Exploring the Legal Framework of Public-Private Partnerships for Climate Action in Sub-Saharan African Sub-nationals: A Case Study of Two Kenyan South Eastern Kenya Economic Block (Machakos and Kitui) Counties

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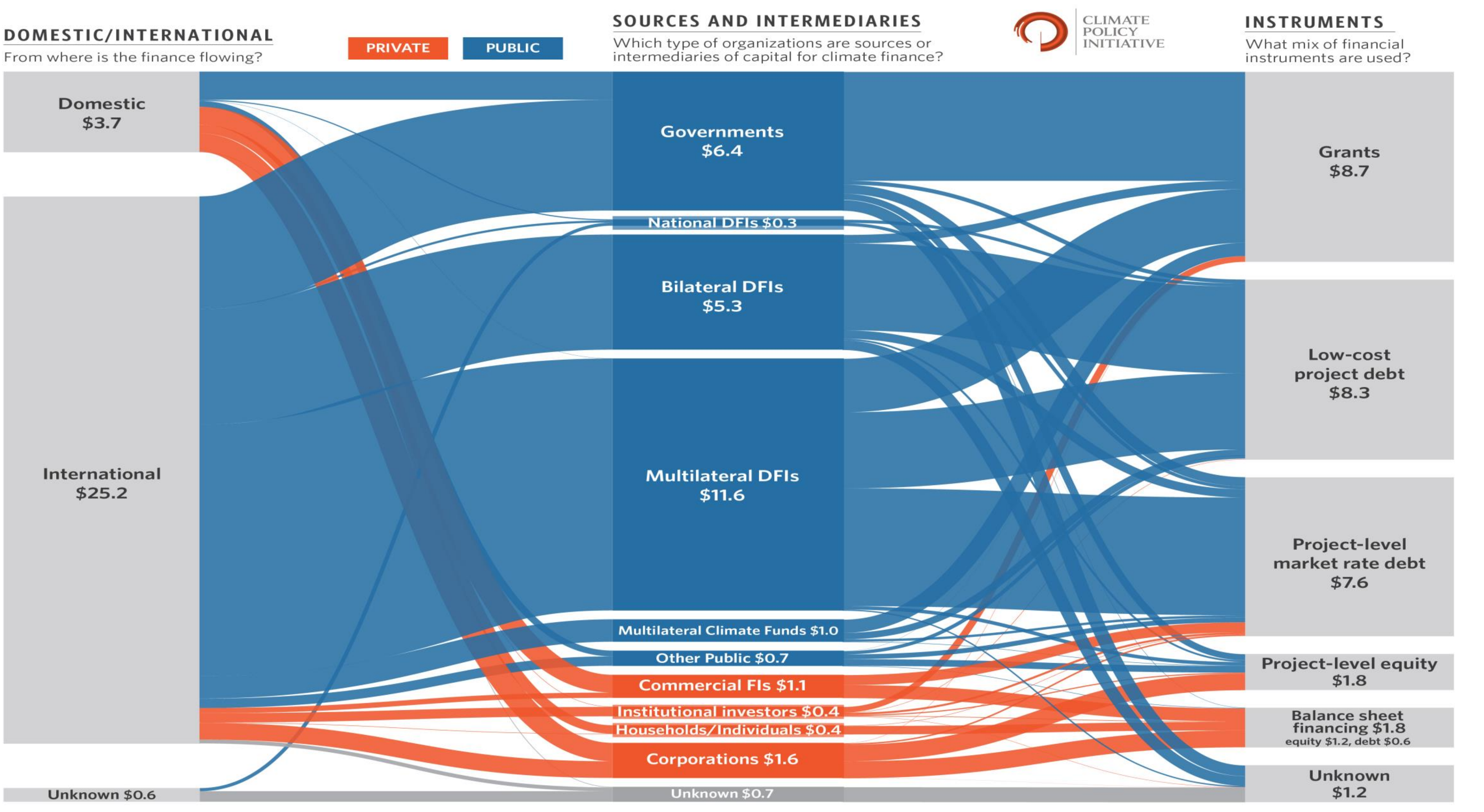
Introduction

