

# **Is climate justice worth exploring? A critical analysis for emerging legal professionals**

**Bernard Namanya**

**Judge, High Court of Uganda**

**15 August 2024**

# Presentation outline

1. Introduction

2. Potential areas of legal work

- i. Legal and policy research/consultancy
- ii. Legal advisory and compliance
- iii. Litigation on climate change

3. Conclusion

# 1. Introduction

- According to the **IBA President 2019-2020** (Horacio Bernardes Neto):  
*“The legal profession must be prepared to play a leading role in maintaining and strengthening the rule of law and supporting responsible, enlightened governance in an era marked by a climate crisis.”*
- According to the information paper on climate change prepared for the **IBA (2021)**:  
*“Climate change is considered by many as one of the biggest threats facing the future of life on our planet, and its impact is beginning to be felt everywhere, including on bars and lawyers.”*

# Introduction (cont'd)

- Let me start by giving you an idea of the kind of climate crisis we are confronted with
  - The Paris Agreement (2015) set the goal of limiting global temperature increase to 1.5 degrees Celsius.
  - However, recent research shows that if the ambition to address climate change is not significantly scaled up, global temperature increase is likely to reach 2.8 degrees Celsius by the end of the 21<sup>st</sup> century.

# Introduction (cont'd)

- According to the Intergovernmental Panel on Climate Change (IPCC), global temperature increase of 2.8 degrees Celsius would be catastrophic for most countries:
  - Lethal heat and humidity leading to loss of life in many parts of the world.
  - Water shortages to a large number of the population.
  - Extinction of plants and animals.
  - Sea level rise leading to loss of habitable land by 2100.
  - Rapid fall in food production exposing a large number of the population to extreme hunger and death.

# Introduction (cont'd)

- Because of the climate crisis, significant financial resources are being invested to address climate change:
  - According to the AfDB, Africa received USD 4.2 billion in private climate finance in the financial year 2019/20.
  - Uganda's updated Nationally Determined Contribution (NDC) (2022), estimates that USD 28.1 billion is required to implement both adaptation and mitigation actions.
  - According to a policy brief on climate finance prepared by the Uganda Development Bank (UDB) (2024), between the years 2000 to 2021, a total of USD 4.74 in climate finance was invested in Uganda.
- In my view, this level of investment in the sector (which is projected to grow upwards to respond to the urgency of the climate crisis) shows that there are opportunities for legal professionals to harness.

## 2. Three (3) areas of potential legal work

### (i) Legal and policy research/consultancy

#### *National Climate Change Act, 2021*

- **Section 5** of the Act provides for the formulation of the Framework Strategy on Climate Change.
- **Section 6** of the Act provides for the formulation of the National Climate Change Action Plan.
- **Section 7** of the Act provides for the formulation of the Lead Agency Climate Change Action Plan. **Note:** A lead agency means a ministry, department, local government or agency of Government

## Legal and policy research (cont'd)

- **Section 8** of the Act provides for the formulation of the District Climate Change Action Plan.
- **Section 9** of the Act provides for emissions trading mechanisms: potential legal work includes providing legal representation to participating parties (producer/buyer of emissions reductions as well as funders of carbon trading).
- **Section 9(4)** of the Act provides for formulation of a regulatory framework for the carbon market. While this activity is already underway, lawyers may engage by providing comments on the draft Regulations.



## Legal and policy research (cont'd)

- **Section 12** of the Act provides for the drafting of the national communications report to the UNFCCC. E.g. NDC, every 5 years.
- **Section 17(3)** of the Act requires MDAs to designate a climate change unit to coordinate action on climate change.
- **Section 21** of the Act provides for the formulation of Regulations for implementation of the Act.
- The law requires most of the policy frameworks to be reviewed every 5 years e.g. see **Section 5(5) of the Act.**

## Legal and policy research (cont'd)

- ***Biofuels Act (2020)***: Section 20 provides for the formulation of Regulations for implementation of the Act.
  - The Biofuels (Declaration of Licensing Authority for Biofuels) Order, 2022.
  - The Biofuels (Licensing) Regulations, 2022.
- Supporting local governments to formulate ordinances and byelaws to address climate change. ***E.g. KCCA Green Infrastructure Ordinance***

## (ii). Legal advisory and compliance

- Legal advice on how clients can reduce greenhouse gas emissions and go green (reduce carbon emissions).
- Identification of potential risks that may expose clients to climate change litigation.
- Helping clients understand their climate change obligations under emerging laws; for example, how many businesses in UG understand their legal obligations under the *National Climate Change Act, 2021*?
- Advising clients on how to participate and benefit from carbon market mechanisms.

# Legal advisory and compliance (cont'd)

- To appreciate the risk exposure to business enterprises, one needs to look some examples of past litigation:
  - Climate litigation against private entities and financial institutions on grounds that they have ignored or misused knowledge about climate risk. E.g. in the case of ***Client Earth v. Belgian National Bank (2022)***, the plaintiffs argue that that the Bank had failed to meet environmental, climate and human rights requirements when purchasing bonds from high carbon emitting companies.
  - In the case of ***Abrahams v. Commonwealth Bank of Australia (2021)***, shareholders challenged the Bank's involvement in a series of fossil fuel projects that potentially infringed the bank's environmental policy.

