REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MISC. CIVIL APPLICATION NO. 118 OF 2004

PETER K. WAWERU …….....……..….. APPLICANT

AND

REPUBLIC ……..…….....…….. RESPONDENT

J U D G M E N T

The Applicants and the Interested Parties were charged with the twin offences of (i) discharging raw sewage into a public water source and the environment contrary to Section 118 (e) of the Public Health Act ***(Chapter 242, Laws of Kenya***), and (ii) failure to comply with the statutory notice from the public health authority contrary to Section 120 (1) of the said Public Health Act.

Section 118 (1) of the Public Health Act sets out what acts are deemed to be nuisances liable to be dealt with in the manner provided in Part (II) ***(Sanitation and Housing***) of the Act. Section 118 (1) (e) deems to be a nuisance

(e) any noxious matters or waste water, flowing or discharged from any premises, wherever situated, into any public street, or into the gutter or side drawned of any street, or into any mullah or water course, irrigation channel or bed thereof not approved for the reception of such discharge."

And Section 119 of the said Act empowers a medical officer of health if satisfied of the existence of a nuisance to serve a notice on the author of the nuisance or the occupier or owner of the dwelling or premises on which the nuisance arises or continues requiring him to remove it within the time specified in the notice and to execute such work and do such things as may be necessary for that purpose, and if the medical officer of health thinks it desirable **(but not otherwise**) specifying any work to be executed to prevent a recurrence of the said nuisance.

Section 120 (1) of the said Public Health Act provides that if the person on whom a notice to remove a nuisance has been served as aforesaid fails to comply with any of the requirements thereof within the time specified, the medical officer of health shall cause a complaint relating to such nuisance to be made before a magistrate and such magistrate shall thereupon issue a summons requiring the person on whom the notice was served to appear before his court.

The procedure is firstly that the Public Health Officer makes a complaint to the magistrate, and secondly that the magistrate issues a summons requiring the person upon whom a notice was served under Section 120 to appear before him; that is the Magistrate.

From the various attachments to the application, the Applicant were not served with a summons to appear before the magistrate. Instead he was charged directly. So he applied pursuant to Rule 3 of the

Constitution of Kenya (**Protection of Fundamental Rights and Freedom of the Individual)** Practice and Procedure Rules, 20-01, (**L.N. 133 of 2001**), for leave to make a Constitutional Reference from the Court of the Magistrate (**the subordinate Court**) to this court, alleging that the Applicant's fundamental rights and freedoms of the individual had been violated by his prosecution. The subordinate court granted the Applicant's application to bring this constitutional reference.

So, following such leave, by an Application brought by way of an Originating Summons dated 20-02-2004 (the Application) one Peter K. Waweru **(the Applicant),** who claimed to be injured and prejudiced in that his rights and freedoms under the relevant law had been or were likely to be contravened sought and prayed for the **ORDERS** following-

1. **That** the entire proceedings in Criminal Case No. 6398 of 2003, consolidated with Criminal Case No. 6399 of 2003, Kibera, be declared a nullity for violation of the Applicant's rights to the equal protection of the law as guaranteed by Section 82 of the Constitution.

2. **THAT** the proceedings in Criminal Case number 6398 of 2003 consolidated with 6399, Kibera, be declared a nullity for abrogating the rights of the Applicant to the equal protection of the Law as guaranteed under Section 70, of the Constitution;

3. **THAT** a declaration be made that the Applicant's fundamental rights and freedoms of the individual under Section 72 and 76 of the Constitution have been contravened by the Respondent and/or the Public Health Officer (s) Kajiado District;

4. **THAT** the commencement of proceedings in Criminal Case Number 6398 of 2003 consolidated with Criminal Case No. 6399 of 2003, Kibera, against the Applicant is a violation of his Constitutional Rights under Section 70 and 77 (8) of the Constitution of Kenya as the responsibility to construct drainage system and sewerage plant, maintain sanitary condition, provide, contain and maintain sewage services in Kiserian Township is on the Olkejuado County Council under the Local Government Act, Chapter 265, Laws of Kenya;