- **Current infrastructure investment is 3.5% of GDP**; 7.1% is needed annually (USD 130-170 billion by 2025).
- **Infrastructure financing gap** is USD 68-108 billion.
- **Climate finance needed** is USD 2.8 trillion (2020-2030).
- **Mitigation sectors**: Transport (58%), Energy (24%), Industry (7%), AFOLU (9%).
- **Adaptation sectors**: Agriculture (25%), Water (17%), Infrastructure and Buildings (12%), Disaster Prevention and Preparedness (10%), Health (8%).
- **Mobilizing private investments** and strengthening policy frameworks are critical.
- **Globally, private climate finance** represents 50% of total climate finance flow, however, in Africa, it accounts for only 14%.
- **Public-Private Partnerships (PPPs)** are vital for addressing financing gaps and achieving sustainable development.

From Where is the Finance Flowing?



Climate Action

- **Sustainable Development Goal 13** calls for urgent action to combat climate change and its impacts.
- **Climate change drivers**: fossil fuels, deforestation, industrial processes, and agriculture.
- **Primary effects**: rising temperatures, extreme weather, melting glaciers, sea level rise, ocean acidification.
- **Sectors contributing to emissions**: energy, transportation, agriculture, construction, and private households.
- **Critical transition**: renewable energy and sustainable practices

Mitigation and Adaptation

- **Mitigation actions**: renewable energy, energy efficiency, low-carbon transportation, sustainable agriculture.
- **Paris Agreement goal:** limit global warming to 1.5°C.
- **Emission reduction target**: 45% by 2030, net-zero by mid-century.
- **Urgent implementation**: necessary at all levels to meet targets.
- **Adaptation focus**: reducing vulnerability to climate change impacts.
- **Local community measures**: drought-resistant crops, water management, regenerative agriculture, wildfire risk reduction.
- **National/international measures**: strengthen infrastructure, enhance early warning systems, climate-specific insurance, protect ecosystems.
- **Essential collaboration**: across all levels of governance.

Climate Finance & Public Private Partnership

- **Substantial resources needed**: for mitigation and adaptation efforts.
- **Climate finance sources**: public, private, national, international.
- **Innovative financial mechanisms**: grants, PPPs, green bonds, debt swaps, concessional loans.
- **Collaborative approaches**: essential for unlocking funding and implementing climate solutions at scale.
- **Definition**: long-term agreement between a private entity and government to deliver a public asset/service, with private sector assuming substantial risk and management duties.
- **IFC support**: technical, legal, regulatory advice; capacity building; addressing social and sustainability issues.
- **Benefits of PPPs**: leverage private sector expertise, secure funding, allocate risk effectively, address urgent development needs.
- **PPP project terms**: typically 20 to 30 years, optimizing costs and benefits.

Problem and Purpose Statements

- **Climate Policy Initiative** estimates annual need of USD 250 billion for climate finance, **BUT** current flows are only USD 30 billion.
- **Urgent need for private investment** and innovative financing mechanisms like PPPs.
- **Kenyan SEKEB Counties** of Kitui and Machakos have potential for using such innovative mechanisms **BUT** inadequate policies impede private sector investments.
- **Explore PPP framework** in Nigeria, South Africa and Kenya.
- **Explore the Kenya PPP Act**, 2021 adaptation in Kitui and Machakos Counties.

Research Questions

1. How familiar are county officials and staff with Kenya's PPP governing legal framework, particularly the Kenya PPP Act, 2021, and how has this been applied in selected two counties?
2. What measures have been taken to ensure awareness of the PPP Act, 2021 among county officials and staff, including the effectiveness of any training sessions or workshops?
3. Have the counties established any PPP-related policies or guidelines, and what are their details and scope?
4. Do the counties have an established unit for PPP functions, and what is its structure, mandate, mission, objectives, and roles of staff members?
5. Could you describe any specific PPP projects in the county, particularly those focused on climate adaptation and mitigation?
6. What has been the county's experience in administering PPPs, including challenges, successes, best practices, and lessons learned?

