

THE APPLICATION OF ADR IN RESOLVING CLIMATE-RELATED DISPUTES TO ACHIEVE SUSTAINABLE DEVELOPMENT IN KENYA

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ABSTRACT

Climate change has been termed the "biggest threat modern humans have ever faced." WHO for instance reports that approximately 24% of all global deaths are associated with effects like drought, and floods, which cumulatively translates to about 13.7 million deaths annually. The continued persistence of climate change effects, such as drought, has threatened Kenya's sustainable development. As a result of these harmful effects, various human rights and entitlements have been violated, thus causing people to initiate climate litigation to address them. Existing literature shows climate litigation has generally been effective in countries like Japan, the U.S., and European countries. Unfortunately, most climate-related disputes or concerns in African countries remain unresolved due to over-reliance on court litigation. Due to the unique circumstances of the African countries, including high poverty levels and a desire for rapid developments through industrialization, there's a need to 'Africanize' the approach in addressing climate-related disputes; a process that should begin with the adoption of ADR as the main mechanism. Thus, this paper will discuss how ADR can be used to resolve climate-related disputes and promote sustainable development in Kenya.

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1.0 INTRODUCTION

Kenya's climate is changing significantly. The Fifth Assessment Report of the Intergovernmental Panel on Climate Change (IPCC) avails concrete and indisputable evidence that surface temperature across Africa has risen by 0.5.²³⁹ Cover the past 100 years.²³⁹ The rising temperatures have intensified the magnitude and frequency of extreme weather occurrences in Kenya, resulting in disasters such as reduced livestock and crop production, diminished livelihoods, loss of lives, and damaged infrastructure, among other severe impacts. Rainfall patterns have equally changed. The short rainy season has become wetter and longer, and the long rainy season has become drier and shorter, while the overall annual rainfall still stands low.

Severe flooding and torrential rains from March to May 2018 significantly impacted communities already suffering from the effects of prolonged drought.²⁴⁰ According to Kenya's National Climate Change Action Plan (2018-2022), climate change is most likely to negatively affect Kenya's future achievement and overall development of *Kenya Vision 2030*- our country's long-term development plan.²⁴¹ One of Kenya's long-term development plans is the government's assurance of sustainable development to its current and future generations, a plan that the dangerous effects of climate change is threatening.

2.0. NEGATIVE IMPACTS OF CLIMATE CHANGE IN KENYA

There are various negative impacts of climate change that have hit Kenya including drought, severe heat, and floods. All these have direct and indirect impacts on our country's sustainable development. Kenya is a country that is quite vulnerable to climate change's effects, especially economy-wise. Its economy significantly depends on climate-sensitive areas such as water, health, wildlife, tourism, energy, and, most importantly,

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²³⁹ Niang et al., "Africa. In: Climate Change 2014: Impacts, Adaptation, and Vulnerability" (2014). Part B: Regional Aspects. Contribution of Working Group II to the Fifth Assessment Report of the Intergovernmental Panel on Climate Change [Barros, V.R., C.B. Field, D.J. Dokken, M.D. Mastrandrea, K.J. Mach, T.E. Bilir, M. Chatterjee, K.L. Ebi, Y.O. Estrada, R.C. Genova, B. Girma, E.S. Kissel, A.N. Levy, S. MacCracken, P.R. Mastrandrea, and L.L. White (eds.)] Cambridge and New York: Cambridge University Press. page 7.

²⁴⁰ Tilly Alcayna, "Climate Change Impacts on Health: Kenya Assessment" (2021) << https://www.climatecentre.org/wp-content/uploads/RCRC_IFRC-Country-assessments-KENYA.pdf>> accessed by October 11, 2022; Government of Kenya (2018), National Climate Change Action Plan (Kenya): 2018-2022. Nairobi: Ministry of Environment and Forestry. The Report elaborates Kenya's development goals by giving measures and mechanisms to attain low carbon climate resilient development in a way that prioritizes adaptation.

²⁴¹ Government of Kenya (2018), National Climate Change Action Plan (Kenya): 2018-2022. Nairobi: Ministry of Environment and Forestry.

agriculture.²⁴² Therefore the increasing magnitude and intensity of weather-related problems in Kenya exacerbate conflicts, mostly over natural resources, thus threatening Kenya's sustainable development, especially for future generations. For example, the economic cost of drought and floods in Kenya has been approximated to result in long-term fiscal liability of about 2%-2.8% of GDP annually.²⁴³ More precisely however, the approximated costs of floods are approximately 5.5% of GDP every seven years, whereas droughts result in 8% of GDP every five years.²⁴⁴ The other noticeable impacts of climate change in Kenya include:

Floods: have resulted in numerous deaths in Kenya. For instance, the floods that occurred in early 2018 resulted in the loss of about 183 lives, displaced approximately 225,000 people, including about 145,000 children, and closed nearly 700 schools.²⁴⁵ The economic effects of floods are disastrous as well; in 2018 alone, flooding and rain destroyed property worth billions of monies. Different infrastructures, including roads, were damaged, seasonal crops across approximately 8,500 hectares of land were affected, and about 20,000 livestock drowned.²⁴⁶

Drought: remains one of the leading impacts of climate change in Kenya.²⁴⁷ According to Kenya's Climate Change Action Plan (2018-2022), droughts are typically large-scale climate-related disasters in Kenya, triggering local conflicts over limited resources, destroying livelihoods, and reducing communities' ability to cope. Thus the gravity of drought in Kenya cannot be ignored. The 2014-2018 drought in Kenya, for instance was declared by President Uhuru's administration as a national emergency in February 2017 since, at that point, it had severely affected 24 counties in Kenya.²⁴⁸ About 3.4 million Kenyans were reported to be hardly food secure, and another 500,000 people did not have water access.

Sea level rise is severely affecting coastal communities and towns. It is approximated that coastal flooding from sea level affects 86,000 people annually.²⁴⁹ It has equally resulted in wetland loss and coastal erosion at an annual cost of approximately 6 billion

²⁴² National Climate Change Action Plan (Kenya): 2018-2022 (n 3).

²⁴³ Ibid.

²⁴⁴ Ibid.

²⁴⁵ Ibid. Some of these impacts have been recurrent even post-2018 period.

²⁴⁶ National Climate Change Action Plan (n 3).

²⁴⁷ ASAL Humanitarian Press Release, "Drought situation in the Kenya ASAL areas now at crisis" (2022) at <<file:///C:/Users/Administrator/Downloads/ASAL%20Humanitarian%20Network%20Press%20Release%20-%20October%205%202022.pdf>> accessed by October 5th, 2022.

²⁴⁸ Ibid.

²⁴⁹ Ongoma V & Onyango OA, 'A Review of the Future of Tourism in Coastal Kenya: The Challenges and Opportunities Posed by Climate Change' (2014). *Journal of Earth Science & Climatic Change*, Vol 5(7), pp. 210 ; Red Cross Red Crescent Climate Centre, "Country level: Climate fact sheet" (2022) at <<https://www.climatecentre.org/wp-content/uploads/RCCC-ICRC-Country-profiles-Kenya.pdf>> accessed by October 10, 2022.

by 2030. To avoid destroying one of Kenya's top historical sites, the National Museums of Kenya is currently constructing a KES 500 million sea wall to safeguard Fort Jesus from erosion due to storm surges and ever-rising sea levels.²⁵⁰

3.0. NEXUS BETWEEN CLIMATE CHANGE AND SUSTAINABLE DEVELOPMENT

There's a clear correlation between sustainable development and climate change. For instance, the continued drought and irregular rain have already threatened Kenya's food security, and natural resources like public forests. These conditions have negatively affected the availability of fundamental human necessities such as energy, food security, and fresh water. Poor and developing countries, especially least developed nations, will obviously be among those severely impacted and least able to address the anticipated shocks on their natural, economic, and natural systems.²⁵¹

Even though the nexus between climate change and sustainable development, is one whose nature is complicated to establish, there are certain situations, which when critically analysed, demonstrate how the two factors are closely related. Primarily, climate change significantly influences key human and natural living conditions and is also the basis for economic and social development. On the other side, society's priorities for sustainable development influence both the vulnerability and the GHG emissions resulting from climate change.²⁵² Secondly, climate change policies can be more efficient and effective when consistently engrained within the broader approaches and strategies modelled to make regional and national development programs more sustainable. The rationale is that the effects of climate change, climate policy responses, and related socio-economic development will impact the capacities of states to achieve sustainable development goals.²⁵³ Conversely, attaining those goals will affect the opportunities for and success of climate policies.

Intergovernmental Panel on Climate Change (IPCC) further reports that climate change effects on development prospects have been described in an interagency project on climate change and poverty as "climate change will compound existing poverty."²⁵⁴ The

²⁵⁰ National Climate Change Action Plan (Kenya): 2018-2022 (n 3).

²⁵¹ United Nations, 'Climate Change' (2022) <<
[²⁵² Intergovernmental Panel on Climate Change \(IPCC\), 'Climate Change 2007: Working Group III: Mitigation of Climate Change. The Dual relationship between climate change and sustainable development' \(2007\) <<
\[>> accessed by October, 11 2022.\]\(https://archive.ipcc.ch/publications_and_data/ar4/wg3/en/ch2s2-1-3.html\)](https://sustainabledevelopment.un.org/topics/climatechange#:~:text=The%20links%20between%20climate%20change,social%2C%20economic%20and%20natural%20systems.>> accessed by October 11, 2022.</p></div><div data-bbox=)

²⁵³ Intergovernmental Panel on Climate Change (IPCC) (n 8).

