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## EXAMINING THE EFFECTIVENESS OF THE LEGAL FRAMEWORK GOVERNING CLIMATE CHANGE IN KENYA

*Mwai Samuel & Wycliffe Otiso*

*Faculty of Law, Chuka University, P.O Box 109-60400*

*smwai@chuka.ac.ke; wotiso@chuka.ac.ke*

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### ABSTRACT

The natural environment has been experiencing enormous challenges associated with natural and human factors. Precisely, most of these environmental challenges have been caused by human activities through pollution, degradation and human interference. Climate change remains one of the contemporary puzzles facing the earth and has been linked with increased heating of the earth. This paper briefly analysis how the world is legally responding to global warming and also investigates the strategic legal measures being undertaken by stakeholders. The paper then proceeds to review the Kenyan legal framework on climate change and the contribution of the regulatory measures adopted to minimise its intensity. The paper thus analysis the Kenyan climate change legal framework and its adequacy and effectiveness. The Constitution of Kenya, 2010, the Environmental Management and Coordination Act, and the Climate Change Act are identified as the main laws regulating this phenomenon. Noteworthy, Kenya was the first country in Africa to legislate on climate change. A review of the Kenya's legal, institutional and policy framework reveals existence of a vibrant framework to combat climate change; however, the slow implementation and poor environmental practices derail the intentions and efforts made. This poses the question of the legal capability of bodies and institutions entrusted to discharge their mandate related to addressing climate change. This paper also notes that bodies and institutional mechanisms such as NEMA and National Climate Change Council have not adequately discharged their mandates in enforcing compliance. In addition, it is noted that such institutions' capacity to tackle the climatic change issues is inadequate, overlapping and the system is compromised by external forces. Based on the findings, the study concludes there exists national and international legal frameworks for managing climate change. However, the analysis reveals that these measures are not comprehensive in addressing climate change in the country and beyond. The paper recommends that the state should develop effective and workable mechanisms and measures of protecting the earth from the adverse effects of climate change. Further, the international community should develop joint frameworks for combating climate change.

**Key words:** *Climate change, environment, climate change framework, pollution, human activities, combating climate change*

## INTRODUCTION

The world is continuously experiencing environmental challenges associated with climate change. According to Wambua floods, drought, changes in weather patterns, wildfires and destruction of infrastructure are some of the adverse effects brought about by climate change.<sup>1</sup> Knowledge, implementation and reforms on the legal framework governing climate change are imperative in saving the earth. Section 2 of the Climate Change Act defines climate change as, “*a change in the climate system which is caused by significant changes in the concentration of greenhouse gases as a consequence of human activities and which is in addition to natural climate change that has been observed during a considerable period.*”<sup>2</sup> According to the United States Environmental Protection Agency, climate change as an environmental challenge occurring out of human activities and natural factors that contribute to rising in global temperature.<sup>3</sup>

The natural environment is experiencing unprecedented catastrophic destruction through human-related activities such as pollution, degradation and human interference as well as natural factors. Though factors leading to climatic challenges are majorly caused by human beings, there are a considerable number of natural factors affecting global temperatures.<sup>4</sup> There is a need to develop a framework that addresses both natural and human factors in order to make the environment conducive for human beings as well as other living and non-living things. As noted in the US case of

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<sup>1</sup> Wambua Clement, ‘The Kenya Climate Change Act 2016: Emerging Lessons From A Pioneer Law’ (2019) *CCLR*, 257.

<sup>2</sup> Climate Change Act No. 11 of 2016.

<sup>3</sup> US Global Change Research Programme, Fourth National Climate Assessment Chapter 2: Our Changing Climate,

2017).

<sup>4</sup> Hermans Kathleen and Robert Mcleman, 'Climate Change, Drought, Land Degradation and Migration: Exploring the Linkages. *Current Opinion in Environmental Sustainability*' (2021) 50, 236-24

*Juliana v US*,<sup>5</sup> court in reference to the due process clause in the *Fifth Amendment* opined that the government has a responsibility to ensure that, "*climate systems are capable of sustaining human life*".

Human activities in the modern world take a toll on our natural environment. Environmental challenges are caused by these environmental destructions, their impacts have as well brought about loss and pain to human beings as they are characterised by irregular weather patterns, droughts, floods, reduced crop yields, and wildfires among others.<sup>6</sup> According to Allen, they have thus subjected human beings to suffering, unprecedented hardships and emergence of new diseases.<sup>7</sup> Human beings must thus safeguard the environment from these adverse effects for the sake of the natural environment and to make the earth safe for him, other living things and the future generations. Wambua finds that this can be done through adaptive capacity, climate resilience, mitigation and pursuit of low-carbon development.<sup>8</sup>

Due to the effects noted above and possibly others, the international community has devised the need to combat and control climate change and its effects. This has been achieved through the adoption of measures and commitments that are intended to reduce emissions of greenhouse gases as well as reduce their concentration in the air. The starting point has been through the adoption of instruments and commitments to addressing climate change. States on their part have as well enacted laws and developed policies geared towards addressing climate change. It is within this context that this paper carries out an analysis of the legal framework governing climate change. The paper also sought to examine the effectiveness of the climate change legal framework in the country with the goal of offering appropriate solutions. This was achieved through an analytical review of existing legal instruments, policies, books, articles, and climate change reports among others. The findings of this paper are that there exists a robust legal framework both from national and international perspectives geared towards combating climate change. At the international level there exist frameworks such as United Nations Framework Convention on Climate Change (UNFCCC) and the Paris Agreement. The enforcement of these instruments is championed by bodies such as United Nations (UN), United Nations Environmental Programme (UNEP) and their sub-agencies such as Intergovernmental Panel on Climate Change (IPCC). However, such enforcement heavily relies on states through compliance with their international obligations which is achieved through domestication into national laws.

