)(b)

⁹⁰ Article 258(2)(c)

⁹¹ Article 258(2)(d)

⁹² Article 260 of the Constitution defines “person” to include a company, association or other body of person whether incorporated or unincorporated.

⁹³ Regulation 11(1) Every private entity listed under Regulation 10 (1) shall – (a) set out its objectives on climate change mitigation and adaptation in its strategy, plans and other guiding documents; (b) align its mitigation and adaptation objectives to national climate change priorities; (c) build the capacity of its staff and stakeholders to assess climate risk and implement action related to climate change in decision making; (d) commit a financial contribution to efforts directed at climate change mitigation and adaptation; (e) undertake efforts aimed at climate change mitigation to reduce the level of greenhouse gas emissions, if any, from their establishment, and where specific emission reduction targets have been set by the Council, to comply with the targets set; (f) invest in research and design to encourage innovations in the use of social and technical measures suitable for climate change adaptation and mitigation; (g) undertake resource efficiency measures in all sectors of involvement including, logistics, energy consumption, packaging and waste management; (h) provide annual training on climate change to all staff and analyse skill gaps; (i) collaborate with public entities to synergize technical and finance support for climate change mitigation and adaptation at both the national and county level; and, (j) engage in joint initiatives with other private entities to identify climate change risks, response measures and adaptation needs.

⁹⁴ See (n 81)

iii. Third-party intervenors

Generally, the Kenyan legal system allows an interested party or amicus curiae to make applications for joinder in proceedings before courts of law. Corporate climate litigation cases would be no exception to this general rule.

The Supreme Court Rules 2022 allow the court on its own motion or upon application by parties to allow a person with expertise in a particular area to appear in the matter as a friend of the court.⁹⁵ In admitting an application for joinder as amicus curiae, the court considers proven expertise; independence and impartiality of the applicant and the public interest. In the case of **Attorney General v Ndi & 73 others; Akech (Intended Amicus Curiae)**, the Supreme Court set guiding principles in considering an application for joinder as amicus curiae.⁹⁶

An intended interest party can apply for leave to be joined as such under the Supreme Court Rules 2020.⁹⁷ The Supreme Court has equally in the case of **Francis Kariuki Muruatetu & another v Republic & 5 others** enunciated guiding principles in considering an application to be enjoined as an interested party.⁹⁸

Suffice it to say, since Kenya applies the doctrine of stare decisis, all courts below the Supreme Court are bound by the decision of the Supreme Court.⁹⁹

iv. Other actors in climate litigation

There are no other categories of climate litigation actors save for the ones discussed above. The definition of a “person” under Article 260 of the Constitution of Kenya as to include a company, association or other body of person whether incorporated or unincorporated is all encompassing. The definition adequately captures all possible climate actors.

⁹⁵ Rule 19(1)

⁹⁶ Petition E016 of 2021 - Attorney General v Ndi & 73 others; Akech Migai (Intended Amicus Curiae). In this case the Supreme Court laid down 5 guiding principles in disposing an application for joinder as amicus curiae to wit, an amicus brief should be limited to legal arguments; the relationship between the amicus curiae and the principal parties and the trajectory of arguments advanced by amicus ought to be governed by the principle of neutrality and fidelity to the law; the amicus brief should have been filed timeously; the amicus should address points of law not addressed by the parties; parties will be heard on any objection raised against the application by amicus.

⁹⁷ Rule 21(1).

⁹⁸ [2016] eKLR. The court held that enjoinderment is discretionary and not as of right. An applicant must therefore file a formal application and demonstrate inter alia: the personal interest or stake that the party has in the matter; the prejudice to be suffered by the interested party in case of non-joinder; the party must set out submissions to be made before the court.

