

2014

An Assessment of the Performance of the Environment & Land Court

16th Scorecard Report





Full Report

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EXECUTIVE SUMMARY

Land disputes contribute to a huge percentage of the conflicts facing Kenya. Most of the literature in Kenya points to the fact that the impact of the colonial land policy led to inequality in land ownership and use, resentment by Africans, landlessness, squatting, land degradation and resultant poverty that exists. There were high expectations following independence in Kenya, as was with other African countries that had experienced similar land challenges. However, the propagation of the same colonial policies continued. Indeed, independence saw a general re-entrenchment and persistence of colonial themes, policies and patterns of organization in all aspects of Kenyan economy. It is not until we got a comprehensive land policy in 2009 and a new constitution anchoring a chapter on land and environment in 2010 that Kenya began a policy redirection of land sector issues and dispute resolution.

However, 50 years down the line, we still face challenges and the land question is yet to obtain answers through the effective and systematic implementation of our land policy and the constitution. The number of disputes over land has continued to increase with population and economic growth. Legislation to mitigate land disputes like the Land Disputes Tribunal Act proved wanting and was later repealed to give way to a more appropriate legislation for dispute resolution. Following the promulgation of a new constitution, the Environment and Land Court Act, 2011 was enacted under which new Environment and Land Court (ELC) has been established in various Counties. The establishment of this court, with the same status as the High Court, has brought in new light and confidence to the public in the resolution of land disputes.

The court started its operations in 2013 with a total of twenty judges in 16 counties across the country as of November 2014. To examine the gains made by this court, Land Development and Governance Institute (LDGI) commissioned the 16th scorecard to assess the performance of the ELC. The study interviewed 466 respondents across 27 counties. Out of the 27 counties visited, 16 had an Environment & Land Court while 11 didn't have. 75% of the respondents filed their cases with the ELC. 25% of the respondents either filed their cases at Magistrate Courts or

sought alternative means to resolve their land disputes such as council of elders. The study also revealed that 79% of the respondents were confident with the ELC while 21% had no confidence in the courts. They also felt that corruption was low with 67% ranking it as low and only 19% said it was high. In conclusion, there is general optimism from the public on service delivery by the Environment & Land Court. In areas where the courts are established, they are fairly accessible to the public.

The report recommends that there is need to increase the number of courts to cover all counties as a way to reduce the cost of travelling incurred by service seekers going to other counties. The courts should also be well facilitated by ensuring that they have independent premises which are not shared for criminal or civil cases. This way the court can hear cases for 5 days each week as opposed to having scheduled days. Finally, computerization of filing process and regular staff training on land issues are central to improving efficiency at the courts.

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1. INTRODUCTION

The National Land Policy, 2009 recognizes the need to ensure access to timely, efficient and affordable dispute resolution mechanisms. It notes that this will facilitate efficient land markets, security of tenure and investment stability in the land sector. In order to facilitate effective, fair and efficient dispute resolution, the National Land Policy urges the Government to: Establish an independent, accountable and democratic system backed by law to adjudicate land disputes at all levels; establish appropriate institutions for dispute resolution and access to justice within communities with clear operational procedures, mechanisms for inclusion of community members in decision-making and clear record keeping to ensure transparency and the development of guiding rules for making decisions on specific matters; and encourage and facilitate the use of Alternative Disputes Resolution (ADR) mechanisms such as negotiation, mediation and arbitration to reduce the number of cases that end up in the court system and delayed justice.

This policy led to the setting up of the Environment and Land Court established under the Environment and Land Court Act, 2011. The court has similar status as the High Court and is guided by the principles of sustainable development of land, the principles of the National Land Policy, judicial authority, national values and principles of public service. Moreover, the court is given exclusive jurisdiction over disputes under Article 162 of the Constitution of Kenya, 2010. These include power to hear and determine disputes relating to environment and land, including disputes relating to environmental planning and protection, trade, climate issues, land use planning, title, tenure, boundaries, rates, rents, valuations, mining, minerals and other natural resources. The other disputes under the ELC's jurisdiction includes those relating to compulsory acquisition of land; land administration and management; public, private and community land contracts; or any other instruments granting any enforceable interests in land.

The court started its operations in 2013 and currently has twenty judges under it in sixteen counties. It continues to play a very important role and provides a unique structure in the judicial system that gives land dispute resolution matters a critical focus. More cases are being filed in the court as it also tries to deal with the backlog that was carried over after the dissolution of land tribunals. While its running has not been fully optimized as will be shown by

this report, huge steps have been made.

In line with this the Land Development and Governance Institute commissioned this study to assess performance of the Environment & Land Court in resolving land disputes. This report contains the findings of the study in which interviews were conducted in sixteen counties with an Environment and Land Court and thirteen without the court.

1.1. Objectives

The main objective of the 16th Scorecard was to assess the performance of the Environment and Land Court in resolving land disputes. The specific objectives were:

1. To ascertain the level of satisfaction with the efficiency of service delivery in the Environment & Land Court.
2. Establish the alternative disputes resolution mechanisms taken by the public in dealing with land dispute.

