



REPUBLIC OF KENYA



**Odando & another (Suing on their Own Behalf and as the Registered Officials of Ufanisi Centre) v National Environmental Management Authority & 2 others; County Government of Nairobi & 5 others (Interested Parties) (Constitutional Petition 43 of 2019) [2021] KEELC 2235 (KLR) (15 July 2021) (Judgment)**

*Isaiab Luyara Odando & another v National Management Environmental Authority & 2 others; County Government of Nairobi & 5 others (Interested Parties) [2021] eKLR*

Neutral citation: [2021] KEELC 2235 (KLR)

**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT AT NAIROBI**

**CONSTITUTIONAL PETITION 43 OF 2019**

**AK BOR, J**

**JULY 15, 2021**

**IN THE MATTER OF A CLASS ACTION LAWSUIT IN RESPECT OF CIVIL RIGHTS OVER POLLUTION OF RIVER WATERS AND AIR IN KENYA**

**AND**

**IN THE MATTER OF ENFORCEMENT OF ENVIRONMENTAL RIGHTS UNDER ARTICLE 70 OF THE CONSTITUTION OF KENYA**

**AND**

**IN THE MATTER OF INHUMAN TREATMENT OF THE USERS (UPSTREAM AND DOWNSTREAM) OF THE NAIROBI AND ATHI RIVER WATERS AND CONSUMERS OF TOXIC AIR FROM EMISSIONS FROM DANDORA DUMPSITE AND INDUSTRIES**

**AND**

**IN THE MATTER OF ARTICLES 10, 22(1) & (2), 23(3)(A),(C) & (F), 25(A), 29(F), 42, 43(1)(D), 69, 70 AND 232 OF THE CONSTITUTION OF KENYA AND SECTIONS 3, 71 (1) & 86 OF THE ENVIRONMENTAL MANAGEMENT & CO-ORDINATION ACT (EMCA) NO. 5 OF 2015**

**BETWEEN**

**ISAIAH LUYARA ODANDO ..... 1<sup>ST</sup> PETITIONER**

**WILSON YATTA ..... 2<sup>ND</sup> PETITIONER**

**SUING ON THEIR OWN BEHALF AND AS THE REGISTERED OFFICIALS OF UFANISI CENTRE**

**AND**



NATIONAL ENVIRONMENTAL MANAGEMENT AUTHORITY .... 1<sup>ST</sup>  
RESPONDENT

CABINET SECRETARY- ENVIRONMENT ..... 2<sup>ND</sup> RESPONDENT

CABINET SECRETARY- WATER & SANITATION ..... 3<sup>RD</sup> RESPONDENT

AND

COUNTY GOVERNMENT OF NAIROBI ..... INTERESTED PARTY

COUNTY GOVERNMENT OF MACHAKOS ..... INTERESTED PARTY

COUNTY GOVERNMENT OF KIAMBU ..... INTERESTED PARTY

COUNTY GOVERNMENT OF KILIFI ..... INTERESTED PARTY

COUNTY GOVERNMENT OF MAKUENI ..... INTERESTED PARTY

COUNTY GOVERNMENT OF TANA RIVER ..... INTERESTED PARTY

**The National Environment Management Authority could be held liable for violating a person's rights to a clean and healthy environment for failing to stop pollution**

*The suit claimed that the National Environment Management Authority (NEMA) and the county governments had not stopped the pollution of River Tana and Nairobi River, that in particular, the Nairobi Metropolitan Service (NIMS) had not stopped the air and water pollution by the Dandora Dumpsite. The court in this case found that NEMA could be held liable for violating a person's rights to a clean and healthy environment for failing to stop pollution.*

Reported by Ribia John

**Words and Phrases** – eliminate – definition of - to remove or get rid of something - The Oxford Advanced Learner's dictionary.

**Constitutional Law** – social and economic rights – right to a clean and healthy pollution – what were the statutory and constitutional obligations set on individuals as regards to the protection of the environment - what were the roles of the National Environment Management Authority (NEMA), county governments and the Nairobi Metropolitan Services (NMS) as regards to environmental pollution – Constitution of Kenya, 2010 article 42, 61(1)(g), 69 and 70; Environmental Management and Co-ordination Act section 3.

**Constitutional Law** – social and economic rights – right to a clean and healthy environment – factors that the court considered in determining whether a person's right to a clean and healthy environment was violated - whether an applicant that sought redress for breach or threat of breach of the right to a clean and healthy environment had to demonstrate that a person had incurred loss or suffered injury - Constitution of Kenya, 2010 article 70.

**Environmental Law** – precautionary principle – what was the precautionary principle – application of the precautionary principle - what duty did the precautionary principle set on the State or on State organs in environmental law - Environmental Management and Co-ordination Act section 2.

**Environmental Law** – disposal of water waste – onus of setting water quality standards and standards for the discharge of effluents to water bodies - which State organ had the role of establishing the criteria for measurement of water quality standards, recommending the minimum water quality standards for different purposes, analysing the conditions for the discharge of effluents, recommending measures for the treatment of effluents before they were discharged into the sewerage system – Environmental Management and Co-ordination Act (EMCA) section 71.



*Civil Practice and Procedures – remedies – remedies for violations of social and economic rights – structural interdicts - what was a structural interdict and what did that remedy entail - whether the remedy of structural interdicts was applicable to state organs when tasked to enforce the right to a clean and healthy environment.*

### **Brief facts**

The petitioners' filed the instant class action suit against the National Environment Management Authority (NEMA) and all the counties that the River Tana traversed. The suit claimed that NEMA and the county governments had not stopped the pollution of the River Tana and Nairobi River, that in particular, the Nairobi Metropolitan Service (NIMS) had not stopped the air and water pollution by the Dandora Dumpsite.

NEMA, the 1st respondent, argued that petitioners did not specify the measures to be taken under the precautionary principle to prevent the alleged pollution. They claimed that the 1<sup>st</sup> respondent had done and continued to do the best it could within its means to prevent pollution through the application of various environmental management tools and principles.

### **Issues**

- i. What was the role of National Environment Management Authority (NEMA) as regards to environmental protection?
- ii. Whether NEMA's role was limited to being an investigator and prosecutor of offenders of environmental laws.
- iii. Whether NEMA could be held liable for violating a person's rights to a clean and healthy environment by failing to stop pollution.
- iv. Which State organ had the role of establishing the criteria for measurement of water quality standards, recommending the minimum water quality standards for different purposes, analysing the conditions for the discharge of effluents, recommending measures for the treatment of effluents before they were discharged into the sewerage system.
- v. What was the role of Nairobi Metropolitan Services (NMS) and county governments as regards environmental protection?
- vi. Whether the measures taken by NMS to reduce air and water pollution in Nairobi River by commissioning the Michuki National Park were satisfactory.
- vii. What factors did the court consider in determining whether a person's right to a clean and healthy environment was violated?
- viii. What were the statutory and constitutional obligations set on individuals as regards to the protection of the environment?
- ix. What was the precautionary principle in environmental law?
- x. What duty did the precautionary principle set on the State or on State organs in environmental law?
- xi. Whether an applicant that sought redress for breach or threat of breach of the right to a clean and healthy environment had to demonstrate that a person had incurred loss or suffered injury under article 70 of the Constitution.
- xii. What was a structural interdict and what did that remedy entail?
- xiii. Whether the remedy of structural interdicts was applicable to state organs when tasked to enforce the right to a clean and healthy environment.

### **Held**

1. The measures taken up by National Environment Management Authority (NEMA) and Nairobi Metropolitan Services (NMS) address the air and water pollution which the petitioners complained of from upstream had been implemented over time. No mention was made when it was anticipated that the initiatives the respondents claimed to be undertaking would address the pollution of the Nairobi River near Korogocho and Mukuru slums, or when the entire River Athi which covered approximately 390 kilometres from its source up to its mouth where it emptied into the Indian Ocean, was expected to be cleaned up and freed from pollution. The respondents were not forthcoming on when the



- rehabilitation of Michuki Park was done and what efforts had been made to clean up the river beyond the Michuki Park.
2. The Environmental Management and Co-ordination Act (EMCA) defined the environment to include the physical factors of the surroundings of human beings including land, water, atmosphere, climate, sound, odour, taste, the biological factors of animals and plants and the social factor of aesthetics. It included both the natural and the built environment. The environment went beyond the physical settings to include issues such as social, economic and cultural conditions that influenced the life of an individual or a community. People formed part of the environment which was why it was critical to eliminate processes that posed danger to human health.
  3. EMCA defined pollution as any direct or indirect alteration of the physical, thermal, chemical, biological, or radioactive properties of any part of the environment by discharging, emitting or depositing wastes so as to affect any beneficial use adversely, to cause a condition which was hazardous or potentially hazardous to public health, safety or welfare, or to animals, birds, wildlife, fish or aquatic life, or to plants or to contravene any condition, limitation or restriction which was subject to a licence under EMCA. Article 69(1)(g) of the Constitution of Kenya, 2010 (Constitution) obligated the State to eliminate processes and activities that were likely to endanger the environment. Eliminate was defined as to remove or get rid of something. The Constitution behoved the respondents to remove or get rid of all the processes and activities that caused pollution of the Nairobi and Athi Rivers, and to stop the air pollution from the toxic substances emanating from Dandora dumpsite which formed the subject matter of the instant petition.
  4. Article 42 of the Constitution guaranteed every person the right to a clean and healthy environment, which included the right to have the environment protected for the benefit of present and future generations through legislative and other measures, particularly those contemplated in article 69, and to have obligations relating to the environment fulfilled under article 70.
  5. Section 3 of EMCA gave effect to the entitlement to a clean and healthy environment which was enshrined in article 42 of the Constitution. Every person had a duty to safeguard and enhance the environment. That section empowered persons alleging that the right to a clean and healthy environment had been or was being denied, violated, infringed or threatened to apply to the Environment and Land Court (ELC) for redress.
  6. NMS undertook the measures it claimed to have put in place to reduce the pollution of Nairobi River but that did not satisfactorily address the air and water pollution complained of by the petitioners. The respondents placed a lot of emphasis on the commissioning of the Michuki National Park and hailed it as a success story in terms of the initiatives they had put in place to address the environmental degradation of the Nairobi River.
  7. Section 9(1) of the EMCA made NEMA the principal instrument of government in the implementation of all policies relating to the environment. Consequently, NEMA had to play a primary role in the elimination of processes and activities that endangered the environment. EMCA bestowed specific roles on NEMA in relation to preventing air and water pollution in the country. NEMA was not just an investigator and prosecutor whose success was measured in terms of successful investigations and prosecutions, rather, as the principal instrument of government it had a bigger mandate towards the people of Kenya in the implementation of all policies relating to the environment.
  8. NEMA argued that it had satisfactorily performed its obligations under the law and that it had taken a raft of measures to eliminate pollution of the Nairobi River including the five year Multi-Agency Urban Rivers Regeneration Programme, enacting the Water Quality Regulations, conducting inspections, arresting offenders, planting trees on riparian land, cleaning up the Kirichwa Kubwa river up to Michuki Park, opening Michuki Park and coming up with the Adopt a River Initiative. While those measures were laudable, they did not directly address the claims made by the petitioners regarding the violation of their rights to a clean and healthy environment and the risk of people contracting