⁹⁹ See also Article 163(7) Kenyan Constitution

B. Procedural hurdles

Below details some of the most common hurdles and barriers encountered in corporate climate cases and examples of potential solutions.

i. Locus standi

Kenya generally affords litigants very liberal locus standi provisions in as far as constitutional public interest litigation goes. In *COI & Another Vs. Chief Magistrate Ukunda Law Courts & 4 Others* (2018) eKLR, the court observed in this respect as follows:

The Constitution of Kenya 2010, unlike our previous one, enshrines a detailed, liberal and robust Bill of Rights. Additionally, the strictures on standing and remedies capable of being issued for violation and/or enforcement of the fundamental freedoms and rights thereunder, which were present in the former constitutional order, are no more.¹⁰⁰

Article 70(3) of the Constitution; section 23(3) of the Climate Change Act and section 3(4) of the EMCA already discussed, make broad provisions, and dispense with proof of injury as a *sine qua non* for instituting any environment related or climate change suit. These provisions alleviate one of the common hurdles to litigation experienced in other jurisdictions by public spirited persons who cannot prove direct or personalized harm.

Comparatively, prior to the EMCA 1999 and the 2010 constitutional dispensation, Kenya upheld very narrow and restrictive locus standi requirements illustrated in the fabled case of *Wangari Maathai v Kenya Times Media Trust*.¹⁰¹ In this case the plaintiff sought to restrain the defendant company from erecting a skyscraper in a public park in the heart of Nairobi pending hearing and determination of her suit. Counsel for the defendant raised a preliminary objection among other grounds that the plaintiff did not have locus standi to institute the suit. The court upheld the preliminary objection thereby dismissing the plaintiff's suit with costs to the defendant.

In the upshot, any person can file climate change action suits before Kenyan courts. Such cases will then be heard on the merits and judgment entered. It is no longer possible in view of the elaborate locus standi provisions in the Constitution, the EMCA and the Climate Change Act to raise a preliminary objection purely on the basis that a litigant has been unable to demonstrate injury suffered.¹⁰²

¹⁰⁰ Paragraph 1

¹⁰¹ *Maathai v Kenya Times Media Trust Ltd* Nairobi High Court Civil Case 5403 of 1989 ([1989] eKLR)

¹⁰² See L. Omuko-Jung 'The Evolving *Locus Standi* and Causation Requirements in Kenya: A Precautionary Turn for Climate Change Litigation?' (2021) 15(2) *CCLR* 171–187 for an evolution of the broad locus standi provisions in Kenya.

ii. Justiciability

The question of justiciability turns on “the quality or state of [a claim] being appropriate or suitable for adjudication by a court”.¹⁰³ In essence this is the question whether a climate claim asserting liability against a corporate will be one that is appropriate for adjudication by the court.

Kenyan courts have determined that non-justiciability relates to three main doctrines.¹⁰⁴ First, it involves the political question doctrine which requires that a claim before court must not relate to an issue involving the discretionary powers of the executive or legislative arms of government. This is because such claims are better addressed by the relevant political arms of government.

Second, the constitutional avoidance doctrine requires a court to restrain from adjudicating a claim where there are other non-constitutional remedies available to a litigant.¹⁰⁵ The courts will therefore decline to determine a constitutional issue when there is an alternative basis for determination of a claim.¹⁰⁶ Corporate climate claims that impinge the three foregoing doctrines are likely to fail on grounds of being non-justiciable.

Third, the doctrine of ripeness precludes courts from determining disputes that are hypothetical, premature or academic and which have not fully matured into justiciable disputes.

iii. Jurisdiction

The Court of Appeal in Kenya underscored the criticality of jurisdiction in the celebrated case of *The Owners of Motor Vessel Lillian “S” V Caltex Oil Kenya Limited* 1989 KLR 1653 by making the following observation:

Jurisdiction is everything, without it, a court has no power to make one more step. Where a court has no jurisdiction there would be no basis for a continuation of proceedings pending other evidence. A court of law downs its tools in respect of the matter before it the moment it holds the opinion that it has no jurisdiction.

Climate change issues in Kenya can therefore only be heard and determined by courts and tribunals vested with competent jurisdiction to handle such issues. The fora discussed below are material in handling climate litigation.

¹⁰³ Black’s Law Dictionary, (8th Edition, 2004) at page 2530

¹⁰⁴ *Anthony Miano & others v Attorney General & others* [2021] eKLR

¹⁰⁵ *Communications Commission of Kenya & 5 Others v Royal Media Services Ltd & 5 Others* Pet. 14A, 14B & 14C of 2014 of [2014] eKLR

¹⁰⁶ *National Assembly of Kenya & another v Institute for Social Accountability & 6 others* Nairobi Civil Appeal 92 of 2015 [2017] eKLR

Environment and Land Court

Article 162(2)(b) of the Constitution establishes the Environment and Land Court (ELC) with jurisdiction to hear disputes relating to the environment and the use and occupation of, and title to, land. In furtherance of this provision, Parliament enacted the Environment and Land Court Act No. 19 of 2011 (hereinafter the ELC Act).