1.2. Scope of the study

The study was conducted at 29 stations in 27 counties between 27th October 2014 and 7th November 2014, targeting counties with Environment & Land Courts (16)¹ as well as others where Environment & Land Courts had not been established (11)².

¹ Busia, Bungoma, Machakos, Meru, Embu, Nakuru, Uasin Gishu (Eldoret), Kerugoya, Nyeri, Kisumu, Mombasa, Kilifi (Malindi and Kilifi), Kakamega, Kitale, Kisii, and Nairobi (5 judges).

² Kajiado, Kiambu, Kitui, Makueni, Isiolo, Laikipia (Nanyuki and Nyahururu towns), Migori, Homabay, Kwale, Narok, and Murang'a.

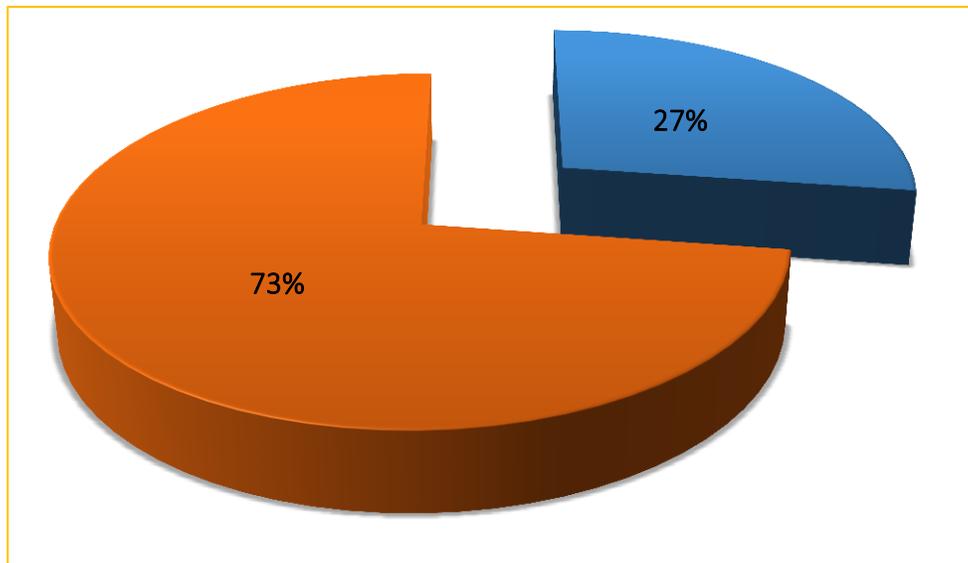
2. FINDINGS

2.1. PROFILE OF THE RESPONDENTS INTERVIEWED

2.1.1. Gender of the respondents

A total of 466 respondents participated in the research. 73% of the respondents were male and 27 % were female as shown in the figure 2.1 below.

Figure 2.1: Gender of the respondents

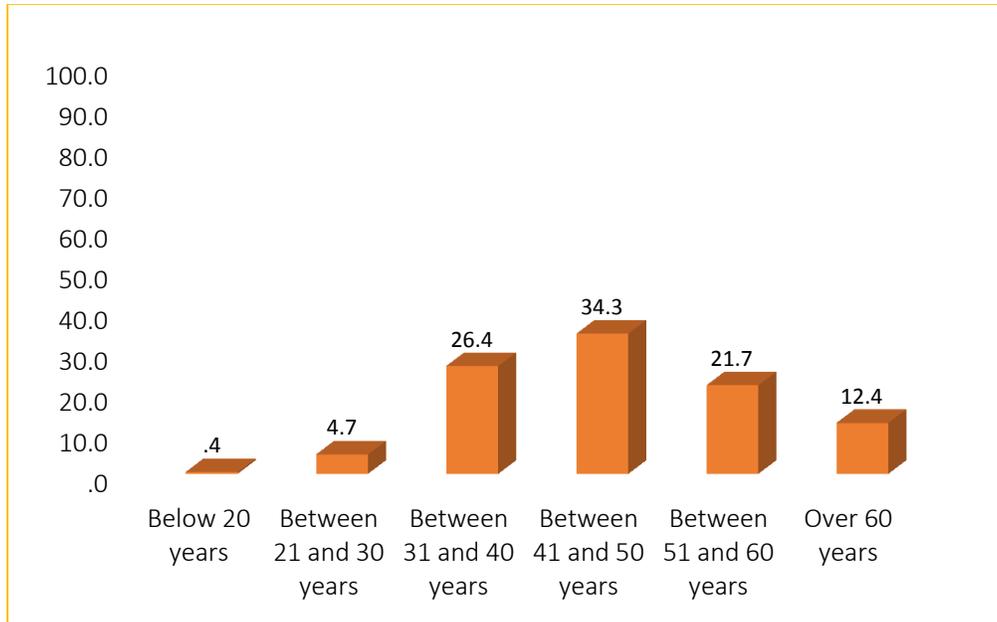


■ Female ■ Male

2.1.2. Age of the respondents

A majority of the respondents seeking justice at Environment & Land Courts were aged between over 30 years, with 26.4% accounting for those aged between 31-40 years, 34.3% aged between 41-50 years, 21.7% of the respondents aged 51-60 and 12.4% were over 60 years. Only 4.7% of the respondents were aged between 21-30 and a further 4% aged below 20 years as shown in figure 2.2 below