- diseases from the air and water pollution from the sources the petitioners complained of. Looking at the evidence adduced by the petitioners, the activities and processes causing pollution of Nairobi River both upstream and downstream had not been stopped altogether.
9. There was much more that the law enjoined NEMA to do pursuant to section 9 of EMCA. It should exercise co-ordination, advisory and technical support functions with a view to ensuring the citizens' right to a clean and healthy environment was safeguarded and in the instant case, to ensure that the pollution of the Nairobi and Athi River was eliminated. The success and efficiency of NEMA would ultimately be seen in the realisation of the right to a clean and healthy environment by every Kenyan more than the information on its website as it urged the petitioners to acquaint themselves with. In light of the nationwide challenge posed by urban waste, NEMA had to be proactive and had to take the lead in enforcing the law and assist NMS and the county governments to develop and implement policies and strategies for dealing with the disposal and management of urban waste in a safe manner that did not derogate from every citizen's right to a clean and healthy environment.
  10. The Water Act 2016 guaranteed every person the right to access water. Section 63 of the Water Act provided that every person in Kenya had the right to clean and safe water in adequate quantities and to reasonable standards of sanitation as stipulated by article 43 of the Constitution. The right to clean and safe water was an implicit component of the right to adequate standard of living and the right to health.
  11. Some of the measures NEMA mentioned that it had taken concerning the state of Nairobi River included enacting the Air Quality Regulations in 2014. The affidavits and photographic evidence of environmental degradation presented by the petitioners confirmed the fact that NEMA had not sufficiently anticipated, prevented and attacked the causes of environmental degradation. NEMA had not discharged its statutory mandate effectively in terms of eliminating the processes and activities that caused air and water pollution in Nairobi especially in Korogocho, Mukuru and other informal settlements.
  12. The respondents had failed to eliminate the processes and activities that caused air pollution in Korogocho and Mukuru kwa Reuben slums which were attributed to the Dandora dumpsite. The respondents had also failed to stop the pollution of Nairobi and Athi River and were responsible for violating the petitioners' rights to a clean and healthy environment under article 42 of the Constitution. The Respondents have also violated the Petitioners' rights to the highest attainable standard of health and to clean and safe water enshrined in Article 43 of the Constitution
  13. Article 69(1)(a) to (h) of the Constitution gave the broad obligations of the State in relation to the environment. It was only article 69(1)(d) which brought citizens into the picture by requiring the State to encourage public participation in the management, protection and conservation of the environment. Article 69(1) confirmed that the State carried a bigger burden in relation to the management and protection of the environment. Article 69(2) provided that every person had a duty to cooperate with State organs to protect and conserve the environment and ensure ecologically sustainable development and use of natural resources. The role of citizens under the Constitution was to cooperate with State organs, such as the respondents, for the protection and conservation of the environment. The duty to eliminate processes and activities that polluted the environment fell on the State and its agencies.
  14. The onus of establishing the criteria for measurement of water quality standards, recommending the minimum water quality standards for different purposes, analysing the conditions for the discharge of effluents, recommending measures for the treatment of effluents before they were discharged into the sewerage system and making recommendations for the monitoring and control of water pollution fell within the docket of the Cabinet Secretary responsible for environmental matters on NEMA's recommendations under Section 71 of EMCA.
  15. Section 9 of EMCA obligated NEMA to perform tasks such as coordinating environmental management activities being undertaken by lead agencies and promoting the integration of



- environmental considerations into development policies. It was also required to audit and determine the value of natural resources and their utilisation and conservation. Article 260 of the Constitution defined natural resources as the physical non-human factors and components which were either renewable or non-renewable and included surface and groundwater. The River Athi was a natural resource whose conservation was the responsibility of NEMA.
16. Kenyans owed future generations a duty to sustain the environment for their benefit, as highlighted in the preamble to the Constitution. The court was required by section 3 of EMCA to be guided by principles of inter-generational and intra-generational equity when exercising its jurisdiction in claims where a person alleged that the right to a clean and healthy environment had been denied or violated. Intergenerational equity enjoined the instant generation while exercising its rights to the beneficial use of the Nairobi and Athi River to maintain or enhance the health, diversity and productivity of this river for the benefit of future generations. A polluted river of death spewing poison was not what the principle of inter-generational equity expected the instant generation to bequeath to future generations. It behoved every person, including the petitioners, to ensure that the environment was not degraded or polluted through the proper disposal of solid and hazardous wastes, limiting the use of non-biodegradable items such as plastics and not disposing solid and hazardous materials into the river.
  17. It was not in contention that there were in place legal provisions and policies for the protection of natural resources such as the Nairobi and Athi River. The challenge was on implementation of the laws protecting the environment mainly because the State agencies entrusted with the protection of the water bodies continued to fail in their given role. Section 142 of EMCA created offences relating to pollution and criminalised the discharge of dangerous materials, substances, and oil mixtures into water, air or the aquatic environment. The court could direct the polluter to meet the cost of cleaning up the polluted environment and of removing the pollution. NEMA had to be satisfied about the clean-up of the polluted environment and removal of the effects of the pollution.
  18. Section 5 of EMCA tasked the Cabinet Secretary (CS) responsible for matters relating to the environment and natural resources to promote co-operation among public departments, county governments and organisations engaged in environmental protection programs. The CS was responsible for policy formulation and directions for purposes of EMCA, and set the national goals and objectives besides determining policies and priorities for the protection of the environment.
  19. The precautionary principle was not only to be enforced after conducting public participation. Article 70 of the Constitution empowered the court to give redress where a person alleged that their right to clean and healthy environment had been or was threatened with violation did not make public participation a factor for consideration when the court made the orders specified in that article. Section 3(5) of EMCA anticipated that public participation was to be taken into consideration in the development of policies and processes for the management of the environment but not that the principle should shield the respondents from fulfilling their statutory obligations for the management of the environment.
  20. Section 2 of EMCA defined the precautionary principle as the principle which postulates that where there were threats of damage to the environment, whether serious or irreversible, lack of full scientific certainty should not be used as a reason for postponing cost effective measures to prevent environmental degradation. The section mirrored Principle 15 of the Rio Declaration on Environment and Development.
  21. The precautionary principle directed the judges to offer scientifically based structural solutions and policies that responded creatively to weak, ineffective regulation even in the absence of regulation.
  22. The onus lay on NEMA to prove that it had anticipated, prevented and addressed the causes of environmental degradation. Its contention that the petitioners should have provided a solution and specified which measures the respondents should have carried out under the precautionary



- principle was misplaced. EMCA was replete with measures and actions which the respondents were to implement in order to address air and water pollution.
23. River Athi flowed through many counties before reaching the Indian Ocean. Those counties were added to the instant petition as interested parties. Considering the importance of the Athi for irrigation purposes, notably the Galana Kulalu Food Security Project on the Galana River and the Thwake Dam once it was completed, it was necessary to apply precaution for the protection of human health and plant health by stopping the pollution emanating from the Dandora dumpsite and the water pollution in the Nairobi and Athi River. The food grown with the contaminated water from River Athi inevitably found its way to our tables whether it be vegetables from the market or the Kenyan staple food, ugali made from maize which was probably grown in the Galana food project, sold to the national cereals board and milled for people's consumption. There was no doubt that the air and water pollution posed potential high risk to human health. Rather than wait to react after confirming through scientific means that the air and water pollution in the Nairobi River was the cause for the increase in cancers, respiratory and other diseases in Nairobi and the country generally, the respondents need to adopt a strategy of precaution.
  24. Harm could have occurred to people living near the Dandora dumpsite, Korogocho and Mukuru as individuals, population or even the entire ecosystem of the Athi River. The effects of the air and water pollution of the Athi River could be distributed disproportionately. The environmental pollution in Korogocho, Mukuru and other informal settlements along the Nairobi River coupled with the fact that those people were least capable of protecting themselves predisposed them to damage to their health.
  25. What the precautionary principle implied was that the State had a duty to prevent environmental harm and health risks as well as conduct what could be harmful even where conclusive scientific evidence regarding the harmfulness was not available. The respondents had to take precautionary actions aimed at reducing exposure to potentially harmful substances, activities and conditions to minimise significant adverse effects to health and the environment.
  26. One way of implementing the precautionary principle was by shifting the burden of proof to the polluters and exploring alternatives to the harmful actions such as the Dandora dumpsite. The precautionary approach to be adopted by the State should have focussed on how much harm could be avoided rather than consider how much could be tolerated.
  27. Under the precautionary principle, the State would rather be wrong in acting instead of failing to act at all because the damage the pollution was likely to cause to human health and the environment could take years to be ascertained scientifically. The respondents should have minimised the future costs of being wrong about environmental and health risks posed by air and water pollution in the country. Applying the precautionary principle in stopping air and water pollution would prevent the actual causes of respiratory and other diseases as well as other underlying risks to health. That would entail examining the evidence of risk and uncertainty to determine the possibility of a significant health threat and the need to take precautionary action. That could only be done by reducing pollution at the source.
  28. What NEMA, NMS and county governments needed to ask themselves was how much contamination could be avoided? For NMS, what were the alternatives to the Dandora dumpsite and the sources of pollution to the river? How would it achieve the desired goal of waste management for Nairobi County? There had to be structures for the independent and public monitoring of alternatives taken to ameliorate potential harm to the environment from the pollution. The respondents did not demonstrate that there were no alternatives available for handling the waste being dumped at Dandora dumpsite causing pollution. The respondents confirmed that there were plans to relocate the dumpsite from Dandora and rehabilitate the site.
  29. Rather than presume that water and air pollution did not cause the diseases the Petitioners alluded to, the State should err towards protecting the environment and public health. The responsibility of



- preventing harm fell on the Nairobi County Government and NMS under the deed of transfer of some of the county's functions. The petitioners and others who potentially would be affected by substances and activities regarding the pollution to the Nairobi and Athi River had to have a say in the decision making process. The decision making process had to be transparent and provide a structure for the involvement of citizens.
30. In managing the waste from Nairobi city, NMS should have employed options that were least prone to environmental or health damage. Decisions taken regarding Nairobi waste management and the pollution of Nairobi and Athi River had to protect health and the environment. The decision to be made would encompass new activities and had to address potential hazards that already existed.
  31. The petitioners failed to prove that their rights under articles 26(3) and 29(f) of the Constitution had been violated by the respondents and the 5<sup>th</sup> interested party.
  32. To conserve basically entailed protecting something or preventing it from being changed or destroyed. Conservatory orders were interim measures or orders which the court gave pending hearing and determination of the suit or appeal, their aim being to protect and preserve the substratum of the case until the case was heard and determined. Conservatory orders would not encompass the final disposal orders the court made after hearing a suit.
  33. The ELC was mandated by section 3 of EMCA to make orders, issue such writs or give directions it could deem appropriate to prevent, stop or discontinue any act deleterious to the environment. The court could also compel a public officer to take measures to prevent or discontinue any act or omission deleterious to the environment or compel the persons responsible for the environmental degradation to restore the environment to the position it was in before the damage, and to provide compensation for any victim of pollution and the cost of beneficial uses lost as a result of the act of pollution. That section stipulated that a person bringing a suit regarding the entitlement to a clean and healthy environment did not need to show that the defendant's act or omission caused him personal injury or loss. All the person needed to show was that his suit was not frivolous, vexatious or an abuse of the court process. EMCA did not require a person who claimed that their right to a clean and healthy environment had been violated to establish a *prima facie* case with probability of success and show the harm they stood to suffer if the orders were not granted.
  34. the Petitioners did not have to demonstrate that they had suffered injury from the air and water pollution they complained of because they and all other persons are entitled to clean and healthy environment that was not polluted. They also had a right to seek redress from the court. The court was empowered by the Constitution and EMCA to make appropriate orders to prevent, stop or discontinue the air pollution attributable to the Dandora dumpsite and the pollution of the Nairobi and Athi River
  35. NMS outlined measures it intended to take concerning the Dandora dumpsite and other forms of pollution affecting the petitioners' access to a clean and healthy environment. The court could issue a structural interdict to ensure that there were remedies in place to redress the petitioners' concerns regarding the pollution of the environment.
  36. A continuing *mandamus* or structural interdict or structural injunction as a relief given by the court through a series of ongoing orders over a long period of time, directing an authority to fulfil its obligation in general public interest. Such an order is issued in a situation which could not be remedied instantaneously but required a solution over a long time and could even go on for years. It was a procedural innovation through a writ of *mandamus* or a mandatory order through which the court monitored compliance with its orders by seeking periodic reports from the authorities on the progress in implementing the court orders.
  37. Owing to the nature of pollution and the harm caused to the Nairobi and Athi River, the aquatic life in it and the effects of the polluted water on human health, the ELC needed to issue a structural interdict or an injunction to be enforced by the respondents for the period of time that it would take



- for the Nairobi and Athi River water to be restored to a point where it was free from the pollution. Ridding the Nairobi River of the pollution could not be done instantaneously and would require a long period of time.
38. Granting a statutory interdict or continuing orders would give effect to article 70(2) of the Constitution which gave the ELC the discretion to make orders or give directions which it considered appropriate to prevent, stop or discontinue any act or omission that was harmful to the environment.
  39. An applicant that sought redress for breach or threat of breach of the right to a clean and healthy environment did not have to demonstrate that any person had incurred loss or suffered injury under article 70 of the Constitution.
  40. One could not tell with certainty the number of people who had been affected by the pollution from the Dandora dumpsite and the Nairobi River. The court could only order that compensation be paid to specific persons whose details were supplied in the suit, which in the instant case was the two petitioners.