Research Methodology (Mixed)

- Secondary: legal, regulatory and policy framework for PPPs in Nigeria, South Africa and Kenya’s sub-nationals.
- Primary: interviewed County Solicitor (Kitui County) and County Director, Department of Trade (Machakos County).
- Data Analysis: thematic analysis of qualitative data with 100% response rate.
- Limitations:
  - Study focused on PPP frameworks in Kitui and Machakos and not the other 45 counties.
  - Potential biases in interviews were mitigated through a neutral and open-ended interview guide.

Theoretical Framework

- Freeman's Stakeholder Theory (1984) emphasizes considering all parties' interests.
- Donaldson and Preston (1995) classify Stakeholder Theory into descriptive, instrumental, and normative.
- Phillips (2003) identifies stakeholders by power and interest, categorizing them into normative, derivative, and non-stakeholders.
- PPPs are long-term collaborations using "design-build" contracts for sustainable infrastructure projects.
- Stakeholder Theory ensures stakeholder involvement in PPPs, aligning projects with sustainable development goals.

Literature Review

- **Public-Private Partnerships** for climate finance, Gardiner et al. (2016)
- **OECD's report** on Scaling up the Mobilization of Private Finance for Climate Action in Developing Countries.
- **Mixed-method research** on climate change funding in Sub-Saharan African countries by Adom et al. (2024)
- **How UNDP Catalyzes** Innovative Public Private Partnerships that Reduce Carbon Emissions by Soezer, A. (2023). .
- **Overcoming barriers to private financing** for urban climate infrastructure in developing countries, White and Wahba (2019)

Sub-Saharan African PPP Framework Landscape

- **PPPs drive economic growth** by planning, financing, and maintaining infrastructure and public services, essential for SDGs.
- **African governments** are embracing PPPs to boost GDP and unlock infrastructure development.
- **Success of PPPs** relies on robust legal and regulatory frameworks.
- **42 out of 54 African countries** have enacted PPP legislation; PPP markets concentrated in Ghana, Nigeria, Egypt, South Africa, and Morocco.
- **Most African countries** have PPP Units; other governments need to enhance PPP frameworks for sustainable development and climate action.

Nigeria's Legal and Institutional Frameworks

- **Key legal instruments: Infrastructure** Concession Regulatory Commission (ICRC) Act of 2005 & the National Policy on PPP of 2009.
- **Updated NDC aims** for a 20% unconditional emissions reduction by 2030 and a conditional target increased from 45% to 47%.
- **Requires** an estimated investment of $177 billion between 2021 and 2030.
- **Emphasis** on engaging capital markets & boosting private sector investments.
- **Established PPP Units** include the PPP Division, Technical Services Department, Ministry of Finance - ICRC, and MDAs.
- **States are allowed to develop PPP-specific laws** and regulate transactions within their regions.

Nigeria’s Frameworks

PPP at the State Level (Sub-national)

- Multiple Nigerian states, including Lagos, Cross River, Rivers, Ekiti, and Niger, have adopted PPP laws and established dedicated PPP units.
- Lagos State enacted the PPP Law in 2011, creating an Office of PPPs to develop public infrastructure and provide social amenities.
- Public infrastructure developed through PPPs includes power stations, bridges, hospitals, and recreational parks.
- In 2012, Lagos State introduced a PPP manual detailing the operational characteristics (e.g. Special Purpose Vehicle) and financial aspects (e.g. private sector funding, value for money).

Institutional Framework

- Infrastructure Concession Regulatory Commission oversees PPPs at the federal level, managing concession agreements, monitoring compliance, and ensuring efficient execution.
- Bureau of Public Enterprises, established under the Public Enterprise (Privatization & Commercialization) Act of 1999, handles the privatization and commercialization of government enterprises using PPP models.
- States with specific PPP laws have dedicated bodies to manage these partnerships.
- Lagos State’s Office of Public-Private Partnerships is responsible for granting, negotiating, monitoring, and ensuring compliance with concession contracts.