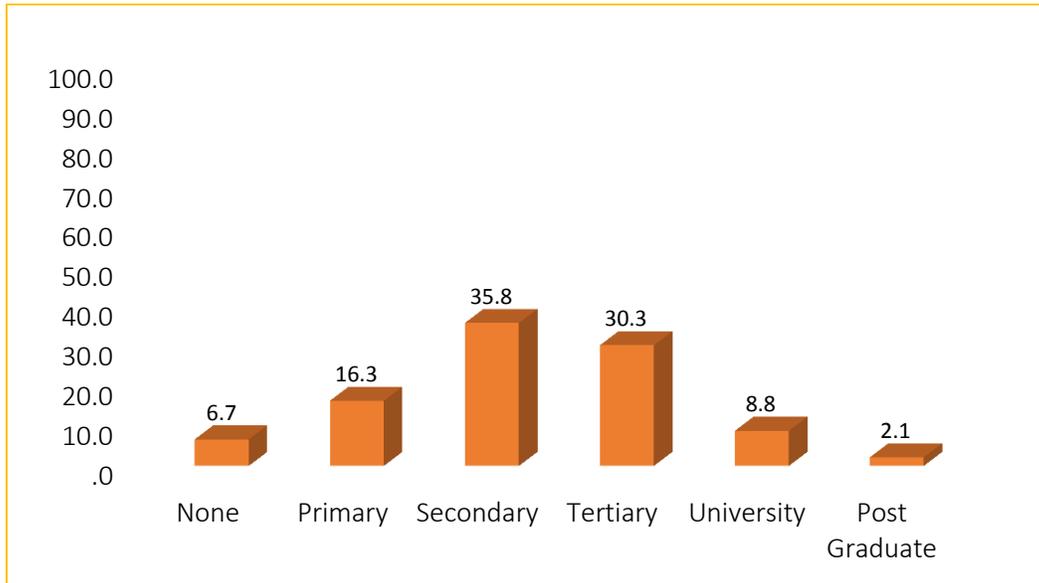
Figure 2.2: Age of the respondents



2.1.3. Highest level of education attained

41.2% of the interviewed respondents had attained post-primary education with 35.8% of the sample having attained secondary education, 30.3% having attained tertiary education and 8.8% and 2.1% representing those who attained university or post-graduate education. 16.3% of the sample had attained only primary education and 6.7% had no formal education as shown in figure 2.3 below

Figure 2.3: Highest level of education attained

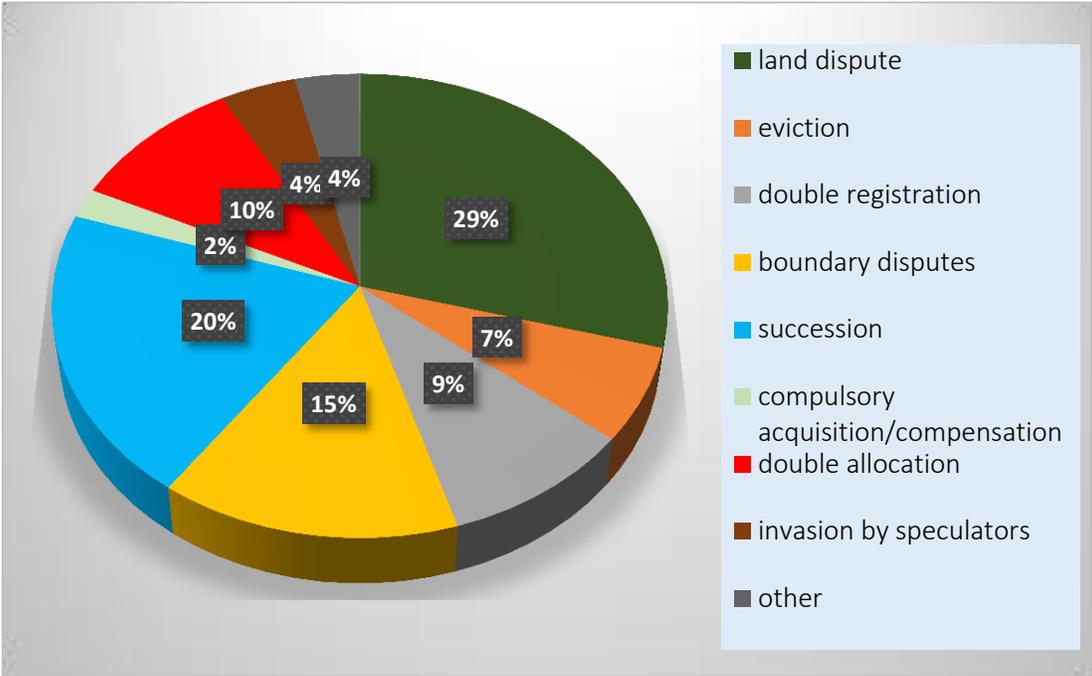


2.2. INTERACTION WITH THE ENVIRONMENT & LAND COURT

2.2.1. Nature of land disputes

A majority of land cases being filed at the Environment & Land Court were land disputes such as family disagreements over land and fraud related cases which accounted for 29 % of the total sample. Succession cases accounted for 20% while boundary disputes accounted for 15%. Double registration and double allocation accounted for 10% and 9% of the cases respectively. Only 4% of the interviewed respondents had invasion cases as shown in Figure 2.4 below.