²⁵⁴ Ibid

severe impacts of climate change will be most evident in developing nations like Kenya as a result of their dependence on natural resources and overall limited capacity to adapt to a changing climate. For example, agriculture remains the bedrock of Kenya's economy and human survival. An effect on Kenya's weather threatens its national food security, thus, sustainable development. Continued risk to Kenya's food production capacity does not only directly impact its sustainable development but also the day-to-day survival of its citizens. Indeed as well put by IPCC, climate change is a real threat to the survival of humanity and planetary health.²⁵⁵ According to the African Development Bank, the poorest among the developing countries have the least resources and adaptability capacity, remain the most vulnerable.²⁵⁶

SDG No. 13 aims to "take urgent action to combat climate change and its effects" while acknowledging that the United Nations Framework Convention on Climate is the fundamental international and intergovernmental forum for negotiating the global response to climate change.²⁵⁷ But more specifically, the connected targets of SDG No. 13 focus on integrating various climate change measures into national policies, promoting education, awareness-promotion, and institutional capacity on climate change adaptation, mitigation, effect reduction, and early warnings. Thus, recognizing the dual relationship between climate change and sustainable development points to an unavoidable exploration of policies that jointly address climate change and sustainable development. In addition, Kenya's national legislation acknowledges the indisputable relationship between protection against climate change and the promotion of sustainable development. For instance, section 3(1) of the Climate Change Act 2016, which contains the primary objective and purpose of the enactment of the Act, provides that the Act shall be applied for regulation, implementation, management, and development of measures to promote climate change resilience and low carbon development for sustainable development of Kenya.²⁵⁸ Therefore, it goes without saying that in addressing the problem of climate change, Kenya would be assuring its citizens and the coming generation of their sustainable development. Besides, section 3(2)(k) of the same Act demands that in addressing the problem of climate, all levels of government and all sectors of the economy should mainstream the principle of sustainable development into the planning for and overall decision-making on climate change response.²⁵⁹ Therefore, among the various values and principles guiding the implementation of the Climate

²⁵⁵ IPCC, Sixth Assessment Report: Climate Change Impacts, Adaptation, and Vulnerability, 2022, 37.

²⁵⁶ Intergovernmental Panel on Climate Change (IPCC) (n 8)

²⁵⁷ Ibid

²⁵⁸ Climate Change Act, 2016, Section 3(1)

²⁵⁹ Climate Change Act, 2016, Section 3(2)(k)

Change Act 2016, the guarantee of promoting sustainable development strikes out as one of the key tenets of the Act.

The only reasonable, reliable, and conceivable conclusion that can be derived from the above dispositions is that Kenya's sustainable development is being threatened by climate change; thus the correlation between climate change and sustainable development. Therefore, any action taken to address the problem of climate change, including but not limited to adaptation, mitigation, and climate litigation will directly or indirectly also promote Kenya's sustainable development. The Climate Change Act, 2016 has provided numerous measures for addressing this problem; including mainstreaming of climate change action plans in national and county governments,²⁶⁰ the establishment of the National Climate Change Council headed by the President,²⁶¹ and the establishment of the Climate Change Directorate, with the primary duty of providing analytical support on climate change to support numerous sector ministries, county governments, and other related agencies.²⁶²

4.0 CLIMATE CHANGE LITIGATION AND ITS INADEQUACIES

Time has proven that the existence of these well-written policies and laws alone isn't enough to address the problem of climate change, especially the little efforts put in place to reduce the level of carbon in the atmosphere.²⁶³ As a result, citizens have opted to rely heavily on climate litigation to ensure that the government and other agencies adhere to the existing laws and policies. Even though climate-related disputes have been subjected to court litigation, there is minimal success occasioned by delays resulting from case backlogs.²⁶⁴ Thus, court litigation is unsuitable in timely resolving climate change disputes; especially those that require urgency.²⁶⁵

Climate litigation refers to cases that raise substantial issues of fact or law concerning climate change adaptation, mitigation, or the science of climate change.²⁶⁶ It has become

²⁶⁰ Climate Change Act, 2016, Section 3(2)(a)

²⁶¹ Climate Change Act, 2016, Section 5(1) & (2) The inclusion of the President and Deputy President into the National Climate Change Council is evidence of the seriousness and significance of the Council.

²⁶² Section 9(1) & 8(a) of the Climate Change Act, 2016.

²⁶³ Elizabeth Wanjiku Gitari, "Use of Alternative Disputes Resolution to Settle Conflicts From Infrastructural Development Activities: A Case Study of Standard Gauge Railway Project in Nairobi National Park" (2012). A Dissertation Submitted to the University of Nairobi in partial fulfillment of the Bachelor's Degree in LLB.

