

## Environmental Rule of Law: Analysis of Kenya's Capacity Building Provisions in Climate Change Legal Regimes

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### Abstract

Kenya has a higher vulnerability to climate change, which ranks it at 151 globally out of 181 in the 2019 ND-GAIN Index, due to its position and location in the Horn of Africa. It is projected that more rain, worse droughts and the emergence of drug-resistant diseases will be experienced in the coming decades, especially over the next 30 years, if little is done to improve resilience and adaptive capacity. On this basis, capacity building, among other measures, has been recommended as an enabler of climate change action, including resilience building. Guided by Hans Kelsen's legal positivism theory, this study sought to assess how capacity-building measures have been included and implemented under Kenya's climate change law regime, with Kisumu County serving as a case study. The study covered four areas: (1) assessment of capacity building mandates, (2) how various climate change actors are fulfilling their mandates, (3) barriers and opportunities and (4) options for strengthening capacity development. The data collection exercise involved the review of literature and key informant interviews. A purposeful sampling procedure was used to identify participants. The study established that capacity building is progressing moderately at institutional, systemic and individual levels. Legal frameworks exist, institutions have been established, and actors are active, but with varied capacities and approaches to capacity building. There exist challenges too: limited finances, inadequate skills, low awareness, weak coordination, lack of incentives, limited data and competition among global institutions. As we advance, the study recommends the development of a locally-led, need-based, multi-sector, and multi-stakeholder framework for capacity building for climate action at national and county levels.

### Introduction

The Constitution of Kenya is the supreme law, while the Climate Change Act of 2016 is the principal legislation guiding Kenya's climate change response in Kenya.<sup>1</sup> The following section details the

outcome of the literature review and findings from key informant interviews, highlighting some of the legal and policy frameworks guiding capacity building for climate change action in Kenya.

### **Environmental Rule of Law and Role of Capacity Building in Climate Governance**

Efficient legal frameworks, vested institutions and informed and knowledgeable citizens are preconditions for delivering Sustainable Development Goal 13 (Climate Action). Central to these prerequisites is the environmental rule of law, which could help rationalize climate change law.<sup>2</sup> From the study, several authors have made novel arguments in their pursuit to underpin the environmental rule of law across institutions and sectors. First, UNEP identifies some elements that define the environmental rule of law. These include fairness, clarity, information, justice, participation, accountability, integrity, coordination, dispute resolution mechanisms, mutual relationships, and integration of capacity-building provisions in law and implementation of such laws in practice.<sup>3</sup>

Davis Jones & Ivan Honorato believe that a robust statute can enable wide-ranging administration and promote acquiescence.<sup>4</sup> They state that all stakeholders need to be involved and given the right responsibilities and mandates within their abilities to contribute to law-making and decision-making processes. Thus, capacity-based participation, if well implemented, can address concerns about inadequacies and avoid unnecessary penalties and sanctions. The inclusive approach could ensure that both duty-bearers and subjects can actively play their roles in a legislative process with an understanding of the ramifications of their inactivity and negligence.

According to Garmestani, A., et al, leveraging untapped capacity for enhancing climate action in existing climate change law has not received adequate attention, and the attempts to govern social and ecological systems have not resulted in desirable and productive environmental change. For climate action to be effective, they propose that planning for capacity-building needs to be accounted for in law and policy.<sup>5</sup>

Fazey et al. advocate for knowledge-sharing and collective learning in capacity building to augment shared knowledge and streamline actions, which ultimately contribute to uniformity in enforcement and general compliance with environmental law and industry standards.<sup>6</sup> In addition, Justice Mensah postulates that constant education and capacity-building programmes should be directed to ensure that every citizen understands legal and policy concepts and their application to local sustainable development priorities.<sup>7</sup>

Kariuki Muigua and others see environmental law as a tool for attaining climate justice for people and nature.<sup>8</sup> As environmental law is being enacted, there is a need to envision the ultimate impact of the legislation on the environment. He calls for inclusive approaches whereby both formal and informal legislative platforms provide for policymakers and the citizens to work together, supported with adequate capacities to discern the pros and cons of the law, and the unifying goal should be to enhance the growth of environmental rule of law.<sup>9</sup>

Margot A. Hurlbert further articulates that the main success factor in implementing climate change law is for the responses to be anchored on a legal regime.<sup>10</sup> Appropriate provisions are obligatory to

ensure targeted adaptation to current and impending unpredictability and extreme climate events. Climate change law must facilitate strong governance instruments to anticipate potential and future incidences of extreme events. These thoughts have been shared by Leonard J., Mintzer I., and Michel D., who theorize that to comprehend efficacious technology transfer and permit innovative response tactics, there is urgency in enacting climate change laws which offer a blend of diverse capacity-building approaches with a focus on local environments and cultural settings.<sup>11</sup>

Mizan Khan and Others write in favour and categorize capacity building into three categories, i.e., understanding of the climate problem, execution of activities, and compromise in negotiations. They suggest that a sustainable capacity-building framework should mirror international arrangements, incorporate human resource training and institutional best practices, and secure adequate and appropriate financial support.<sup>12</sup>

Jacqueline Peel points out that climate change law has established itself as a reliable rejoinder in the discourse where innovation, green economy and sociopolitical developments are regarded as panaceas to environmental problems. Legislation powered by technical abilities and necessary resources, at national and international levels, can fortify governance, embed regulatory settings and offer a medium for arbitration and acceptance of the power of environmental law in influencing positive climate change law outcomes.<sup>13</sup>

Finally, Gitanjani et al infer that because of climate change law, courts, as underwriters of the environmental rule of law, have promoted social, organizational, and individual actions that have contributed positively to reversing the negative climate trends that have continued to threaten the well-being of the deprived and susceptible people. Initiatives such as UNEP's ACP-MEAs program have helped in influencing judicial decisions around climate change judgments, as judicial officers can relate to climate change and its impacts.<sup>14</sup>

### **The Application of International Law on Climate-related Capacity Building in Kenya**

Since the establishment of the UN, international law has rapidly developed over the last decade. Numerous international frameworks, including treaties, conventions, charters, final acts, pacts, agreements, covenants, and protocols, exist, and international customary rules have been established. Kenya, as a dependable member of the international community, is bound to these frameworks whereby it is working together with other countries through Multilateral Environmental Agreements, which set out legally binding and non-legally binding principles to which Kenya commits to achieve specific environmental goals.

Kenya previously adopted a dualist approach, which espoused the doctrine of transformation with a vision that international law could only be applicable in the domestic legal system if it had been domesticated by parliamentary legislation. This meant that all laws ratified and domestic could only be applied in the domestic legal system at the same level as other domestic legislation and could be amended by a simple legislative majority. Luckily, after decades of dualism, Article 2(5) and (6) of the New Constitution of Kenya envisage a direct application of international law as contained in international treaties. This provision was made alive by the enactment of the Treaty Making and Ratification Act, No. 45 of 2012, which gives effect to the Constitution and provides for the making

and ratification of treaties and allows international law to operate directly into Kenya's legal system once such instruments have been ratified by the state without insisting on domestication. The monist dualist distinction was withheld by Civil Appeal no 20 of 2013.<sup>15</sup> This is meant to ensure that the people are represented in the legislative process by their domestically elected representatives. Similarly, in the Civil Appeal no. 218 of 2016, the court held that in determining a dispute, a domestic court must take cognizance of rules of international law to the extent that the same are relevant and not in conflict with the Constitution, statutes or a final pronouncement. The Judges argue that Articles 2(5) and Article 2(6) of the Constitution is both inward-looking and outward-looking. The articles are outward-looking in the sense that they commit Kenya to conduct its international relations in accordance with its obligations under international law. On the other hand, they are inward-looking because they require Kenyan courts of law to apply international law in resolving disputes before them if the same were relevant, and not in conflict with the Constitution, local statutes, or a final judicial pronouncement. That international law could be applied to fill a lacuna in domestic law in the context of a dispute before a domestic court because international law was part of the laws of Kenya.<sup>16</sup>

International environmental law as applied in Kenya comprises both hard law and soft law components as listed in Article 38 of the Statute of the International Court of Justice (ICJ), which is the principal judicial organ of the United Nations. The sources of environmental law in Kenya include the courts (such as the ICJ and the Environmental and Lands Court), international conventions such as the UNFCCC, international customs, the general principles of law, as well as judicial decisions and expert opinions.