In Kenya, this has been primarily provided by the supreme law of the land; the Constitution of Kenya, 2010. It has as well been given the force of law through statutory enactment and policy frameworks. Environment Management and Coordination Act and Climate Change Act are the main statutes governing this area. These two laws have provided *inter alia* structures for National Environment Management Authority and the National Climate Change Council to oversee and enforce compliance with climate change legal requirements. In addition there exist other enabling laws, policies and enforcement mechanisms in the state as discussed. Whereas the country has adopted a vibrant framework to combat climate change, the implementation and poor environmental practices derail the efforts to address the rising temperatures. This paper notes that there has been inadequate and ineffective implementation of these laws and policies at the state level and thus has not made meaningful impact towards addressing climate change. There exist some gaps and overlaps in the discharge of mandates and functions related to climate change controls. It is also noted that the majority of people are not knowledgeable in the existence, objectives and implementation of climate change laws. This leaves the application of such laws to a few people who may not make significant progress towards combating climate change. Thus, the paper recommends the adoption of sustainable measures and adaptations that will ensure that climate change effects are addressed as well as providing mechanisms that are resilient to its adverse effects.

#### **International Commitments and Principles on Climate Change**

Climate change and its attendant effects are experienced worldwide. This is the case despite who contributes to its prevalence. Unfortunately as noted by Mbow *et al*, some countries such as in Africa that have little to do with the cause of

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<sup>5</sup> 947 F.3d 1159 (9th Cir. 2020).

<sup>6</sup> Ageyo Joe and Idah Gatwiri Muchunku, 'Beyond the Right of Access: A Critique of the Legalist Approach to Dissemination of Climate Change Information in Kenya' (2020) *Sustainability*, 12(6), 2530.

<sup>7</sup> Thompson Allen, 'Adaptation, Transformation, and Development: Environmental Change and Rethinking the Human Good' (2020) *Environmental Ethics*, 42(1).

<sup>8</sup> Wambua Clement, 'The Kenya Climate Change Act 2016: Emerging Lessons from a Pioneer Law' (2019) *CCLR*, 257.

climate change are as well adversely affected by such challenges.<sup>9</sup> Due to its level of development, Africa again is the most vulnerable to the effects of climate change. In an attempt to combat climatic change, the world is responding by enacting laws and putting in place legal and policy measures that will assist states in countering these problems. Climate change being a global problem requires a global solution coupled with individual state compliance to such obligations. There are legal and strategic measures that have been undertaken by the international community to deal with climate change. Stakeholders in the sector have been involved through the efforts of the United Nations and its related structures.<sup>10</sup> The international journey for saving the planet from destruction is as old as the earth itself. However, international environmental law can be traced from the activities surrounding the two major world wars and the aftermath. The United Nations was formed in 1945 with the mandate inter alia of looking into the issue of human rights globally.<sup>11</sup> Thus, the body was the brain behind the many conferences and commitments made by the international community to deal with the environment. Among them was the 1972 UN Stockholm Conference that was convened with an aim of the need of developing common principles to guide in the preservation and enhancement of the environment.<sup>12</sup> Later, other conferences and taskforces were constituted to protect the environment. However, some specific commitments were constituted to address issues related to climate change. These milestones include the UNFCCC, Paris Agreement and lately the Glasgow Conference. The UNFCCC was constituted to prevent human activities that interfere with the environment to bring about climate change.<sup>13</sup> It was thus meant to assist the world in reducing activities of greenhouse emissions. This framework was ratified in Kenya in 1994 and thus created room for domesticating its provisions. Important to mention is that there exists the Kyoto Protocol to the UNFCCC that was adopted in a conference in Kyoto, Japan 1997. However, it has now been superseded by Paris Agreement which addresses all the issues covered by the Protocol. Paris Agreement was adopted by states in 2015 as the only binding instrument for member states on regulating greenhouse emissions. This was achieved in the 21<sup>st</sup> meeting of the Conference of Parties that was held in Paris. Paris Agreement stands tall on international commitments as it is legally binding. According to Jane, the Agreement is important in combating climate change through accelerating and intensifying the actions and investments needed for a sustainable low carbon.<sup>14</sup> Similar findings were reported by Shaikh and Fankhauser through states enacting legislation on climate change.<sup>15</sup> The agreement has however not gone without drawbacks. For example, the withdrawal of the US from the agreement led by the then President, Donald Trump. Fortunately, this was short-lived as within a few months of the assumption of office, President Joe Biden, led his country back to the agreement. Glasgow Climate Change Conference (COP26), 2021 is among the recent contributor towards reducing environmental damage.<sup>16</sup> The conference gave birth to decisions that came to be referred to as Glasgow Climate Pact. Mitchel and Morgera claim that the conference was exploring ways of addressing climate change and the participants agreed to take steps to limit global temperature rise to 1.5 degrees.<sup>17</sup>

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‘Achieving Mitigation and Adaptation to Climate Change through Sustainable Agroforestry Practices in Africa’ (2014) *Current Opinion on Environmental Sustainability* 6:8–14.

<sup>10</sup> See The United Nations Framework Convention on Climate Change.

<sup>11</sup> United Nations Charter under Article 1 provides its main objective as maintaining international peace and security, developing friendly relations among States and enhancing international cooperation in solving international cooperation as well as promotion of Human Rights.

<sup>9</sup> Mbow Cheikh, Pete Smith, David Skole, Lalisa Duguma and Mercedes Bustamante,

<sup>12</sup> United Nations Conference on Human Environment in Stockholm (Stockholm Conference), 1972.

<sup>13</sup> United Nations Framework Convention on Climate Change, 1994.

<sup>14</sup> Leggett Jane, ‘The United Nations Framework Convention on Climate Change, The Kyoto Protocol, And The Paris Agreement: A Summary’ (2020) *Unfccc, New York*, 2.

<sup>15</sup> Eskander Shaikh and Sam Fankhauser, ‘Reduction in Greenhouse Gas Emissions from National Climate Legislation (2020) *Nature Climate Change*, 10(8), 750-756.

<sup>16</sup> Adedoyin Festus Fatai, Festus Victor Bekun, Md Emran Hossain, Elvis Kwame Ofori, Bright Akwasi Gyamfi and Murat Ismet Haseki, ‘Glasgow Climate Change Conference (COP26) and its Implications in Sub-Saharan Africa Economies’ (2023) *Renewable Energy*, 206, 214-222.