5. **THAT** a declaration that the applicant has been deprived of the protection of the law and his constitutional rights violated by charging him in Criminal Case No. 6398 of 2003 consolidated with Criminal Case No. 6399 of 2003 as the responsibility of constructing, providing and maintaining sewage system, sewage treatment facility and sewage plant is on the Local Authority under the Public Health Act, Chapter 242, Laws of Kenya;

6. **THAT** a declaration that the Applicant has been deprived of the protection of the law and his constitutional rights violated by charging him in Criminal Case No. 6398 of 2003 consolidated with Criminal Case No. 6399 of 2003, Kibera, as the responsibility of constructing, providing, containing and maintaining sewage system, sewage treatment facility and sewage plant is on the Water Services Board and/or agents of the Water Services Board under the Water Act, 2002 **(No. 8 of 2002),**

7. **THAT** a declaration that the Applicant has been deprived of the protection of the law and his constitutional rights violated by charging him in Criminal Case No. 6398 consolidated with Criminal Case No. 6399 of 2003 as the responsibility of constructing, providing and maintaining sewage system, sewage treatment facility and sewage plant is on the Olkejuado County Council under the Local Government Act, Chapter 265, Laws of Kenya.

8. **THAT** as a result of the aforesaid the Applicant has been charged and his Constitutional rights have been abridged and he has been entitled to seek redress by virtue of or under Section 84 of the Constitution.

In addition to the Applicant the Court on 8-07-2004 allowed the joinder of another 22 applicants as Interested Parties.

The Application was supported by the Affidavit of Peter K. Waweru, sworn on 20th February, 2004, together with ten (10) annextures (PKW 1-10) attached thereto, and the Affidavits of Edward Ngugi, the 2nd Interested Party, sworn on 14th October, 2004 and that of Charles Mwangi the 1st Interested Party, sworn on 8th November, 2004 together with the annextures thereto.

THE FACTS:

The Applicant and the Interested Parties are all plot owners in Kiserian Township, and on these plots, the Applicant and Interested Parties have all erected residential –cum commercial buildings, whose buildings plans or drawings were first approved by the health and other authorities of the Olkejuado County Council before the erection or construction. Every building had a septic tank for the disposal of its solid waste, and other domestic washing waste water. Following the institution of criminal proceedings, the Applicant and the Interested Parties formed Kiserian Township Welfare Group, all comprising about one hundred plot owners and other residents of the Township of Kiserian. So in a sense, the outcome of the Application by the Applicant and the Interested Parties herein will concern this country's treatment of environmental issues raised by this Application. According to the Replying Affidavit of one Paul M. Tikolo a Public Health Officer (1) an employee of the Ministry of Health (M.O.H.) and stationed at Ngong Division, of Kajiado District, Rift Valley Province, as the Officer-in-Charge, sworn on 14th July, 2004 and filed on 20th July, 2004 he carried out investigations into complaints by the members of the public and the Ministries of Agriculture, Health and Environment and Natural Resources, and the Office of the President regarding the indiscriminate discharge of offensive smelling waste matters within the trading centre flowing out of various premises into open channels along the road to the environment and to the Kiserian River.

This deponent further states that following his investigations on these complaints, he established that most plot owners had connected underground pipes to their septic tanks to act, as overflow outlets, discharging liquid waste waters into the open environment and flowing down-stream into the river.

Samples of this water were taken and upon analysis by the government chemist revealed that the waste water was alkalinic and strong in heavy metal making it toxic in nature, and requiring treatment before discharge into the environment of water bodies. This deponent also states, when his notices to **STOP** discharges were ignored, his office issued a THREE **(3) MONTHS NOTICE** statutory notices to one hundred and two (102) residents to abate and prevent a recurrence of the nuisance arising from discharging waste water into open drain and requiring each resident, to contain waste water in his plot and remove the pipes used in draining waste water in open drain.