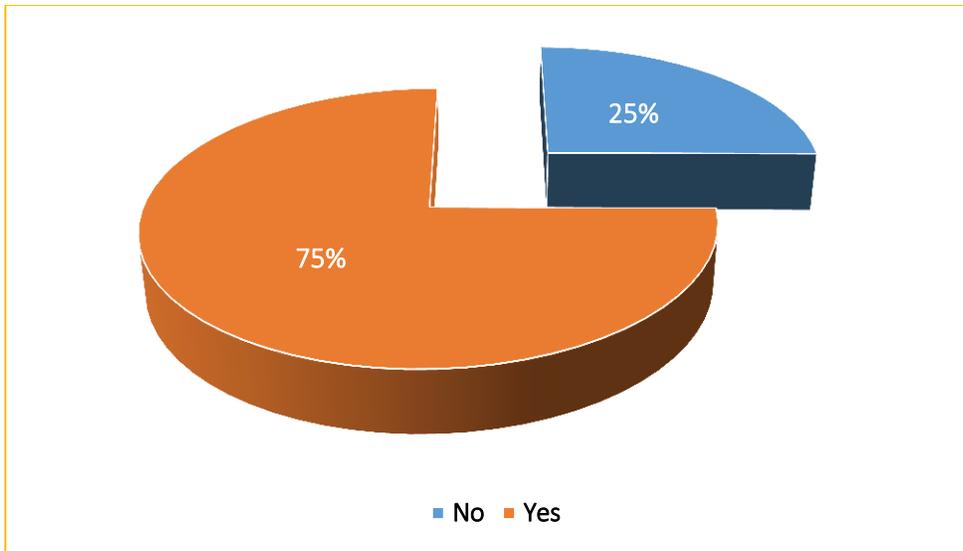
Figure 2.4: Nature of disputes



2.2.2. Point of seeking justice

As shown in Figure 2.5 below, 75% of the respondents filed their cases with the ELC. 25% of the respondents either filed their cases at Magistrate Courts or sought alternative means to resolve their land disputes such as council of elders.

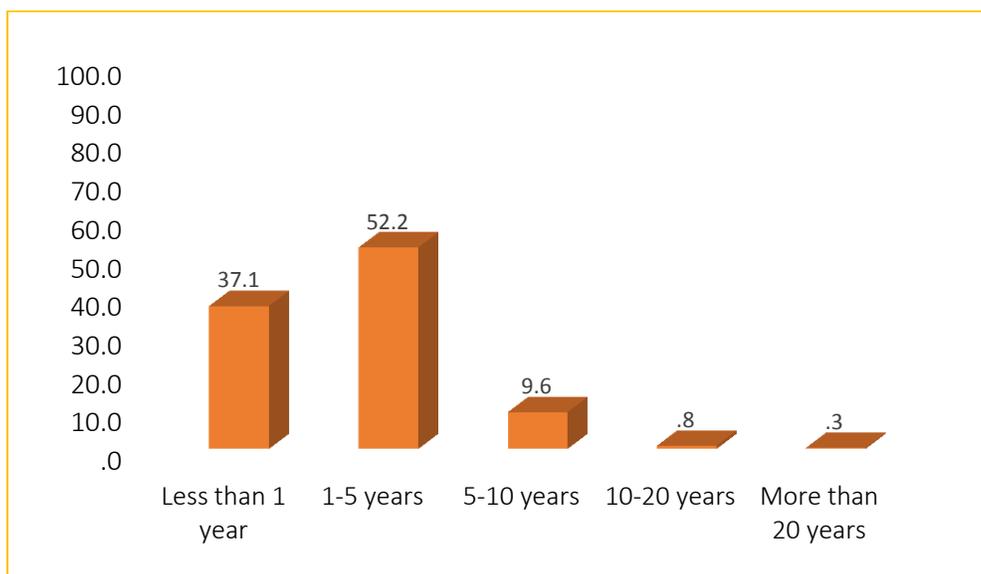
Figure 2.5: Whether case was filled with the ELC



2.2.3. Duration in years respondents have pursued cases.

With regard to the duration of time respondents had pursued land cases, 52.2% of the respondents had spanning cases for 1-5 years while 37.1% had pursued their cases for less than one year. 9.6% had pursued their cases for a duration ranging between 5-10 years while 0.8% of the respondents had been following up cases for a period of 10- 20 years. Only 0.3% of respondents had pursued their cases for more than 20 years as shown in Figure 2.6 below.