<sup>17</sup> Lennan Mitchell and Elisa Morgera, ‘The Glasgow Climate Conference (COP26)’ (2022) *The International Journal of Marine and Coastal Law*, 37(1), 137-151

Though United Nations has a major role in environmental protection, the main agency tasked with these major roles is the United Nations Environmental Programme. UNEP was established by United Nations through the recommendation of the Stockholm Conference. Thus it has been instrumental among other things in addressing climate change.<sup>18</sup> The agency has been assisting states in coming up with laws and policies at the national level that enable them to comply with their international commitments and environmental needs. They have also been advising states in taking measures aimed at protecting and conserving the environment. For example, the UNEP 2017 report on Forestry and Illegal Logging, emphasized the importance of protecting forests to maintain ecosystems.<sup>19</sup>

United Nations Sustainable Development Goals have as well played an important part in the fight against climate change. Kurma and Mishrah argue that UN Sustainable Development Goals provide a framework upon which the world is supposed to meet its environmental goals.<sup>20</sup> Though all the goals are important towards the protection of the environment but goal 13 is specific about taking action in combating climate change.<sup>21</sup> Similarly 2030 Agenda for Sustainable Development provides goals to combat climate change. The United Nations also spearheaded the formulation of the UN Convention to Combat Desertification (UNCCD) and Land Degradation as part of enhancing the sustainability of the environment.

Rio Summit helped in developing principles that guide the state in protecting and conserving the environment. The Declaration that was achieved in this Summit set 27 principles for environmental protection and sustainable development. As noted in one of the principles identified in this Declaration, the realisation of environmental protection requires the involvement and support of all stakeholders. Thus, the participation of members of the public is one of the principles that states must observe for the protection of the environment.<sup>22</sup> Further, the Summit also came up with the precautionary principle as a tool for preventing environmental damage before it occurs. Precautionary principle require that if an activity proposed to be undertaken will cause irreversible harm, then such an activity should not be carried out.

In addition to the discussed international commitments, there is the Montreal Protocol on Substances that Deplete the Ozone Layer.<sup>23</sup> This Protocol takes cognisance of the importance of the ozone layer in protecting the earth. Thus, measures must be taken to curb substances that deplete or reduce the ozone layer.

Africa as a region has been the main victim of climate change.<sup>24</sup> However, despite the negative consequences brought about by climate change to the continent, the region has been slow in partaking joint regulation of climate change. Arrangements that have been in place before the recently concluded Africa Climate Change Summit in Nairobi are general and deal with broad matters. These include the African Union which is a summit of heads of state in the continent and governments and the African Charter on Human and Peoples Rights that provides a general framework of human rights. However, there exist arrangements such as African Convention on the Conservation of Nature and Natural Resources (Algiers Convention). This Convention was adopted by the head of states summit in 1969 and came

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<sup>18</sup> Notable is the United Nations Convention to Combat Desertification and the Bonn-Based Secretariat of the United Nations Framework Convention on Climate Change.

<sup>19</sup> UNEP 2017 Report is available at

[https://projects.unep.org/docs/gef/documents/pirs/2017/unep%20fy17%20apmr%20part%20ii%20pir%20reports/bio%20diversity%20pirs-fy17/5356\\_2017\\_pir\\_unep\\_global.docx](https://projects.unep.org/docs/gef/documents/pirs/2017/unep%20fy17%20apmr%20part%20ii%20pir%20reports/bio%20diversity%20pirs-fy17/5356_2017_pir_unep_global.docx) Accessed on 10th August 2023.

<sup>20</sup> Arora Naveen Kumar and Isha Mishra, 'United Nations Sustainable Development Goals 2030 and Environmental Sustainability: Race against Time' (2019) *Environmental Sustainability*, 2(4), 339-342.

<sup>21</sup> United Nations Sustainable Goals are Available at United Nations Website. Accessed at <https://Sdgs.Un.Org/Goals> on 8th August 2023.

<sup>22</sup> Rio Summit Declaration, Principle 10.

<sup>23</sup> Montreal Protocol on Ozone Depleting Substances, 1987.

<sup>24</sup> Leal Filho Walter, Ulisses Miranda Azeiteiro, Abdul-Lateef Balogun, Andréia Faraoni Freitas Setti, Serafino Ar Mucova, Desalegn Ayal, Edmond Totin, Adeleke Mosunmola Lydia, Felix Kanungwe Kalaba, and Nicholas Otienoh Oguge, 'The Influence of Ecosystems Services Depletion to Climate Change Adaptation Efforts in Africa' (2021) *Science of the Total Environment*, 779, 146414.

into force in 1972. With the passing of Nairobi Declaration Climate Change, 2023, the continent is expected to comply with its commitment in dealing with the challenge.<sup>25</sup> Kenya was the first country in Africa to enact a law to regulate climate change.<sup>26</sup> Majority of the other states relied on policy frameworks in dealing with rising global temperatures.<sup>27</sup> However with time some other countries made similar achievements such as South Africa and Nigeria. In the East African region, there are some joint frameworks and attempts towards controlling global warming. The East Africa Community Protocol on Environment and Natural Resources is one of the arrangements by the partner states. Other commitments include the EAC Vision 2050, EAC Climate Change Policy 2010, and EAC Change Master Plan 2011-2031. Individual countries are also realising the importance of having national legislation in regulating environmental destruction through the release of greenhouse emissions. For example, within the region, Uganda has followed the footsteps of her counterpart Kenya and enacted National Climate Change Act in 2021.

### **National Legal and Policy Framework on Climate Change**

Enforcement of international obligations and commitments is best actualised at the state level. This is because the national framework and institutions of enforcing law are situated and mandated within national jurisdictions. Except where there are cooperation agreements or arrangements allowing states to dispense with their rights in certain specified or exceptional matters of cooperation, states are best placed to ratify and enforce international agreements. Thus, this paper majorly analysed the position of climate change law in the state of Kenya and its attendant issues. At the national level, the Constitution of Kenya, 2010 has several provisions dealing with environmental protection and conservation and by extension climate change.<sup>28</sup> In addition there are laws made by Parliament, delegated legislations, policies and other rules and principles that have a force of law in this area within the state.