²⁶⁴ Kariuki Muigua. 'Empowering Kenyan People through Alternative Dispute Resolution Mechanisms' Alternative Dispute Resolution, [2015] ,79. (I do not understand how the year of publication comes before the publisher, Please Check on that throughout the document)

²⁶⁵ Kariuki Muigua, 'ADR: The Road to Access to Justice in Kenya' [2018] Alternative Dispute Resolution, 51

²⁶⁶ United Nations Environmental Programme, 'Global Climate Litigation Report; 2020 Status Review' (2021) <<[Global Climate Litigation Report: 2020 Status Review | UNEP - UN Environment Programme](#)>> accessed by 25 March 2022.

relevant because global climate ambition and aspiration remain insufficient to counter the challenges of climate change. Consequently, communities, non-governmental organizations (NGOs), subnational governments, and even private individuals have turned to courts to seek relief through compensation for climate harms; enforcement of the existing climate laws; a clear definition of important climate obligations and rights, and the integration of climate action into existing energy, environmental, and natural resources laws. As these legal actions become random in their occurrence and generally more numerous overall, there's growth in the body of legal precedent, creating an increasingly cogent field of law.

Despite the over-reliance on climate change litigation as the primary source of addressing climate-related disputes, it is evident that court litigation may not be the ideal method of resolving these disputes because of the following reasons. Firstly, climate-related conflicts are mostly multifaceted and too complex to resolve through the litigation process due to the multiple parties involved and the overall complexity of the institutional and legal framework.²⁶⁷ The difficulty of showing that releasing GHGs into the environment by a particular action or infrastructure would cause specific effects on a local community or region is perhaps the most challenging task awaiting litigants in global warming lawsuits. Consequently, there's a need to resolve these disputes in a simple, non-complex, and expedient manner.

Secondly, other legitimate concerns against the application of litigation in resolving climate change disputes include the fear of potential bias and limited competence among the court judges on technical climate change issues.²⁶⁸ Climate change entails great scientific, technical, and economic complexity and overall pervasive uncertainty issues, thus necessitating multi-pronged innovative redress.²⁶⁹ On these grounds, Kariuki Muigua argues that as climate is a global problem that calls for international collaboration, ADR mechanisms are well equipped to manage climate-change-related disputes because of their ability to address the root causes of conflicts while equally preserving relationships.²⁷⁰

²⁶⁷ Gail Bingham Leah & V. Haygood, "Environmental Dispute Resolution: The First Ten years" *Dispute Resolution Journal*. Vol 4

²⁶⁸ Reynold Orsua, 'Resolving Climate Change Related Disputes Through Alternative Modes of Dispute Resolution,' *Asian Dispute Resolution*[2022] ,29.

²⁶⁹ Reynold Orsua (n 24).

²⁷⁰ Kariuki Muigua, 'Dealing with Conflicts in Project Management' *Alternative Dispute Resolution*[2018] ,4.

5.0 APPLICATION OF ALTERNATIVE DISPUTE RESOLUTION (ADR) IN RESOLVING-CLIMATE RELATED DISPUTES

In his work, "The Race to Zero Emissions from an African Perspective," Dr. Kariuki Muigua significantly acknowledges the need for the African continent to come up with its own unique-structured responses to address the problem of climate change since the challenges faced by the African continent may not necessarily be a problem to the rest of the world; especially the developed world.²⁷¹ It is on this basis that this paper fronts the application of ADR as one of the most efficient and effective ways of addressing climate disputes.

The call for addressing climate change-related disputes in Kenya using ADR is further presented on the ground of its success in other parts of the world. For example, the U.S. Environmental Protection Agency (EPA) applies ADR in resolving complex environmental enforcement strategies, a move that has encouraged its application in an environmental justice conflict setting.²⁷² In addition, considering the thin line between climate and environment-related disputes, the successful application of the ADR in resolving the *Storm King Mountain and River* dispute, which is ranked as one of the most difficult and complex environmental disputes in the environment mediation,²⁷³ is indeed sufficient evidence of the key role that ADR can play in addressing climate-related disputes in Kenya.

The question of whether ADR can be applied in resolving climate-related disputes has been the subject of discussion in the international arena. In 2019, the International Chambers of Commerce (ICC) Commission on Arbitration and ADR, in collaboration with the ICC Commission on Environment and Energy, established a task force on "Arbitration of Climate Change Related Disputes," whose primary aim was to inquire into the existence of valid and binding agreements to arbitrate, in cases where parties agree to resolve climate-related disputes using ADR.²⁷⁴ According to the report, ADR (specifically Arbitration) had already been applied successfully in determining climate change-related disputes arising under the Kyoto Protocol and the UNFCCC's Green Climate Fund.²⁷⁵

²⁷¹ Kariuki Muigua, 'The Race to Zero Emissions from an African Perspective' (2021), *Journal of Conflict Management & Sustainable Development*. Vol 7(3), Page 1-35.