Figure 2.6: Average duration respondents have pursued cases



2.3. SERVICE DELIVERY RANKING

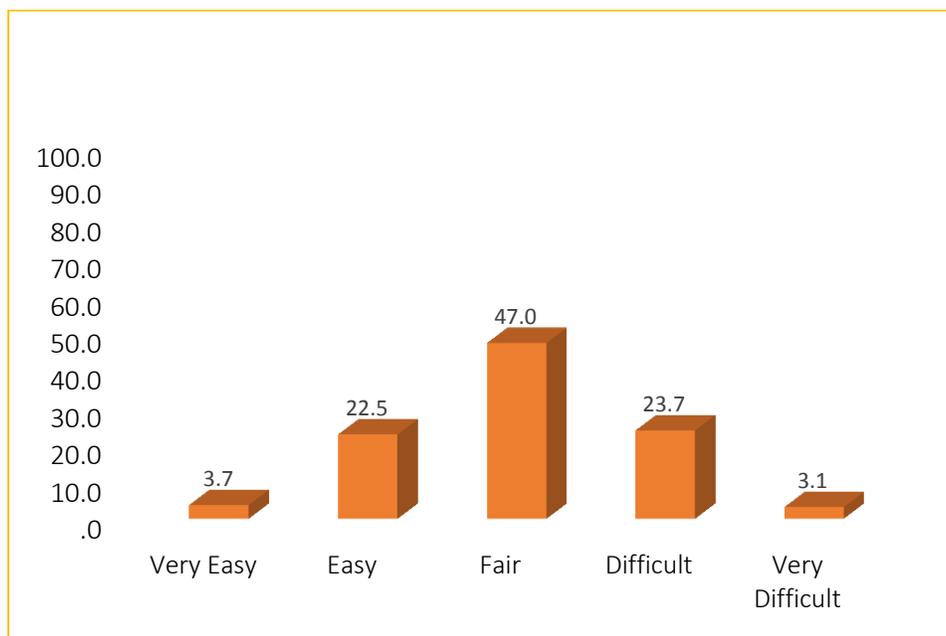
This scorecard sort to gauge the ELC in terms of service delivery based on the following indicators;

- Accessibility of the courts
- Ease of accessing information
- Cost of seeking justice
- Incidences of corruption
- Confidence level towards the judicial process

2.3.1. Accessibility of the courts

As shown in figure 2.7 below, majority of the respondents (47%) ranked the accessibility of the Environment & Lands Courts as fair with a further 26.2% stating that it was easy. 26.8% ranked accessibility as difficult attributing it to the fact they have to travel over long distances to access the court. A case in point is Kajiado where most people are being referred to Machakos Environment & Land Court.

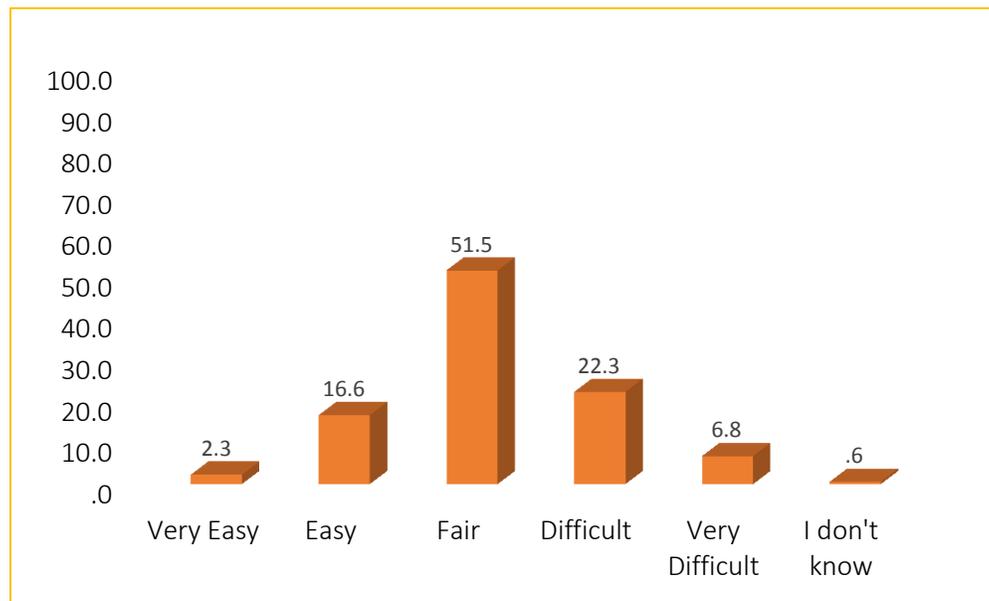
Figure 2.7: Accessibility of the courts



2.3.2. Ease of accessing information

Over half of the respondents (51.5%) ranked access to information as fair, with 16.6% ranking it as easy and 2.3% as very easy. 22.3% viewed information access as difficult and a further 6.8% said it was very difficult to access information. 0.6% of the respondents didn't know as shown in the figure 2.8 below.