*Petition allowed. The respondents were directed to adopt the precautionary principle in the management of the environment in which the petitioners resided by taking the following measures to stop the air pollution and prevent the pollution of the Nairobi and Athi River by:*

#### **Orders**

- i. *Within 30 days of the date of the judgement, the respondents were to identify materials and processes that were dangerous to the environment and human health in relation to the people living in Nairobi and more specifically in Korogocho, Mukuru, and the areas surrounding the Dandora dumpsite. They were also directed to prescribe measures for the management of the materials and processes identified as obligated by section 86 of EMCA.*
- ii. *The respondents were directed to prescribe measures and formulated methods for the management and safe disposal of waste from the City County of Nairobi in accordance with section 86 of EMCA read with Part 2(2)(g) of the Fourth Schedule to the Constitution.*
- iii. *The Nairobi Metropolitan Services was to ensure that all the waste from the City County of Nairobi was disposed of in an environmentally sound manner in accordance with the Environmental Management and Coordination (Waste Management) Regulations of 2006.*
- iv. *The Nairobi Metropolitan Services was directed to take steps to decommission the Dandora dumpsite and relocate it to another site within six months of the date of the instant judgement. The Nairobi Metropolitan Services was to shut down the Dandora dumpsite within six months of the date of the instant judgement and rehabilitate the dumpsite.*
- v. *In the intervening period, the Nairobi Metropolitan Services would take all practical steps to ensure that the waste in the Dandora dumpsite was managed in a manner which protected human health and the environment against adverse effects from the waste. The Nairobi Metropolitan Services had to ensure that there was no burning of plastic or other waste in the Dandora dumpsite.*
- vi. *In establishing the new landfill for the safe disposal of the waste from Nairobi County, the Nairobi Metropolitan Services would in conjunction with NEMA, make concerted efforts aimed at waste reduction, separation of biodegradable and organic waste, and prioritise the implementation of recycling strategies.*
- vii. *The respondents were directed to develop a plan and strategy for the cleaning up of the Nairobi and Athi River. The respondents were directed to undertake an urgent clean-up of the Nairobi River from the source up to the estuary at Sabaki River in Malindi until the whole river was clean and free of pollution. NEMA would take the lead role in the development of an environmental action plan for the cleaning up of the Nairobi and Athi River.*
- viii. *The respondents would file reports in court every four months showing the water quality of samples of water taken from a minimum of twelve different points of the Nairobi and Athi River, including samples of water taken from all the counties which River Athi passed through.*



- ix. *NEMA would oversee the survey of the Nairobi and Athi River for purposes of protecting it from encroachment and other harmful activities.*
- x. *NEMA was directed to perform its duties under EMCA and the Environmental Management and Coordination (Water Quality) Regulations of 2006 and to file reports in court every four months showing the measures taken to rid the Nairobi and Athi River of pollution such as stopping the discharge of effluent, poison, toxic, noxious, radioactive waste or other pollutants which did not conform to the standards set by law into the river.*
- xi. *All the counties which the Nairobi and Athi River coursed through were directed to eliminate all pollution from the river and to act in a precautionary manner by eliminating activities along the river which could pose a risk to human health or the environment.*
- xii. *The Nairobi Metropolitan Services and NEMA would ensure that they complied with the requirement for public participation in the implementation of the judgement.*
- xiii. *NEMA was directed to undertake programmes intended to create public awareness, enhance environmental education on the pollution of the Nairobi and Athi River and to develop and disseminate guidelines relating to the prevention of pollution and degradation of the Nairobi and Athi Rivers in accordance with section 9 of EMCA. That would be done with the relevant lead agencies and the necessary public participation.*
- xiv. *The court awarded the 1<sup>st</sup> and 2<sup>nd</sup> petitioners compensation of Kshs.10, 000/= each against the respondents. The petitioners were awarded the costs of the petition, which would be borne by the respondents.*

#### **Citations**

#### **Statutes**

None referred to

#### **Advocates**

*Mr. Kenneth Amondi* for Petitioners

*Mr. Erastus Gitonga* for 1st Respondent

*Ms. Jeptoo Adomeyon* for 2nd and 3rd Respondents

*Mr. David Chege* for 1st Interested Party

*Ms. P. Mueke holding brief for Mr. D. Makau* for 5th Interested Party

## **JUDGMENT**

1. The Petitioners filed the petition dated 29/8/2019 against the Respondents. They amended the petition on 25/10/2019 and added the County Governments of Nairobi, Machakos, Kiambu, Kilifi, Makueni and Tana River as Interested Parties to the suit. The Petitioners, who are adult Kenyan citizens based in Nairobi County, stated that they were the officials of Ufanisi Center in Korogocho area in Nairobi County. Ufanisi Centre is described in the petition as an environmental community based organisation established pursuant to Section 2 (i) of the Environmental Management and Coordination Act (EMCA).
2. The National Environment Management Authority (NEMA), sued as the 1<sup>st</sup> Respondent in this petition, is created under EMCA and is clothed with the mandate to exercise general supervision and coordination of all matters relating to the environment. It is the principal Government instrument in the implementation of all policies relating to the environment. The 2<sup>nd</sup> and 3<sup>rd</sup> Respondents are the Cabinet Secretaries for Environment and Water and Sanitation respectively. The Interested Parties are State organs established under Article 176 of the Constitution. The Interested Parties exercise delegated sovereign power and are required to perform their functions in accordance with the Constitution.



3. In the Amended Petition which was brought as a class action, the Petitioners seek a declaration that the Respondents had jointly and severally violated their rights and fundamental freedoms enshrined in the bill of rights under Articles 10(2) (b), 26(3), 29(f), 42, 43(1) (d), 47, 69 and 232(1) (c) of the Constitution of Kenya. They also seek permanent conservatory orders to compel the Respondents to adopt the precautionary principle in environmental management with respect to preventing the upstream and downstream pollution of Nairobi and Athi Rivers. Additionally, they seek permanent conservatory orders to compel the Respondents to implement permanent restoration of the Nairobi and Athi River waters.
4. Further, the Petitioners seek conservatory orders to compel the Respondents to shut down polluters and force industries to treat their waste before disposing it into the rivers and for the Respondents to remove more than 4,000 structures encroaching on riparian land and build embankments and barriers to allow the river to flow free from contamination. The Petitioners also seek compensation for all the members of the public who fall within the bracket of this class action as well as the costs of the petition.
5. The Amended Petition was supported by the affidavit sworn by Isaiah Luyara Odando, the Chairperson of Ufanisi Center. He averred that they instituted the petition for themselves in the public interest as a class action environmental lawsuit on behalf of those who have been affected by the Respondents' mishandling of the environment by failing to put in place the precautionary principle thereby failing to stymie run away water pollution upstream and downstream inherent in the Nairobi and Athi Rivers; and the air pollution manifest at the Dandora dumpsite with its attendant drastic effects downstream at the Korogocho and Mukuru kwa Reuben slums and the Nairobi environs at large.
6. He averred that the members of his group desired to see their environment revert to the original state from which the city got its name, from the Maasai phrase "enkare Nairobi" which means the place of cool waters because back then it was punctuated by greenery permeating the Nairobi, Ngong and Mathare Rivers. He added that the members of his group who reside in the informal settlements comprise the highest proportion of the Nairobi population living in fragile areas known to lack basic necessities which are generally adjacent to sewers, river valleys and dumpsites.
7. He deponed that the issue of pollution of the Nairobi River has been in the public domain since the 1980's and annexed a paper titled "Pollution Effects on a Tropical Stream: The Nairobi River" by Stephen Gichuki Njuguna, Department of Botany, University of Nairobi authored in 1979 discussing the extent of pollution of the Nairobi River at the time.
8. Mr. Luyara averred that the Nairobi River water is polluted upstream by waste from industries, untreated and improperly treated effluent from the Dandora sewerage treatment plant and several drainage channels that gather storm water from Nairobi city. The polluted water flows through its feeder tributaries which include Ngong, Getathuru, Ruaraka, Kamiti, Ruiru and Thiririka before it joins the Athi River 76 kilometers from its source to form the Athi which flows over the Fourteen Falls, rounds the extinct volcano, the Doinyo Sabuk and continues south-eastwards into the Indian Ocean about 11km North of Malindi.
9. He deponed that the flow of the polluted Nairobi and Athi River water all the way downstream to Malindi demonstrated the negative impact and consequences that are to be found in far flung areas and which are being felt as a result of the Respondents' failure to put in place pre-emptive measures to protect the environment against pollution. He averred that citizens consume unclean water yet there is a public health threat from drinking unclean water including the risk of severe pathogen pollution. He exhibited a 2016 United Nations Environmental Programme (UNEP) report titled, "A Snapshot



of the World's Water Quality: Towards a Global Assessment", which discussed the consequences of drinking unclean water.