There are general concepts and principles of international environmental law which Kenya subscribes to, relevant to capacity building. These include State Sovereignty, cooperation, preservation and protection of the environment, prevention, polluter pays principle, information and assistance in environmental emergencies, information and consultation in cross-boundary relations, the rights of individuals to information, participation and access to justice, good governance, sustainable development, integration and interdependence, inter-generational and intra-generational equity, responsibility for transboundary harm, transparency, public participation and access to information and remedies, common concern for humanity, rights of future generations, common heritage of mankind and common but differentiated responsibilities.

The Common but Differentiated Responsibilities (CBDR) principle is a cornerstone of international climate law, which has evolved from the UNFCCC through the Kyoto Protocol to the Paris Agreement. The UNFCCC introduced the CBDR principle in 1992 as a recognition that developed countries bear a greater historical responsibility for climate change due to their higher emissions and acknowledgement that developing countries have different capacities and needs. This was reinforced by the Kyoto Protocol by setting binding emissions reduction targets for developed countries while exempting developing countries from the targets. This created a binary system with clear obligations, with developed countries taking the lead in emissions reductions, while developing countries are encouraged to participate in mitigation efforts and as they receive financial and technological support.<sup>17</sup>

On the other hand, the Paris Agreement moves away from the rigid categorization of developed and developing countries. It establishes nationally determined contributions where each country sets its own mitigation and adaptation goals based on its national circumstances and capabilities. While CBDR is acknowledged, the Paris Agreement gives it a more flexible and procedural approach to implementation as it aims for a more inclusive and universally applicable approach to climate action, recognizing that all countries have a role to play in addressing climate change.<sup>18</sup>

In essence, the evolution from Kyoto to the Paris Agreement reflects a shift from a top-down, binary system of differentiated responsibilities to a more flexible, bottom-up approach where countries contribute based on their circumstances, but with developed countries still expected to provide support to developing nations.

Specifically, the text on Common but Differentiated Responsibilities and Respective Capabilities (CBDR-RC) under the UNFCCC reads: "...*the global nature of climate change calls for the widest possible cooperation by all countries and their participation in an effective and appropriate international response, in accordance with their common but differentiated responsibilities and respective capabilities and their social and economic conditions.*" The CBDR-RC has served as a guiding principle as well as a source of contention in the UN climate negotiations between emerging, developing and developed economies. The ICJ is expected to give an advisory opinion on the Obligations of States in respect of Climate Change based on a request for an advisory opinion by the United Nations General Assembly.<sup>19</sup> The Court advisory could be of importance and significance in compelling nations to prioritize the implementation of capacity-building obligations under the UNFCCC and the Paris Agreement. This Principle has been put to the test in several climate court cases, with the latest being the verdict against Switzerland by the European Court of Human Rights (ECHR), which ruled that the Swiss government failed to take necessary measures to tackle climate change<sup>20</sup>. In the meantime, the Paris Agreement upholds the principle of CBDR with the acknowledgement that all countries have a shared responsibility to address climate change, but also recognizes that their capacities and historical contributions differ. This then means that all Parties to the UNFCCC are expected to act, though based on their level and national circumstances and capacities. The Agreement introduces and emphasizes voluntary contributions, differentiation, flexibility, transparency and accountability.<sup>21</sup>

Some of the most important MEAs are hereby introduced briefly in the following section.

The Agenda 21 proposes enhancing education and training, promoting public awareness, and strengthening national institutional capacity as the means for its implementation.<sup>22</sup> It calls upon government and member parties to cooperate with regional and international sector players to build capacities, strengthen institutions and entrench inclusive and participatory decision-making platforms.<sup>23</sup> The Agenda further proposes capacity building through skills and knowledge at all levels to ensure that communities and lower-level governance structures have the requisite capacities to the extent that they can contribute to and influence policy and development decisions.<sup>24</sup>

Similarly, the UNFCCC establishes global commitments on climate change, including capacity building. It provides for member countries to encourage and support initiatives towards capacity development, with training, skills development, and sensitization being given priority.<sup>25</sup> It urges

parties to promote regional and national capacities, and public participation, undertake training and personnel deployment, develop and implement education and training programs and strengthen existing institutions.<sup>26</sup> The article also advocates for, among others, building capacities to undertake studies, developing faculties, and centres for implementing UNFCCC and developing the public capacity to undertake projects and programmes to minimize climate change impact.

Capacity building under the Convention includes interventions at the individual, institutional, and systemic levels. Key trends in climate change litigation around capacity building-related matters recorded 2,341 cases by 2023, with more than 50% of climate cases having direct judicial outcomes that are understood as favourable to climate action beyond the courtrooms. Recent developments at the international level include a decision by the UN Human Rights Committee in the case of Daniel Billy and Others v. Australia on the obligation of states to take adaptation measures to protect the human rights of citizens. Litigation has also been used to clarify obligations and responsibilities and encourage active engagement with key decision-makers, as recorded in the case of Butler-Sloss V. Charities Commission.<sup>27</sup>

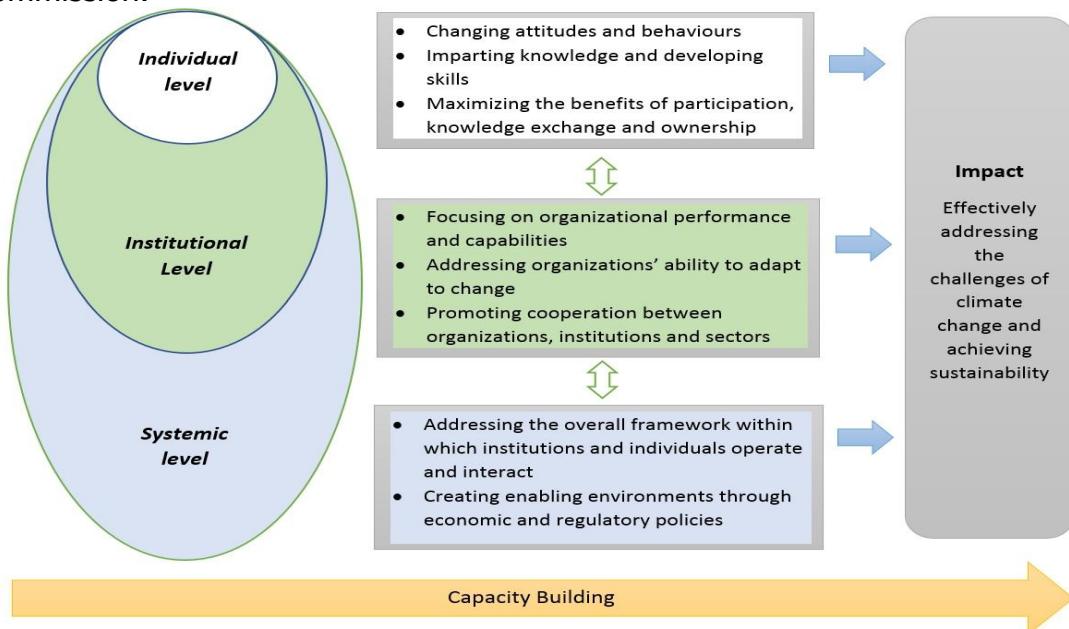


Figure 1: Capacity Building Under the UNFCCC (UNFCCC,2021)

The Paris Agreement reinforces capacity building as a key pillar for developing countries to meet climate goals. It builds on the UNFCCC, which is the principal Convention<sup>28</sup> to provide capacity building to help developing countries achieve their obligations. The two frameworks state that capacity building should be country-driven, need-based, multi-level, multi-sector and participatory, guided by the lessons learnt, interactive, iterative, and responsive to the needs of women, youth and marginalized groups. The Agreement establishes the Paris Committee on Capacity-building, whose mandate includes addressing capacity and skills gaps and managing capacity-building programs and work plans in the execution of the Paris Agreement.<sup>29</sup> In addition, in 2015, COP21 established the Capacity-Building Initiative for Transparency (CBIT) to help in institutional strengthening and technology transfer, as well as build systems towards transparency requirements

under Article 13 of the Paris Agreement. They are to offer member Parties tools and training as they prepare Biennial Transparency Reports (BTRs).