The Public Health Officer depones that following the issue of the notices, some of the persons affected resorted to ***inter alia*** , writing anonymous letters, lobbying with members of the Provincial Administration **(the District Commissioner)** holding defiance meetings/gatherings under cover of welfare, and accused the Public Health Staff of corruption, and that at the expiry of the notices some plot owners had complied with the notices, some were carrying out the works as advised, and yet others remained defiant. The Public Health Officer decided to institute criminal proceedings against Twenty two (22) Plot owners. The Applicant and Interested Parties thereafter formed the Kiserian Welfare Group, presumably to chart out a common cause on how both to deal with the prosecution, and no doubt the future of how to deal with waste water and other waste matter generated within their premises in the Kiserian Township.

The foregoing is in essence, the factual situation in this application. It is only necessary to add that the Applicant, and the Interested Parties did not savour their prosecution in a matter or matters in respect of which according to the submissions of Mr. Munge, learned Counsel for the Applicant who was and indeed largely the Interested Parties were, not the responsibility of either the Applicant or the Interested Parties. So they brought this Application seeking the orders first above set out.

FINDINGS

1. The charges were brought under s 118 and 120 of

the Public Health Act Cap 242 of the Laws of Kenya. The required notice in respect of waste water was not given. Instead the applicants are charged with discharging of raw sewage which is contaminated into river Kiserian through laid down underground pipes. The provision of s119 and 121 have not been complied with and in particular.

(a) No proper notice in terms of the Act

(b) The Notice given did not stipulate the time within which the requirements of the notice were to be met.

(c) The summons to show cause were not issued as per the provisions of the Act.

As a result we find that as due process was not adhered to the charges are not valid in law and an order of certiorari and prohibition must forthwith issue to quash the charges and the proceedings and to prohibit the charges on similar facts as prayed for in the application.

2. In view of the unchallenged evidence that all the property owners had built septic tanks and that the real issue is the disposal of waste matter charging the twenty three applicants with the discharge of sewerage was arbitrary and oppressive. Moreover in view of the fact that the property owners are about 100 in number the selection of the 23 accused persons was not based on any objective criteria nor can it be said to have been reasonable in the circumstances. All the property owners should have been charged with the correct offences under the relevant law. The law does not permit discrimination either of itself or in its *effect.*

Under Section 82 (3) of the Constitution of Kenya, "**discriminatory**" means "affording different treatment to different persons attributable wholly or mainly to their respective descriptions by race, tribe, place of origin or residence or other local connection, political opinions, colour, creed or sex whereby persons of one such description are subjected to disabilities or restrictions to which persons of another such description are not made subject or are accorded privileges or advantages which are not accorded to persons of another such description".

*Blacks Law Dictionary 11TH Edition defines "**discrimination"** as under:*

"**Discrimination"** In constitutional law the effect of a statute or established practice which confers particular privileges on a class arbitrarily selected from a large number of persons, all of whom stand in the same relation to the privileges granted and between them and those not favoured no reasonable distinction can be found.

Unfair treatment or denial of normal privileges to persons because of their race, age, sex, nationality or religion. A failure to treat all persons equally where no reasonable distinction can be found between those favoured and those not favoured." ***BAKER v CALIFORNIA LAND TITLE Co.*** **D.C. CAL 349 F. Supp 235, 238, 239.**

This being a matter concerning health and environment the public health officials should have taken a broad view of the matter because at the end of the day it will take all the property owners and residents including the Local Authority, Water Ministry (Water Services Board) to solve the problem. Picking on a few in an arbitrary manner is in our view discriminatory and the charges framed cannot stand on this ground as well. The applicants have been discriminated due to their local connection.

Section 82(1) the Constitution provides that no law shall make provision that is discriminatory either of itself or in its effect s 82(2) discrimination in the performance of the

functions of a public officer or public authority is prohibited.

3. The court is also concerned with the disclosure that the area earmarked for the construction of sewerage treatment works is said to have been acquired for private use. Under the relevant law i.e. the Public Health Act and Water Act the responsibility falls squarely on the **OLKEJUADO** County Council and the appropriate Water Services` Board and not on the individual owner of the plot to construct the treatment works. Since the digging of pits to contain waste water cannot be done we consider that under the Constitution this court having found the two Government agencies responsible has the power under s 84(2) under which the application was brought to issue an order of mandamus to compel both the OLKEJUADO County Council and the Ministry of Water (through the relevant Water Services Board to perform their duties as required under the applicable Acts in each case. Orders of mandamus shall therefore issue to each of the authorities accordingly.