In July 2023, the ELC was split into two administrative divisions comprised of the Environment and Planning division as well as the Land Division. Climate change related matters will be filed in the Environment and Planning Division whereas the Land Division will mainly adjudicate land cases. The ELC Act, clothes the ELC with “original and appellate jurisdiction to hear and determine all disputes in accordance with Article 162(2)(b) of the Constitution and with the provisions of [the] Act or any other law applicable in Kenya relating to environment and land.”¹⁰⁷ Pursuant to this jurisdiction, the ELC has power to hear and determine disputes relating to climate change issues.¹⁰⁸

The ELC is further vested with the jurisdiction to hear and determine “applications for redress of a denial, violation or infringement of, or threat to, rights or fundamental freedom relating to a clean and healthy environment under Articles 42, ... and 70 of the Constitution” discussed herein.¹⁰⁹ This jurisdiction is exclusive to the ELC and is not shared with other fora that have jurisdiction to adjudicate environment related disputes. More particularly the jurisdiction of the High Court to entertain environment and land related disputes is expressly ousted by the Constitution.¹¹⁰

Appeals from the decision of the ELC lie to the Court of Appeal¹¹¹ and appeals from the decisions of the Court of Appeal lie to the Supreme Court which is the court of final authority in Kenya.

Magistrate’s Court

A magistrate’s court by dint of section 9 of the Magistrates Court Act No.26 of 2015 has jurisdiction to hear and determine claims relating to climate issues, subject to section 26 of the ELC Act and pecuniary limits set under the Act.¹¹² Pecuniary limits may

¹⁰⁷ Section 13(1)

¹⁰⁸ Section 13(2)(a)

¹⁰⁹ Section 13(3)

¹¹⁰ Article 165(5)(b) provides that “the High Court shall not have jurisdiction in respect of matters falling within the jurisdiction of the courts contemplated in Article 162 (2).”

¹¹¹ Section 16 ELC Act

¹¹² Section 9(a)(i) Magistrates Court Act; See also section 7(1) Magistrates Court Act, a magistrate's court shall have and exercise such jurisdiction and powers in proceedings of a civil nature in which the value of the subject matter does not exceed —(a) twenty million shillings (approx. \$ 200,000), where the court is presided over by a chief magistrate; (b) fifteen million shillings (approx. \$ 150,000), where the court is presided over by a senior principal magistrate; (c) ten million shillings (approx. \$ 100,000), where the court is presided over by a principal magistrate;

however find little relevance in climate change litigation, in view of difficulties attendant to pecuniary quantification of loss or value of the subject matter. Section 26 of the ELC Act enables the Chief Justice by way of Gazette notice, to appoint magistrates to adjudicate environment and land matters in any part of the country. Appeals from decisions of magistrates however lie to the ELC.¹¹³

A magistrate's court is however precluded from hearing and determining claims for compensation for loss or damage suffered in consequence of a violation, infringement, denial of a right or fundamental freedom in the Bill of Rights.¹¹⁴ Given the smorgasbord nature of most climate change issues litigated before courts, a magistrate's court presents a less competent and an inappropriate adjudicatory forum.

National Environment Tribunal

The National Environment Tribunal (NET) is established under the EMCA.¹¹⁵ NET exercises appellate jurisdiction over several regulatory acts provided for under the EMCA¹¹⁶ and decisions of NEMA, the Director General of NEMA, and committees of NEMA.¹¹⁷

Whereas the NET does not have express jurisdiction to hear and determine climate related issues as is the case with both the ELC and Magistrate's courts, climate issues may be inextricably intertwined in matters falling within its jurisdiction as was seen in the Save Lamu case.¹¹⁸ By entertaining such matters, the NET will still be acting within the purview of its jurisdiction.¹¹⁹

(d) seven million shillings (approx. \$ 70,000), where the court is presided over by a senior resident magistrate; or (e) five million shillings (approx. \$ 50,000), where the court is presided over by a resident magistrate.