10. He deponed that Kenyans had been treated to high incidences of strange diseases which researchers have attributed to air and water pollution and that a United Nations (UN) study done in May 2018 established that asthma, bronchitis, emphysema, laryngitis, pneumonia and influenza were prevalent in Muthurwa Market, Kariokor, Babadogo, Donholm, Hazina Estates and parts of Gachie which have the most polluted air in Nairobi. He annexed an article written by Felista Wangari which was published in the Daily Nation of 16/08/2019 on the point that polluted air has long been associated with breathing difficulties and respiratory ailments.
11. He stated that the fact that poor air quality had adverse effects on the right to life, health, water, food and adequate standards of living was appreciated by the United Nations General Assembly in the Special Rapporteurs' report presented at the 40<sup>th</sup> Session of Human Rights Council on 22/2-22/3/2019 titled "Issue of Human Rights obligations relating to the enjoyment of a safe, clean, healthy and sustainable environment". He produced a copy of that report.
12. Mr. Luyara averred that it had been established that the Nairobi River was a recipient of improperly treated or untreated effluent from the Dandora Sewerage Treatment Plant and several drainage channels that gather storm water from Nairobi city. He added that the polluted water and raw sewage is used for irrigation which exposes consumers of food products to various health hazards.
13. He made reference to the Citizen Television documentary titled the 'Choking City' prepared with technologists from Code of Africa which showed that the air pollutant pm 2.5 level at Mukuru slums was found to be 16 times higher than the acceptable standards leading to cases of respiratory diseases like asthma which are common among the elderly people having bad lungs and development of heart failure. The documentary highlighted heaps of garbage at Dandora dumpsite which was filled with smoke from the burning of plastics which releases toxic and carcinogenic gases into the atmosphere increasing the risk of respiratory diseases for people living in Korogocho, Kariobangi and Lucky Summer. He added that the Dandora dumpsite is near Nairobi River hence toxic metals find their way into the river and downstream.
14. He deponed that the Daily Nation in its serialization dubbed 'Toxic Flow' expose which was basically an investigative project on river pollution with sampling points at Ondiri springs in Kikuyu, Ndwaru or Satellite near Kawangware, Chiromo at the Museum Hill interchange near the Nairobi Museum, Gikomba, Dandora dumpsite and Pipeline near the bridge on Outer Ring Road, Thwake Makueni County and Malindi near Sabaki bridge at the end of the river described a classic case of a river of death spewing poison on its way to the Indian Ocean and was found to carry with it unacceptable toxic levels of lead, selenium, copper, aluminium, manganese, iron, bacteria, nitrates, phenolic compounds, cyanide and ammonia which have caused an upsurge in cancer and respiratory diseases in Nairobi County and downstream in the counties of Kiambu, Machakos, Makueni, Tana River and Kilifi.
15. He blamed the Respondents for the pollution of the air through the release of toxic substances into the air and the release of poisonous metals into the Nairobi and Athi River and averred that these compromised people's health which places them under the threat of being deprived of their lives contrary to Article 26 of the Constitution. He added that there is widespread cases of strange diseases of a respiratory and carcinogenic nature not only in Nairobi but in Kenya generally. He was emphatic that the Respondents' poor management of the environment contrary to the Constitution and statutory provisions had played a big role towards that state of affairs.
16. Mr. Luyara pointed out that the precautionary principle required that where there are threats of damage to the environment, whether serious or irreversible, immediate, urgent and effective measures



- must be deployed to prevent environmental degradation even in the absence of full scientific certainty on the threat to the environment. He urged the court to allow the Petition.
17. NEMA opposed the petition through the replying affidavit sworn by its acting Director General, Mamo B. Bamo on 24/07/2020. He deponed that the Petitioners did not specify the measures to be taken under the precautionary principle to prevent the alleged pollution. He averred that the 1<sup>st</sup> Respondent had done and continued to do the best it could within its means to prevent pollution through the application of various environmental management tools and principles.
  18. He listed a raft of compliance and enforcement measures which had been undertaken to clean the Nairobi and Athi River ecosystem including policy documents, action plans, demolitions of encroachments on riparian reserves, resettlement plans, restoration plans, clean-up activities, issuance of improvement and restoration orders as well as prosecution of offenders. He conceded that the pollution of the Nairobi and Athi Rivers was of concern to the Respondents but maintained that a lot had been done to reduce or stop the pollution through various environmental management tools and principles including the precautionary principle.
  19. He clarified that the management of the Dandora dumpsite fell within the ambit of the Nairobi City County pursuant to Schedule IV of the Constitution.
  20. He specified that the 1<sup>st</sup> Respondent had put in place a five year Multi-Agency Urban Rivers Regeneration Programme which he described as a special purpose vehicle tasked with the restoration and sustainable cleaning of the Athi and Nairobi Rivers. He added that the Air Quality Regulations of 2014 and the Water Quality Regulations of 2006 had been enacted, which set the permissible emission and discharge standards. He produced a copy of the National Solid Waste Management Strategy developed by the Respondents in conjunction with the county governments.
  21. According to NEMA, the petition lacked clarity in terms of the Petitioners' requirement for the Respondents to employ the precautionary principle in preventing the air and water pollution. He added that Chapter 5 of the Constitution obligated both the Government and citizens to protect the environment.
  22. He deponed that the cleaning up and protection of rivers would not be solved by court orders but by the mutual responsibility of both the government and the citizens for whom NEMA had provided leadership. He opined that both the Government and the citizens should take certain measures and that a declaration of liability should only issue to the Government if the Petitioners proved that the omissions or actions were by the Government or its agents. He explained that river pollution was caused by unsustainable solid waste management, encroachment of the riparian reserve, illegal effluent discharges from industries, blockages and vandalism of sewerage reticulation system, non-adherence to physical development plans and zoning policies and the sanitation crisis in the informal settlements.
  23. Mamo B. Bamo also swore the supplementary affidavit dated 20/09/2020 where he deponed that NEMA had in conjunction with the 2<sup>nd</sup> Respondent, taken a raft of measures to stop the pollution of Nairobi River. He averred that the 1<sup>st</sup> and 2<sup>nd</sup> Respondents started cleaning up Nairobi River from the source as it flows from Ondiri swamp down to Kirichwa Kubwa and its other tributaries and that the clean-up had reached Michuki Park area. He invited the court to take judicial notice of the fact that the Michuki Park was launched in August 2020 after the river had been cleaned upstream. He maintained that there was significant progress while pointing out that the clean-up commenced from Ondiri swamp and passed through Riruta, Kawangware, and Hurlingham into mid-town and that what remained was the areas downstream from the Michuki Park towards the Industrial Area which according to him was work in progress.



24. In order to demonstrate the action taken to clean up the river, he annexed several reports including a report on compliance with the judgement of this court in ELC Petition No. 7 of 2017- Castle Rock Gardens v The Attorney General & Others which was prepared in September 2018; a Report on Kirichwa Kubwa River (Upper Part of Nairobi) enforcement measures against encroachments dated August 2020; a Report on Kirichwa Kubwa Effluent Discharge Monitoring dated August 2020; and a report on Nairobi River Enforcement Measures against Dumpsites (Solid Waste) & Effluent Discharges dated May 2020. He added that the challenges in cleaning up the Nairobi river basin and the encroachment of riparian reserves by informal settlements, industrial facilities and dysfunctional sewer lines were also being addressed.
25. The 2<sup>nd</sup> and 3<sup>rd</sup> Respondents opposed the petition through the replying affidavit of Stephen M. Nzioka sworn on 29/07/2020. Mr. Nzioka who is the Director, Environment, Water and Sanitation Officer of the Nairobi Metropolitan Services denied the averments the Petitioners made against the 2<sup>nd</sup> and 3<sup>rd</sup> Respondents. He stated that the National Government and the County Government of Nairobi signed a Deed of Transfer of Functions pursuant to Article 187 of the Constitution of Kenya, 2010 read with Section 26 of the Inter-governmental Relations Act, (No. 2 of 2012), which was published in the Kenya Gazette on 25th February, 2020 as Gazette Notice No.1609 of 2020. Under the deed, the County Government of Nairobi transferred four functions relating to county health services, county transport services, county planning and development services and county public works, utilities and ancillary services to the National Government.
26. Consequently, the Nairobi Metropolitan Services (NMS) was therefore in charge of the environment, water and sanitation services in collaboration with what he referred to in his affidavit as other MDA's without giving the meaning of this abbreviation. Mr. Nzioka outlined several measures and interventions which had been undertaken in Nairobi and Athi River by the Directorate of Environment, Water and Sanitation he Nairobi, NMS and Athi Water Development and Services Board to prevent pollution of rivers including identification, cracking down, clearing and closure of illegal dumpsites; identification, mapping out and blockage of illegal effluent discharge points and referral to the Nairobi City Water and Sewerage Company; prompt attendance and repair of sewage flooding and overflow by the Nairobi City Water and Sewerage Company; restoration of Michuki to its lost glory with the water passing through it being clean; and initiation of the Nairobi River Water Front Improvement Project to assist in the regeneration and rehabilitation of the Nairobi River riparian reserve from Globe Cinema Roundabout to the Race Course bridge.
27. He added that other measures had also been undertaken including solid waste removal from the river and riparian reserve, survey and delineation of the riparian reserve, relocation of the traders' garages and mechanics from the riparian reserve to suitable sites, control of illegal discharge into the river stretch and relocation of illegal inhabitants and structures from the riparian reserve. He elaborated that the NMS' collection system collected and disposed over 75% of the city's solid waste, which was the biggest contributor to blockage of sewers and the concomitant river pollution.
28. He averred that plans were underway to decommission the Dandora dumpsite, generate 25mw of electricity from it and turn it into a recreational park. Further, that there were plans to control pollution in the low income areas and to improve the delivery of essential services to informal settlements. He gave the example of the ongoing implementation of Mukuru Special Area (SPA) for the laying of approximately 48 kilometres of sewer network system and deponed that similar upgrades were planned for Mathare, Kibra and Korogocho among others to control pollution and other negative implication of unplanned settlements.



29. Mr. Nzioka noted that raw sewer contributed immensely to the eutrophication of Nairobi River and the resultant death of living things in it as well as the collapse of the riverine ecosystem. According to him, these would be stopped by the implementation of SPA projects and programmes. He added that these programmes started in the 2019/2020 financial year and were prioritised under the 2020/2021 work plan and budget.
30. He emphasised that NMS was fully committed to strict compliance and enforcement initiatives to curb the ever increasing environmental offences by informal and formal residents by ensuring surveillance was carried out on a regular basis and that rivers are cleaned up. In light of the measures undertaken, he believed that NMS had embarked on ensuring a clean and healthy environment within the Nairobi metropolitan area which will secure a clean and healthy environment for the communities and counties that lie downstream of the Athi River. He produced the NMS Enforcement, Monitoring and Compliance report for July 2020 showing the measures implemented. He also produced photographs of water in the Nairobi River at the Museum Bridge containing sludge and another photo showing clean water after the closure of the illegal discharge points upstream.
31. The 1<sup>st</sup>, 2<sup>nd</sup>, 4<sup>th</sup> and 6<sup>th</sup> Interested Parties entered appearance but did not oppose the petition. The 5<sup>th</sup> Interested Party supported the petition but denied liability for any wrongful acts. It filed a replying affidavit sworn on 24/07/2020 by its Chief Officer for Natural Resources, Environment and Climate Change in Makueni County, Ms. Mary Mbenge.
32. Ms. Mbenge deponed that the 5<sup>th</sup> Interested Party had of its own volition, taken steps to control pollution in Makueni County by encouraging the use of green technologies such as biogas and solar and ensuring the protection of river and riparian areas through the enforcement of regulations on cultivation along river beds and rehabilitation of degraded rivers.
33. Further, that the 5<sup>th</sup> Interested Party recognised its constitutional role to control air and noise pollution and other public nuisances by including these in the Makueni County's First County Integrated Development Plan which recognised that pollution of water sources was a major cause of waterborne diseases and upper respiratory tract infections that had led to loss of lives in that County. She added that the 5<sup>th</sup> Interested Party enacted the Public Financial Management (Makueni County Climate Change Fund) and set up several bodies whose functions include coordinating climate issues, overseeing finance, facilitating cooperation between various stakeholders and ensuring cross-county cooperation on environmental issues.
34. With regard to construction of the Thwake Dam, she deponed that the dam was under the auspices of the National Government but that an Environmental and Social Impact Assessment had been completed in June 2013. She stated that the Project Appraisal Report noted the negative effects of the construction and outlined mitigation measures. She emphasised that the 5<sup>th</sup> Interested Party was keen on ensuring that the dam's construction was completed because its overall positive impacts included eradication of waterborne diseases and provision of water for irrigation to villages in Makueni County whose main constraint to development was the scarcity of water.
35. She deponed that the 5<sup>th</sup> Interested Party supported the prayers sought by the Petitioners in the Amended Petition since they are well meaning. However, she pointed out that the prayers sought were vague on who bears what liability and who was under an obligation to clean up Nairobi and Athi Rivers as well as the Dandora dumpsite. She clarified that the 5<sup>th</sup> Interested Party supported the prayer for members of the public to be granted compensation only where there is a clear and effective way of identifying who was entitled to the compensation. She hastened to add that that compensation would not come from the 5<sup>th</sup> Interested Party.