²⁷² Joel B Eisen, "Alternative Dispute Resolution at the Environmental Protection Agency" (2000) << <https://core.ac.uk/outputs/232763860>>> accessed on 30th September, 2022.

²⁷³ Joel Eisen (n 34).

²⁷⁴ Commission on Arbitration and ADR, "Resolving Climate Change Related Disputes through Arbitration and ADR" (2019) << <https://iccwbo.org/content/uploads/sites/3/2019/11/icc-arbitration-adr-commission-report-on-resolving-climate-change-related-disputes-english-version.pdf>>> accessed 1st September, 2022.

²⁷⁵ Commission on Arbitration and ADR (n 36).

However, the application of ADR in resolving climate-related disputes should not be construed narrowly to suggest that it only deals with disputes of various harms arising from the impacts of climate change. Such a narrow understanding will bring difficulty in understanding how exactly its application in resolving climate-related disputes will advance sustainable development. The proper approach should be much broader. Thus, in the context of climate change, the application of ADR in resolving climate-related disputes entails measures towards adaptation and mitigation to climate change, enactment of laws and policies, harnessing traditional knowledge, availability of adequate and appropriate information, capacity-building initiatives, and the existence of forums for debate.²⁷⁶ According to Nayla Comair-Obeid, the application of ADR, especially during the earlier stages of these disputes, is necessary because it allows the involved parties to resolve their problems before they escalate into a dispute.²⁷⁷ Equally, it helps sustain a good working relationship between the different parties involved in the case.²⁷⁸

6.0 NEGOTIATION AND CLIMATE CHANGE DISPUTES

As one of the methods of ADR, negotiation has proven to result in the empowerment of government and village-level participants, thus promoting awareness of impending conflicts and their causes.²⁷⁹ It has largely been used in resolving disputes relating to environmental protection and climate change including negotiation of contracts relating to mining and renewable energy.²⁸⁰ For example, pursuant to the Petroleum Act, the Cabinet Secretary and chief executive contractor are obligated to meet and resolve any disputes that arise amicably.²⁸¹ Timely and effective resolution of mining and petroleum-related disputes using negotiation will ensure that the environmental activities causing climate change are addressed before such effects can threaten or exacerbate Kenya's sustainable development.

Scholars such as Antonia Engel and Benedikt Korf further underscore this argument by asserting that negotiation is more effective in addressing some types of conflicts than

²⁷⁶ UNEP/PCA Advisory Group on Dispute Avoidance and Settlement concerning Environmental Issues, 2006.5.

²⁷⁷ Nayla Comair-Obeid, 'Dispute Avoidance and Resolution in Times of Crisis' [2018] *The International Journal of Arbitration, Mediation, and Dispute Management*, 4.

²⁷⁸ Nayla Comair-Obeid (n 29).

²⁷⁹ Kariuki Muigua, 'Managing Natural Resource Conflicts in Kenya through Negotiation and Mediation' [2016] *Alternative Dispute Resolution*, 29.

²⁸⁰ Simon Vorburger and Angelina Pett, *Arbitrating Energy Disputes in Switzerland: The Practitioner's Guide* (Kluwer Law International, 2018) 1281-1284.

²⁸¹ Clause 53(1), Model PSC 2019.

others.²⁸² For instance, conflicts stemming from differing interests concerning natural resources are negotiable, while basic needs, such as recognition, security or identity are usually non-negotiable.²⁸³

Despite being a promising method of addressing climate-related disputes, there are some two glaring limitations of negotiation as a method of resolving climate-related disputes. First, it relates to the intractable nature of climate-related disputes. For instance, in most cases, disputes cannot be resolved in win-win ways—reduction of greenhouse gases produced by manufacturing industries will ensure that effects of climate change are mitigated, however, the reduction will equally mean minimization of their production activities thus generating less income.