4. It has been contended by the applicants that they cannot comply with the health requirements concerning the waste water and that the cost of having treatment works in their respective plots would be out of reach of the individual property owners – and that the costs would be prohibitive. We have been unable to accept this argument firstly because sustainable development has a cost element which must be met by the developers and secondly because they have not stated that they have thought of other alternatives which could be more environmentally friendly to deal with the problem. For example the exhauster service could be tried and the property owners could pool their resources to address the problem on an interim basis pending the establishment of the sewerage treatment works as set out above. Going by the Hydrologist expert report concerning the fact that the entire town sits on a water table it is our view that the alternative to contain the problem in the short term should be explored and NEMA is called upon to assist in coming up with viable and sustainable alternatives in the short term including making appropriate restoration orders under s 108 of the Environment Management and Coordination Act, 1999 (**EMCA).**

The argument by the applicants' counsel that because some of the properties were built over 30 years ago they should not have been charged with offences on the principles established under **GITHUNGURI II** case is not sound in law. Our finding on this however is that much as we salute the principles enunciated in the case concerning the reasonableness of bringing charges after 9 years, we do not think that they apply in all the circumstances and in particular to this case because nuisance can by its very nature have a silent continuing effect – say with effluent percolating slowly into the water table and polluting the same without being detected and also because it has repetitive nature – one could comply this year or moment pursuant to the notices and repeat the same the following year.

Moreover as regards environmental offences the task of restoration could take the same period which the degradation took or more.

Further in terms of ascertaining which property owner is causing greater pollution to the water table below or to the Kiserian River, it is very difficult for the authorities to identify or pin point a particular property owner as the greatest polluter and apportion blame because causation in this regard might be beyond the relevant authorities ability to scientifically apportion the blame and prosecute on this basis. Yet it is absolutely necessary for the relevant authorities to have taken the precautionary measures they took in identifying the problem and charging the (culprits) although as we have found above they did not adhere to the due process. We do urge that the same precautionary measures continue to be taken but adhering to the due process whether in enforcing the provisions of the Public Health Act, the Water Act 2002 or the EMCA.

Finally we are concerned that the quashing and prohibition of the preferred charges might lead the applicants to the erroneous conclusion that they have won and that they need not do anything further. Nothing could be further from the truth for the reasons appearing herein after.

As regards relief we decline to give the declarations sought except any declarations or findings and

holdings as above and the specific orders we have given on the vital grounds as set out in the entire judgment.

The Court is concerned that if the Kiserian Township is located literally on a water table and the structural developments have been approved by the relevant authorities and the accused persons are emptying effluent including solid waste into the Kiserian River, the matter raises very serious environmental issues and challenges. We are told that the Kiserian River is used by other persons including their livestock downstream and for this reason the issue of environmental justice looms large in this case. The peoples right to a clean environment although a statutory right under s 3 of Environment Management & Co Ordination Act (EMCA) raw sewage or waste water does threaten the lives of the users of the water downstream wherever they are located along the river and it further poses a serious threat to the water table in terms of pollution.

As regards the township itself this court is concerned on whether or not in the circumstances described the development is ecologically sustainable. If the property owners plead that they are helpless without a sewage plant because they sit on a shallow water table what environmental considerations come into play as regards the present and the future? We must confess that what was described to the court by Counsel and going through the documents and reports exhibited the town is a ticking time bomb awaiting to explode. We are also concerned that the situation described to us could be the position in many other towns in Kenya especially as regards uncoordinated approval of development and the absence of sewerage treatment works.

As a Court we cannot therefore escape from touching on the law of sustainable development although counsel from both sides chose not to touch on it although it goes to the heart of the matter before us. This larger issue should be of great concern to us as a court for the following reasons:

1. Under section 71 of the Constitution all persons are entitled to the right to life - In our view the right of life is not just a matter of keeping body and soul together because in this modern age that right could be threatened by many things including the environment. The right to a clean environment is primary to all creatures including man, it is inherent from the act of creation, the recent restatement in the Statutes and the Constitutions of the world notwithstanding.