36. Parties filed written submissions which the court considered. The Petitioners submitted that their claim was about the environmental degradation of the Nairobi River basin comprising Nairobi, Ngong and Mathare rivers with catchment areas in Kikuyu and Limuru Hills which flows downstream to Mavoko, Athi River, Thika, Kiambu, Machakos, Makueni and Kilifi thereby traversing Nairobi, Kiambu, Machakos, Makueni, Tana Rivers and Kilifi Counties. That the case pits affected individuals against powerful government agencies that were complacent or compromised. The Petitioners submitted that the atmosphere is a public trust asset and that the government had public trust obligations and that the Constitution allowed the enforcement of those public trust obligations.
37. The Petitioners submitted that the question of law arising was the Respondents' failure to apply the precautionary principle under Articles 42 and 69 of the Constitution as well as Sections 3 and 86 of EMCA to stymie runaway water and air pollution both upstream and downstream of the Nairobi River and the Nairobi air generally.
38. The Petitioners submitted that their claim had two facets, firstly, the water pollution inherent in the Nairobi and Athi Rivers both upstream and downstream; and secondly, the air pollution with the epicentre being the Dandora dumpsite, which releases toxic and carcinogenic gases into the atmosphere in the low income areas of Korogocho, Mukuru slums, Kariobangi and Lucky Summer. They contended that the pollution emanated from waste products that are dumped into Nairobi River from the numerous industries in Baba Dogo and the Kariobangi Light Industries as the river flows downstream. They relied on the documentary "Choking City" aired on Citizen Television which showed that the air pollution level in Mukuru slums was sixteen times higher than the allowed standards and urged that this had led to respiratory diseases like asthma.
39. The Petitioners relied on the decision in *Gatirau Peter Munya v Dickson Mwenda Kithinji & 2 Others* [2014] eKLR on the principles for grant of conservatory orders. The Petitioners submitted that Articles 42 and 69 of the Constitution enjoined the Respondents to adopt a proactive approach in the nature of the precautionary principle in environmental governance and management. They argued that the precautionary principle required that where there are serious or irreversible threats of damage to the environment, immediate, urgent and effective measures must be taken to prevent environmental degradation even in the absence of full scientific certainty on the threat.
40. They contended that the Respondents had acted in breach of Articles 10, 25(a), 26(3), 29(f), 42, 43(1) (d), 47(1), 69, 70 and 232 of the Constitution as well as Sections 3, 71(1) and 86 of EMCA and that they had failed to apply the precautionary principle in stymieing pollution both upstream and downstream of Nairobi and Athi Rivers, as well as the air pollution from the Dandora dumpsite and toxic emissions from industries located in informal settlements thereby exposing Kenyans to life threatening dangers in terms of diseases and ailments.
41. The Petitioners urged that the supporting affidavits of Isaiah Luyaro Odando together with his the further affidavit and the affidavits sworn by Sammy Ndirangu, Peter Ndungu and Andrew Young had demonstrated a clear case of water pollution over the Nairobi River and that this was backed by the photographic evidence which showed that the violation was continuing. They cited the case of *Centre for Human Rights and Democracy & Another v the Judges and Magistrates Vetting Board & 2 Others* [2012] eKLR in which the court stated that where a legal injury is caused to a person or class of persons through a violation of a constitutional or legal right or threat, the High Court had power to grant appropriate reliefs so that the aggrieved party was not rendered hapless or helpless in the eyes of the wrong visited upon them.
42. The Petitioners contended that they had demonstrated a clear and unrefuted manifestation of serious and irreversible threats and continuing damage to the environment which called for immediate, urgent



and effective measures to be taken to prevent environmental degradation. They urged the court to grant the conservatory orders notwithstanding the absence of scientific certainty of the threat posed by the pollution. They pointed out that they had expert backing from reputable UN affiliated organisations and made reference to the contents of the UNEP report titled “A snapshot of the World’s Water Quality: Towards a global assessment” which they claimed indicated that respiratory diseases such as asthma, bronchitis, emphysema, laryngitis, pneumonia and influenza were the leading reason for hospital visits. They added that the report suggested that 21,000 Kenyans die from air pollution related causes every year. They referred to the “Nation’s Toxic Flow expose” which was published in the Daily Nation, that traced the Nairobi River from its source in Ondiri swamp in Kiambu County through Athi River, Galana, Sabaki and the Indian Ocean, and which concluded that the river had turned into a river of death and was a greasy, clammy and smelly sludge that is used downstream to grow food, drink and bathe.

43. In addition, the Petitioners relied on the report on the six deadly metals which makes all parts of the Nairobi and Athi River unsafe. They submitted that the metals which are toxic and of great concern to human health are mercury, lead, arsenic and cadmium and pointed out that boiling the polluted water or cooking food contaminated by these metals and chemicals could not stop their harm to the human body.
44. They adverted to the expose by Citizen Television on “The Choking City” which gave shocking details of the management of waste at the Dandora dumpsite and the health hazards posed by the industrial waste and toxic substances released into the atmosphere in Korogocho and Mukuru kwa Reuben slums and Kariobangi which cause respiratory diseases. They also referred to an article by Anne Tibajuka, who was the Executive Director of the UN Habitat titled ‘Cities Can Achieve More Sustainable Land Use if Municipalities Combine Urban Planning and Development With Environmental Management’. Ms. Anne Tibajuka wrote that water pollution carried environmental and health risks to communities in Nairobi especially the poor who use the untreated water in their homes. She added that farmers along Nairobi River and its tributaries commonly used polluted water and raw sewage for irrigation exposing the farmers and consumers of the food crops to potential health problems such as diarrhoea and helminthic infections. The report indicated that almost half of the vegetables consumed in Nairobi were grown on the banks of polluted rivers.
45. The Petitioners faulted the Respondents for various failures including the failure to invoke the precautionary approach in environmental management to stop or prevent air and water pollution as highlighted in the petition; breaching the Petitioners’ rights under Articles 42, 69 and 70 of the Constitution by not taking pre-emptive measures to ensure they enjoy a clean and healthy environment; breaching Article 69 by failing to monitor the environment and to eliminate processes and activities that were likely to endanger the environment thereby subjecting the Petitioners to water and air pollution; failing to enforce Section 71 of EMCA and failure to enforce the criteria, procedures and measures for water and air quality; compromising the Petitioners’ rights to a clean and healthy environment by failing to enforce the precautionary principle under Sections 3 and 86 of EMCA and failing to identify materials and processes that are dangerous to human health and the environment before the demonstrated pollution to water and air; failing to implement the public policy enunciated by EMCA thereby compromising the Petitioners’ rights to be treated with human dignity which entails consumption of clean water and air; and breaching the Petitioners’ right to clean water envisaged by Article 43 of the Constitution.
46. The other breaches complained of included acting contrary to Article 232 of the Constitution by not providing responsive, prompt, and effective service and to inculcate the national values and principles of good governance; failing to exercise general supervision and coordination over air and



- water pollution contrary to Section 9 of EMCA and failing to monitor and assess the activities of lead agencies under that section; failing in its duty as the principal instrument of Government in the implementation of policies relating to the environment; threatening to deprive Kenyans of life contrary to Article 26(3) by condoning pollution of the air by toxic emissions and the poisonous metals in the Nairobi and Athi Rivers and subjecting them to inhuman and degrading treatment contrary to Article 29 of the Constitution; and failing to implement legislation to fulfil Kenya's international obligations.
47. The Petitioners urged the court to grant compensation under Article 23 of the Constitution. They relied on a United States of America case in which Apple Incorporated agreed to pay damages of \$25 to iPhone users who sued the company because their batteries suddenly shut down despite having plenty of battery power. They urged that this being a class action on pollution representing the interests of an estimated 7,000,000 Kenyans, that Kshs. 10,000/= per person would be fair, reasonable and adequate compensation which would translate to Kshs. 70 Billion in total.
  48. NEMA submitted that it had not neglected its duties and emphasised that it had fully discharged its mandate under Section 9(1) of EMCA, which is to exercise general supervision and coordination over all matters relating to the environment and being the principal instrument of the Government of Kenya in the implementation of all policies relating to the environment.
  49. It further submitted that in a bid to meet its mandate, it had launched the Adopt-a-River initiative which seeks to bring on board students in high schools, universities and colleges, community based youth groups and other institutions in adopting a nearby river and being in charge of monitoring its pollution levels and undertaking its restoration and conservation. It also submitted that it launched a 100 day rapid results initiative on effluent discharge licenses on 08/05/2019 which resulted in the arrest of 30 people, closure of 48 facilities and the issuance of 37 restoration orders in Nairobi County. It submitted further that it was working jointly with multi-agencies and the Nairobi Regeneration Programme in the identification of illegal discharges and marking of illegal structures which are major polluters of Nairobi River and was creating awareness on the need to preserve the riparian reserves and the general environment.
  50. It also submitted that the Petitioners were guilty of contributory negligence since the Constitution at Article 69 (2) places the obligation to protect the environment on both the government and the citizens. While NEMA claimed that it had not been indolent in that regard, it maintained that the Petitioners failed to play their role as citizens. It cited encroachment of riparian reserves by informal settlements as one of the causes of river pollution in Kenya.
  51. The 2<sup>nd</sup> and 3<sup>rd</sup> Respondents submitted through the Attorney General (AG) that the Petitioners were required to provide sufficient proof of the allegations of constitutional breaches they raised in their petition. The AG contended that apart from citing omnibus provisions of the Constitution, the petition did not provide particulars of the alleged complaints, the manner of the alleged infringements by the 2<sup>nd</sup> and 3<sup>rd</sup> Respondents or the jurisdictional basis of the action before the court. The AG added that the failure to draft the petition with precision prejudiced them greatly while emphasising that constitutional rights were very specific hence a petitioner must set out with some level of particularity the specific right and how it had been violated.
  52. The AG submitted that there was nothing to conserve because according to the Petitioners, harm had already occurred and what the Petitioners feared had already taken place. In his view, the only issue to be considered was the issue of environmental governance.



53. The AG submitted that the tenor, import and scope of a conservatory order was defined by the Supreme Court in *Gatirau Peter Munya v Dickson Mwenda Kithinji & 2 Others* [2014] eKLR as follows:
- “Conservatory orders bear a more decided public law connotation: for these are orders to facilitate ordered functioning within public agencies, as well as to uphold the adjudicatory authority of the court, in the public interest. Conservatory orders, therefore, are not, unlike interlocutory injunctions, linked to such private-party issues as ‘the prospects of irreparable harm’ occurring during the pendency of a case; or high probability of success’ in the applicants’ case for orders of stay. Conservatory orders, consequently, should be granted on the inherent merit of a case, bearing in mind the public interest, the constitutional values, and the proportionate magnitudes and priority levels attributable to the relevant causes.”
54. The AG referred to the decision in *J.S Muiru & 2 others v Tigoni Treasurers Limited & 2 others* [2014] eKLR and quoted what Mutungi J. had to say regarding the application of the *Giella v Cassman Brown* principles to environmental matters:-
- “Although the said conditions/principles may not be applicable in environmental matters in a strict sense as they are applied in ordinary suits, an applicant must nonetheless demonstrate an arguable case that is not frivolous in environmental matters it may be difficult to determine the question of damages as the damage may not be easily ascertainable or even foreseeable. The fact being once there is damage to the environment, the damage is irreversible and thus the precautionary principle would be applicable where there are any threats to the environment to prevent environmental degradation”
55. The AG was emphatic that the orders the Petitioners seek could not be granted because a court seized of an environmental dispute whether at the interlocutory stage or at the substantive hearing is to bear in mind that through its judgement or ruling, the courts play a crucial role in promoting environmental governance, upholding the rule of law, and ensuring a fair balance between competing environmental, social, development, and commercial interests. In essence, that if the court were to grant the prayers the Petitioners seek, it would cause a virtual collapse of the sectors targeted by the orders and will occasion a devastating, unquantifiable and irreparable loss to the affected sectors.
56. The AG added that the law recognised that the court must apply its mind to a variety of principles of sustainable development when handling an environmental dispute and that the response by NMS provided a summary of what its Enforcement Monitoring and Compliance Department had done. The AG pointed out that most of the dumpsites in the informal settlements in Nairobi and its environs were illegal dumpsites that are cleared every now and then but keep re-emerging. That the culprits are arrested and charged while polluters are made to pay. It added that NMS undertook to sensitize the public on the need to protect the environment, maps out illegal dumpsites and issues notices. That all these were undertaken in strict compliance with the Integrated Solid Waste Management Plan for the City of Nairobi [2010-2020] as well as the Integrated Solid Waste Management for the Future [2020 – 2030].
57. The AG urged that it was mischievous for the Petitioners to single out one principle and ask the court to give permanent conservatory orders to the exclusion of all the other principles yet all the principles of environmental management are important and are to be applied jointly with the other principles. Further, that the realization of this principle was not an event but a process and that the rights the Petitioners seek to enforce were socio-economic rights which require resources. The AG argued that the petition failed to provide a specific solution and should therefore be dismissed.