Second, major differences in power among agencies, groups, and people involved, e.g. a multinational company, government agencies, local NGO, or a local community may impede efficient decision-making; consensus building is premised on the ground that power imbalances among various parties are not so substantial that a third party cannot bridge them in the whole negotiation process.²⁸⁴

7.0 MEDIATION IN RESOLVING-CLIMATE RELATED DISPUTES

Mediation remains one of the most effective and efficient ADR methods of resolving land and natural resources disputes.²⁸⁵ The numerous advantages of addressing natural resource conflicts through mediation outweigh the disadvantages of permitting the gravamen to exacerbate unsolved or mitigating the effect of an escalated dispute. The rationale for this is that through mediation, the mediators help the involved parties to identify shared interests, maximize the various shared benefits, and equally address the challenges and problems together.²⁸⁶

Based on section 154 (b) of the Mining Act, any dispute arising from issues related to mineral rights in Kenya must be deliberated through mediation once negotiations have not been successful.²⁸⁷ Besides, in those cases where negotiations concerning Community Development Agreement terms fail, the Act obligates the mining license holder and the

²⁸² Antonia Engel & Benedikt Korf, “Negotiation and mediation techniques for natural resource management” (2005) <<https://peacemaker.un.org/sites/peacemaker.un.org/files/NegotiationandMediationTechniquesforNaturalResourceManagement_FAO2005.pdf>> accessed by 11 October, 2022.

²⁸³ Antonia Engel & Benedikt Korf (n 49).

²⁸⁴ Ibid.

²⁸⁵ Alvin Gachie, ‘Natural Resource Dispute Resolution: Promoting peace and Security through Alternative Dispute Resolution’ [2017] *Alternative Dispute Resolution*, 158.

²⁸⁶ Francis Kariuki, Geoffrey Kerecha, and James Kirwa, *Handling Extractives Related Grievances in Kenya: A Guide for Judicial Officers* (Extractives Baraza 2019)66.

²⁸⁷ Section 154 (b), Mining Act Kenya.

local community to resolve their dispute through mediation.²⁸⁸ Applying mediation, in this case, will help resolve climate disputes and attain sustainable development because for disputes entailing natural resources, United Nations Development Programme (UNDP) demands the mediator to collect all information regarding location, quality, quantity, and type of the natural resources at issue.²⁸⁹ In fact, when collecting the information and conducting their assessment, the UNDP policy framework obligates the mediators to understand the benefits of natural resources, the harmful effects of their exploitation, the livelihoods that depend upon them, and the political economy they support.²⁹⁰ In addition, the assessment should measure how effectively natural resources are governed and whether or not the governance structure is the reason for the conflict in question.

Such measures have actually been in practice in Kenya. For example, in the Magarinin inquiry in Malindi, the Kenya Association of Manufactures engaged Ufadhili Trust in 2016 as a mediator between the mining companies and the community. The selected mediator created a common platform of dialogue between the parties in question on conflicts touching on land disputes, labour practices, and environmental impacts.²⁹¹ This allowed the mining company and the citizens to work directly in resolving their conflicts. Mediating climate change disputes is even more effective in cases where the involved mediator has sufficient expertise in the relevant issue.²⁹² This will be critical because the mediator has an obligation to conduct an assessment of all elements of the conflict dynamic. This entails comprehending the following issues: who the actors are; the nature of the conflict; the sources of power; the bigger context; the capacities of the parties to engage, and the leverage among the parties.²⁹³ Considering the diverse parties participating in climate change-related disputes, the mediators have a duty to engage with them.²⁹⁴ These include private sector actors, community representatives, civil society representatives, government administrators, top officials and the marginalized.

²⁸⁸ Regulation 9(5), Mining CDA Regulations, 2016.

²⁸⁹ United Nations Development Programme (UNDP), *Natural Resources and Conflicts: A Guide for Mediation Practitioners*, 2015, 18.

²⁹⁰ United Nations Development Programme (UNDP) (n 38).

²⁹¹ Francis Kariuki & Vianney Sebayiga (n 21).

²⁹² ICC Arbitration and ADR Commission, *Resolving Climate Change Related Disputes through Arbitration and ADR*, 8. (ICC Arbitration and ADR Commission).

²⁹³ United Nations Development Programme (UNDP) (n 38).

²⁹⁴ *Ibid*

8.0 EXPERT DETERMINATION AND CLIMATE CHANGE DISPUTES

The nature of climate-related disputes is complex, thus necessitating the need to rely on an expert to resolve those disputes instead of litigating them. Expert determination refers to the process by which parties submit their dispute to an expert for resolution. For example, in the energy sector, expert determination is used to resolve technical and pricing disagreements, similar to cases where parties allege a variation of legal provisions or circumstances.²⁹⁵ Thus, expert determination will significantly help in the early resolution of complex and technical climate-related disputes by providing the involved parties with an early assessment of the technical facts in issue such as the amount of carbon emitted by the party. This eventually would allow for the resolution of disputes as the projects continue.²⁹⁶ The preference for experts, compared to the court in resolving this nature of disputes, is equally on the ground that experts can carry out assessments to map and catalogue variations between the expectations of the parties in question and review compliance with obligations. Furthermore, even in those circumstances where the settlement is not struck, prior expert analysis and determination will be a critical source of guidance to the parties and arbitral as such assessment can be adduced as an expert's opinion or evidence.²⁹⁷