¹¹³ Section 26(4) ELC Act; See also section 16A ELC Act.

¹¹⁴ Section 8(3) Magistrate's Court Act

¹¹⁵ Section 125 EMCA

¹¹⁶ Section 129(1) of the EMCA provides – "Any person who is aggrieved by— (a) the grant of a licence or permit or a refusal to grant a licence or permit, or the transfer of a licence or permit, under this Act or its regulations; (b) the imposition of any condition, limitation or restriction on the person's licence under this Act or its regulations; (c) the revocation, suspension or variation of the person's licence under this Act or its regulations; (d) the amount of money required to be paid as a fee under this Act or its regulations; (e) the imposition against the person of an environmental restoration order or environmental improvement order by the Authority under this Act or its Regulations, may within sixty days after the occurrence of the event against which the person is dissatisfied, appeal to the Tribunal in such manner as may be prescribed by the Tribunal."

¹¹⁷ Section 129(2) EMCA

¹¹⁸ See *Save Lamu & 5 others v National Environmental Management Authority (NEMA) & another* [2019] eKLR

¹¹⁹ Section 129(1) of the EMCA stipulates the jurisdiction of the NET to include: Any person who is aggrieved by— (a) the grant of a licence or permit or a refusal to grant a licence or permit, or the transfer of a licence or permit, under EMCA or its regulations; (b) the imposition of any condition, limitation or restriction on the person's licence under EMCA or its regulations; (c) the revocation, suspension or variation of the person's licence under EMCA or its regulations; (d) the amount of money required to be paid as a fee under EMCA or its regulations; (e) the imposition against the person of an environmental restoration order or environmental improvement order by the Authority under EMCA or its Regulations.

NET however does not possess jurisdiction to entertain matters for alleged breach of the Constitution and particularly so Article 42 on the right to a clean and healthy environment.¹²⁰ Such matters must be referred to the ELC. In mixed grill instances where the NET is confronted with matters within both its jurisdiction and the exclusive jurisdiction of the ELC, then the ELC is the competent forum to deal with such cases.¹²¹

Appeals from decisions of the NET lie to the ELC¹²² and the decisions of the ELC under this provision shall be deemed to be final.¹²³

iv. Group litigation

The Constitution of the Republic of Kenya allows the filing of suits by “a person acting as a member of, or in the interest of, a group or class of persons.”¹²⁴ This provision is further replicated at Article 258(2)(b) of the Constitution. Whereas the former provision envisages enforcement of the Bill of Rights, the later relates to enforcement of the Constitution. Where climate change liability infringing the Bill of Rights or other constitutional provisions arises, the Constitution permits a class or group of aggrieved litigants to file suit against a corporate entity or state actors.

Further, the **Civil Procedure Rules 2010** adopted under the **Civil Procedure Act CAP 21** Laws of Kenya provides that “where numerous persons have the same interest in any proceedings, the proceedings may be commenced, and unless the Court otherwise orders, continued, by or against any one or more of them as representing all or as representing all except one or more of them.”¹²⁵

v. Apportionment of costs

In Kenya the Civil Procedure Act CAP 21 Laws of Kenya provides that the award of costs shall be in the discretion of a court or a judge. The judge is accordingly vested with power to “determine by whom and out of what property and to what extent costs are to be paid.”¹²⁶

Where a court determines that it doesn’t have jurisdiction to entertain a matter, that court shall nevertheless have power to award costs if it deems it fit to do so. This is consistent with the general rule that costs follow the event unless a judge directs

¹²⁰ In *John Muthui & 19 others v County Government of Kitui & 7 others* [2020] eKLR, the court at paragraph 71 observed “Under the provisions of the Constitution and Section 13 (4) of the Environment and Land Court Act, it is this court [ELC] which has the jurisdiction to determine if indeed the Petitioners’ rights under Article 42, 69 and 70 of the Constitution have been or are likely to be infringed upon and not the National Environmental Tribunal (NET).”