South Africa’s Legal & Institutional Frameworks

- **South Africa,** constitutional democracy with a three-tiered government system and an independent judiciary
- **Updated NDC targets** a 31% emissions reduction, aiming for 398-510 $MtCO_2e$ by 2025 and 350-420 $MtCO_2e$ by 2030, focusing on sectors like agriculture, forestry, energy, industrial processes, & waste.
- **S.A needs USD 8 billion annually** by 2030
- **Private sector contributes 86%** of tracked annual investments, with 92% from commercial sources and 98% sourced domestically.
- **S.A has advanced PPP framework** in all government levels; national and provincial PPPs governed by Public Finance Management Act (PFMA), 1999, and Treasury Regulation 16 (TR 16).
- **Municipal PPPs** governed by the Municipal Finance Management Act (MFMA), 2003, Municipal Systems Act (MSA), 2003, & Municipal PPP Regulations 2005.
- **Climate Action Project** : eThekwini (Durban) Metropolitan Municipality.

South Africa’s Frameworks

PPP Framework at Municipal Level

- The Municipal Finance Management Act (MFMA), No. 176 of 2004, promotes financial accountability at the municipal level, setting norms and underpinning PPP regulation with a tripartite test.
- The Municipal Systems Act (MSA) allows various service delivery methods, including PPPs, and mandates community notification and assessment of costs, benefits, and capacity.
- The Municipal PPP Regulations of 2005 expand PPP provisions, detailing the project cycle and requiring treasury consultations.
- S.A’s PPP Manual provides comprehensive guidance on municipal service delivery and PPPs, including financial commitments and service options.

Institutional Framework

- S.A’s PPP Unit was established under the Government Technical Advisory Centre (GTAC) of the National Treasury in the mid-2000s.
- Unit ensures PPP projects meet legal requirements for affordability, value for money, and risk transfer.
- Unit provides technical assistance for PPP setup and management to government departments, provinces, and municipalities.
- Offers national treasury approvals and recommendations throughout the PPP implementation cycle.

Kenya Devolved system

- Kenya has two levels of government: national and 47 county governments.
- Governments operate independently yet cooperatively.
- The 2010 Constitution transferred sovereign power to the people, allowing direct exercise or through elected representatives.
- The Constitution created 47 County Governments to empower citizens and promote social development.
- County functions include agriculture, health, pollution control, cultural activities, transport, animal welfare, trade regulation, and environmental conservation.

Financing Climate Action via Private Sector Participation

- **Kenya is committed** to addressing climate change through climate adaptation and mitigation at national and county levels.
- **Updated NDC** aims to reduce GHG emissions by 30% by 2030 compared to the business-as-usual scenario.
- **Estimated cost for mitigation and adaptation** actions is USD 62 billion, to be sourced locally and internationally. Significant contributions are expected from the private sector.
- **Kenya has a strong PPP environment** with key sectors like transport, health, and ICT, and the Directorate has prioritized 43 projects, including climate-focused initiatives
- **Nairobi Smart Street Lighting Project**, which aims to modernize 100,000 streetlights with LED technology and a smart management system.

History of PPP in Kenya

Legislative and Regulatory Framework Enhancements for PPP before 2011

- Water Act (2002), the Privatization Act (2005), and the Energy Act (2006).
- Amendments to the Public Road and Tolls Act (2007) and the Kenya Communications Act (2009) facilitated private sector involvement in roads and communications.
- Public procurement procedures for PPPs were established in 2006, followed by specific PPP regulations in 2009.
- A PPP Steering Committee and Secretariat were established in 2010, leading to the creation of a dedicated PPP law.
- The 2010 Constitution promotes transparency and legislative oversight.

Policy Statement on Public Private Partnerships, 2011

- Kenya's 2011 PPP Policy laid the groundwork for future PPP legislation, addressing delays and legal uncertainties in private infrastructure investments.
- Established central institutions, including the PPP Steering Committee and Secretariat, to oversee initiatives and set clear guidelines for project selection and evaluation.
- Aimed to attract both domestic and international investments and provide government support through funding and technical assistance.
- Created a transparent and efficient system for infrastructure development.

History of PPP in Kenya Cont.

The Public Private Partnership Act, 2013

- Enabled private sector participation in government infrastructure projects through concessions or contracts.
- Established institutions to regulate, monitor, and supervise PPPs.
- Defined stakeholder roles, project approval procedures, and ensured transparency and accountability.
- County governments were designated as contracting authorities, but county-level PPP projects required approval from both the PPP Committee and the Cabinet

The Public Private Partnership Regulations, 2014

- Apply to contracts for designing, financing, constructing, operating, equipping, or maintaining public service projects.
- Do not apply to national projects with a contract value over eighty-five million shillings.
- Do not apply to county government projects with a contract value over five million shillings.
- Do not apply to projects with a contract value over five million shillings that do not involve capital expenditure but include life cycle costs.