2. Section 3 of EMCA demands that courts take into account certain universal principles when determining environmental cases. Apart from the EMCA it is our view that the principles set out in s 3 do constitute part of international customary law and the courts ought to take cognisance of them in all the relevant situations. Section 3 reads:

3. (1) Every person in Kenya is entitled to a clean and healthy environment and has the duty to safeguard and enhance the environment.

(2) The entitlement to a clean and healthy environment under subsection (I) includes the access by any person in Kenya to the various public elements or segments of the environmental for recreational, educational, healthy, spiritual and cultural purposes.

(3) ... provides for access to redress by the High Court – and the powers of the High Court are

very widely set out.

(4) ... expands the standing to all persons provided the matter brought to court is not frivolous

or vexatious or an abuse of the court process.

(5) In exercising the jurisdiction conferred upon the Court under subsection 3, the High

Court shall be guided by the following principles of sustainable development:

(a) the principle of public participation in the development of policies plans and processes for the management of the environment;

(b) the cultural and social principles traditionally applied by any community in Kenya for the management of the environment or natural resources in so far as the same are relevant and are not repugnant to justice and morality or inconsistent with any written law

(c) the principle of international co-operation

in the management of environmental resources shared by two or more states;

(d) the principle of intergenerational equity;

(e) the polluter pays principle; and

(f) the precautionary principle

The four principles which we consider directly relevant to the matter at hand are:

(1) sustainable development

(2) precautionary principle

(3) polluter pays

(4) Public Trust (not spelt out in EMCA

We shall shortly turn to each of the above principles when we consider the relevance and impact of each on the subject matter of this constitutional matter.

(3) Klaus Topfer, the Executive Director of the United Nations Environment Programme (UNEP) which is in turn located in our great country, stated inter-alia in his message to the UNEP Global Judges Programme 2005, in South Africa:

.....

"**The judiciary is also a crucial partner in promoting environmental governance, upholding the rule of law and in ensuring a fair balance between environmental, social and developmental consideration through its judgments and declarations."**

Sustainable Development

The Rio Declaration on Environment and Development 1992 adopted the following:

"**In order to achieve sustainable development environmental protection shall constitute an integral part of the development process and cannot be considered in isolation from it."**

Precautionary Principle

The Rio Declaration adopted this principle in these words:

"**In order to protect the environment, the precautionary approach shall be widely**

applied by States according to their capabilities. Where there are threats of serious or irreversible damage, lack of full scientific certainty shall not be used as a reason for postponing cost – effective measures to prevent environmental degradation."

Under Principle 16 the internationalization of environmental costs and polluter pays principle was adopted as follows:

"**National authorities should endeavour to promote the internalization of environmental costs and the use of economic instruments, taking into account the application that the polluter should in principle bear the cost of pollution with due regard to the public interest and without distorting international trade and investment"**

Nothing summarises the concept of sustainable development better than the United Nations World Commission on Environment and Development (WCED) 1987 published report "OUR COMMON FURURE" at page 44:

"**Development that meets the needs of the present without compromising the ability of future generations to meet their needs."**

4. Public Trust

The essence of the public trust is that the State, as trustee, is under a fiduciary duty to deal with the trust property, being the common natural resources, in a manner that is in the interests of the general public.

The best example of the application of the principle is in the Pakistan, case of ***GENERAL SECRETARY WEST PAKISTAN SALT MINERS LABOUR UNION v THE DIRECTOR OF INDUSTRIES AND MINERAL DEVELOPMENT* 1994 s CMR 2061.**

The case involved residents who were concerned that salt mining in their area would result in the contamination of the local watercourse, reservoir and pipeline. The residents petitioned the Supreme Court of Pakistan to enforce their right to have clean and unpolluted water and filed their claim as a human rights case under Article 184(1) of the Pakistan Constitution. The Supreme Court held that as Article 9 of the Constitution provided that "no person shall be deprived of life or liberty save in accordance with the law the word "life" should be given expansive definition, the right to have unpolluted water was a right to life itself.