¹²¹ *David Meroka & another v Director General, Nema & 2 others* [2020] eKLR

¹²² Section 130(1) EMCA

¹²³ Section 130(5) EMCA

¹²⁴ Article 22(2)(b)

¹²⁵ Order 1 Rule 8

¹²⁶ Section 27

otherwise. A judge also has power to award interests on costs “at any rate not exceeding 14% per annum and such interests shall be recoverable as a component of costs awarded to a litigant.”¹²⁷

Public interest litigation constitutes an exception to the general rule on award of costs and it is the practice in Kenya that in such cases, each party shall bear their own costs and no costs shall be awarded by the court against a losing litigant.¹²⁸ Where however a court determines that public interest litigation is frivolous or an abuse of the due process of court, a litigant might be condemned to pay costs.¹²⁹ The foregoing considerations will be applicable to corporate climate litigation.

C. Arguments and Defences

i. Redressability

Kenyan courts will only entertain claims where a judicial relief sought will redress the injury suffered. Otherwise, a court will not spend its time and valuable judicial resources on claims for which it can grant no remedy. The question of redressability hinges on the defence of mootness. In **Evans Kidero v Speaker of Nairobi City County Assembly & Another (2018) eKLR**, the High Court observed as follows:

A case or issue is considered moot and academic when it ceases to present a justiciable controversy by virtue of supervening events, so that an adjudication of the case or a declaration on the issue would be of no practical value or use. In such instance, there is no actual substantial relief which a petitioner or applicant would be entitled to, and which would be negated by the dismissal of the case. Courts generally decline jurisdiction over such cases or dismiss them on grounds of mootness...

A corporate entity can therefore mount a successful defense of mootness if it can demonstrate that a relief sought by a claimant against it is unavailable and consequently a court of law cannot engage in an academic exercise.

ii. Causation

Causation relates to damage suffered by a claimant which damage is attributable to a defendant’s negligence. In Kenya, causation is a *sine qua non* for a claimant to succeed in any action. Where a claimant fails to demonstrate that a defendant caused the harm complained of, or some part of the harm, then the claim must fail.¹³⁰

Causation may be linked to locus standi where a court declines to admit a claim for want of individualized direct harm or loss. As already discussed, the Kenyan

¹²⁷ Section 27(2) Civil Procedure Act CAP 21 Laws of Kenya

¹²⁸ *Mumo Matemu v Trusted Society of Human Rights Alliance and 5 others* [2014] eKLR

¹²⁹ *Danila Ntalason Lenatimayama v Independent Electoral and Boundaries Commission & another* [2021] eKLR

¹³⁰ *Anastassios Thomos v Occidental Insurance Company Limited* [2017] eKLR

Constitution and the Climate Change Act have expressly delinked causation from *locus standi* in public interest litigation.¹³¹ An applicant before court must not therefore demonstrate individualized loss or injury for a claim brought in the public interest to be admitted.

Causation will however still be material to the extent that loss or injury that is generalizable to the diffuse public, is attributable to acts of the defendant. To strike this nexus, attribution studies or reports may be relevant. Kenyan courts have not yet had an opportunity to determine the question of legal causation for climate change loss or damage.

There will however be a necessity to distinguish between the science of event attribution and the demonstration of legal causation. Kenya may borrow a leaf from Philippines, where in the National Inquiry on Climate Change (NICC) report, the Philippine Commission on Human Rights (“CHR”) pertinently observed thus:

There is a distinction between the science of event attribution and the establishment of legal causation. Event attribution is not a direct reconstruction of how each carbon contribution of an individual caused damage through climate change. Instead, it seeks to establish: (a) whether the likelihood or strength of a natural event has changed in the observational record, and (b) whether this change is consistent with the anthropogenic influence as found in one or more climate models.

Assessment of the “Fraction of Attributable Risk” is often misunderstood and misapplied in the context of legal causation where a clear unbroken chain of events leading up to the injury or damage is necessary to establish liability.

In many jurisdictions, courts evaluate evidence linking actors to climate-related losses using the stringent standards of legal causation. This disregards the work of climate and attribution science, and causes more climate injustice.

The Commission therefore recommends that the judiciary take notice of developments in the science of attribution when considering legal causality in assessing climate change impacts and damages.¹³²

D. Sources of evidence

The Evidence Act CAP 80 Laws of Kenya regulates adducing of evidence in judicial proceedings before Kenya courts. The rule of thumb under the Evidence Act is that “whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist.”¹³³ Such a party is said to bear the legal burden of proof.¹³⁴ Conversely put, “the burden of proof

¹³¹ See (n 38) & (n 81) respectively.