**Sustainable Development Goals**<sup>30</sup> calls upon countries to support each other, more so the developing countries, through targeted capacity building to be able to design, implement and monitor development plans.<sup>31</sup> Privy to the inadequate capacity in developing countries, SDG 17 seeks to strengthen member states and build stronger partnerships that ensure that capacity building is mainstreamed and integrated into development planning and budgeting, both at the national and community levels.<sup>32</sup> Goal 13 seeks to promote urgent action to combat climate change and its impacts. The country scored 123/166 on the SDG Index Ranking, 60.9 on the SDG Index Score, 97.5 on the Spillover Score, 64 on the Total Policy Score, 52 on the Transformation Score, 73 on the Coordination Score, and 64 on the Multilateralism Score.<sup>33</sup> The Third Voluntary National Review on the Implementation of the Sustainable Development Goal show that the total number of deaths, missing persons and persons affected by disaster per 100,000 people reduced from 2,759 in 2019 to 2,399 in 2021. Again, the report shows that Total greenhouse gas emissions increased from 97 CO2eMt in 2019 to 98 CO2eMt in 2020 and 100 CO2eMt in 2021. The emissions exceeded the set targets for 2019 (90) and 2020 (96), and the target was attained in 2021 (101). Figure 4.16 shows the trends in greenhouse gas emissions for the period 2019-2022.<sup>34</sup>

The contribution of capacity building has been highlighted in the Education for Sustainable Development document as a key component of climate change education, as it can help in influencing decisions, changing attitudes, mobilizing action, and building stronger alliances for greener and more sustainable education systems.<sup>35</sup>

In 2011, the Parties to the UNFCCC created the **Durban Forum on Capacity Building** to contribute to monitoring and reviewing capacity-building efforts under the UNFCCC and to share experiences, good practices, and lessons learned from and with developing countries. The Doha Work Programme was followed by the Dialogue on Article 6 and the launching of a portal to cater for capacity building.<sup>36</sup> Finally, parties to the UNFCCC launched two frameworks to enable member states to achieve their obligations under the Convention and be able to contribute to the Kyoto Protocol.<sup>37</sup>

A compilation and synthesis report by the UNFCCC (April 2024) shows that under the Convention, Kyoto Protocol and Paris Agreement, UNFCCC constituted bodies increased capacity-building interventions from 174 in 2022 to 230 in 2023. The category with the most activities reported in 2023 is events, technical meetings and forums (61), followed by tools and handbooks (50), training and workshops (45), technical assistance and support (41) and webinars, tools and courses (33).<sup>38</sup>

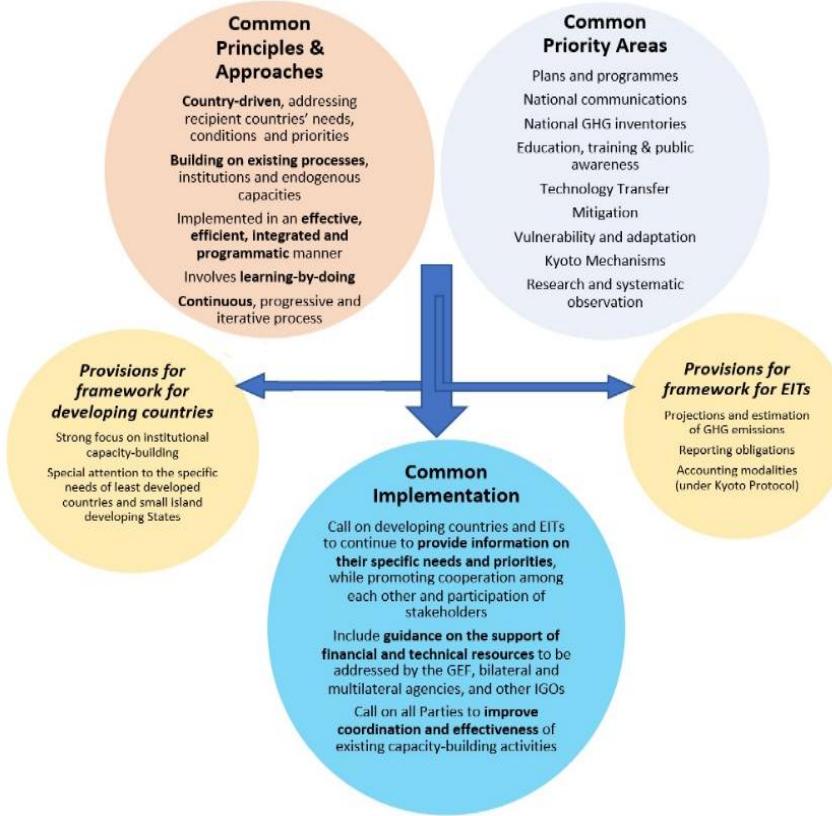


Figure 2: Capacity Building Frameworks. (Source: UNFCCC, 2012)

The COP 28 outcome sought to ensure participation and inclusivity and the critical importance of empowering all stakeholders to engage in climate action, including through the action plan in Action for Climate Empowerment and the Gender Action Plan. The parties also laid the ground for an enhanced transparency framework and increased climate finance toward decarbonizing economies and societies while considering the needs and priorities of developing countries. The parties further noted that capacity gaps and needs still exist in developing countries regarding the implementation of the Framework Convention on Climate Change.<sup>39</sup>

The efficacy of capacity building interventions under the UNFCCC and allied bodies and frameworks can be assessed within the lens of bodies such as Subsidiary Body for Implementation (SBI), Adaptation Committee (AC), Least Developed Countries Expert Group (LEG), Paris Committee on Capacity Building (PCCB) and the Clean Development Mechanism (CDM) Executive Board. These bodies implement activities such as enhancing skills and knowledge, strengthening institutional capacity, promoting inclusivity and participation, fostering collaboration and knowledge sharing and monitoring and evaluation.<sup>40</sup> However, challenges still abound in ensuring coherence and coordination, addressing emerging needs and challenges, strengthening and sustainability, improving access to finance and bridging the gap between theory and practice.<sup>41</sup>

**The ICJ Advisory:** The international community's obligation on climate change has been supported by the recently delivered International Court of Justice Advisory Opinion on Climate Change, issued on July 23, 2025. The advisory offers a chance to create a unified understanding of states' climate obligations, transcending specific treaties and regional arrangements and cutting across the entire

spectrum of international law. It underscores that the consequences of climate change are severe and far-reaching, affecting both natural ecosystems and human populations, making climate change an urgent and existential threat to humanity. The Court affirms that climate treaties neither displace nor exhaust states' wider obligations under general international law and other treaty laws. It considers the entire corpus of international law to form part of the most directly relevant applicable law which include but not limited to: Charter of the United Nations; the three climate change treaties (UNFCCC, Kyoto Protocol and Paris Agreement); the UN Convention on the Law of the Sea (UNCLOS); international human rights law; the customary international law relating to climate change, as well as other environmental treaties, including the Ozone Layer Convention, the Montreal Protocol, the Biodiversity Convention and the Desertification Convention. Other applicable principles include the principles of sustainable development, common but differentiated responsibility and respective capabilities, equity, intergenerational equity and the precautionary approach as guiding principles, which are also part of the applicable law. The Court held that UNFCCC, the Kyoto Protocol and the Paris Agreement are complementary and mutually reinforcing. That states' discretion in formulating their Nationally Determined Contributions (NDCs) is not unlimited. In setting NDCs, parties must exercise due diligence so that, collectively, their commitments can limit warming to 1.50 °C above pre-industrial levels and stabilize greenhouse-gas concentrations at a level that prevents dangerous human-induced interference with the climate system. The ICJ recognizes the interdependence between human rights and the protection of the environment. It affirms that every person has a human right to a clean, healthy and sustainable environment, which is a prerequisite for enjoying foundational rights such as life, health, food, water and housing. States cannot meet their existing human-rights obligations unless they also protect the environment. The court treats the right as firmly grounded in international, regional and national law, pointing to its widespread recognition by United Nations resolutions, human-rights treaties and more than 100 constitutions. The Court further determined that any breach of obligations related to loss and damage from climate change must be assessed under the established customary international law rules on state responsibility. Under the Paris Agreement, parties incur binding obligations to provide financial assistance, technology transfer and capacity-building to vulnerable states.