58. The AG argued that under EMCA, a court could only apply the precautionary principle where it is proved that there had been public participation yet the Petitioners wanted the court to enforce this principle without public participation first taking place.
59. The AG reiterated that the precautionary principle was a common-sense principle that was acknowledged and applied before its international proclamation. He quoted the Australian case of *Leach v National Parks and Wildlife Service and Shoalhaven City Council* 8 1 LG ERA 270 where Stein J defined it as follows:
- “In my opinion the precautionary principle is a statement of common sense and has already been applied by decision makers in appropriate circumstances prior to the principle being spelt out. It is directed towards the prevention of serious or irreversible harm to the environment in situations of scientific uncertainty. Its premise is that where uncertainty or ignorance exists, concerning the nature or scope of environmental harm (whether this follows from policies, decisions or activities) decision makers should be cautious.”
60. On the permanent conservatory orders that the Petitioners seek, the AG cited the decision in *Muslims For Human Rights (Muhuri) & 2 Others v Attorney General & 2 Others* High Court Petition No. 7 of 2011 in which Ibrahim J (as he then was), stated thus:
- “What is clear to me from the authorities is that strictly a conservatory order is not an injunction as known in civil matters or generally another legal proceedings but is an order that tends to and is intended to preserve the subject matter or set of circumstance that exist on the ground in such a way that the constitutional proceedings and cause of action is not rendered nugatory. Through a conservatory order the court is able to “give such directions as it may consider appropriate for the purpose of securing of ... the provisions of the Constitution (see – BANSRAJ above)”. A conservatory order would enable the court to maintain the status quo or existing situation or set of facts and circumstances so that it would be still possible that the rights and freedoms of the claimant would still be capable of protection and enforcement upon determination of the Petition and the trial was not a futile academic discourse or exercise.”
61. The AG referred to the principles for the grant of a conservatory orders enunciated in *Board of Management of Uhuru Secondary School v City County Director for Education & 2 Others* [2015] eKLR. These are that an applicant must demonstrate an arguable prima facie case with a likelihood of success and that in the absence of the conservatory orders he is likely to suffer prejudice. Further, that the court should decide whether a grant or a denial of the conservatory relief will enhance the constitutional values and objects of a specific right or freedom in the bill of rights, and whether if an interim conservatory order is not granted, the petition or its substratum will be rendered nugatory. Lastly, that the Court should consider the public interest and relevant material facts in exercising its discretion whether to grant or deny a conservatory order.
62. The upshot of the AG’s submissions was that the Respondents could not engage or implement either the precautionary principle or engage in environmental decision making without being cautions. He maintained that the management of rivers was multi-sectorial and that the 2<sup>nd</sup> and 3<sup>rd</sup> Respondents were doing their part to conserve the environment. The AG submitted that the Petitioners merely alleged violation of constitutional rights but did not provide any evidence to substantiate their claims. He urged that they failed to demonstrate that they had a prima facie case hence the orders they sought should not be granted. The AG also urged that the Petitioners had not demonstrated the danger they stood to suffer if the orders sought were not granted. The AG maintained that the Petitioners had failed



- to prove their case and had instead attached extensive hearsay evidence. On the issue of costs, he urged that this being a suit concerning public interest, each party should bear its costs.
63. The 5<sup>th</sup> Interested Party submitted that the primary obligation in relation to air and water quality standards and the issue of sustainable use of Nairobi and Athi Rivers lay with the Respondents and not the 5<sup>th</sup> Interested Party. It further submitted that while the question of environmental protection and sustainability was the responsibility of every individual, the herald should be the National Government through the relevant ministries.
  64. It submitted that it was not responsible for the pollution of Nairobi and Athi Rivers since it had taken all necessary caution in managing the environment. Further, that based on the Environmental Impact Assessment and Project Appraisal Report carried out for the Thwake Dam construction, the unacceptable levels of metals found at a sampling point in Thwake were attributable to upstream pollution rather than the construction of the dam. On whether the Petitioners deserved the orders sought, it submitted that the court should grant those orders. It proffered that in order to avoid having an academic exercise regarding the outcome of the petition the court should consider compelling the Nairobi City County to implement the Integrated Solid Waste Management Plan for the City of Nairobi, Kenya, 2010-2020, on or before the end of the year 2020.
  65. It also proposed that the Respondents and the Nairobi City County should be compelled to prepare a revision of the Integrated Solid Waste Management for 2020-2030 and that the court should exercise its powers under structural interdicts to ensure the implementation of its orders by compelling the Respondents and the Nairobi City County to file a report in court detailing the steps taken to implement the Integrated Solid Waste Management Plan.
  66. The Petitioners filed supplementary submissions in which they contended that over time the Respondents were to carry out a series of feasibility studies and prepared strategy papers without implementing any of them. They singled out the National Solid Waste Management Strategy of 2014 which the 1<sup>st</sup> Respondent exhibited and pointed out that it had not been implemented more than five years later. One of its objectives was to establish environmentally sound infrastructure and systems for waste management within five years of August 2014, which was not done.
  67. The Petitioners urged the court to look at this petition from a public policy consideration perspective claiming that it was intended to promote justice, efficiency and what they called prophylaxis which they explained as treatment or action to prevent disease. They argued that the Respondents had not tabled evidence to rebut the evidence which they presented including the academic papers cited and the investigative documentaries. They urged the court to find as it was found in Mombasa ELC Petition No. 1 of 2016- Kelvin Musyoka (minor suing through mother and best friend Scholastica Khalayi Shikanga) & 9 Others v Attorney General & 7 Others, that there was actual violation of their rights and that liability must attach to the Respondents.
  68. On the question of compensation, the Petitioners urged the court to enforce Principle 13 of the Rio Declaration which obligates State parties to develop the law regarding liability and compensation of victims of pollution and other environmental damage. They renewed their plea for an award of Kshs. 7 Billion damages for 7 million residents of the counties of Nairobi, Kiambu, Machakos, Makueni, Tana River and Kilifi. They claimed that based on the last census based on the last census, this was the number of people in the six counties. The Petitioners proposed that counsel would craft a suitable settlement agreement outlining the mode of allocation of half of these funds being Kshs. 35 billion, who would qualify for compensation and the advocates' fees. They proposed to have the settlement agreement implemented by an administrator with the court's approval. They proposed that the difference of Kshs. 35 billion could be utilised for the permanent restoration of the Nairobi



and Athi River and for building embankments and barriers to allow Nairobi River to flow free of contamination within three months, failing which the money should be paid to the Petitioners' advocates to coordinate the process and give reports on the implementation to the court.

69. The court directed parties to file supplementary submissions on the issue of a court's application of the precautionary principle and comparative jurisdiction on how other courts had applied this principle. The Petitioners and the Respondents filed their further submissions. Having succeeded substantially on the petition, the Petitioners are entitled to the costs of the petition. The costs will be borne by the Respondents who under the law bear a bigger responsibility in environmental management and protection.
70. The main issues for determination in this petition are:
- i) Whether the Respondents had jointly and severally violated the Petitioners rights and fundamental freedoms enshrined in the bill of rights under Articles 10(2) (b), 26(3), 29(f), 42, 43(1) (d), 47, 69 and 232(1) (c) of the Constitution of Kenya;
  - ii) Who bears responsibility for the protection of the environment against pollution? What is the role of the Respondents in managing the environment and preventing air and water pollution?
  - iii) How should the court apply the precautionary principle to matters relating to air and water pollution?
  - iv) Should the court issue permanent conservatory orders to compel the Respondents to adopt the precautionary principle in environmental management with respect to preventing the upstream and downstream pollution of Nairobi and Athi River?
  - v) Should the court issue permanent conservatory orders to compel the Respondents to implement permanent restoration of the Nairobi and Athi River waters?
  - vi) Whether the court should issue permanent conservatory orders to compel the Respondents to shut down polluters and force industries to treat their waste before disposing it into the rivers; for the removal of the more than 4,000 structures encroaching on riparian land; and an order for the Respondents to build embankments and barriers to allow the river to flow free from contamination;
  - vii) What other relief should the court issue for the protection of the environment against the air pollution from the Dandora dumpsite and the pollution of the Nairobi and Athi River water?
  - viii) Are the Petitioners and all the members of the public who fall within the bracket of this class action and who are estimated to be 7 million in number entitled to compensation of Kshs. 10,000/= each?
  - ix) Who should bear the costs of this petition?
71. The Petitioners' claim is that there is rampant water pollution of the Nairobi and Athi River which mainly affects people living in Nairobi especially those in informal settlements such as Korogocho and Mukuru kwa Reuben slums. They faulted the Respondents for mishandling the environment by failing to apply the precautionary principle to stop the pollution of the Nairobi River by waste from industries, untreated and improperly treated effluent from the Dandora sewerage treatment plant. They relied on the affidavits supporting the petition to which they attached photographic evidence showing the extent of the pollution within the Nairobi River.