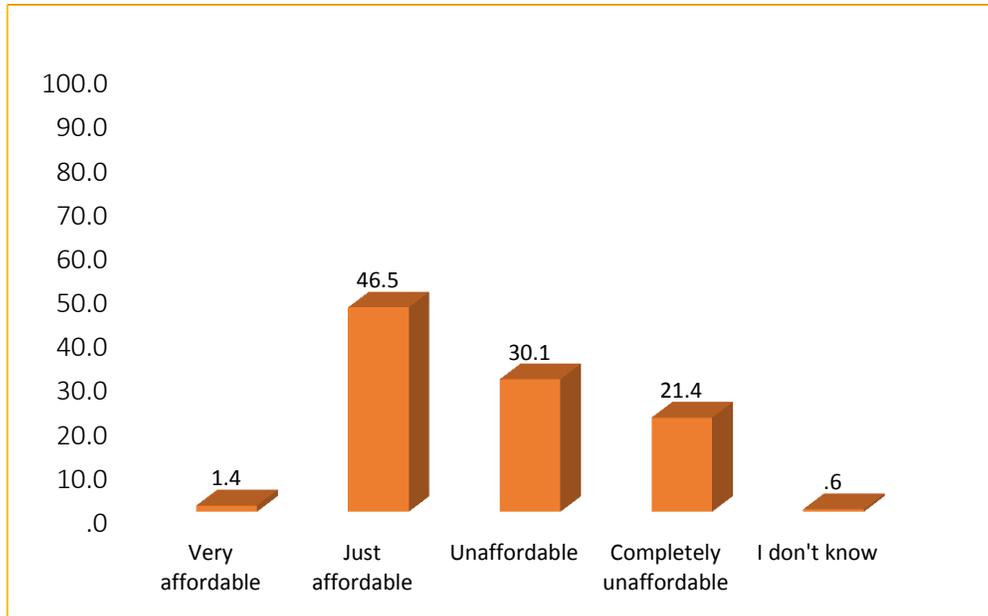
Figure 2.8: Ease of accessing information



2.3.3. Cost of seeking justice

Majority of citizens who took part in the study felt that costs were unaffordable at Environment & Land Courts, with 30.1% ranking affordability as *unaffordable* and 21.4% ranking the costs as *completely unaffordable* as shown in figure 2.9 below. 46.5% of the citizens seeking services at Environment & Land Courts felt the cost of seeking justice was just affordable and 1.4 % ranked this as very affordable.

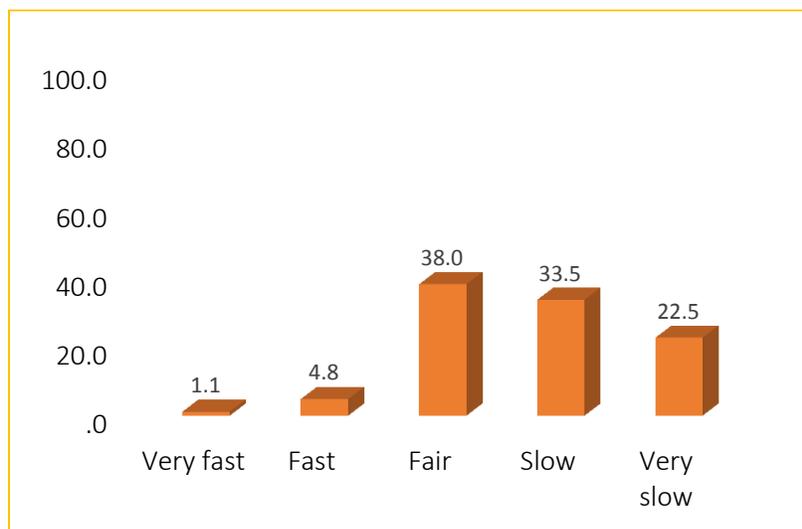
Figure 2.9: Cost of seeking justice



2.3.4. Speed of obtaining justice/processing cases under the new courts

Respondents felt that it takes long to conclude cases and give a verdict. 38% of the interviewed sample rated timeliness as fair, with 4.8% and 1.1% giving a ranking of fast and very fast respectively. Majority ranked speed of obtaining justice as slow, (33.5% as slow and 22.5% as very slow) as shown in the figure 2.10 below.