9.0 ARBITRATION AND CLIMATE CHANGE DISPUTES

Both the Paris Agreement and the UNFCCC have provisions for dispute resolution either by Arbitration or the International Court of Justice. However, pursuant to Article 36 of the ICJ Statute and Article 14 of the UNFCCC, Arbitration can only be used in those states that have expressed consent to the jurisdiction of an arbitral award. Nonetheless, as the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards was ratified by the Kenyan government on February 10th. 1989, and incorporated into the Kenyan Arbitration Act by dint of section 36, the application of Arbitration in the resolution of climate disputes is well anchored in Kenya. Furthermore, Article 159 (2)(c) of the Constitution provides for the use of Arbitration as one of the methods of ADR in resolving any disputes pursuant to the limitations of the law.

Arbitration can efficiently be relied upon in resolving complex climate-related disputes. This method is inherently flexible and permits parties to willingly select a neutral third

²⁹⁵ Simon Vorburger and Angelina Pett, *Arbitrating Energy Disputes Arbitration in Switzerland: The Practitioners Guide* (Kluwer Law International 2018) 1319.

²⁹⁶ Francis Kariuki & Vianney Sebayiga (n 31).

²⁹⁷ *Ibid.*

party according to her/his expertise in the subject matter in dispute.²⁹⁸ Based on the interpretation of section 117(2)(i) of the Mining Act 2016, the arbitration process effectively resolves disputes in the Kenyan extractives sector.²⁹⁹ Pursuant to the section, mining agreements should encompass a clause on resolving disputes through a sole expert or International Arbitration.

Reliance on Arbitration equally gives the parties to the dispute an opportunity to choose their own arbitrators and may even decide to appoint experts in a particular climate change-related field.³⁰⁰ For example, the Permanent Court of Arbitration (PCA) maintains a catalogue of environmental experts where parties may choose their arbitrators.³⁰¹ Court litigation does not present litigants with such opportunities since judges are 'generalists' and most need neutral experts' training and assistance to understand technical matters.³⁰² Even though article 162(2) provides for the creation of the Environment and Land Court (ELC), the primary focus of these courts has been to resolve land and general environmental-related disputes; they are not well placed in addressing climate-related disputes.

10.0 CONCLUSION

The breadth of climate and environmental law and the diverse nature of parties' interests add complexity to resolving climate-related disputes. However, the rising acknowledgement of the flexibility of ADR processes designed to address the issues involved and meet the parties' needs, is nevertheless creating more opportunities for parties to reach durable solutions in these complex and multiparty disputes. Considering that the effects of climate change are already ravaging Kenya at an alarming rate, any measure, including those that will address climate-related disputes swiftly, would directly or indirectly promote Kenya's sustainable development. In addition, since the nature of climate disputes encompass interests from various parties, it is important that such disputes are resolved without necessarily straining the existing relationships as such disagreements may also affect Kenya's economic development since most parties to these disputes are mining companies and factories whose contribution to Kenya's economy cannot be ignored. Such goals can only be best achieved with reliance on ADR as the primary method of resolving them.

²⁹⁸ ICC Arbitration and ADR Commission (n 41).

²⁹⁹ Francis Kariuki & Vianney Sebayiga (n 31).

³⁰⁰ Ibid

³⁰¹ Art 8(3) and 27(5), Optional Rules for Arbitration of Disputes Relating to Natural Resources and /or Environment.

³⁰² Art 24(4) PCA Environmental Rules 2001.