While lacking direct enforceability under Article 59 of the Courts' Statute, they are among the most persuasive sources of international legal interpretation. Historically, they have often filtered state behaviours, driven legislative change, and guided national courts because their reasoning clarifies existing international law and helps crystallize emerging customs. The ICJ confirms that states do have legal duties-including a due diligence obligation to regulate private actors to prevent, mitigate, and remedy climate harm. These duties flow from treaty obligations (e.g., UNFCCC, Paris Agreement) and customary international law, including a right to a clean, healthy and sustainable environment.<sup>42</sup>

## **Regional Conventions**

On the continent, the African Union's Agenda for 2063 promises to promote climate change action through its climate change programme of action.<sup>43</sup> The African Convention on the Conservation of Nature and Natural Resources focuses on protecting and sustainably managing Africa's natural resources. It emphasizes the importance of conserving natural resources while recognizing their vital role in the continent's heritage and the well-being of its people.<sup>44</sup> Similarly, the Protocols on Environmental Management for Sustainable Development integrate environmental considerations

into all aspects of development planning and decision-making within the African Union member states. It calls for precaution in minimizing damage and ensuring the equitable use of natural resources.<sup>45</sup> However, despite having no provision on capacity building implementation of the two AU Protocol and Conventions have faced challenges, including limited attention due to multiplicity of treaties ( The Conventions lacks a COP while Maputo received very low numbers of ratifications by Parties), resource constraints, resources and weak monitoring and enforcement mechanisms, balancing conservation with development, increasing land degradation, weak community involvement of local communities and lack of focus on climate change and related in[acts on natural resources and biodiversity.<sup>46</sup>

To strengthen sustainable development in Africa, the African Ministers of Conference on the Environment (AMCEN) in Arusha adopted an education and training action plan with four result areas: formal education; vocational education and training; lifelong learning, youth development and community education and capacity building, networking and social learning. Under Strategic Area 4, the Action plan prioritizes media, social media and social learning and e-learning capacity development, network building and support, mentorship and leadership program, donor and research organization involvement, and capacity to build capacity: environmental education, innovation, infrastructure and leadership.<sup>47</sup>

Regionally, the East African Community has formulated several policies and frameworks, such as the climate change policy and strategy, and action plans, among others, that guide partner states and other actors in the preparation and execution of shared actions to fight climate change. The Treaty for the Establishment of the East African Community seeks to strengthen and consolidate cooperation that would lead to equitable economic development within the Partner States and which would, in turn, raise the standard of living and improve the quality of life of their populations.<sup>48</sup> It provides for harmonization of policies and cooperation in human resources development and information exchange, as well as climate analysis and seasonal forecasting. It further provides for co-operation in environment and natural resources management through the development and promotion of capacity-building programmes for the sustainable management of natural resources. The EAC Treaty has significantly impacted climate actions as it provides a framework for regional cooperation on environmental issues, including climate change, by integrating climate approaches in environmental and natural resources management, including trans-boundary ecosystem management, which then allows its members to collectively address the challenges of climate change through policy development, regional cooperation and participation in international agreements.<sup>49</sup> The EAC Protocol on Environment recognizes the role of capacity building through development and harmonization of laws, policies and strategies, promoting the development and implementation of education, training programmes, including strengthening of national human and institutional capacities on climate change.<sup>50</sup> However, while the Protocol provides a framework for cooperation, it lacks effective implementation with weak political will, inadequate resources and ineffective enforcement mechanisms.<sup>51</sup>

The Climate Change policy seeks to promote capacity-building efforts through *inter alia* education, training, research, technology development and transfer, information and knowledge management.<sup>52</sup> The Lake Victoria Basin Commission has a roadmap for addressing and adapting to

climate change impacts. It provides strengthening the institutional and coordination capacity of the Lake Victoria basin Commission and Partner states by strengthening the legal and operational framework, strengthening human resources capacity, and enhancing the coordination capacity of focal point institutions from partner states.<sup>53</sup>

## **National Legislation and Regulatory Frameworks**

Law-making in Kenya must be cognizant of some basic principles and considerations. First, there is a need to appreciate the Constitution as the supreme law of the Republic, which binds all persons and state organs at both levels of government. Every person is obligated to respect, uphold and defend the Constitution. Other principles and considerations in law-making include international treaties and conventions ratified by the State, territorial jurisdiction, conflict of law, national law and policy, policy parameters, statutory harmony, ethical and other concerns, technical soundness or practicality concerns, public participation and cost-benefit analysis as part of the Regulatory Impact Assessment (RIA). Actors in the legislative process at the national level include the National Executive, the Cabinet Secretaries, the Parliament (National Assembly and Senate), Political Parties, the Public, the Attorney General and other Constitutional bodies, and the Civil Society and other non-state actors.

As a result of its rich legislative history, Kenya has an enabling policy and legal framework that guides its response to climate change. The Constitution of Kenya created a devolved system of governance made up of the National Government and 47 county Governments.<sup>54</sup> The Climate Change Act of 2016 is the principal legislation guiding Kenya's climate change response. The following section details some of the legal and policy frameworks guiding climate change response in Kenya.

### **The Constitution of Kenya**

Environmental governance in Kenya is founded on the Constitution. The Bill of Rights provides transparency and accountability by granting citizens the right to access information, which is crucial to public participation and the ability to contribute to law-making.<sup>55</sup> The Constitution provide for access information and for every person to have the right to a clean and healthy environment, which includes the right to (1) have the environment protected for the benefit of present and future generations through legislation and the measures, particularly those contemplated in Article 42 and Article 69 and (2) have obligations relating to the environment fulfilled under Article 70.<sup>56</sup>

The supreme law mandates the state to encourage public participation in the management, protection and conservation of the environment. It further states:

*"Every person has a duty to cooperate with State organs and other persons to protect and conserve the environment and ensure ecologically sustainable development and use of natural resources."<sup>57</sup>*

It is interesting to note that the Constitution provides for redress to a court of law in case the rights in Article 42 are not protected, and the person does not have to show personal injury or loss.<sup>58</sup> It mandates Parliament to enact legislation to give full effect to the provisions on the environment<sup>59</sup> and to facilitate public participation and involvement in the legislative and other business of Parliament and its committees.<sup>60</sup> For example, the Court in *Kenya Association of Manufactures & 2*

*others V Cabinet Secretary- Ministry of Environment and Natural Resources & 3 others* [2017] eKLR stated that in determining environmental disputes at any stage, Kenyan courts are obliged to be guided by and promote the constitutional framework on the environment as spelt out in Articles 42, 69 and 70 of the Constitution and the EMCA.<sup>61</sup>

The Constitution identifies public participation as a binding national value guiding the implementation of any public policy or decision, or in the making or implementation of any law<sup>62</sup> as reflected in the Tribunal Appeal No. Net 196 of 2016 (Judgement, 2019), where the court ruled that the NEMA violated public participation requirements in issuing a license to construct a coal-fired power plant and that the Environmental Impact Assessment did not adequately consider climate change and other factors.<sup>63</sup> An almost similar case is Judicial Review No. 11 of 2017 in a matter of an application by the Green Belt Movement, Pan African Climate Justice Alliance and Transparency International Kenya on the appointment of the members of the Climate Change Council in line with sections of the Climate Change Act, No. 11 of 2016. The Court ruled that the procedure of nomination, approval and appointment of members of the National Climate Change Council was violated due to a lack of public participation as envisaged in the Constitution.<sup>64</sup> This ruling gives the national government the basis to foster participatory partnerships with itself, and county governments, public entities, the private sector, civil society, development partners, media and international agencies.<sup>65</sup> It also gives the Public Service Commission the power to develop human resources in the public service.<sup>66</sup>

At the same time, under the distribution of functions between the national and county governments, the constitution mandates the National Government to provide capacity-building and technical assistance to the counties<sup>67</sup> as captured in Petition No. 25 of 2019, whereby the Court ruled that while the two levels of government must work in consultation and cooperation with each other, the Senators cannot oversight the County governments at the county level as the rule is reserved for the County Assembly.<sup>68</sup>

The Constitution mandates the national government to prepare and implement programmes for the continuing education and training of judges and judicial officers.<sup>69</sup> The law further provides for the cooperation between national and county governments and that governments at either level shall (b) assist, support and consult and, as appropriate, implement the legislation of the other level of government; (c) liaise with government at the other level to exchange information, coordinate policies and administration and enhance capacity.<sup>70</sup> There are also provisions for the government to 'facilitate public participation and involvement in the legislative and other business of the assembly and its committees'.<sup>71</sup>

Under the values and principles of public service, the constitution provides for the involvement of the people in the process of policymaking.<sup>72</sup> It mandates the Public Service Commission to develop human resources in the public service.<sup>73</sup>

### **The Environmental Management and Co-ordination Act, Cap 387 of 1999**

This is an Act of Parliament that establishes the legal and institutional framework for the management of the environment.<sup>74</sup> It has been the foundation for entitlement to a clean and healthy environment by declaring that<sup>75</sup> (1) 'Everyone in Kenya is entitled to a clean and healthy environment

and must safeguard and enhance the environment. 'In exercising the jurisdiction conferred upon it, the national and county governments are guided by, among others, *the principle of public participation in the development of policies, plans and processes for the management of the environment*.