In *ZIA v WAPDA PLD* 1994 SC 693 Justice SALEEM AKHTAR held as follows:

"**The Constitution guarantees dignity of man and also right to "life" under Article 9 and if both are read together, question will arise whether a person can be said to have dignity of man if his right to life is below bare necessity line without proper food, clothing shelter education, healthcare, clean atmosphere and unpolluted environment."**

The Court went on to establish a Commission to supervise and report on the activities of the salt mining for the purpose of protecting the watercourse and reservoirs hence illustrating the public trust doctrine implicit in the decision

Definition of life

Concise Oxford English Dictionary 11th Edition defines life as under:-

"**the condition that distinguishes animals and plants from inorganic matter,**

including the capacity for growth, functional activity and continual change preceding death – living things and their activity."

The Kenyan Constitutional provision on the right to life is Section 71(1) of the Constitution states:

"**No person shall be deprived of his life intentionally save in execution of the sentence of a court in respect of a criminal offence under the law of Kenya of which he has been convicted."**

Whereas the literal meaning of life under s 71 means absence of physical elimination, the dictionary covers the activity of living. That activity takes place in some environment and therefore the denial of wholesome environment is a deprivation of life.

Although the point does not call for authoritative determination in this case, it has arisen to the extent that the court has found it necessary to compare the affected lives downstream Kiserian River with the economic activities of the Kiserian Town developers in polluting their environment and therefore denying them of life. In balancing their rights we have found the two Pakistani authorities extremely persuasive.

We have added the dictionary meaning of life which gives life a wider meaning including its attachment to the environment. Thus a development that threatens life is not sustainable and ought to be halted. In environmental law life must have this expanded meaning as a matter of necessity.

The UN Conference on the Human Environment 1972, that is the Seminal Stockholm Declaration noted that the environment was "*essential to ... the enjoyment of basic human rights – even the right to life itself."*

Principle 1 asserts that:

"***Man has the fundamental right to freedom, equality and adequate conditions of life; in an environment of a quality that permits a life of dignity and well-being"***

Closer home – Article 24 of the African Charter of Human and Peoples Rights 1981 provided as under:

"***All people shall have the right to a general satisfactory environment favourable to their development."***

Finally the UN Conference on Environment and Development in 1992 – ie. The **Rio DECLARATION** principle 1 has a declaration in these terms:

"***... human beings are at the centre of concerns for sustainable development. They are entitled to a healthy and productive life in harmony with nature."***

It is quite evident from perusing the most important international instruments on the environment that the word life and the environment are inseparable and the word life means much more than keeping body and soul together. The orders we make in this case under s 84(1) are clearly intended to secure the right to life in the environmental context and the court is not limited in terms of the orders it can make under s 84(2).

SUMMARY OF REMEDIES

1. Statutory Remedies and the Public Trust. We accept the applicant's counsel argument that the responsibility to provide a safe sewerage treatment works under the Water Act and the Local Government Act respectively falls on the Water Ministry (ie relevant Water Services Board) and the County Council under which the township falls. There is mention of a treatment site having been identified and subsequently suspiciously acquired for private use.

To this we find that both the Ministry of Water and the Olkejuado County Council are under statutory

duties to find a suitable site for the sewage treatment work for the township. The idea of the Council having been constitutionally mandated to handle trust land and also
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Peter K. Waweru v Republic [2006] eKLR12 having the responsibility to deal with matters of public health in its jurisdiction places the Council in a position of public trust to manage the land resources in the township so as to ensure that adequate land isavailable for treatment works. We further declare that the Government itself is both under a statutory obligation by virtue of the Water Act the Local Government Act and the Environment Management and Coordination Act and also under a public trust to provide adequate land for the establishment of treatment works. We further declare that both the Government through the Water Ministry and under the Local Government Act is under a statutory obligation to establish the necessary treatment works andsince the development of the township has been going on with Government and the Local County Council approval and since the development poses a threat to life we order that amandamus issues under s 84 of the Constitution to compel them to establish and maintain the treatment works.
In the case of land resources, forests, wetlands and waterways to give some examples the Government and its agencies are under a public trust to manage them in a way that maintains a proper balance between the economic benefits of development with the needs of a clean environment.