72. The Respondents did not dispute the fact that the Nairobi River is indeed polluted, the Replying Affidavits of Stephen Nzioka and Mamo B. Mamo confirm that there is widespread pollution of the Nairobi River. The Respondents went to great lengths to outline the measures they had undertaken towards stoppage of pollution of the Nairobi River and hailed the commissioning of the Michuki Park as a big milestone in the restoration of the river. They stated that the clean-up of the Nairobi River had reached the Michuki Park area located along the southern side of the Nairobi River near the Globe Cinema Roundabout.
73. The Petitioners also contended that there was rampant air pollution in Korogocho, Mukuru kwa Reuben from toxic emissions emanating from the burning of plastics and other waste in the Dandora dumpsite. NEMA exonerated itself and urged that the management of the Dandora dumpsite was the mandate of the 1<sup>st</sup> Interested Party. NMS on its part stated that there were plans to decommission the Dandora dumpsite as a way of managing the city's solid waste management and added that it was collecting 75% of the 3000 tonnes of solid waste generated in Nairobi every day. NMS went further to mention that there were plans to install sewer systems in Mathare, Kibera and Korogocho and to turn Dandora dumpsite into a recreational park. The 2<sup>nd</sup> and 3<sup>rd</sup> Respondents did not give an indication of when they expected to have the Dandora dumpsite decommissioned and turned into a park.
74. NMS stated that it had taken several measures to clean up the Nairobi River including closure of 74 illegal effluent discharge points, clearance of 30 discharge points, blockage of 50 discharge points, prompt repair of sewerage flooding, restoration at Michuki Park, control of illegal discharge into the river and relocation of illegal inhabitants along the riparian reserve. NMS and the 1<sup>st</sup> Interested Party are bound by the Article 69 (1) (g) of the Constitution to eliminate processes and activities that are likely to endanger the environment. The air and water pollution which the Petitioners complained of in the petition certainly endanger the environment.
75. The crux of the petition which raises environmental issues is that the Respondents should apply the precautionary principle to address the air and water pollution in parts of Nairobi even in the absence of scientific evidence to confirm that the rising cases of cancers, respiratory and other diseases in the informal settlement near Nairobi River and the country generally are attributable to the pollution. Further, that the Respondents' failure to stop the air and water pollution had breached the Petitioners' and Kenyans' rights to enjoy the right to a clean and healthy environment among other rights enshrined in the Constitution.
76. What the court understood NEMA and NMS to be urging was that they were addressing the air and water pollution which the Petitioners complained of from upstream and that they should be allowed to proceed with the measures they had put in place at their own pace and convenience. What the court can discern from the documents placed before it is that those measures have been implemented over time. No mention was made of when it is anticipated that the initiatives the Respondents claimed to be undertaking would address the pollution of the Nairobi River near Korogocho and Mukuru slums, or when the entire River Athi which covers approximately 390 kilometres from its source up to its mouth where it empties into the Indian Ocean, is expected to be cleaned up and freed from pollution. The Respondents were not forthcoming on when the rehabilitation of Michuki Park was done and what efforts had been made to clean up the river beyond the Michuki Park.
77. EMCA defines the environment to include the physical factors of the surroundings of human beings including land, water, atmosphere, climate, sound, odour, taste, the biological factors of animals and plants and the social factor of aesthetics. It includes both the natural and the built environment. From this definition, it is clear that the environment goes beyond the physical settings to include issues such as social, economic and cultural conditions that influence the life of an individual or a community.



People form part of the environment which is why it is critical to eliminate processes that pose danger to human health.

78. EMCA defines pollution as any direct or indirect alteration of the physical, thermal, chemical, biological, or radioactive properties of any part of the environment by discharging, emitting or depositing wastes so as to affect any beneficial use adversely, to cause a condition which is hazardous or potentially hazardous to public health, safety or welfare, or to animals, birds, wildlife, fish or aquatic life, or to plants or to contravene any condition, limitation or restriction which is subject to a licence under EMCA.
79. Article 69 (1) (g) of the Constitution obligates the State to eliminate processes and activities that are likely to endanger the environment. The Oxford Advanced Learner's dictionary defines 'eliminate' as to remove or get rid of something. The Constitution behoves the Respondents to remove or get rid of all the processes and activities that cause pollution of the Nairobi and Athi Rivers, and to stop the air pollution from the toxic substances emanating from Dandora dumpsite which form the subject matter of this petition.
80. Article 42 of the Constitution guarantees every person the right to a clean and healthy environment, which includes the right to have the environment protected for the benefit of present and future generations through legislative and other measures, particularly those contemplated in Article 69, and to have obligations relating to the environment fulfilled under Article 70.
81. Section 3 of EMCA gives effect to the entitlement to a clean and healthy environment which is enshrined in Article 42 of the Constitution. Every person has a duty to safeguard and enhance the environment. That section empowers a person alleging that the right to a clean and healthy environment has been or is being denied, violated, infringed or threatened to apply to the Environment and Land Court (ELC) for redress.
82. It may very well be that NMS undertook the measures it claimed to have put in place to reduce the pollution of Nairobi River but that does not in the court's view satisfactorily address the air and water pollution complained of by the Petitioners. The Respondents placed a lot of emphasis on the commissioning of the Michuki National Park and hailed it as a success story in terms of the initiatives they had put in place to address the environmental degradation of the Nairobi River.
83. Section 9 (1) of the EMCA makes NEMA the principal instrument of Government in the implementation of all policies relating to the environment. Consequently, NEMA has to play a primary role in the elimination of processes and activities that endanger the environment. EMCA bestows specific roles on NEMA in relation to preventing air and water pollution in the country.
84. In *Martin Osano Rabera & Another v Municipal Council of Nakuru & 2 others* [2018] eKLR, the court stated that NEMA was not just an investigator and prosecutor whose success is measured in terms of successful investigations and prosecutions, rather that as the principal instrument of government it had a bigger mandate towards the people of Kenya in the implementation of all policies relating to the environment.
85. NEMA argued that it had satisfactorily performed its obligations under the law and that it had taken a raft of measures to eliminate pollution of the Nairobi River including the five year Multi-Agency Urban Rivers Regeneration Programme, enacting the Water Quality Regulations, conducting inspections, arresting offenders, planting trees on riparian land, cleaning up the Kirichwa Kubwa river up to Michuki Park, opening Michuki Park and coming up with the Adopt a River Initiative. While these measures are laudable, they do not directly address the claims made by the Petitioners regarding the violation of their rights to a clean and healthy environment and the risk of people contracting



- diseases from the air and water pollution from the sources the Petitioners complained of. Looking at the evidence adduced by the Petitioners, the activities and processes causing pollution of Nairobi River both upstream and downstream have not been stopped altogether.
86. There is much more that the law enjoins NEMA to do pursuant to Section 9 of EMCA. It should exercise co-ordination, advisory and technical support functions with a view to ensuring the citizens' right to a clean and healthy environment is safeguarded and in this case, to ensure that the pollution of the Nairobi and Athi River is eliminated. The success and efficiency of NEMA will ultimately be seen in the realisation of the right to a clean and healthy environment by every Kenyan more than the information on its website as it urged the Petitioners to acquaint themselves with. In light of the nationwide challenge posed by urban waste, NEMA must be proactive and take the lead in enforcing the law and assist NMS and the county governments to develop and implement policies and strategies for dealing with the disposal and management of urban waste in a safe manner that does not derogate from every citizen's right to a clean and healthy environment.
87. The Petitioners contended that the Nairobi River in particular was deeply polluted with wastes from various industries and also due to human activities; that consequently the river is filled with dangerous and toxic metals and other substances. Further, they pointed out that the water from the river is used for agricultural and other purposes. They urged the rampant pollution was the cause of the upsurge in cancers and respiratory diseases in the country generally.
88. The Water Act 2016 guarantees every person the right to access water. Section 63 of the Water Act provides that every person in Kenya has the right to clean and safe water in adequate quantities and to reasonable standards of sanitation as stipulated by Article 43 of the Constitution. The right to clean and safe water is an implicit component of the right to adequate standard of living and the right to health. In *Isaac Kipyego Cherop v State Ministry of Water & 142 others* [2017] eKLR, the court affirmed that the right to clean water is intertwined with the right to a clean and healthy environment.
89. Some of the measures NEMA mentioned that it had taken concerning the state of Nairobi River include enacting the Air Quality Regulations in 2014. The affidavits and photographic evidence of environmental degradation presented by the Petitioners confirms the fact that NEMA had not sufficiently anticipated, prevented and attacked the causes of environmental degradation. The court is not persuaded that NEMA has discharged its statutory mandate effectively in terms of eliminating the processes and activities that cause air and water pollution in Nairobi especially in Korogocho, Mukuru and other informal settlements.
90. The court finds that the Respondents have failed to eliminate the processes and activities that cause air pollution in Korogocho and Mukuru kwa Reuben slums which are attributed to the Dandora dumpsite. The Respondents have also failed to stop the pollution of Nairobi and Athi River and are responsible for violating the Petitioners' rights to a clean and healthy environment under Article 42 of the Constitution. The Respondents have also violated the Petitioners' rights to the highest attainable standard of health and to clean and safe water enshrined in Article 43 of the Constitution.
91. The court understood the 1<sup>st</sup> Respondent to be blaming the Petitioners for not playing a role in the protection of the environment. It is helpful to analyse the role citizens' play and that of State organs in environmental protection. Article 69 1(a) to (h) of the Constitution gives the broad obligations of the State in relation to the environment. It is only Article 69 1(d) which brings citizens into the picture by requiring the State to encourage public participation in the management, protection and conservation of the environment. A reading of Article 69 (1) confirms that the State carries a bigger burden in relation to the management and protection of the environment. Article 69(2) provides that every person has a duty to cooperate with State organs to protect and conserve the environment



- and ensure ecologically sustainable development and use of natural resources. The role of citizens under the Constitution is to cooperate with State organs, such as the Respondents, for the protection and conservation of the environment. The duty to eliminate processes and activities that pollute the environment falls on the State and its agencies.
92. Section 3(1) of EMCA provides that every person in Kenya is entitled to a clean and healthy environment in accordance with the Constitution and relevant laws, and is required to safeguard and enhance the environment. Section 3(2A) of EMCA provides that every person shall cooperate with State organs to protect and conserve the environment and ensure the ecological sustainable development of natural resources. The Fourth Schedule of the Constitution places the control of air pollution as well as refuse removal, refuse dumps and solid waste disposal in the hands of County Governments.
  93. The Fourth Schedule specifically makes the protection of the environment and natural resources and water protection the work of the National Government, which in this case is performed by the Respondents. The onus of establishing the criteria for measurement of water quality standards, recommending the minimum water quality standards for different purposes, analysing the conditions for the discharge of effluents, recommending measures for the treatment of effluents before they are discharged into the sewerage system and making recommendations for the monitoring and control of water pollution falls within the docket of the Cabinet Secretary responsible for environmental matters on NEMA's recommendations under Section 71 of EMCA.
  94. Section 9 of EMCA obligates NEMA to perform tasks such as coordinating environmental management activities being undertaken by lead agencies and promoting the integration of environmental considerations into development policies. It is also required to audit and determine the value of natural resources and their utilisation and conservation. Article 260 of the Constitution defines natural resources as the physical non-human factors and components which are either renewable or non-renewable and includes surface and groundwater. The River Athi certainly is a natural resource whose conservation is the responsibility of NEMA.
  95. Alongside the statutory responsibility, Kenyans owe future generations a duty to sustain the environment for their benefit, as highlighted in the preamble to the Constitution. The court is required by Section 3 of EMCA to be guided by principles of intergenerational and intragenerational equity when exercising its jurisdiction in claims where a person alleges that the right to a clean and healthy environment has been denied or violated. Intergenerational equity enjoins the present generation while exercising its rights to the beneficial use of the Nairobi and Athi River to maintain or enhance the health, diversity and productivity of this river for the benefit of future generations. A polluted river of death spewing poison is not what the principle of intergenerational equity expects the present generation to bequeath to future generations.
  96. It behoves every person, including the Petitioners to ensure that the environment is not degraded or polluted through the proper disposal of solid and hazardous wastes, limiting the use of non-biodegradable items such as plastics and not disposing solid and hazardous materials into the river.
  97. It is not in contention that there are in place in place legal provisions and policies for the protection of natural resources such as the Nairobi and Athi River. The challenge is on implementation of the laws protecting the environment mainly because the State agencies entrusted with the protection of the water bodies continue to fail in their given role. Section 142 of EMCA creates offences relating to pollution and criminalises the discharge of dangerous materials, substances, and oil mixtures into water, air or the aquatic environment. The court may direct the polluter to meet the cost of cleaning up