### **The Constitution of Kenya, 2010**

The Constitution of Kenya, being the supreme law of the land provides a good basis for addressing environmental issues in the country. It as well provides a basis for the enactment of laws and policies that will ensure the actualisation of its provisions. According to Article 2 (5) and (6) of the Constitution, general rules of international law and international conventions ratified by Kenya become part of her domestic laws.<sup>29</sup> Among other things the Constitution provides for the protection and conservation of the environment. The Constitution recognises this role by providing the right to a clean and healthy environment as one of the safeguards in the Bill of Rights under Article 42. The preamble of the Constitution recognises the importance of respecting the environment sustainably for the sake of the current generation and for the benefit of the future ones. When it comes to matters of governance and upholding national values, Article 10 of the Constitution requires sustainable development and involvement of the public to be observed by all the government and all persons. Regarding the utilization, implementation and enforcement of environmental rights and concerns, Article 69 and 70 of the Constitution provides an important base. The Articles together with Articles 22, 23 and 162 of the Constitution empower persons (including those not directly affected by an action or inaction)) to take a step of enforcing environmental violations, denial, infringement or threats. For example, Article 162 (1) and (2) (b) as actualised through the enactment of the Environment and Land Court Act has created a court to resolve disputes relating to the environment and by extension climate change.<sup>30</sup> The relaxation of the doctrine of *locus standi* by Article 22 and

<sup>25</sup> Nairobi Declaration of Climate Change was passed in Nairobi on 6<sup>th</sup> September 2023 by Africa Leaders and partners Summit with the objective of having a declaration on climate change and call for action. This was in response to 2019 African Union Assembly Resolution.

<sup>26</sup> Wambua, Clement, 'The Kenya Climate Change Act 2016: Emerging Lessons from a Pioneer Law' (2019) *CCLR*, 257.

<sup>27</sup> Naeku Messy Janet, 'Climate Change Governance: An Analysis of the Climate Change Legal Regime in Kenya' (2020) *Environmental Law Review*, 22(3), 170-183.

<sup>28</sup> Constitution of Kenya, 2010.

<sup>29</sup> Constitution of Kenya, 2010 thus gives international conventions and commitments on climate change entered into by the state a force of law within the state.

<sup>30</sup> Environment and Land Court Act No. 9 of 2011 was established pursuant to constitutional requirement envisaged in Article 162 of the Constitution. Among other functions, pursuant to section 13 of the Act, The Court has mandate to hear and determine disputes relation to environmental protection and climate issues.

provision simplifying access to justice under Article 48 empowers any member of the public and other interested stakeholders to take action through court enforcement mechanisms in situation of environmental wrongs. This is inclusive of activities relating to or leading to climate change.

Similarly, the 4<sup>th</sup> Schedule Part 1 (22) and Part 2 (3) and (10) outlines the functions of national government vis -a-vis that of county government relating to the environment. However, in accordance with Article 189, the national government and the county government are supposed to cooperate, support and consult each other where dictates of good governance require.

### **The Environmental Management and Coordination Act**

The Environmental Management and Coordination Act was enacted in 1999 but came into force in 2000.<sup>31</sup> This Act was a game change in addressing and coordinating environmental matters in the country. It provided for a comprehensive mechanism of managing and coordinating environmental matters from a central point. Before this legislation, there existed several sectoral legislations that posed challenges when it came to coordinating and addressing environmental issues that were overlapping. On a positive note, it as well established the National Environmental Management Authority (NEMA) as a lead agency in the implementation and enforcement of environmental issues in the country.<sup>32</sup> Though NEMA is established as the lead agency in all matters touching on the environment, its role in addressing climate change is clear cut. Though the Act is not wholly dedicated to issues of climate change, it has several provisions for the protection and conservation of the environment. More specific provisions that are important in climate change include sections 56 and 56A.<sup>33</sup> Section 78 deals with the reduction and minimisation of greenhouse emissions and measures of controlling climate change. Also, provision such as in section 49 requires the promotion of the use of renewable energy and encouraging the planting of trees by various parties.

### **The Climate Change Act**

Kenya made a great milestone in 2016 by enacting the first legislation on climate change in Africa.<sup>34</sup> Before this legislation; matters of climate change were addressed through other environmental-related laws as well as policy frameworks. The Climate Change Act brought with it several measures and mechanisms for combating and enforcing issues related to climate change in the country. Among other milestones, the Act provides for the development of a five-year National Climate Change Action Plan (NCCAP) for guiding the mainstreaming of adaptation and mitigation actions. The Act establishes the National Climate Change Council as the overall climate change coordination mechanism. The Climate Change Act also provides for the operationalisation of the National Climate Change Response Strategy, 2010, the establishment of the Climate Change Directorate, and Climate Change Fund; administered by the National Climate Change Council. The Climate Change (Amendment) Act 2023 introduces the climate change carbon credits, trade and market regulation in the country.<sup>35</sup> NCCAP creation is to achieve provisions of the Paris Agreement. So far this has been achieved through two cycles. That is 2013-2017 and 2018-2022.<sup>36</sup> The country is now in the third cycle of the NCC Action Plan, the period for the other two Plans (2013-2017, 2018-2022) having lapsed. The measures and plans provided are meant to drive the country in achieving a low carbon climate resilient development pathway.

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<sup>31</sup> Environment Management and Coordination Act No. 8 of 1999 was enacted in 1999 with the objective to, “provide for the establishment of an appropriate legal and institutional framework for the management of the environment.....”.

<sup>32</sup> Section 7 read together with section 9 of Environmental Management and Coordination Act provides for establishment of NEMA with various functions inclusive of monitoring compliance on climate change laws as provided under section 17 of the Climate Change Act.

<sup>33</sup> EMCA section 56 deals with the protection of ozone layer while section 56A is on guidelines on climate change.

<sup>34</sup> Wambua Clement, ‘The Kenya Climate Change Act 2016: Emerging Lessons from a Pioneer Law’ (2019) *CCLR*, 257.

<sup>35</sup> The Climate Change (Amendment) Act, no. 9 of 2023 was assented on 1<sup>st</sup> September, 2023 and came into force on 15<sup>th</sup> September, 2023.

<sup>36</sup> Though the Climate Change Act came into force in 2016, there was already a National Climate Change Action Plan (2013-2017) that was regulated through a policy. The Act came to cement and give it more force of law.