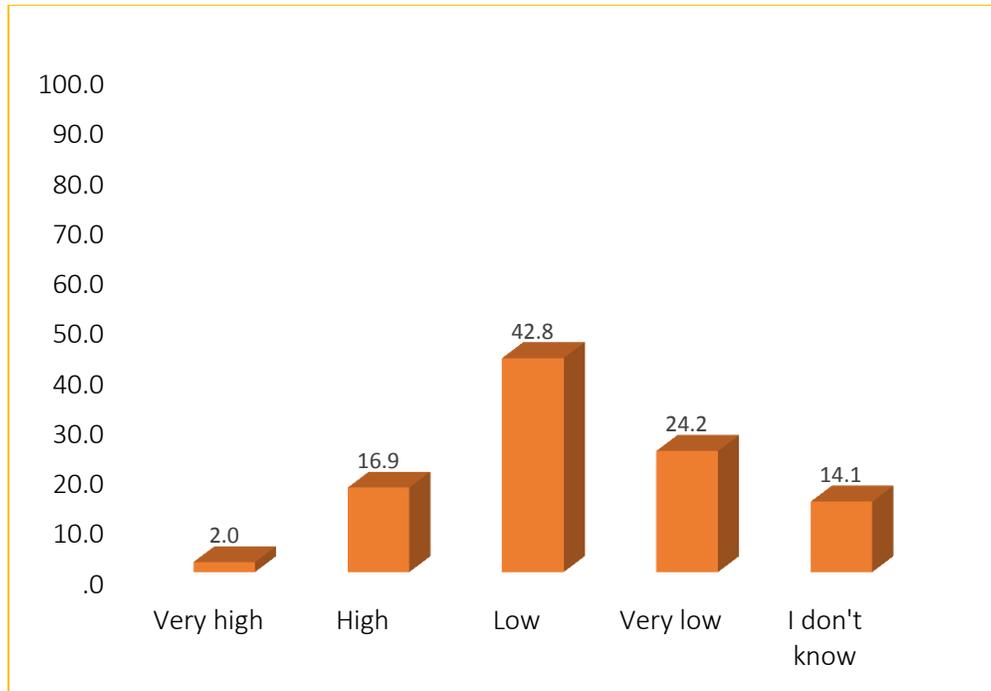
Figure 2.10: Speed of processing cases under the new courts



2.3.5. Incidences of corruption

Level of corruption in the Environment & Lands Court is low. A total of 69% of the respondents gave corruption a positive rating; 42.8% ranked corruption levels as low with 24.2% ranking it as very low whereas 14.1% could not rank. However, 16.9% ranked corruption incidences as high and 2% felt it was very high as shown in the figure 2.11 below.

Figure 2.11: Incidences of corruption

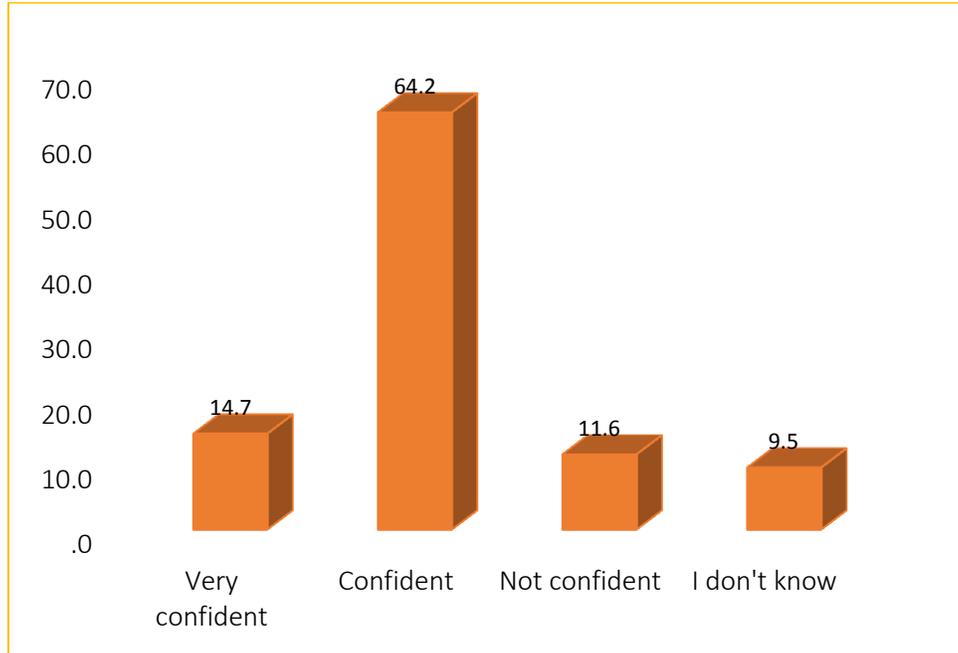


2.3.6. Confidence of the Judicial System under the Environment & Land Court

Respondents are generally confident with dispute resolution under the Environment & Lands Court.

64.2% of the respondent said they were confident and a further 14.7% felt very confident in the Court. Only 11.6% of the interviewed sample expressed a lack of confidence in the Environment & Land Courts. 9.5% of the respondents in the study could not rank as shown in figure 2.12 below.

Figure 2.12: Confidence of the judicial system under the ELC



2.4. ALTERNATIVE DISPUTE RESOLUTION

Alternative Dispute Resolution mechanisms are well entrenched in Chapter 10 of the Constitution of Kenya, 2010 on judiciary (Article 159). Subsequently Article 20 of the Environment & Land Court Act, 2011 legally recognizes ADRs.

Land registrars and chiefs mostly handle land boundary disputes. Most people were of the opinion that these alternative land dispute resolution mechanisms were effective, expeditious and affordable. Some even opined that these alternative land dispute resolution mechanisms were fostering good relationship and harmony between neighbors wrangling over land issues hence they preferred ADR to courts.