The Public Private Partnership Act, 2021

PPP Act, 2021 Overview

- Streamlined the regulatory framework and replacing the 2013 Act.
- Aligned with Article 227 of the Constitution regarding procurement.
- Harmonized the institutional framework and simplifying processes.
- Introduced transparent project selection and procurement procedures to encourage private sector investment.

Sub-national Role & Impact in the Act

- 2021 PPP Act enhances County Governments' roles in PPPs.
- Part IV and Part VI define the role of County Governments in managing PPP projects.
- Section 63 grants counties responsibility for the entire project development cycle, including feasibility studies.
- Counties can nominate members to the PPP Committee.
- County Assembly approval unless the project exceeds the county's fiscal capacity.
- Act recognizes County corporations as entities capable of entering PPPs.
- Section 66 provides clear guidance on PPP procurement methods for county projects.

The Public Private Partnership Act, 2021

Sub-national Institutional Framework under the Act

- Section 6 allows counties to have two representatives on the PPP Committee, nominated by the Council of County Governors.
- Section 75 permits county participation in the petition committee for handling grievances, with two experienced individuals not part of the county executive committee.
- Section 15 establishes the Directorate within the National Treasury lead institution for PPPs, managing projects, providing advisory services, retaining transaction advisors, maintaining a project register, monitoring liabilities, and conducting research.
- Act does not mandate the establishment of a similar unit within counties.

Procedural Sub-national Framework per The Act

- Provides explicit guidelines for counties undertaking PPP initiatives.
- Section 63(3) requires a detailed feasibility study for PPP projects, with coordination at each project phase.
- Written approval from the PPP Committee and the Cabinet Secretary for Finance is necessary if the project needs national government support or exceeds the county's fiscal capability.
- Counties must obtain approval from the relevant County Assembly to proceed with a PPP, aligning with devolved government principles.
- Section 66 requires counties to submit a list of projects to the Directorate for inclusion in the national list of PPP projects.

South Eastern Kenya Economic Bloc

- **South Eastern Kenya Economic Bloc (SEKEB**) comprises Kitui, Machakos, and Makueni counties, sharing historical, geographical, and socio-cultural ties.
- **SEKEB covers 45,000 km²** (13% of Kenya's land) with a population of over 5.2 million (10% of Kenya's population).
- **Bloc is rich in natural resources** & holds significant economic potential.
- **County Assembly oversees** legislation and representation, while the County Executive manages executive functions.
- **SEKEB's objective**: foster joint public investments and strengthen public-private partnerships across sectors such as infrastructure, agriculture, education, health, ICT, trade, and climate change.

Kitui County Government (KCG)

- Designated as the 15th of 47 counties in Kenya, divided into 8 sub-counties & 40 wards.
- County is an Arid and Semi-Arid Land (ASAL) region with relatively low rainfall.
- County Integrated Development Plan (CIDP) for 2023-2027 emphasizes private sector participation and includes a framework for PPPs.
- Key initiatives include providing solar power to off-grid facilities, promoting green energy (biogas, solar, wind), and investing in climate-resilient water infrastructure.
- County promotes PPPs in solid waste management, environmental management, and climate-smart agriculture.
- The Kitui County Climate Change Action Plan (KCCCAP) for 2023-2027 highlights PPPs as a key resource for renewable energy projects such as wind and solar energy.
- County prioritizes investments in renewable energy technologies like briquettes and biogas to enhance sustainable energy solutions.

Machakos County Government (MCG)

- Designated as the 16th of 47 counties in Kenya, divided into 8 constituencies, 9 sub-counties, and 40 wards.
- The County is semi-arid and heavily reliant on rain-fed agriculture.
- The CIDP serves as a five-year guiding policy, prioritizing the development of a PPP framework to address development challenges.
- The Machakos County Climate Change Action Plan (MCCCAP) for 2023-2027 emphasizes PPPs in the energy and transportation sectors.
- County aims to generate affordable and reliable energy supplies such as solar, wind, and biogas through PPPs.
- The Annual Development Plan (ADP) includes the development of the Machakos Investment Authority Act to facilitate private investments.