Section 5 read together with section 7 of the Act provides for the creation of the National Climate Change Council. The Council is supposed to be chaired by the president and deputised by the deputy president. Under section 6, the Council has various functions inclusive of coordinating national climate change mechanisms. They also approve and oversee the implementation of the NCCAP and sets targets for the regulation of greenhouse emissions. Unfortunately, the pioneer NCCC operationalisation was delayed and even one appointment was subjected to legal hurdles in court due to politics related to its constitution.<sup>37</sup> This arose from the vagueness of the provision on the nomination of the representative of private and representative of civil society working on climate change. Similarly, the composition and headship of the NCCC may pose challenges when driving an agenda on climate change that may be unpopular to the government. Considering the manner of its constitution of members, the majority of the appointees are expected to be loyal to the president and thus giving the executive an upper hand when deciding projects where the government has an interest notwithstanding their effect on the environment. Being headed by the president, it becomes susceptible to manipulation. The Climate Change Directorate is established under section 9 as the lead agency of the government in matters of climate change. Working directly with the National Climate Change Council, its role is paramount in the implementation of climate change decisions in the country. In accordance with section 9, the mandate of the directorate seems to be confined to national climate change plans and actions. However, the role of the directorate might overlap with that of NEMA which is established by EMCA as the lead agency in all matters relating to the environment this notwithstanding the provision in section 17 that mandates NEMA to monitor, investigate and report on compliance to the Act on behalf of the Council. The Act requires mainstreaming to be done at the planning process of both levels of governance. Whereas this implementation may be carried out through existing national structures, at the county level, county governments are required to establish mechanisms for such implementation. A brief review of the progress made in establishing climate change laws in the county governments reveals that the majority of counties have not enacted such laws. A review of Kenya Law Report indicates that only about 10 counties had legislated specific laws to control climate change.

To strengthen the implementation of the Climate Act, it provides for enforcement mechanisms through criminal law. This is by providing offences related to climate change and their punishments. For example, section 33 provides for offences by persons including corporate bodies if they fail without lawful justification to comply with instructions issued by NCC Council as per the Act.<sup>38</sup> The Climate Change Fund should also be used in the enforcement of climate change adaptations and funding litigations by environmental actors. Jurisprudence in climate change in the country is still in the infancy stages. Noting that Climate Change Act allows citizens to hold public and private entities accountable, members of the public should utilise such provisions to enhance compliance with environmentally friendly activities. Section 23 of the Act read together with Article 70 of the Constitution empowers persons to enforce provisions of the Act relating to adaptations and resilience. Despite the provision as well as relaxing the doctrine of *locus standi*, the same has not been exploited in redressing wrongs committed against the environment. Climate change knowledge and dissemination of information is a requirement under the Act.<sup>39</sup> This important role has been actualised by the establishment of a climate change knowledge portal by the Directorate of Climate Change.<sup>40</sup> This is a database platform for collection, storage and dissemination of information related to climate change. It plays an important platform and initiative in empowering people with climate change information. Unfortunately, very few people are aware of the existence of such a portal and its content.

### **Other Enabling Laws**

Though the above-discussed laws are the main legislations dealing with climate change, there are other laws such as Forest Conservation and Management Act, Water Act, Land Act, Environment and Land Court Act, and Bio Safety Act *inter alia* that play an important role in climate change adaptations, resilience and enforcement. For example, the

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<sup>37</sup> *Republic v National Assembly & 5 others Ex-parte Greenbelt Movement & 2 others* (2018) eKLR.

<sup>38</sup> Climate Change Act, 2016.

<sup>39</sup> See Part V on public participation and duties provided under Part IV of the Climate Change Act.

<sup>40</sup> Climate change portal was establishment as a requirement by Climate Change Act and is overseen by the directorate of climate change established under section 9 of the Act.

Forest Conservation and Management Act assist in the management and conservation of forests and by extension trees. Forests are important in maintaining the natural ecosystem. According to UNEP 2017 Report, forest reserves are used in the conservation and protection of the natural ecosystem.<sup>41</sup> Most rivers and water sources originate from forest reserves. Where there is illegal logging and uncontrolled cutting down of trees, dangers associated with the sustainability of natural ecosystems and biodiversity are eminent. The Environment and Land Court is instrumental in the enforcement of provisions relating to the environment. Thus issues of environmental concern that require enforcement through the court process are within the purview of the court. Fortunately, the Constitution simplifies access to environmental justice by relaxing the principle of *locus standi* and as well providing for easier access to justice in terms of cost and process. As noted by Angote, very few cases have been handled by Environment and Land Court since its inception in 2012.<sup>42</sup> In his findings, Angote noted that the majority of cases handled by the court have been relating to land. This partly explains why the Judiciary has separated the court into two divisions; one is mandated to hear and determine cases dealing with land matters and the other to have jurisdiction in environmental matters. Notwithstanding that initiative, court relies on matters brought before it and resolves cases based on the evidence availed by parties. Noting the complexities related to gaseous substances emissions and quality standards, it becomes hard for an ordinary citizen to enforce matters related to climate change in court. It requires resources and expertise to gather and produce enough evidence in court that will sustain a case of climate change provisions contravention. The enforcement is best left to bodies and institutions of the government that are mandated and empowered to discharge such roles. Thus, where the government have interests it may compromise the system and processes and disregard the provisions of the law. This is the position when it comes to the implementation of major government programmes such as LAPPSET project, Standard Gauge Railway, and Nairobi Expressway among others. In addition, agencies such as NEMA are not properly empowered in tackling all the mechanisms and control measures. For example, they have resorted to delegating some key duties and reliance on other stakeholders because of their inadequate human resource.<sup>43</sup> The agencies also lack expertise in certain fields and are thus unable to implement the legal framework in such situations.

#### **Jurisprudence from Court**

Enforcement of climate change laws and policies in the country is still at the infancy stages. A close review of court decisions noted that though there exists a small percentage of environmental-related cases determined by the Environment and Land Court in Kenya compared to Land cases, little information exists specifically on climate change justice.<sup>44</sup> This paper however reviewed some few environmental-related cases that have an impact on climate change as they address pertinent issues regarding the destruction of the natural environment through human activities. One such notable case is the *Save Lamu & 5 others V National Environmental Management Authority (NEMA) & another*,<sup>45</sup> where the court authoritatively made its findings on the importance attached to protecting and conserving the environment. Court noted that the implementation of the Lamu Coal Project as proposed could have adversely affected the environment and livelihoods of the community in the area. Sadly, the EIA that was carried out and approval given by NEMA as the competent agency in environmental matters, the approval was done without proper public participation. Also, the findings of the court seem to be that the project can be implemented if the right procedure is followed, this paper finds the decision as a great achievement towards environmental justice. Similarly, in *Seifert & another v. National Environment Management Authority & another*,<sup>46</sup> court reiterated the importance of public participation and the value of undertaking EIA on projects that impact the members of the public. In accordance

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<sup>41</sup> UNEP 2017 Report.