The Act establishes NEMA, which is the UNFCCC-designated authority responsible for (m) undertaking programmes, in cooperation with relevant lead agencies, intended to enhance environmental education and public awareness.<sup>76</sup> The Authority has done well in rendering advice and technical support, where possible, to entities engaged in natural resources management and environmental protection to enable them to carry out their responsibilities satisfactorily.<sup>77</sup> The role of NEMA is understood in the case of *Republic v National Environmental Management Authority Ex-Parte Sam Odera and 3 Others*<sup>78</sup> where the Court faulted the Authority for failing to adopt the precautionary principle in its decision-making and held:

*"By overlooking the necessary statutory procedures and Regulations, NEMA has, in the view of the Court, thrown caution to the wind, and in turn, justice demands that they undertake the exercise again with a cautionary mind.*

*In view of this Court, NEMA/respondent failed to demonstrate that it had discharged its mandate or legal obligations under the Act and the regulations as a decision maker. It only has to prove that it did take all material considerations into account when making its decision. Failure to do so would justify a challenge under the Act and would directly invite judicial review of the decisions.<sup>79</sup>"*

The Act also establishes the National Environment Trust Fund, which has been facilitating research and capacity-building activities for various actors, both in the public and private sectors.<sup>80</sup> Additionally, it provides for the National Environmental Action Plan that recommends methods for building national awareness through environmental education on the importance of sustainable use of the environment and natural resources for national and county development.<sup>81</sup> Lastly, the Act has empowered NEMA to identify other appropriate measures necessary for the national implementation of such treaty, convention or agreement.<sup>82</sup>

Even though all these institutions have been created and are operational, the study records lack harmonization and coordination of roles and responsibilities, which then affect institutional accountability and enforcement of existing laws. This weakness is attributed to the EMCA not being explicit about how its capacity-building provision will be implemented, as it continues to face hurdles such as a lack of meaningful participation, power imbalances and logistical hurdles. On a positive note, EMCA provides for public participation, which is central to capacity for climate action as it ensures that climate policies are responsive to local needs, foster ownership and commitment, as well as promote a more inclusive and sustainable approach. Community involvement in decision-making processes can help tailor capacity building towards specific challenges and leverage local knowledge and resources for locally-led climate initiatives.<sup>83</sup> Further, the Act also mandates public involvement in Environmental Impact Assessment and other processes, promoting transparency and accountability as well as identifying potential environmental risks, mitigating negative impacts and fostering acceptance of climate change-based projects.<sup>84</sup>

## **The Climate Change Act No. 11 of 2016**

This is an Act of Parliament that provides for a regulatory framework for an enhanced response to climate change. Since its enactment, it has (a) provided mechanisms and measures to achieve low-carbon climate development among other purposes; (b) offered a legal basis for the development, management, implementation and regulation of mechanisms to enhance climate change resilience and low-carbon development for sustainable development in Kenya and (c) facilitates capacity development for public participation in climate change responses and provides for mechanisms which facilitate research and development, training and capacity building.<sup>85</sup> The law puts responsibility on the Cabinet Secretary for the environment and climate change to formulate a national public education and awareness strategy on climate change and an implementation programme.<sup>86</sup> Under this Act, Environment & Land Petition E001 of 2023 was heard and a ruling was issued that the Petitioner and the people of Kenya are entitled to participate in making, formulating, developing and legislating laws, rules, regulations and guidelines.<sup>87</sup>

The Act establishes the Climate Change Council, whose mandate is to provide policy direction on capacity building on climate change.<sup>88</sup> The Council's functions include, but are not limited to, providing policy direction on research and training on climate change, including collation and dissemination of information relating to climate change to the national and county governments, the public and other stakeholders. Unfortunately, the constitution of the Climate Change Council has faced legal hurdles as certain stakeholders and interest groups sought legal redress in the High Court, which led to the suspension of the sittings of the Council. Even though the case was dismissed, while giving judgment, the Judge relied on the *Resley vs The City Council of Nairobi* [2006]2 EA 311 and made the following observations:

*"In this case, there is an apparent disregard of statutory provisions by the Respondent, which are fundamental. The Parliament has conferred powers on public authorities in Kenya and has laid a framework on how those powers are to be exercised, and where that framework is clear, there is an obligation on the public authority to strictly comply with it to render its decision valid. The purpose of the court is to ensure that the decision-making process is done fairly and firstly to all the parties, and blatant breaches of statutory provisions cannot be termed as mere technicalities by the Respondent."*<sup>89</sup>

With the powers given under this Act, the Climate Change Directorate has been influential in facilitating research and development, innovation, training and capacity building related to climate change. serving as the national knowledge and information management centre for collating, verifying, refining, and disseminating knowledge and information on climate change and coordinating the implementation of the intergenerational climate change education, consultation and learning at the national and county government levels.<sup>90</sup> The Directorate also has a statutory function to provide, on instruction of the Cabinet Secretary, technical assistance based on needs identified by county governments.<sup>91</sup> The Directorate has been coordinating the development and reporting on the National Climate Change Action Plan since 2015. The NCCAP has helped with (g) developing a structure for public awareness and engagement in climate change response and disaster reduction, (i) creating mechanisms for climate change knowledge management and access to information and (k) establishing approaches to climate change research, training and technology transfer.<sup>92</sup> Section 15 of the Act provides for every state department to designate a unit with adequate staff and financial

resources and appoint a senior officer as head of the unit to coordinate the mainstreaming of the climate change action plan and other climate change statutory functions and mandates into sectoral strategies for implementation.<sup>93</sup>

Section 21 of the Climate Change Act has helped involve counties in climate change governance by integrating and mainstreaming climate change actions, interventions and duties into their County Integrated Development Plans and Sectoral Plans.<sup>94</sup> The Kenya Institute of Curriculum Development has played its role under this law by integrating climate change into various disciplines and subjects of the national education curricula at all levels, including integrating climate change into university and tertiary institutions' curricula.<sup>95</sup> The implementation of the Act has also yielded other innovative partnerships set to deliver a digital climate curriculum that seeks to empower Kenyan learners and educators to become climate leaders.<sup>96</sup>

Section 24 of the Climate Change Act has promoted public participation where public entities, at each level of government, are reporting their successes with (1) public awareness and (2) public consultations, in a manner that ensures the public contribution makes an impact on the threshold of decision-making.<sup>97</sup> The strength of this provision is reflected in the *Environmental Land Court Petition E001007 of 2022*, where the Court allowed an application to have a three-judge bench to hear their case on the failure, neglect and or refusal by several government officials to discharge their obligations under the Climate Change Act.<sup>98</sup>

The Climate Change Fund, established under the Act, has supported Kenya's ambition towards climate action through (b) the provision of grants and loans to businesses, industry, civil society, academia and other stakeholders for the development of innovative actions that benefit climate change responses in Kenya and (d) provision of technical assistance to county governments.<sup>99</sup> So far, Kenya is spending around USD 1.53 billion annually on climate change-related expenditures against a financing gap of USD 40 billion for the next ten years. Luckily, the existence of the Act has opened doors for partnerships for new financial flows with GCF and European Investment Bank collaborating with the Central Bank of Kenya to improve access to climate finance through Public-Private Partnerships.