Research Findings

- **Kitui County** has basic understanding of the Kenya PPP Act 2021, primarily within the Department of Trade, but lacks awareness in other departments, missing potential opportunities. This aligns with Gardiner et al. (2016), who emphasize the importance of early stakeholder engagement.
- **Machakos County** shows fair familiarity with the PPP Act, in the Department of Trade, but other departments are not well-versed. This reflects White and Wahba's (2019) recommendation for local governance reforms to attract investment.
- **Kitui County** has not undertaken specific measures for PPP Act awareness or training, whereas Machakos County has sponsored partial training programs. OECD supports tailored mechanisms for capacity building, with Machakos aligning more closely.
- **Kitui County** has not developed formal PPP policies, while **Machakos County** is drafting the Machakos Public Private Partnerships Act 2024. This effort addresses regulatory gaps noted by White and Wahba (2019).
- **Both counties** lack dedicated PPP units. Kitui proposes an interdepartmental committee, and Machakos is drafting the Machakos Investment Authority. This mirrors structural weaknesses in Sub-Saharan Africa, as identified by Adom et al. (2024).

Research Findings (Cont.)

- **Kitui County** has not implemented PPP projects but shows interest in climate-related initiatives. Machakos County has also not engaged in PPP projects. Kitui's initiatives align with Soezer's (2020) findings on PPPs driving green investments.
- **The primary barrier for both counties** is stakeholder unawareness about PPPs as viable financing mechanisms. This barrier is highlighted by Gardiner et al. (2016) and Adom et al. (2024), who cite risks and low engagement as key challenges.
- **Machakos County's** partial training efforts align with recommendations for enabling environments, whereas Kitui's lack of training shows fragmented communication and weak capacity.
- **The draft PPP Act 2024** by Machakos County aligns with literature emphasizing the need for governance reforms to attract private capital. This reflects findings by White and Wahba (2019).
- **Barriers** such as stakeholder unawareness and slow adaptation reflect common challenges in developing countries, underscoring the need for systematic evaluations as noted by Gardiner et al. (2016) and Adom et al. (2024).

Recommendations

- **Both Counties** should enhance their understanding and interaction with the PPP Act 2021 across all departments (including the leaderships) in County Executives and Assemblies.
- **Collaborate with National agencies** like the National Treasury's PPP Unit and other accredited institutions to support capacity building.
- **Both counties should prioritize** development of comprehensive PPP policies & guidelines.
- **Machakos should expedite the finalization and implementation** of Machakos County’s PPPs Act to solidify its commitment to undertaking PPP projects.
- **Both counties should establish dedicated PPP units** with clear mandates, for management and coordination of partnership projects.
- If standalone units are not feasible, forming **interdepartmental committees** comprising representatives from key sectors can serve as an alternative.
- **Include climate action** projects in the counties’ strategic planning; including the climate plans, County Integrated Development Plans and Annual Development Plans.
- **Engaging private sector partners** specializing in climate-focused technologies and solutions.

Suggestions for Future Research

- Underexplored climate finance landscape in African sub-nationals.
- Strategies to attract private investment in climate finance
- PPP focused legislation
- Capacity building
- Expand research to all 45 counties and other Sub-Saharan Africa counties.

Conclusion

- **PPP is becoming widely accepted** as an innovative climate finance mechanism across the globe an is picking up in Sub-Saharan African countries.
- **Sub-Saharan African countries** have an opportunity to take advantage of PPP framework as instrument that can help in mobilizing climate finance from the private sector.
- **Conducive legal frameworks** are necessary for successful development and implementation of PPPs.
- **Capacity building** across many sub-national needs to be a priority as the gaps are evident.
- **Kitui and Machakos Counties prioritization** of the development of PPP policies and capacity building should will help unlock and offer opportunities for innovative mechanisms that can fund their climate action.

“Climate finance is not charity, it’s an investment”

“Climate action is not optional, it’s an imperative” António Guterres, U.N. Secretary General's remarks to World Leaders Climate Action Summit at COP29

Thank you

Asante!