3. CITIZEN'S SUGGESTIONS

The public suggested the following changes to improve service at the Environment & Land Courts:

3.1. Expeditious hearing and determining of cases:

Most respondents rated the speed in hearing and determining cases as slow. It is also supported by the fact that most of respondent's cases had taken an average of 1-5 years with others even taking longer. The longer the time taken the more the cost incurred hence making the cost justice very expensive. It is therefore the respondents' suggestions that the period taken should be shorter as a way of making the process more affordable.

3.2. Hiring of more judges

Respondents request that more judges be appointed to serve the Environment & Land Court. At the moment the courts are presided over by one judge per station. In the event of absenteeism, cases come to a standstill. It is therefore important to have two or more judges assigned to each court to ensure continuity in case one judge is not available.

3.3. The Environment & Land Court to operate on all working days of the week

Respondent suggested that the courts should be facilitated in order to sit throughout the week. This will substantially increase the speed of hearing and determination of cases. A case in point is Kiambu and Machakos counties where the court only sits on Tuesdays and Thursdays.

3.4. Computerization of the court registry

Digitalization of the filing systems in the registries is also a paramount to ensuring that there is speed and efficiency in these courts.

3.5. Ethics and professional conduct of advocates

Advocates are important in the process of land dispute resolution. They form the link between the citizens seeking justice and the courts. The public feels that advocate fee is too high, with respondents particularly alleging that some advocates prolong cases in order to increase earnings when representing clients, making dispute resolution at the ELC costly. In this regard, citizens called for the firm application of the advocates' practicing regulations and code of conduct.

3.6. Increase Environment & Land Courts

In counties without an Environment & Land Court, citizens called for this court to be established at county level as travelling to other counties increased the total cost of seeking justice. Respondents also proposed the use of mobile courts before establishment of the ELC in the counties.

4. CONCLUSIONS AND RECOMMENDATIONS

4.1. CONCLUSIONS

4.1.1. Accessibility of the courts

Kenyans feel that the Environment & Land Courts are accessible. However some also feel the courts are too far from them hence less accessible, occasioned by long distances they travel to attend to the court.

4.1.2. Access to information

Access to information at the ELCs is easy, especially in Nairobi and Kisumu as a result of digitization which made it easier to access information through the judiciary websites. This can also be attributed to change of attitude by the judiciary staff. In incidences where access to information is difficult are mainly due to the manual court registry and poor communication between the court and the citizens.

4.1.3. Cost of seeking justice

Most of the citizens feel the cost of seeking justice was unaffordable. The high cost of justice is attributed to high charges incurred when filing cases, legal fees and the numerous trips made to the courts.

4.1.4. Timeliness

The speed of obtaining justice in the Environment & Land Court is overly slow. Many citizens follow their cases for over two years before reaching a solution. Some citizens have carried over cases from the former land dispute resolution regimes and therefore complain of experiencing delays in obtaining justice due to the backlog of the cases that the ELC has inherited. People also complain of court injunctions as an impediment to speedy delivery of justice.

4.1.5. Incidences of corruption

Corruption is low in Environment & Land Courts. Most Kenyans feel that bribing for services at the ELC does not exist and that the employees are doing a good job. However, respondents observed that some lawyers are deliberately delaying services to create opportunities for rent-seeking from the public.

4.1.6. Citizen confidence in the Environment & Land Courts

Kenyans are confident in the ELC ability to resolve disputes on land and environmental matters. Many feel that in the short time that the courts have been in operation, they have proven that they can handle land cases fairly. To further boost this, citizens sought to have more judges appointed to the courts.

4.2. RECOMMENDATIONS

- 1. Establishment of more of ELCs:** The Institute recommends that ELC stations be provided for in every county. Currently, there are only 20 ELCs in operation in 16 counties (5 in Nairobi) and as envisioned in the Environment & Land Court Act, 2011 there is need for an Environment & Land Court in every county. Hence the government should speed up the establishment of these courts in all the 47 counties to ensure that all citizens have access to justice with regard to land dispute resolution. In addition, use of innovative approaches such as mobile courts in vast counties to ensure each and every citizen have access to justice on matters land and environment should be explored.
- 2. Digitization of court registry:** Easy and efficient access to information is central to delivery of justice. It is recommended that all the court registries be computerized. This will greatly improve the quality of service delivery at the ELCs. Computerizing the filing system will ease retrieval of files and avoid loss of vital information.
- 3. Provision of more space for ELC:** In most counties, courts only sit for a number of days in a week due to lack of adequate space to house the Environment & Lands Court independently. The government should facilitate ELCs to have their own premises for their smooth running.
- 4. Hiring of more judges:** Each ELC station at county level is currently being handled by one judge, with an exception of Nairobi which has five judges. Given the backlog of cases that the court inherited from the former system, one judge cannot cope and more judges need to be hired for the ELCs for faster hearing of cases.
- 5. Capacity building for ELC staff:** The personnel that have been deployed to the court from other sections should be trained on land matters to empower them for better service delivery.