¹³² Commission on Human Rights, National Inquiry on Climate Change, at 147 (2022).

¹³³ Section 107(1) Evidence Act

¹³⁴ Section 107(2) Evidence Act

in a suit or proceeding lies on that person who would fail if no evidence at all were given on either side.”¹³⁵ Further in proving the existence of a particular fact, the Evidence Act provides that “the burden of proof as to any particular fact lies on the person who wishes the court to believe in its existence, unless it is provided by any law that the proof of that fact shall lie on any particular person.”¹³⁶

The foregoing provisions will guide determination of questions of causation of climate change. Where a person for instance alleges that a corporate entity is liable for climate change impacts or loss and/or damage, the legal burden of proof lies on such a person to prove causation. For that party to succeed, that burden must ordinarily be discharged to the satisfaction of the court, and this is termed the standard of proof.¹³⁷

A distinction between the legal burden of proof, and the evidential burden of proof was struck in the case of Ahmed Mohammed Noor v Abdi Aziz Osman [2019] eKLR. Although the case was not linked to climate change, the court pertinently stated as follows:

The Petitioner on whom the legal burden of proof lies may or may not adduce sufficient and admissible evidence in proof of any of the allegations in the Petition. On one hand, if no sufficient evidence is adduced to the required standard, then the allegation(s) fail and it all ends there. On the other hand, if evidence is adduced to the satisfaction of the Court that an election ought to be impugned, then it becomes the burden of the Respondent(s) to adduce evidence rebutting the allegations and to demonstrate that the law was complied with and/or that the irregularities did not affect the result of the election. At that point the burden is said to shift to the Respondents. That is the evidential burden of proof.¹³⁸

This observation would be applicable in climate change litigation against a corporate entity. Where a Petitioner adduces sufficient evidence to the required standard, then the burden shifts to the corporate entity to adduce evidence rebutting allegations made by the Petitioner. The evidential burden is then said to rest on the corporate entity. The standard of proof required to be discharged in civil cases, is on a balance of probability whereas criminal cases must be proved beyond reasonable doubt. Once parties start filing climate change cases in Kenya, it will be desirable to examine the court’s interpretation of causation vis a vis the Evidence Act.

¹³⁵ Section 108 Evidence Act

¹³⁶ Section 109 Evidence Act

¹³⁷ Black’s Law Dictionary, (8th Edition, 2004) at page 4399 defines ‘the standard of proof’ as the degree or level of proof demanded in a specific case, such as “beyond a reasonable doubt” or “by a preponderance of the evidence.”

¹³⁸ Paragraph 27

E. Limitation of Action for Climate Change Cases

In Kenya, the Limitation of Actions Act CAP 22 Laws of Kenya prescribes the period for limitation of court actions. The Act does not make specific reference to causes of action linked to climate change.

The question of limitation is however likely to arise relative to the specific causes of action that a litigant seeks to invoke. Thus, for example, a litigant pursuing a cause of action based on tort law, must file the same within 3 years. Conversely where a litigant alleges infringement of a constitutional right, such infringement cannot be amenable to limitation of actions.

As courts receive and adjudicate climate disputes against corporates, clear jurisprudence will emerge that might require parliament to legislate limitations of action in appropriate cases.

3. Remedies

It is trite law that where a cause of action has been established by a litigant, there must be a corresponding remedy. Different causes of action discussed in this toolkit disclose corresponding remedies available to persons who may be aggrieved by climate change impacts attributable to corporate entities.

A. Pecuniary Remedies

Primarily, pecuniary remedies relate to the award of damages for loss suffered by a successful claimant. Whereas there are various typologies of damages that litigants can claim, damages can be broadly classified as either general or special.

General damages flow from a court's finding of loss or injury to a claimant and must not be specifically pleaded. The assessment of general damages is at the discretion of the court.¹³⁹ However award of general damages for climate change loss and/or damage is only likely to be made to persons who can prove direct loss and /or damage on a personalized basis as opposed to diffuse loss and /or damage suffered by the public.¹⁴⁰

Special damages may be precipitated by circumstances due to climate change that result in subsequent loss and or injury to a claimant. To be awardable by Kenyan courts, such special damages must be specifically pleaded and proved. Given the inherently long and indeterminate causal chain of climate change, it may be extremely difficult for a claimant to prove special damages. Potential claims for special damages may include loss of arable land or tangible assets due to climate change impacts.