## (iii). Litigation on climate change

- What is climate litigation?
  - Climate litigation is defined as cases brought before adjudication bodies that raise issues of law or fact regarding the science of climate change and the response measures to climate change consisting of mitigation, adaptation, and means of implementation such as climate finance, technology transfer, and capacity building.
  - Climate litigation cases can be classified into two main categories – strategic and routine court cases. Strategic cases aim at influencing public and private climate accountability to instigate broader climate policy debates and reform.
  - Routine cases deal with less prominent cases such as challenging decisions of environmental regulators on environmental impact assessments.

# Litigation (cont'd)

## **Section 26 of the National Climate Change Act provides for litigation on climate change**

- (1) A person may apply to the High Court for relief if a person or entity's action or omission threatens or is likely to threaten efforts towards adaptation to or mitigation of climate change.
- (2) The High Court may, in addition to any other orders it may deem appropriate, make orders to—(a) prevent, stop or discontinue the act or omission that is the subject of the application; (b) compel the Department, lead agency or any person to take measures to reverse the act or perform the act that was omitted; or (c) provide compensation to a person that has suffered loss or damage as a result of the act or omission.
- (3) A person may apply to the High Court under subsection (1) notwithstanding that that person cannot prove that the act or omission of the Department, lead agency, individual or private entity has caused or is likely to cause personal harm or injury to that person or any other person.

# Litigation (cont'd)

- According to the **UNEP Global Climate Litigation Report: 2023 Status Review**, as of 31 December 2022, the global picture is that 2,180 cases had been filed in 65 jurisdictions and international or regional courts, tribunals, quasi-judicial bodies, or other adjudicatory bodies, including in UN bodies and arbitration tribunals.
- Litigation growth:
  - 2017>>884
  - 2020>>1550
  - 2022>>2180
- 70% of the litigation is happening in the USA but growth is happening in the global south including in Africa.

# Litigation (cont'd)

- According to the **UNEP Report (2023)**, there is an observed increase in global climate change litigation as demonstrated below:





# Litigation (cont'd)

- Some of the types of litigation include:
  - Enforcement of existing climate change laws.
  - Orders against stakeholders to take more ambitious action on climate change.
  - Compensation for harm caused by climate change (failure to adapt cases).
- Potential adjudication forums include:
  - National (domestic) courts.
  - Regional courts e.g. East African Court of Justice, COMESA Court of Justice, African Court on Human and Peoples Rights, etc.

# Litigation (cont'd) – Success stories

- *D.G. Khan Cement Company v. Government of Punjab (2021)*: The Supreme Court of Pakistan noted the value and need of devising and implementing appropriate adaptation measures to ensure water, food and energy security for the country.
- In the South African case of *EarthLife Africa Johannesburg v. Minister of Environmental Affairs and Others (2003)*, the applicant challenged the approval of an environmental impact assessment (EIA) for the construction of a coal fired power station without adequately addressing the potential impacts of climate change, and the court set aside the EIA approval, and ordered for a climate change impact assessment of the project.
- The Kenyan case of *Save Lamu & Others v. National Environment Management Authority (2016)* concerned the planned development of a coal fired power plant at Lamu. Save Lamu and others challenged government's decision to approve the EIA for the project on several grounds including the project's contribution to climate change. The Tribunal agreed with the plaintiffs and set aside the EIA approval for the project.

# Conclusion

## Possible ways for a lawyer to engage:

- The existence of a robust legal framework on climate change means that are opportunities for legal professionals. Suggested ways to engage include the following:
  - Find an appropriate climate justice network to belong to. E.g. the **Peer Review Network of the Sabin Center for Climate Change Law**.
  - Get engaged by doing research on climate justice.
  - Be prepared to volunteer, do *probono* climate change legal work – this is a gateway for potential career opportunities.
  - Establish rapport with some of the key stakeholders e.g. **Climate Change Department, Climate Finance Unit at the Ministry of Finance, UNFCCC Regional Office for Eastern Africa (hosted by EADB), other UN Agencies in Uganda, etc.**

# Conclusion (cont'd)

## Resources on climate litigation

- United Nations Environment Program (UNEP) Global Climate Litigation Report (2023) [https://www.unep.org/resources/report/global-climate-litigation-report-2023-status-review?gad\\_source=1&gclid=Cj0KCQjwq\\_G1BhCSARIsACc7Nxr7WoOZUZx-J8DYkNcN0jitJTrVVrPTO7TmV8bjkeUX6pUhL5fr\\_lcaAsItEALw\\_wcB](https://www.unep.org/resources/report/global-climate-litigation-report-2023-status-review?gad_source=1&gclid=Cj0KCQjwq_G1BhCSARIsACc7Nxr7WoOZUZx-J8DYkNcN0jitJTrVVrPTO7TmV8bjkeUX6pUhL5fr_lcaAsItEALw_wcB)
- United Nations Framework Convention on Climate Change (UNFCCC) <https://unfccc.int/>
- Climate change litigation database run by the Sabin Center for Climate Change Law of Columbia Law School <https://climatecasechart.com/>
- Climate crisis project of the International Bar Association <https://www.ibanet.org/LPRU/Climate-Crisis>
- Global trends in climate change litigation: 2024 snapshot <https://www.lse.ac.uk/granthaminstitute/publication/global-trends-in-climate-change-litigation-2024-snapshot/>
- Climate Litigation Network <https://climatelitigationnetwork.org/>
- Eastern Africa Alliance on Carbon Markets and Climate Finance <https://easternafricaalliance.org/>
- Carbon Markets in Africa <https://www.undp.org/africa/blog/carbon-markets-africa-balancing-finance-mobilization-emission-reduction-goals>