Despite all the positives in the Act, the lack of clear pathways on how capacity-building provisions will be implemented leaves a lot to be fixed by a harmonized and integrated framework on capacity building for climate change law.<sup>100</sup> Some of the prominent challenges facing its implementation include a lack of coordination due to the absence of the National Climate Change Council, jurisdictional overlap between national and county governments, weak legal frameworks due to inadequate or missing enforcement mechanisms, and a lack of transparency.<sup>101</sup> In terms of capacity building, the implementation of the Act suffers from limited technical expertise, data scarcity to inform decision-making<sup>102</sup>, lack of public awareness and engagement, concerns with market-based mechanisms, lack of transparency and participation and trade-offs with development priorities.<sup>103</sup>

## **The Water Act, 2016**

The Act provides for the regulation of the ownership, management and use of water resources. It establishes the Water Resources Authority, which has been undertaking capacity development

activities, enforcing regulations, formulating and enforcing standards, providing information and advice on policies and strategies, and coordinating with other relevant bodies. The Act created the Water Storage Authority, which has been delivering on its mandate in developing water works, collecting and providing data and information, undertaking strategic water emergency interventions and enforcing water harvesting strategies. It also created the National Water Services Strategy, which contains standards for the progressive realization of the right to water and a resource mobilization strategy to guide the implementation of resilient water resource management plans. The Act has seen improvement in the provision of technical services and capacity building to county governments and water service providers.<sup>104</sup>

The Water Act is very silent on capacity building for climate action, other than providing for the training of staff on normal routines. This gap is a risk to mainstreaming climate change into the water sector, which happens to be one of the most at-risk sectors from climate change and related impacts.

### **The Forest Conservation and Management Act No. 34 of 2016**

The Act creates the Kenya Forest Service with a mandate to prepare and implement management plans, assisting county governments to build capacity and promote forestry education and training, as well as ensuring community participation in forest governance.<sup>105</sup> The Act has enabled county governments to domesticate and implement national policies through county policies and regulations.<sup>106</sup> The Act created a Trust Fund which supports nurturing and promoting innovations and best practices in climate-smart forest conservation and development, including apprenticeships and vocational training.<sup>107</sup> The Kenya Forestry Research Institute, established through the Act, has been conducting expert training courses for government and researchers nationally and within the region.

Even though the Act provides for the establishment of training and research institutions, it does not mention climate change as a key area for consideration. Its silence on capacity building for climate action calls for increased efforts to ensure that climate change contents are included in the forestry-related training curriculum.

### **The Energy Act, CAP 314 of 2019**

The National Energy Act responds to previous calls to consolidate all laws on energy. It seeks to promote renewable energy exploration, recovery, and commercial utilization of geothermal energy, and regulate midstream petroleum and coal activities.<sup>108</sup> It established the Energy and Petroleum Regulatory Authority, which has been helpful in the development and implementation of national energy efficiency and conservation plans, certification of energy managers and auditors, and ensuring enforcement and compliance with the national values and principles. The Authority has managed to develop guidelines on applicable treaties, conventions and protocols affecting the energy sector.<sup>109</sup> The Act has provided a good ground for the development of appropriate local capacity for the manufacture, installation, maintenance and operation of basic renewable technologies.<sup>110</sup> An Inter-Ministerial Renewable Energy Resources Advisory Committee, created by the Act, has been involved in advising the County Governments on matters relating to renewable energy resources.<sup>111</sup>

The existence of the Energy Act has provided impetus towards energy justice in Kenya, whereby public participation was pronounced in the case of Mui Coal Basin Local Community & 15 others v Permanent Secretary, Ministry of Energy & 17 others, where the Constitutional Court observed that:

*"Public participation is a national value that is an expression of the sovereignty of the people as articulated under Article 1 of the Constitution. Article 10 makes public participation a national value as a form of expression of that sovereignty..."*

### **Sustainable Waste Management Act No. 31 of 2022**

The Act provides for the establishment of a legal and institutional framework for the sustainable management of waste towards the realization of the constitutional provision on the right to a clean and healthy environment.<sup>112</sup> Since its enactment, the waste sector has experienced a slow improvement in coordination and oversight of waste management, as there is mild clarity of roles, composition, and functions of the various stakeholders.<sup>113</sup>

The Act has enabled increased collaboration between public entities and the private sector, with increased access to information and integration of waste management into the school curriculum.<sup>114</sup> The partnership between NEMA and county governments, as well as the coordination of adherence to international obligations with regard to waste management.<sup>115</sup> It has given county governments the impetus to enact county waste management legislations that conform with national legislation.<sup>116</sup> The strength of this Act was evidenced in the Environment and Land Petition 19 of 2020, whereby the Petitioners claimed that the respondents' actions of transporting to, dumping and or disposing of refuse and or waste on an unlicensed and un gazetted dumpsite on a public road were considered unlawful. The court declared that the petitioner's right to a clean and healthy environment, as guaranteed by Article 42 of the Constitution, has been violated by the acts and or omissions of the Respondents. The Court issued prohibitory and mandatory injunctions, with environmental restoration orders issued against the respondents.<sup>117</sup> A similar case, Petition 50 of 2012, concerning the operation of a dumpsite in Naivasha, where Petitioners argued that the continued operation of the dumpsite violates their right to a clean and healthy environment. The order was given to NEMA to ensure that they proceed to ensure compliance with the orders.<sup>118</sup>

The Acts' silence on capacity building and how waste management is linked to climate action confirms other studies on the prospects of entrenching vertical environmental integration (VEI), which is undermined by inadequate and incongruent intergovernmental coordination mechanisms and strategies, as well as a lack of clarity in the distribution of regulatory responsibilities between the national and county governments.<sup>119</sup>

### **The County Governments Act No. 17 of 2012**

The Act gives effect to Chapter 11 of the Constitution and provides for public participation in the conduct of the activities of the County assembly as required under Article 196 of the Constitution.<sup>120</sup> The Act has been instrumental in promoting capacity building within counties by providing a legal framework for establishing County Service Boards, which are tasked with human resources management, including staff capacity building, as well as facilitating the development of their staff to effectively perform their duties. It puts emphasis on comprehensive human resource functions, such as recruitment, training, performance management and other related activities which are

geared towards building a competent and efficient county workforce.<sup>121</sup> The Act also provides for intergovernmental relations, while recognizing the need for coordination and support between national and county governments in capacity building and service delivery. Section 3 (f) of the Act provides for the mechanism for capacity building requirements of the national government and the county governments, and makes proposals for the gaps to be addressed. The Act's provision on county planning, resource allocation and intergovernmental relations offers a strong foundation for integrating climate change considerations into county development strategies.

As a result of this Act, the Kisumu County Assembly has been providing oversight to the county executive<sup>122</sup> and extends professional knowledge, experience and specialized knowledge on climate change and any issue for discussion to relevant assembly committees.<sup>123</sup> The Assembly exercises its legislative powers through climate change bills, which, when passed, are assented to by the governor, who is responsible for, among others, considering, approving and assenting to bills passed by the county assembly.<sup>124</sup> In this regard, the Kisumu County Public Service Board is responsible for institutions, systems and mechanisms for human resource development in a manner that best enhances service delivery<sup>125</sup>. The Board also informs and educates county public officers and the public about the values and principles of devolution.<sup>126</sup>

The Act<sup>127</sup> has enhanced citizen participation in the county which has resulted in (a) timely access to information, data, documents, and other information relevant or related to policy formation and implementation, (b) reasonable access to the process of formulating and implementing policies, laws, and regulations, (c) protection and promotion of the interest and rights of minorities, groups and communities and their access to relevant information (d) reasonable balance in the roles and obligations of county governments and non-actors in decision-making processes (e) promotion of public-private partnerships, such as joint committees, technical teams, and citizen commissions, and (f) recognition and promotion of the reciprocal roles of non-state actors' participation and governmental facilitation and oversight.

The county's public communication and access to information are provided in the Act and have contributed to the creation of awareness on devolution and governance, b) undertaking advocacy on core development issues and c) promotion of freedom of the media, among others.<sup>128</sup>

However, the Act is not explicit about capacity building provisions and how this can be achieved at the county level. This is a gap which can only be addressed by an integrated capacity-building framework that enables national and county governments to train and build skills for climate change law at both levels.