¹³⁹ See *KM & 9 others v Attorney General & 7 others* [2020] eKLR where the Environment and Land Court in Mombasa awarded general damages to the victims of lead poisoning for infringement of their right to a clean and healthy environment.

¹⁴⁰ In *Benson Ambuti Adegga & 2 others v Kibos Sugar and Allied Industries Limited & 4 others; Kenya Union of Sugar Plantation and Allied Workers (Interested Party)* [2019] eKLR paragraph 28 – the Environment and Land Court declined to award compensatory damages to Petitioners for effluent discharge in the following words “*The court has after considering the entire petition taken the petitioners to be public spirited individuals exercising their constitutional and statutory obligation to ensure the pollution to the environment being done by the 1st to 3rd Respondents under the 4th and 5th Respondents’ disinterested eyes, is stopped for the good of the residents of the area and the public. That the petition is not about their personal and individual satisfaction only. That for that reason and further considering there are many other persons in the area and beyond, who have been affected and continue to be affected by the effects of the 1st to 3rd Respondents discharging raw effluent into the environment, the court considers an award of damages to the Petitioners as individuals not appropriate.*” The decision of the ELC declining compensation to the Petitioners was upheld by the Court of Appeal in *Kibos Distillers Limited & 4 others v Benson Ambuti Adegga & 3 others* [2020] eKLR.

B. Non-Pecuniary Remedies

i. Remedies for Breaches under the Climate Change Act

The court may make orders in favor of an applicant who has successfully invoked section 23(1) of the Climate Change Act 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.¹⁴¹

Further, the ELC in exercising its jurisdiction on climate change issues under the ELC Act is allowed to grant any orders or give such reliefs as the court deems fit including: interim or permanent preservation orders including injunctions; prerogative orders; award of damages; compensation; specific performance; restitution; declaration; or costs.¹⁴²

ii. Constitutional remedies

The ELC upon making the finding that any person's right secured under the Bill of Rights has been infringed, may grant to such persons reliefs that include a declaration of rights; an injunction; a conservatory order; a declaration of invalidity of any law that denies, violates, infringes, or threatens a right or fundamental freedom in the Bill of Rights and is not justified under Article 24; an order for compensation; and an order of judicial review.¹⁴³

The Supreme Court in the case of *Mitu-Bell Welfare Society v Kenya Airports Authority & 2 others* held that the list of appropriate reliefs that a court could grant under Article 23(3) is not exhaustive.¹⁴⁴ Consequently, the court could craft orders aimed at protecting an infringed right.¹⁴⁵ To buttress this point, in the case of *Communications Commission of Kenya & 5 others v Royal Media Services Limited & 5 others*; Petition No 14, 14A, 14B and 14C of 2014 (Consolidated), the court stated as follows in respect of Article 23(3) of the Constitution:

... a close examination of these provisions [article 23(3) and 165(3)(d) of the Constitution] shows that the Constitution requires the court to go even further than the US Supreme Court did in *Marbury v Madison*, ... article 23(3) grants the High Court powers to grant appropriate relief "including" meaning that this is not an exhaustive list.¹⁴⁶

¹⁴¹ Section 23(2) Climate Change Act

¹⁴² Section 13(7) ELC Act

¹⁴³ Article 23(3)

¹⁴⁴ See paragraph 1 Supreme Court decision in *Mitu-Bell Welfare Society v Kenya Airports Authority & 2 others*; Initiative for Strategic Litigation in Africa (Amicus Curiae) (Petition 3 of 2018) [2021] KESC.

¹⁴⁵ Ibid, paragraph 23

¹⁴⁶ Paragraph 359.