<sup>42</sup> Angote Oscar, 'The Role of the Environment and Land Court in Enforcing Environmental Law; A Critical Analysis of the Environmental Caseload' (2018) University of Nairobi.

<sup>43</sup> Francis Matsanga, 'Factors Affecting Organisational Performance: The Case Of The National Environmental Management Authority (NEMA)' (2012).

<sup>44</sup> Angote Oscar, 'The Role of the Environment and Land Court in Enforcing Environmental Law; A Critical Analysis of the Environmental Caseload' (2018) University of Nairobi.

<sup>45</sup> [2019] eKLR.

<sup>46</sup> [2022] eKLR.

with *Mui Coal Basin Local Community & 15 others v Permanent Secretary Ministry of Energy & 17 others*,<sup>47</sup> court found that proper public participation in matters of environmental governance is a prerequisite. This means that environmental decisions are not a preserve of those in governance only, but those likely to be adversely affected and their descendants.

In *Ken Kasinga V Daniel Kiplagat Kirui & 5 Others*,<sup>48</sup> court found that procedures required when dealing with the environment must be strictly complied with by duty bearers. In *Republic V National Environmental Tribunal & 3 Others Ex-Parte Overlook Management Ltd and Silversand Camping Site Limited* court reiterated its important role in enforcing environmental duties in matters where the public is likely to be impacted. Similar decisions impacting the environment and climate change concerns are seen in *Mohamed Ali Baadi and Others v the Hon. Attorney General and 7 others*;<sup>49</sup> *Isaiah Luyara Odando & another v National Management Environmental Authority & 2 others*, or *County Government of Nairobi & 5 others (Interested Parties)* - (Dandora case),<sup>50</sup> and *Friends of Lake Turkana Trust v Attorney General & 2 others* (Friends of Lake Turkana case).<sup>51</sup> In all these cases, court took a bold step of deciding in support of the right to clean and health environment where environmental wrongs and damage subsisted for a long duration.

### **Devolved legislations**

The Constitution of Kenya, 2010 introduced county governments as part of governance in Kenya. Equally, they were as well endowed and have a role to play in the protection of the environment and natural resources. Though the 4<sup>th</sup> Schedule of the Constitution provides the division of functions between the national government and the county government, the overall objective is to bring good governance and welfare of all Kenyans. Pursuant to other provisions such as Articles 189 and 190 of the Constitution provide that the two levels of governance are supposed to work in a manner that cooperates and complements each other. Article 63 of the Constitution places community land in the hands of county governments. Thus, counties can protect community land especially where they hold natural resources such as forests. This thus calls upon the county government to work hard towards establishing workable climate change frameworks. The Climate Change Act of Kenya provides that mainstreaming of climate change provisions is to be done by the national government and county governments. As noted in the discussion of the Climate Change Act and county legislation, the provision of climate change laws at the County level is still wanting. A review done on the Kenya Law Report website indicates that the majority of counties have not provided specific legislation on climate change.<sup>52</sup> Some of the counties that have adopted climate change framework include Wajir, Makueni, Vihiga, Kericho, Isiolo, Kisumu, Machakos, and Tharaka Nithi. Sadly, some counties such as Tharaka Nithi County and Wajir County have dedicated their laws to finances and its administration as opposed to having rules and principles to control climate change.<sup>53</sup> Further, a close review of county climate change laws reveals that there is less if no provision for coordination of climate change issues between the national government and county governments. For example, Isiolo County Climate Act does not have a provision regarding the relationship between the two levels. Elgeyo Marakwet and Kwale have enacted Elgeyo Marakwet County Charcoal Act and Kwale County Air Pollution, Noise Pollution and Nuisances Act respectively. However, these laws are not particular on climate change but address it scantily together with other related matters.

This paper finds that proper formulation and implementation of county frameworks can greatly contribute to maintaining the natural ecosystems and the county's environs. Unfortunately noting, the way counties are structured, it is prudent for all counties to take steps towards combating climate change jointly as the destructive activities of one county may injure that of the neighbouring county.

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<sup>47</sup> *Constitutional Petition No. 305 of 2012*.

<sup>48</sup> Nakuru ELC Constitutional Petition No. 50 of 2013.

<sup>49</sup> Nairobi HCCC Petition No 22 of 2012.

<sup>50</sup> [2021] eKLR; [2021] KEELC 2235 (KLR).

<sup>51</sup> [2014] eKLR.

<sup>52</sup> Kenya Law Report website available at <http://kenyalaw.org/kl/>.

<sup>53</sup> See the Wajir County Climate Change Fund Act, 2016 and Tharaka Nithi County Climate Change Fund Act, 2019.

A wide range of rules and policies have been developed to deal with climate change in the country. Some of these legislations include National Climate Change Framework Policy.<sup>54</sup> Importantly, this policy was made at the same time as the Climate Change Act. This was preceded by the National Climate Change Response Strategy, 2010. Others are National Environment Protection Policy, 2013 formulated to provide better environmental quality through sustainable management and use of both the environment and natural resources. There is also Environmental Management and Coordination (Air Quality), were developed to provide for the prevention, control and abatement of air pollution. Importantly the regulations require emission standards in areas such as industries and motor vehicles. The Environmental Management and Coordination (Substances) 2007 was formulated to regulate the production, trade and use of controlled substances and products. Through the regulations, data is collected to facilitate compliance with reporting requirements such as Montreal Protocol on Substances and Products that Deplete the Ozone Layer.

### **Emerging Issues in Climate Change Law Compliance and Enforcement – The Kenyan Situation**

The effectiveness of the legal, institutional mechanism and policy directions that have been taken by the state has taken different trajectories. As noted the constitutional framework provides a direction towards protecting and conserving the natural environment and the Climate Change Act provides a basis for the normative regime for controlling climate change. This is in addition to the discussed legislations as well as policy frameworks. However, the implementation of such a framework has not been effective and has been hampered by legal, institutional, policy and administrative challenges. The Act despite being enacted about 7 years ago prescribes several measures and actions to be undertaken, many such measures are yet to be operationalised. For example, section 16 requires the formulation of regulations to govern the nature and procedure of reporting by private entities which has not yet been actualised. This paper however notes that there are some draft regulations that have not been given the force of law. These are Drafts on Climate Change on (Public Participation and Access to Information) Regulations; (Duties and Incentives) Regulations; (Monitoring, Reporting and Verification) Regulations; (Code of Conduct and Conduct for Doing Business) Regulations; and National Climate Change Learning Strategy 2021-2031. Once enacted such regulations are expected to give climate change laws an impact in combating rising global temperatures. These draft regulations seeks inter alia in effecting constitutional requirement on public participation; establish a framework on public awareness and participation; imposing climate change duties on public entities at both levels of governance; creating a framework for monitoring, reporting and verifying greenhouse gas (GHG) emissions, mitigation and adaptation actions among others; and guiding the conduct of members of the National Climate Change Council.