### **County Government Legislation**

County governments get their legislative mandates from the Constitution of Kenya, the County Governments Act and the Climate Change Act. The County Assemblies are required to make laws in the exercise of their legislative authority as provided for in the Constitution.<sup>129</sup> The County Assemblies make laws and exercise their power through Bills passed by the Assemblies and assented to by the Governors.

There are several actors in the legislative process at the county level. These include the County Executive, members of the County Executive Committee, the County Attorney, the County Assembly, the Public and the Civil and other non-state actors.<sup>130</sup>

In this regard, the Climate Change Act recognizes Counties as co-implementers of climate change action at the local level to address the needs of local communities.<sup>131</sup> From the study, most counties have already formulated climate-related legislation and laws, and established institutional frameworks such as departments, directorates and committees. As of 2023, all 47 counties in Kenya have climate change policies which establish County Climate Change Funds and climate change institutions.

The following section highlights Kisumu County's Climate change legislation.

### **The Kisumu County Climate Change Act No. 7 of 2020**

The Act is an important addition to the climate change law and policy landscape at the national level.<sup>132</sup> Among its provisions is the creation of a Climate Change Directorate that coordinates and manages climate action and related responsibilities at the county level.<sup>133</sup> It has established financial instruments to fund and identify measures to build resilience and enable local climate action.<sup>134</sup> The Act establishes the Climate Change Council, which is gender smart and has undertaken responsibilities including identifying obstacles and making proposals to address local climate challenges and ensure an enabling environment through laws, policies and actions.<sup>135</sup> The created County and Ward Climate Change Planning Committees oversee sub-county and ward-level planning and identify county-wide needs and vulnerabilities.<sup>136</sup>

The Act gives roles and responsibilities to county departments and platforms such as the Climate Change Planning committees but is not explicit on which institutions are responsible for capacity building and even how capacity-building initiatives can be delivered.

### **The Kisumu County Climate Finance Regulations, 2025**

The Regulation was enacted to provide funding for climate change activities identified in the County Climate Change Action Plan.<sup>137</sup> The Fund commits 2% of the county's annual budget to climate change issues,<sup>138</sup> which goes towards funding resilience assessments, response projects, research, knowledge management, public education, sensitization, awareness, capacity building and monitoring, evaluation, reporting and learning.<sup>139</sup> The Climate Change Council coordinates capacity development for key actors to increase their capacity to develop bankable proposals on climate change.<sup>140</sup> The Regulations are not yet operational. A meeting was held between the County Assembly's Sectoral Committee on Water, Environment, Climate Change, and Natural Resources, the Executive Department and stakeholders to unlock the stalemate and to deliberate on its operationalization.

In addition to the above legislation, Kenya has enacted supportive strategies, policies and plans. These are highlighted below:

### **The National Climate Change Response Strategy (NCCRS) of 2010**

The Strategy was developed in 2010 to guide the country in ensuring that adaptation and mitigation measures are integrated into all government planning, budgeting and development.<sup>141</sup> Since then,

it has supported with increased understanding of the global climate change negotiations process, international agreements, policies and processes and most importantly, the explored positions Kenya needs to take to maximize beneficial outcomes of these negotiations and actions to take on climate change and its impacts locally.<sup>142</sup> Its existence has seen the country make important moves related to capacity-building, which include,<sup>143</sup>

- Capacity building and support for the modernization and development of the Kenya Meteorological Service.
- Strengthening planning and capacity development initiatives to reduce risk, prepare and recover from disasters, including strengthening institutions in charge of Disaster Risk Reduction (DRR) to cope with climate change disasters.
- Capacity building in using geo-referenced demographic and socioeconomic data, in addition to setting up a GHG reduction policy and tools.
- Strengthening NEMA as the Designated National Authority (DNA), including additional personnel.
- Building the capacity of local communities to enable them to adapt to the adverse impacts of climate change.

In summary, the Strategy is one of the existing frameworks which is strong on capacity building and its role in enabling climate action.

### **The Kenya Vision 2030**

Through this Vision, Kenya has created a globally competitive and adaptive human resource base that meets the requirements of a rapidly industrializing economy through lifelong training and education.<sup>144</sup> Through it, Kenya has continued to provide globally competitive quality education, training and research to its citizens for development and enhanced individual well-being. The vision is being achieved through a low-carbon, climate-resilient development pathway. Under the social pillar, Kenya is on the path towards a clean, secure and sustainable environment by 2030, increasing its forest cover to 10%, improving the capacity for adaptation to global climatic change, and harmonizing environmental-related laws for better environment planning and governance.<sup>145</sup>

### **The National Climate Change Action Plan 2023-2027**

NCCAP views capacity building as an enabler of information and knowledge management. It proposes that capacity development should be participatory, cross-cutting and gender-responsive.<sup>146</sup> Since its first version in 2013, the Action Plan has helped Kenya to safeguard children and youth rights from the impacts of climate change, including through active and continuous involvement in climate action and related policy and decision-making. Its ten-point actions towards youth and children include (1) developing an engagement strategy, (2) enhancing engagement in policy processes, (3) establishing and operationalizing county innovation hubs, (4) building capacity on technologies and innovations, climate change and risk management education and practice, and climate action, (5) developing a youth platform for accessing climate finance information and initiatives, (6) empowering youth in climate change advocacy and financing, (7) building capacity of youth on development of bankable climate change project proposals, and (8) increasing climate finance for building resilience of child critical services.

The 2023-2027 Action Plan's strength towards priority enabling actions on capacity development and knowledge management are envisaged to help with (1) establishing community information centres in counties (ii) strengthening the capacity of national government institutions which will deliver on the goals of the Climate Change Act, NDC and NAP, (iii) training of staff of ministries, training media houses and providing support to National Climate Change Council and Climate Change Directorate for its coordination role. Other actions include (iv) building the capacity of county governments in engendering climate change coordination units, setting up functional climate change units, coordination of climate change programmes across counties and monitoring and reporting on climate change programmes (v) building the capacity of stakeholders such as private sector, vulnerable groups and private sector (vi) developing and operationalize a public awareness and engagement strategy that highlights outreach to all stakeholders (vii) enhancing the capacity to mobilize and manage climate finance including operationalizations of the Climate Change Fund.

Despite the fund recognition and providing for capacity building, there is no clarity on which institution is responsible and where the funds will come from. These grey areas compromise the successful implementation of the whole Action Plan.

### **Kenya Nationally Determined Contribution (NDC)2023-2027**

As a global framework, an NDC is helping Kenya to raise its GHG emissions reduction ambitions in line with the Paris Agreement commitments. The new NDC presents Kenya's ambitious mitigation contribution by abating its GHG emissions by 32% by 2030 relative to the BAU scenario of 143 MtCO<sub>2</sub>eq and in line with its sustainable development agenda.<sup>147</sup> An indictment of this framework at the national level was recently witnessed when the Dutch Supreme Court agreed with the lower court's order requiring the Dutch Government to reduce greenhouse gas (GHG) emissions by a minimum of 25% by 2020 compared to 1990 levels. The court held that the government, under the UNFCCC and the Dutch State's legal duties to protect the life and well-being of citizens in the Netherlands.<sup>148</sup>

Kenya's total cost of adaptation actions is estimated at USD 43,927 Million by 2030 under the NDC, subject to national circumstances and the ability to mobilize domestic resources to cater for 10% of the adaptation cost while 90% of the adaptation interventions will require international support in the form of finance, technology development and transfer, and capacity building. Activities under adaptation, with direct effect on capacity building include: (a) enhancing the adaptive capacity and climate resilience across all the sectors; (b) enhancing generation, packaging and widespread uptake and use of climate information in decision-making and planning, (c) institutional strengthening of the CCD, the Climate Change Units and related institutions across sectors and counties and, (d) strengthening tools for adaptation, monitoring, evaluation and learning.