Further, the ELC may grant specific remedies to a successful petitioner where it finds that the right to a clean and healthy environment has been infringed. To this end, “the court may make any order, or give any directions, it considers appropriate to prevent, stop or discontinue any act or omission that is harmful to the environment; to compel any public officer to take measures to prevent or discontinue any act or omission that is harmful to the environment; or to provide compensation for any victim of a violation of the right to a clean and healthy environment.”¹⁴⁷

iii. Remedies by the National Environment Tribunal

The NET in adjudicating climate related disputes within its jurisdiction, may confirm, set aside or vary the order or decision in question; it may exercise any of the powers which could have been exercised by NEMA in the proceedings in connection with which the appeal is brought; or make such other order, including orders to enhance the principles of sustainable development and an order for costs, as it may deem just; It can also issue orders maintaining the status quo of any matter or activity which is the subject of the appeal until the appeal is determined, if satisfied upon application by any party; it can review any orders it has made in favor of a party, if satisfied upon application by any party.¹⁴⁸

iv. Reliefs Against Boards and Directors

The Code of Corporate Governance Practices for Issuers of Securities to the Public 2015¹⁴⁹ neither codifies nor prescribes remedies available to aggrieved persons where a listed company fails to protect, enhance, and invest in the wellbeing of the economy, society, and the environment in its operations.

The mandatory provisions of the code that have been replicated in Regulations adopted under the Capital Markets Authority Act CAP 485A (hereinafter CMA Act) however possess consequences for breach. An example is recommendation 5.3.3 which provides that the “Board shall protect, enhance, and invest in the wellbeing of the economy, society and the environment.”¹⁵⁰

Where the board fails to abide by this recommendation, such failure may attract imposition of sanctions and penalties as well as other remedies under the CMA Act.¹⁵¹ The remedies under the CMA Act are without prejudice to the right of an aggrieved

¹⁴⁷ Article 70(2)

¹⁴⁸ Section 129(3) EMCA

¹⁴⁹ See (n 52)

¹⁵⁰ This recommendation is replicated in Schedule 1 of the Capital Markets (Securities) (Public Officers, Listing and Disclosures) Regulations 2002 made under the Capital Markets Authority Act CAP 485A Laws of Kenya.

¹⁵¹ See sections 11(3)(cc); 25A(1)(c); and 34A Capital Markets Authority Act.

party to file suit against the company for redress by invoking causes of action previously discussed herein.

v. Enforcement of ESG Requirements

The NSE Disclosure Guidance manual is of itself non-justiciable.¹⁵² The guidance can however avail remedies to aggrieved litigants, where its provisions are predicated upon justiciable statutes such as Companies Act No. 17 of 2015¹⁵³ and the Public Procurement and Assets Disposal Act No. 33 of 2015.¹⁵⁴ Similarly, the CBK Guidance on climate related risk management was adopted under the Banking Act CAP 488 which prescribes penalties where any person fails to comply with directions given under the Act.¹⁵⁵ Parties can therefore advance climate change related claims based on the foregoing instruments depending on how they choose to couch such claims. Climate related ESG provisions which crystalize into justiciable legal provisions, bear the potential to expand the array of remedies and causes of action available to aggrieved litigants.

¹⁵² See Black's Law Dictionary (n 103).

¹⁵³ See (n 63)

¹⁵⁴ See (n 64)

¹⁵⁵ Section 33(5) provides "A person who fails to comply with any direction under this section commits an offence and shall, in addition to the penalty prescribed under section 49, be liable to such additional penalty as may be prescribed, for each day or part thereof during which the offence continues."

Conclusion

The dearth of climate change cases in Kenya notwithstanding, the elaborate policy, legislative and constitutional framework discussed in this toolbox, is adequate to anchor incipient corporate climate litigation. Innovative interpretation of extant legal provisions on climate change can over time contribute to novel climate change jurisprudence. The toolbox traces out legal strands upon which litigants aggrieved by negative corporate conduct can weave successful climate change suits.

Through emerging climate change cases against corporates, Kenyan courts will be able to develop climate change jurisprudence by giving interpretational heft to the hitherto untested provisions of law. Increasing awareness on climate change in Kenya and evolving regulatory framework, is triggering positive behavioural change among corporate entities. A fundamental shift in behaviour will enable corporate entities avoid reputational risks and remain economically competitive.

Corporate climate litigation therefore promises to be an indispensable tool in enhancing climate ambition and catalysing the race to net zero. It bears potential to deter business as usual approaches clothed in greenwashing and other unethical corporate practices that accelerate climate change.

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