2. Sustainable Development

The Government through the relevant Ministries is under the law under an obligation to approve sustainable development and nothing more, which is development that meets the needs of the present generation without compromising the ability of future generations to meet their needs. To this end no further development in the township should be undertakenwithout satisfying all the environmental and health requirements. If septic tanks cannotprovide an acceptable alternative in the short-term the alternative of exhauster services shouldbe considered and enforced pending the establishment of the treatment works. We would recommend that the National Environmental Management Authority (NEMA) shouldimmediately move in and come up with a Development Management Plan to tackle both thepast and the future for the township – but for now no development should be sanctioned without NEMA's approval. On restoration NEMA should consider invoking s 108 of EMCA.

As regards the argument that the cost of environmental restoration including exhauster service would be beyond the owners of the properties we find this unacceptable to the Court because there is no price for the lives of people downstream whose lives are endangered by the pollution from the property developers and residents of the township. On this point we order the relevant authorities to apply the "**polluter pays principle**" and cause them to pay for this including any viable alternatives. It must not be forgotten that the state of affairs as described to us is a health threat to the Town dwellers as well.

As a long term measure the Government should consider applying the principle in all townships so that the price of the development is increased to reflect the additional cost of establishing and maintaining proper treatment works. Development should be made to meet the cost of pollution which the development causes. Indeed this would be in line with the other principle of coming up with a policy of costing and pricing so as to maintain sustainable development.

As regards environmental justice as applied by the Public Health officials we recommend that the requirement of a septic tank be applied to all owners of the properties across the board, including any other acceptable alternatives. The same standard should be applied to all the developers and residents where applicable. This would achieve some inter-generational equity for the benefit of future residents, fauna and flora of the Kiserian area.

Given that the township sits on a water-table we consider that the environmentAL damage which is likely to result is immense and for this reason we do urge the relevant Ministries and lead agencies as identified above to seriously reflect on the situation and come up with both short term and long-term scientific solutions to what appears a monumental problem. For now the fact that this court was not told of any death of livestock or persons downstream Kiserian river is no reason for the Government and the lead

agencies including NEMA not to exercise maximum caution in approving any future development including stopping further development until the facilities are in place. Instead this is a case where they should put an end to further development and also deal with the existing development. They should apply s 3 of EMCA and especially the precautionary principle in halting further development. At this time and age no development is valid which cannot answer the requirements of sustainable development. As and when a plan of action is put in place as recommended it will be quite apparent to the policy makers and implementers that the Kiserian township time-bomb brings into play nearly all the major principles known to the world today – from the Stockholm Declaration to Rio and more recently in Johannesburg as indicated above. Indeed the act of balancing the rights of the Kiserian town developers with those of their brethren living along downstream Kiserian river does involve the application of the principle intragenerational equity or environmental justice. Intragenerational equity involves equality within the present generation, such that each member has an equal right to access the earth's natural and cultural resources. In our view this includes the balancing of the economic rights of the town dwellers with the rights of the down-stream dwellers to use unpolluted water. If the balance is achieved the chances of achieving inter-generational equity shall have been enhanced.

Looking at the same problem from another level if the development of the township is slowly causing an irreversible damage to the water table and the adjoining Kiserian river which is believed to be a tributary of the even bigger river - Athi River – the need to formulate and maintain ecologically sustainable development that does not interfere with the sustenance, viability and the quality of the water table and the quality of the river waters as described above does in our view also give rise to the equally important principle of intergenerational equity because the water table and the rivers courses affected are held in trust by the present generation for the future generations. Yes, the intergenerational equity obligates the present generation to ensure that health, diversity and productivity of natural resources are maintained or enhanced for the benefit of future generations. We observe that water tables and clean rivers are for this and future generations. A well known writer on the subject E. Brown Weiss, in his unique work "**ON FAIRNESS TO FUTURE GENERATIONS UN UNIVERSITY PRESS, 1989 at pp 36 – 37** has defined the intergenerational principle in these memorable words which we endorse fully:

> "**The proposed theory of intergenerational equity postulates that all countries have in intergenerational obligation to future generations, as a class, regardless of nationality ... There is increasing recognition that while we may be able to maximize the welfare of a few immediate successors, we will be able to do so only at the expense of our more remote descendants, who will inherit a despoiled nature and environment. Our planet is finite, and we are becoming increasingly inter-independent in using it. Our rapid technological growth ensures that this dependence will increase. Thus our concern for our own country must, as we extend our concerns into longer time horizons and broader geographical scales, focus on protecting the planetary quality of our natural and cultural environment. This means that, even to protect our own future nationals, we must co-operate in the conservation of natural and cultural resources for all future generations."**

(3) Environmental Crimes

As is clear from the above we did quash and prohibit the charging of the Applicants and the Interested Parties for the offences as described for both technical and constitutional reasons. However in view of the importance of the subject we felt privileged to travel the extra mile to demonstrate that in the circumstances presented to us, there are no winners or losers. Instead all the parties should look at the situation afresh and take this judgment as a challenge to both applicants and respondents. Environmental crimes under the Water Act, Public Health Act and EMCA cover the entire range of liability including strict liability and absolute liability and ought to be severely punished because the challenge of the restoration of the environment has to be tackled from all sides and by every man and woman.

(4) The Challenge

Although E. Brown Weiss has aptly described the challenge perhaps it is important for our generation not to ask for a sign before joining in this great fight for environmental justice. The reason for this is that this generation can never have the excuse of lacking in inspiration. It will be recalled that it is our generation that wholly depended on river water for home consumption and for livestock, water pipes and taps were invented in our lifetime but had not reached us. Our rivers had quality water that sustained all generations. Then came the tapped water with the cleansing power of chlorine – finally the water pipes and taps reached some of us – they still have not reached many and the majority of our brothers and sisters. It is our generation again which now says that you **take tap water at your own risk** – to be on the safe side take "**bottled water**" yet it is a fact that only a chosen few have access to this new invention! What went wrong before our own eyes! In the name of environmental justice water was given to us by the Creator and in whatever form it should never ever be the privilege of a few – the same applies to the right to a clean environment.

Thus our inspiration to take up the challenge should spring from the fact that our generation has perhaps witnessed the greatest degradation of the environment more than any other past generation as clearly depicted by the bottled water phenomenon described above – we have witnessed the greatest and steepest drift from Grace (call it the Garden of Eden if you may) to the bottled water type of environment! We were created for greater things and no effort should be spared in restoring the lost Grace.

CONCLUSION

For the above reasons orders of certiorari and prohibition shall forthwith issue as prayed and the proceedings in the lower court in Kibera Criminal cases 6398/2003 and 6399/2003 are hereby brought to this court and the charges quashed and we further reiterate that an order of mandamus shall immediately issue to compel the Ministry of Water – i.e. the Nairobi Water Services Board and the Olkejuado County Council to construct Sewerage Treatment Works. In this regard it is noted that the Republic is a party to these proceedings via the Attorney General and the appropriate treatment works must be installed within a reasonable time and for this purpose there shall be liberty to apply. We further order that a copy of this judgment be served by the applicant on the Ministry of Water, Ministry of Local Government, Ol Kejuado County Council, NEMA, the Attorney General's office and whatever Ministry is concerned with Physical Planning. NEMA is also urged to consider making such restoration order as may be appropriate in the circumstance.

Finally as this matter came to us as a reference, the lower court is ordered to terminate the proceedings in Kibera Criminal Cases 6398/2003 and 6399/2003 forthwith in terms of this judgment.

As this is a matter of public interest, each party shall bear its own costs.

It is so ordered

DATED and delivered at Nairobi this 2nd day of March, 2006.

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J.G. NYAMU

JUDGE

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M. IBRAHIM

JUDGE

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ANYARA EMUKULE

JUDGE