BIBLIOGRAPHY

- Antonia Engel & Benedikt Korf, "Negotiation and mediation techniques for natural resource management" (2005) << https://peacemaker.un.org/sites/peacemaker.un.org/files/NegotiationandMediationTechniquesforNaturalResourceManagement_FAO2005.pdf>> accessed by 11 October, 2022.
- Alcayna T, "Climate Change Impacts on Health: Kenya Assessment" (2021) << https://www.climatecentre.org/wp-content/uploads/RCRC_IFRC-Country-assessments-KENYA.pdf>> accessed by October 11, 2022
- Climate Change Act, 2016.
- Commission on Arbitration and ADR, "Resolving Climate Change Related Disputes through Arbitration and ADR" (2019) << <https://iccwbo.org/content/uploads/sites/3/2019/11/icc-arbitration-adr-commission-report-on-resolving-climate-change-related-disputes-english-version.pdf>>> accessed 1st September, 2022
- Eisen J, "Alternative Dispute Resolution at the Environmental Protection Agency" (2000) << <https://core.ac.uk/outputs/232763860>>> accessed on 30th September, 2022.
- Government of Kenya (2018). National Climate Change Action Plan (Kenya): 2018-2022. Nairobi: Ministry of Environment and Forestry.
- Gachie A, 'Natural Resource Dispute Resolution: Promoting peace and Security through Alternative Dispute Resolution' [2017] *Alternative Dispute Resolution*, 158.
- Gitari E, "Use of Alternative Disputes Resolution to Settle Conflicts From Infrastructural Development Activities: A Case Study of Standard Gauge Railway Project in Nairobi National Park" (2012). A Dissertation Submitted to the University of Nairobi in partial fulfillment of the Bachelor's Degree in LLB.
- Intergovernmental Panel on Climate Change (IPCC), 'Climate Change 2007: Working Group III: Mitigation of Climate Change. The Dual relationship between climate change and sustainable development' (2007) << https://archive.ipcc.ch/publications_and_data/ar4/wg3/en/ch2s2-1-3.html>> accessed by October, 11 2022.
- IPCC, Sixth Assessment Report: Climate Change Impacts, Adaptation, and Vulnerability, 2022, 37.
- ICC Arbitration and ADR Commission, *Resolving Climate Change Related Disputes through Arbitration and ADR*, 8. (ICC Arbitration and ADR Commission).
- Kariuki F& Sebayiga V, 'Evaluating the Role of ADR Mechanisms in Resolving Climate Change Disputes' (2022). *Alternative Dispute Resolution*. 10(3); page 1-35.

Kariuki F, Geoffrey Kerecha, and James Kirwa, Handling Extractives Related Grievances in Kenya: A Guide for Judicial Officers (Extractives Baraza 2019)66.

Leah G & V. Haygood, "Environmental Dispute Resolution: The First Ten years" *Dispute Resolution Journal*. Vol 4

Muigua K, 'The Race to Zero Emissions from an African Perspective' (2021), *Journal of Conflict Management & Sustainable Development*. Vol 7(3), Page 1-35.

Muigua K.' Empowering Kenyan People through Alternative Dispute Resolution Mechanisms' [2015] *Alternative Dispute Resolution*,79.

Muigua K, 'ADR: The Road to Access to Justice in Kenya' [2018] *Alternative Dispute Resolution*, 51

Muigua K, 'Dealing with Conflicts in Project Management' [2018] *Alternative Dispute Resolution*,4.

Muigua K, 'Managing Natural Resource Conflicts in Kenya through Negotiation and Mediation' [2016] *Alternative Dispute Resolution*,29

Mining Act Kenya, 2016.

Mining CDA Regulations, 2016.

Niang et al., "Africa. In: Climate Change 2014: Impacts, Adaptation, and Vulnerability" (2014). Part B: Regional Aspects. Contribution of Working Group II to the Fifth Assessment Report of the Intergovernmental Panel on Climate Change [Barros, V.R., C.B. Field, D.J. Dokken, M.D. Mastrandrea, K.J. Mach, T.E. Bilir, M. Chatterjee, K.L. Ebi, Y.O. Estrada, R.C. Genova, B. Girma, E.S. Kissel, A.N. Levy, S. MacCracken, P.R. Mastrandrea, and L.L. White (eds.)]. Cambridge and New York: Cambridge University Press. page 7.

Orsua R, 'Resolving Climate Change Related Disputes Through Alternative Modes of Dispute Resolution' [2022] *Asian Dispute Resolution*,29.

Obeid N, 'Dispute Avoidance and Resolution in Times of Crisis' [2018] *The International Journal of Arbitration, Mediation, and Dispute Management*,4.

Optional Rules for Arbitration of Disputes Relating to Natural Resources and /or Environment.

Ongoma V & Onyango OA, 'A Review of the Future of Tourism in Coastal Kenya: The Challenges and Opportunities Posed by Climate Change' (2014). *Journal of Earth Science & Climatic Change*, Vol 5(7), pp. 210.

United Nations, 'Climate Change' (2022) <<

[Global Climate Litigation](https://sustainabledevelopment.un.org/topics/climatechange#:~:text=The%20links%20between%20climate%20change.social%2C%20economic%20and%20natural%20systems.>> accessed by October 11, 2022. United Nations Environmental Programme, 'Global Climate Litigation Report; 2020 Status Review' (2021) <<<a href=)

The Application of ADR in Resolving Climate-Related Disputes to Achieve Sustainable Development in Kenya by Bruno. O. Osanan

[Report: 2020 Status Review | UNEP - UN Environment Programme](#)>> accessed by 25 March 2022.

UNEP/PCA Advisory Group on Dispute Avoidance and Settlement concerning Environmental Issues,2006,5

United Nations Development Programme (UNDP), Natural Resources and Conflicts: A Guide for Mediation Practitioners,2015, 18.

Vorburger S & Pett A, Arbitrating Energy Disputes in Switzerland: The Practitioner's Guide (Kluwer Law International, 2018) 1281-1284