Finally, the cost of mitigation in the NDC for the period 2020 to 2030 is estimated at USD 17,725 million, subject to national circumstances- the country intends to bear 21% (3,725 million USD) of the cost from domestic sources, while subjecting the balance of USD 14,000 million (79%) to international support. The government intends to mobilize domestic resources to meet 13% of the estimated USD 62 billion NDC implementation costs.<sup>149</sup>

With all these ambitious targets and financial needs to achieve the NDC, it is not very clear who will lead in the provision of technical and financial support that Kenya so much needs. This leaves the entire document in the hands of well-wishers and non-committal UNFCCC parties who might have different priorities.

### **The Kisumu County Integrated Climate Change Action Plan (KCICCAP) 2022-2027**

The Action Plan presents detailed actions that the County Government of Kisumu will undertake to address climate change adaptation, mitigation and access to sustainable energy.<sup>150</sup> In meeting its objectives, the Plan is helping the County Government to develop action points and align climate actions to the county CIDP and the NCCAP. It has contributed to improved participation of all stakeholders, including the private sector, civil society, and the vulnerable in society, including youths, women, older members of society and persons living with disabilities. The Plan's implementation has experienced a surge in support for the Climate Change Planning Committees, which have initiated training and capacity-building interventions for communities on Participatory Climate Risk Assessment (PCRA).

In conclusion, the plan is broad enough and gives prominence to capacity building, but it is not very direct on the roles and responsibilities and how these interventions can be funded in the short and long term.

### **Global Landscape of Systemic Challenges Affecting Implementation of Climate Change Law**

First, implications arising from the scope, sternness, and rapidity of climate change<sup>151</sup> call for countries to deliver cost-effective, deliberate, and just capacity-building across sectors. Studies such as those done by *Parry, J-E.*, point to inadequate capacity as one of the reasons inhibiting countries from undertaking competently designed and locally relevant climate adaptation and mitigation actions.<sup>152</sup> He recommends capacity building that incorporates training, education, technology transfer and capacity assessments within institutions.<sup>153</sup>

Secondly, the proliferation of MEAs, fragmentation of institutions, profligate advancement of agreements, and geographical spread of MEA institutions have placed environmental law into disorder.<sup>154</sup> The discrepancies in rules and the overwhelming pace of MEA activities are draining developing countries.<sup>155</sup> Due to scarce resources, competing agreements, and weak institutions, developing countries like Kenya cannot exploit their synergies and achieve their full potential due capacity capacity-related problems such as treaty congestion, national institutional demands, duplication of mandates, conflicting global agenda, and weak science-policy interface.<sup>156</sup>

Thirdly, the lack of cooperation and coordination among local organizations has always been a drawback to the goal of environmental governance due to its cross-cutting nature.<sup>157</sup> The instantaneous advancement in the number of international actors, like the private sector players in international law-making platforms, has made synchronization of MEAs more difficult. For example, the conception of the Adaptation Fund under the Green Climate Fund, as a core funding instrument for several MEA secretariats, has led to fractious competition and inter-agency politics whose impacts are experienced in the form of distrust, uneven resource distribution, and overlapping mandates.<sup>158</sup>

This has created an environment that is not as conducive as hitherto envisaged during negotiations. This challenge is no longer mentioned as an isolated issue within environmental institutions but has turned out to be a capacity-related problem in law-making and implementation of action plans.

There have been concerns that the many MEAs have not been accompanied by corresponding enthusiasm when it comes to domestication and implementation at the national level.<sup>159</sup> There is little evidence that these agreements have yielded a commendable change in how the environment has improved and improved livelihoods for environmentally resource-reliant communities.<sup>160</sup>

Abbot, C, et al argue that there is a need to maintain and improve environmental quality and also to sanctify and respect governance instruments in terms of implementation, compliance, and enforcement.<sup>161</sup> This problem is made apparent when laws are made but are not complied with due to weak execution instruments, and law implementers are not capacitated at the local level.<sup>162</sup> There is a need for negotiators and policymakers to appreciate that reaching agreements and enacting laws may bring rewards and recognition to them, but these agreements and laws can only be successful at the national level with the political goodwill and necessary capacities.<sup>163</sup> Notes should be taken to ensure that no law is fated to fail as a result of missing local instruments and the failure of policymakers to shift attention from negotiations to actualization. This is where capacity building comes in to help identify how international legal regimes can fit within the overall country's priorities.<sup>164</sup> Capacity-building should be appropriate for relevant actors and timely.<sup>165</sup> There is a need to determine which capacities are needed through assessment with participation from those who need capacity enhancement.<sup>166</sup>

Fourth, inefficient use of resources is one major challenge to capacity building for climate change law.<sup>167</sup> According to IUCN, there are concerns that the money available for capacity building is not enough, as goals keep changing, and funds are unpredictable and unreliable, with the available resources being stretched too thinly across fragmented systems.<sup>168</sup> There is limited data on the exact value, nature, and impact of support offered under the UNFCCC to developing countries towards climate action.<sup>169</sup> Again, available reports indicate that the resources given to developing countries have accountability concerns as their transparency laws have eclectic gaps.<sup>170</sup>

There are apprehensions that resources meant for capacity-building activities are being lost through funding contradictions, overlaps, missing collaborations, and weak oversight institutions.<sup>171</sup> Concerns are also being expressed as huge chunks of money are being spent on maintaining the systems and institutions, but relatively little money is spent on actual activities.<sup>172</sup> Investing in environmental-related capacity-building initiatives is not a key priority for most countries, and climate change projects continue to fight for attention.<sup>173</sup> The credence that capacity-building programmes are futile and uneconomical comes with a hefty reputational cost and yields disinclination amongst nonchalant benefactors, thus, the inability to attract new resources for capacity building.<sup>174</sup>

Additional challenges include ad hoc, short-lived, project-based interventions; dictated decisions by donors on where and when the capacity building should be done and in what form; lack of data on financial spending on capacity building; and sparse literature to inform capacity building discussions and interventions.

## Conclusion

Kenya's climate change sub-sector is governed by the Constitution, sectoral laws, statutes, common law, international law and statutes, reports, policies and guidelines. In 2010, it developed its National Climate Change Response Strategy, which was followed thereafter by the Climate Change Act of 2016. The Fourth Schedule of the Constitution of Kenya provides for the National government to provide capacity-building support to county governments. The study shows that capacity building is a core factor in the legislative process, and, within climate change contexts, it can be considered a procedural right that unlocks opportunities for multi-stakeholder involvement, access to climate information, and multi-level decision-making. The legislative process has benefited immensely from the court's complementary roles in advancing its goals and political goodwill to enforce compliance with its provisions.<sup>175</sup>

The study shows that capacity building is a core factor in the legislative process. Within climate change contexts, it can be considered a procedural right that unlocks opportunities for multi-stakeholder involvement, access to climate information, and multi-level decision-making.

Secondly, the definition of capacity building is adequate to accept that most of these end in characterizations. They don't move beyond what the law provides to what should be done to achieve their intended purposes regarding capacity building.

For the county government of Kisumu, the study reveals a worrying situation. Climate change legislation is not explicit on matters of capacity building, but is strong towards awareness creation, public participation and resource mobilization. This gap in legislation can be linked to an inadequate understanding of the role of capacity building in enabling climate action at the national and local levels. Again, the constitution requires that the national government and its agencies lead in building the capacities of county governments. However, it is not very clear how this is being implemented regarding climate change. Apart from universities, there is no public institution with a clear mandate to build the capacities of counties and local actors. Thanks to the private sector and international development partners who are supporting various initiatives geared towards capacity development at both the national and county levels. It is precise to conclude that governments that do not prioritize capacity building in their climate change laws, and policy frameworks may then find it difficult to design and implement their strategies and action plans. Again, the legal right to involvement can only be realized in the presence of enabled capacities anchored on a statute as a good practice and a constitutional foundation, with details of implementation and enforcement, as well as monitoring and evaluation frameworks. Consequently, climate change and policy frameworks which do not provide for sustainable capacity building should be reviewed and existing gaps well tackled.

Finally, whereas most authors agree on generic factors leading to capacity, how this capacity is built or improved within the sphere of climate change law remains significantly unspecified. It is then conclusive to aver that more study needs to be carried out to get the lived experience of relevant actors in government, private sector, NGOs, media, civil society and academia. The data from the

Key Informant Interviews will help address the highlighted gaps and inform recommendations for future capacity-building efforts to implement climate change law and policy frameworks.

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