The Climate Change Act provides the Climate Change Directorate as the lead agency of government in climate change matters; however, it as well grants NEMA additional role of monitoring compliance with the Act on behalf of the Council. NEMA as the lead agency in environmental matters is authorised to monitor compliance with the provisions of the Climate Change. This is despite the Authority having had challenges of inadequate personnel.<sup>55</sup> This complicates the matter further on the functioning of the Authority. However, this can be addressed by empowering the authority with human resources.

A review of the existing framework reveals that there is lack of structured manner to combat climate change. The National Climate Change Council is chaired by the president and deputised by the deputy president. Though this works well when it comes to political goodwill of implementing climate change programmes, such an arrangement may be a drawback when it comes to the implementation of government programmes where the political leadership has an interest. Further constituting the climate change as envisaged poses some challenges as witnessed in composing the pioneer Council. This explains why it was bedevilled by litigation challenging some of the people appointed to represent various stakeholders.<sup>56</sup> All measures and steps to be taken in dealing with climate change must be in line with climate justice. In addition, measures taken must as well be consistent with human rights. This is the case especially when dealing with vulnerable people, minority and marginalised groups. Such measures must uphold community rights and interests. Minority and

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<sup>54</sup> National Climate Change Framework Policy -Sessional Paper Number 5 of 2016

<sup>55</sup> Francis Matsanga, 'Factors Affecting Organisational Performance: The Case of the National Environmental Management Authority (NEMA)' (2012).

<sup>56</sup> See case challenging appointment of members of the council.

marginalised groups rights and benefits must be safeguarded. Historical injustices occasioned to community and groups such as Endorois and Ogiek should be addressed. This can be achieved through collaboration and partnership with community stakeholders and members. Such measures should extend to as well addressing historical injustices and exploitation subjected to African states and societies such as colonialism and exploitation of natural resources. Impediments associated with the administration of climate justice are weakest on the complexities associated with litigation.<sup>57</sup> Soyapi claims that the process of litigating environmental wrongs is not accessible to an ordinary individual. Reflecting on the principle of sustainability, if climate change effects are allowed to persist, then the current generation may have less to deliver to the future generation. As noted, there is lack of capacity by government agencies they are thus unable to effectively challenge, implement, enforce or encourage the population in adopting climate change resilience and adaptive measures. According to Ageyo and Gatwiri, there is lack of awareness of the existing frameworks on climate change. The majority of people do not access or comprehend information related to climate change despite the existence of a framework advocating for the right and access to information.<sup>58</sup> Ageyo and Gatwiri find that an obstacle exists in how information relating to climate change is disseminated in the country more so at the grassroots level.<sup>59</sup>

The country's climate change framework should address national and local action in combating rising global temperatures. Sustainability measures at the local and household level may be affected by socio-economic factors such as poverty. The use of charcoal and firewood as the main source of energy for cooking in the rural set-up is driven by a lack of alternative means of cooking as well as lack of awareness. Similarly, for the people who resort to charcoal burning which is a great contributor to emission of carbon, the majority engage in the practice as an economic activity. Such issues are not contemplated by Climate Change Act and thus not achievable under the current framework. A review of the Climate Change Fund established under the Climate Change Act presupposes part of the money being raised through assistance. There are challenges associated with overreliance on such funds in that the donors and funders usually have vested interests. Thus, there is a need to explore other avenues such as trading in carbon credit as a source of funds for the government and players in the climate change control aspects. This paper takes cognisance of the amendment to streamline carbon credit trading in the country. However, noting the same is yet to be operationalised, there is need to fast-track the same to benefit the country in engaging in environmentally friendly activities.

In an attempt to implement the LAPPSET Project as one of the Vision 2030 flagship projects, the state made some enactments and reforms on the legal framework. The Energy Act 2019 was enacted among other things to allow for the regulation of coal energy. Before this law, there was the discovery of coal deposits in Lamu County which was projected by the government as an important resource in providing a source of energy to support the needs of the LAPPSET corridor. Thus, the enactment of the Act gave room to production of coal as an energy source. This led to the approval and licensing of coal mining in Lamu and prospects be carried out in Kitui. Considering the challenges that coal poses to the environment and by extension to the emission of poisonous gaseous substances, the approval of the licence by NEMA was challenged in court, and the court agreed with the petitioners that the approval process did not adhere to the laid down procedure.<sup>60</sup> Thus court stopped the continuation of the venture until proper public participation is conducted.

Forests play an important role in maintaining the natural ecosystem by purifying the air. This is by absorbing excess carbon released into the atmosphere. Thus, forest reserves enable the conservation and protection of the natural ecosystems. In addition, most rivers and water sources originate from forest reserves and other water catchment points. Such water assists the population in situations of dry weather occasioned by climate change. Illegal logging and

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<sup>57</sup> Soyapi Caiphas, 'Environmental Protection in Kenya's Environment and Land Court' (2019) *Journal of Environmental Law*, 31(1), 151-161.

<sup>58</sup> Constitution of Kenya, 2010, Article 35 provides for citizens right to access information. Similarly, Parliament enacted Access to Information Act No. 31 of 2016, to give effect to the stated constitutional provision.

<sup>59</sup> Ageyo Joe and Idah Gatwiri Muchunku, 'Beyond the Right of Access: A Critique of the Legalist Approach to Dissemination of Climate Change Information in Kenya' (2020) *Sustainability*, 12(6), 2530.

<sup>60</sup> *Save Lamu & 5 others v National Environmental Management Authority (NEMA) & another* [2019] eKLR.

deforestation thus threaten the water supply and availability in the country.<sup>61</sup> Lifting of a ban on the logging of trees in public forests by the president was not informed by environmental needs but by political convenience. That explains why the Law Society of Kenya was quick to seek court intervention in nullifying that directive.<sup>62</sup> Noting the role that trees play especially in gazetted forest, stakeholders must jealously guard any form of cutting of trees. Further, from previous experiences, allowing logging of trees for economic purposes has been faced with misuse of the windows by the forest managers and entrepreneurs to the detriment of others. This runs contrary to intra-generational equity and in turn, affects inter-generational equity. Such wanton cutting down of trees is destructive to the natural environment and thereby denies the country ability to the natural form of cleaning or purifying the air (carbon).

It should as well create possibilities of partnering with other states noting that pollution does not respect political boundaries. Transboundary pollution is the main menace affecting global temperatures. There is lack of capacity by states to enforce climate change obligations and principles beyond borders. Foreign jurisprudence more so in the US, has held that municipal courts (national) cannot through municipal law hold multi-national oil companies liable for damages resulting from greenhouse gas emissions.<sup>63</sup> The state must continuously invest in research, investigations and seeking knowledge that can address climate change impacts. Laxity and allowance of destructive activities such as permitting uprooting of Baobab trees for commercial purposes without scientific proof and assessment of its effect must be shunned. Such efforts should be directed towards adoption of policies and climate resilience action measures of reducing climate change impact.

## CONCLUSION

Environmental protection is a concern for everyone. Our natural environment has its way of balancing itself if left on its own. However, due to increased human activities in the process of improving his livelihood, there is human interference through the introduction of destructive gaseous substances into the air. These greenhouse emissions in turn negatively affect the atmosphere thereby interfering with the environment. This has thus affected the natural environment and led to increased global temperatures that lead to climate change. The world has responded to this by proposing measures and control of greenhouse emissions to combat climate change. As noted in the discussion, the study concludes that there exists a legal framework, both nationally and internationally to address climate change. This is in the form of international instruments and commitments such as the UNFCC and the Paris Agreement.

Nationally, in addition to climate change policies, Kenya enacted the Climate Change Act in 2016. Climate Change Act serves as a normative framework for combating climate change in the country. There also exists several other legal frameworks intended to control climate change. However, these have not met their objectives of combating climate change. This is because, despite the existence of such frameworks, the world and the country are still facing huge cases of greenhouse emissions. Further, the effects of such activities are being felt in the country more than before. As noted, the enforcement of climate change adaptation and resilience measures have not been complied with by both the public and private sectors. According to Soyapi, little has been made when it comes to enforcement of climate change measures through the court system.<sup>64</sup> This study attributes this to lack of awareness and capacity to push stakeholders in complying with the provisions of the climate change law and other enabling provisions. There is also complexity and financial implications in sustaining cases on climate justice. Institutions such as NEMA and Climate Change Directorate should explore enforcement mechanisms inclusive of litigation.

However, as the analysis reveals the current legal framework, requires concerted efforts in actualising its objective. According to Jane, the ever-rising destructive human activities leading to global temperatures require multiple solutions in addressing climate change.<sup>65</sup>

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<sup>61</sup> UNEP 2017 Report on Forestry And Illegal Logging.

<sup>62</sup> LSK sought conservatory order against president's directive lifting the ban of logging of trees in gazetted forests.

<sup>63</sup> *West Virginia v Epa*, 142 S. Ct. 2587, 213 L. Ed. 2d 896, 597 U.S. (2022); *Wildearth Guardians V. Zinke*, 368 F. Supp. 3d 41 (D.C. 2019).

<sup>64</sup> Soyapi Caiphias, 'Environmental Protection in Kenya's Environment and Land Court' (2019) *Journal of Environmental Law*, 31(1), 151-161.

<sup>65</sup> Leggett Jane, 'The United Nations Framework Convention on Climate Change, The Kyoto Protocol, and the Paris Agreement: A Summary' (2020) *UNFCC, New York*, 2.

Analysis of the enforcement of climate justice reveals that the implementation and enforcement require inputs of the international community, political leadership and judicial actors. There is need to developing joint frameworks for combating climate change. Thus, realisation of a comprehensive and coordinated adaptation and resilience measures of addressing the effects of climate change.

The challenge of over-reliance on international financing is that financiers also come with vested interests. However, the international community have a great role to play in addressing activities and practices that continue to subject the earth to the effects of climate change. This should be within parameters that consider environmental needs as of priority.

## **RECOMMENDATIONS**

Based on the findings above, the study recommends the following measures to be undertaken;

- Adoption of a multi-disciplinary approach to climate change resilience and adaptations. This can be achieved through partnerships, collaboration, public participation and stakeholders' involvement.
- The international community and environmentalists to cooperate and develop joint actions geared towards actualising climate change laws.
- Strengthening and enabling institutions and structures of environmental protection such as NEMA. This can be achieved through capacity building to undertake enforcement measures inclusive of litigation.
- The constitution of climate change committees should be downscaled to the lowest level of administration. This is in line with constitutional concepts of devolved governance and inclusivity.
- States are obligated to develop comprehensive and effective mechanisms and measures for reducing activities that are pushing the world to global warming and by extension to climate change.
- Continuous development of climate change resilience measures and adaptations to address adverse effects on the natural environment. This can be achieved through reforming the Climate Change Act to respond to the realities of the nation and beyond. For example, through the uptake of climate change adaptations.
- The country should adopt structures and frameworks that will enable communities and interested individuals to benefit from climate change resilience mechanisms e.g. carbon credit. Noteworthy is that Climate Change Fund can be supplemented by carbon credit. With the passing of the Climate Change (Amendment) Act, 2023, the next step is actualising carbon credits, markets, and trading in the country. This should as well integrate and put structures for carbon credit trading and awareness. This will complement growth efforts that might be halted because of their impact on the environment.
- Enforcement and whole implementation of climate change laws and policies by all stakeholders inclusive of the private sector who are much involved in the production of greenhouse emissions. This can be achieved partly by encouraging the uptake of enforcement and litigation by the public.
- County governments should develop effective laws and governance structures. Counties that have not enacted laws on climate change should prioritise enacting such laws. Similarly, amendments and reforms to existing county climate change laws should be done to improve their climate control measures and resilience mechanisms.
- People must be empowered and educated about climate change and measures of addressing the same. Further, there should be integration of climate change learning at all levels of education and training.
- There should be recognition and involvement of traditional knowledge in protecting environment. This is so especially in cases of indigenous communities and knowledge.