- the polluted environment and of removing the pollution. NEMA has to be satisfied about the clean-up of the polluted environment and removal of the effects of the pollution.
98. Section 5 of EMCA tasks the Cabinet Secretary responsible for matters relating to the environment and natural resources (CS) to promote co-operation among public departments, county governments and organisations engaged in environmental protection programs. The CS is responsible for policy formulation and directions for purposes of EMCA, and sets the national goals and objectives besides determining policies and priorities for the protection of the environment.
  99. The AG faulted the Petitioners for urging the court to apply the precautionary principle to the exclusion of the other principles of sustainable development prescribed by Section 3(5) of EMCA. The principles include the polluter pays principle, the precautionary principle, the principle of international cooperation in the management of shared resources and the principles of intergenerational and intragenerational equity. The others are the cultural and social principles traditionally applied by Kenyan communities in the management of the environment and natural resources, and the principle of public participation in the development of policies and plans for management of the environment. These principles guide the court when it is addressing allegations of a breach or threat of violation of the right to a clean and healthy environment.
  100. In the court's view the AG's submission that the precautionary principle can only be enforced after conducting public participation is not persuasive. Article 70 of the Constitution which empowers the court to give redress where a person alleges that their right to clean and healthy environment has been or is threatened with violation does not make public participation a factor for consideration when the court makes the orders specified in that Article. Section 3(5) of EMCA anticipates that public participation is to be taken into consideration in the development of policies and processes for the management of the environment but not that the principle should shield the Respondents from fulfilling their statutory obligations for the management of the environment.
  101. The Respondents contended that they had applied the precautionary principle in dealing with the pollution in Nairobi yet at the same time faulted the Petitioners for not specifying the manner in which they ought to apply this principle to address the air and water pollution the Petitioners complained of. Section 2 of EMCA defines the precautionary principle as the principle which postulates that where there are threats of damage to the environment, whether serious or irreversible, lack of full scientific certainty should not be used as a reason for postponing cost effective measures to prevent environmental degradation. This section mirrors Principle 15 of the Rio Declaration on Environment and Development.
  102. The precautionary principle has been applied elsewhere in environmental management. The report issued in 1987 on the Second International Conference on the Protection of the North Sea (London Declaration), determined that a precautionary approach was needed in order to protect the North Sea from dangerous substances from the dumping of solid waste into the North Sea. (See the Second International Conference on the Protection of the North Sea, London, Nov 25, 1987, 27 I.L.M 835[1988]. The precautionary approach was also incorporated in the 1987 Pollution Control Guidelines authorised by Article 4(e) of the Agreement on the Protection of Lake Constance against Pollution (Steckborn Agreement). The Guidelines contain obligations for Switzerland, Austria and Germany for the purpose of protecting the drinking water and fishing supplies of Lake Constance. (Harald Hohmann, Precautionary Legal Duties and Principles of Modern International Environmental Law 236-38 [1994].)
  103. The European Union adopted the precautionary principle in its treaty alongside the principle that preventive actions should be taken, that environmental damage should as a priority be rectified at



source and the polluter should pay. (See the Treaty on European Union, Feb 7, 1992, 31 I.L.M.285-86). The United States exercised precaution in its food safety and banned imports of beef from some European countries because of the ‘mad cow’ disease outbreak in the United Kingdom and other countries in 1997 even though there was no evidence that the disease had spread into the US from the contaminated beef. (U.S. Bans Imports of European Meat; Agriculture Dept. to Assess Risk of Mad Cow Disease in this Country, Wash. Post, Dec. 13, 1997, at A8.)

104. Closer home, the Bamako Convention on Hazardous Wastes Within Africa of 1991 behoves each party to strive to adopt and implement the preventive, precautionary approach to pollution problems which entails preventing the release into the environment of substances which may cause harm to humans or the environment without waiting for scientific proof regarding such harm. (Bamako Convention on Hazardous Wastes Within Africa, Jan. 29, 30 I.L.M. 773 [1991].
105. The Rio Declaration on Environment and Development, 1992 states that 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. (Rio Declaration on Environment and Development, June 14, 1992, 31 I.L.M. 874 [1992].
106. Professor Gitanjali Nain Gill in his article ‘The Precautionary principle, its interpretation and application by the Indian Judiciary: ‘When I use a word it means just what I choose it to mean-neither more nor less’ Humpty Dumpty’ published in Environmental Law Review 2019, Vol. 21(4) 292–308 described the application of the principle by the Indian courts as follows:

“The precautionary principle is invoked and followed by judicial and expert members as a normative commitment. It thereby directs the judges, particularly the technical expert judges, to offer scientifically based structural solutions and policies that respond creatively to weak, ineffective regulation even in the absence of regulation. Adoption of a variety of procedures, including investigative, stakeholder consultation and appointment of specialised committees, helps in the application of the precautionary principle. This improves active participation through dialogue, argument and norms for eliciting factual realities and expert knowledge to respond to environmental problems. Expert members by on-spot site inspection can evaluate contradictory claims, positions and reports filed by the parties. The stakeholder consultative process is applicable to cases of wider ramification involving major issues including river cleaning and air pollution.

The specialised committees promote the accountability of different authorities for the implementation of the rules under the National Green Tribunal Act 2010.<sup>23</sup> Thus, the precautionary principle in India mandates well-judged usage in favour of observing, preventing and mitigating potential threats. Indeed, modern risk factors have become more complex, far reaching and adversely affect public health and environment. The principle is employed as a tool within Indian environmental governance to promote better health and environmental decisions.”

107. In *Vellore Citizen Welfare Forum v Union of India* (1996) 5 SCC 647 at 658 the court declared that the precautionary principle involved three conditions. Firstly, that the State government and statutory authorities must anticipate, prevent and attack the causes of environmental degradation. Secondly, where there are threats of serious and irreversible damage, lack of scientific certainty should not be used as a reason for postponing measures to prevent environmental degradation. Lastly, that the ‘onus



- of proof' was on the actor or developer or industrialist to show that the actions were environmentally benign.
108. The case was directed against the pollution caused by the discharge of untreated effluent by the tanneries and other industries in the State of Tamil Nadu into agricultural fields, roadsides, waterways and open lands. The Indian Court while interpreting the precautionary principle in the context of municipal laws directed the Government to form an authority under their environmental laws to deal with the situation created by the tanneries and other polluting industries in the State of Tamil Nadu. The court also directed that the authority to determine the compensation to be paid to the affected parties, with part of the funds being applied towards reversing the ecology. The authority which was to be formed had the mandate to direct closure of industries whose owners refused to pay the compensation assessed by the authority. The court fixed timelines for constituting the authority and the time frame within which it was to undertake its task. The court also set up a fund to be used for compensating victims of the pollution and for the restoration of the damaged environment. Tanneries in a different area were to obtain the board's consent to operate the tanneries.
  109. In the court's view, the onus lay on NEMA to prove that it had anticipated, prevented and addressed the causes of environmental degradation. Its contention that the Petitioners should provide a solution and specify which measures the Respondents should have carried out under the precautionary principle is in this court's view misplaced. EMCA is replete with measures and actions which the Respondents are to implement in order to address air and water pollution.
  110. The Petitioners stated in their affidavits that cancer, respiratory illnesses, birth defects, water borne diseases, eye and skin ailments were common within their locality and attributed these to the prevalent air and water pollution. They relied on reports from UNEP and UN-HABITAT on the risks that air and water pollution pose to health generally. While the Petitioners have not proved with certainty that the ailments and illnesses which they mentioned were directly linked to the air and water pollution within their locality, in this court's view, they have provided sufficient evidence to justify the application of the precautionary principle. This is buttressed by the Respondents admission that there is indeed pollution of the Nairobi River and air pollution from the Dandora dumpsite. The Petitioners have demonstrated that circumstances do exist that warrant the Respondents to take action even in the absence of scientific certainty.
  111. From the reports and studies adduced by the Petitioners, there is credible evidence that the burning of waste in Dandora dumpsite and the water pollution from effluent and metals found in the Athi and Nairobi River may be harmful even though the nature of that harm is not fully understood. The threat of respiratory diseases and cancers is serious, irreversible and may be widespread which calls for precautionary action.
  112. River Athi flows through many counties before reaching the Indian Ocean. Those counties were added to this petition as Interested Parties. Considering the importance of the Athi for irrigation purposes, notably the Galana Kulalu Food Security Project on the Galana River and the Thwake Dam once it is completed, it is necessary to apply precaution for the protection of human health and plant health by stopping the pollution emanating from the Dandora dumpsite and the water pollution in the Nairobi and Athi River. The food grown with the contaminated water from this river inevitably finds its way to our tables whether it be vegetables we buy from the market or the Kenyan staple food, ugali made from maize which was probably grown in the Galana food project, sold to the national cereals board and milled for people's consumption. There is no doubt that the air and water pollution pose potential high risk to human health. Rather than wait to react after confirming through scientific means that the air and water pollution in the Nairobi River is the cause for the increase in cancers, respiratory and other diseases in Nairobi and the country generally, the Respondents need to adopt a strategy of precaution.



113. Harm may occur to people living near the Dandora dumpsite, Korogocho and Mukuru as individuals, population or even the entire ecosystem of the Athi River. The effects of the air and water pollution of the Athi River may be distributed disproportionately. The environmental pollution in Korogocho, Mukuru and other informal settlements along the Nairobi River coupled with the fact that these people are least capable of protecting themselves predisposes them to damage to their health.
114. What the precautionary principle implies is that the State has a duty to prevent environmental harm and health risks as well as conduct that may be harmful even where conclusive scientific evidence regarding the harmfulness is not available. The Respondents must take precautionary actions aimed at reducing exposure to potentially harmful substances, activities and conditions to minimise significant adverse effects to health and the environment.
115. One way of implementing the precautionary principle is by shifting the burden of proof to the polluters and exploring alternatives to the harmful actions such as the Dandora dumpsite. The precautionary approach to be adopted by the State should focus on how much harm can be avoided rather than consider how much can be tolerated.
116. Under this principle, the State would rather be wrong in acting instead of failing to act at all because the damage the pollution is likely to cause to human health and the environment may take years to be ascertained scientifically. The Respondents should minimise the future costs of being wrong about environmental and health risks posed by air and water pollution in the country. Applying the precautionary principle in stopping air and water pollution will prevent the actual causes of respiratory and other diseases as well as other underlying risks to health. This would entail examining the evidence of risk and uncertainty to determine the possibility of a significant health threat and the need to take precautionary action. This can only be done by reducing pollution at the source.
117. What NEMA, NMS and county governments need to ask themselves is how much contamination can be avoided? For NMS, what are the alternatives to the Dandora dumpsite and the sources of pollution to the river? How will it achieve the desired goal of waste management for Nairobi County? There must be structures for the independent and public monitoring of alternatives taken to ameliorate potential harm to the environment from the pollution. The respondents did not demonstrate that there were no alternatives available for handling the waste being dumped at Dandora dumpsite causing pollution. The Respondents confirmed that there were plans to relocate the dumpsite from Dandora and rehabilitate the site.
118. Rather than presume that water and air pollution do not cause the diseases the Petitioners alluded to, the State should err towards protecting the environment and public health. The responsibility of preventing harm falls on the Nairobi County Government and NMS under the deed of transfer of some of the county's functions. The Petitioners and others who potentially will be affected by substances and activities regarding the pollution to the Nairobi and Athi River must have a say in the decision making process. The decision making process must be transparent and provide a structure for the involvement of citizens.
119. In managing the waste from Nairobi city, NMS should employ options that are least prone to environmental or health damage. Decisions taken regarding Nairobi waste management and the pollution of Nairobi and Athi River must protect health and the environment. The decision to be made will encompass new activities and must address potential hazards that already exist.
120. Other jurisdictions have come up with creative ways to deal with pollution of their rivers. One such innovation adopted for the conservation of rivers and lakes is by granting these bodies legal personality. New Zealand enacted the Te Awa Tupua (Whanganui River Claims Settlement) Act 2017 (the Act)



which stipulates that the Whanganui River is a living entity and a legal person. The Act establishes the river's guardian body to act and speak for the river and to promote and protect the environmental, social, cultural, and economic health and well-being of the river. The Act also establishes a strategy group comprising community representatives, local authorities, the government, commercial and recreational users and environmental groups whose purpose is to act collaboratively to advance the health and well-being of the river. The guardians administer a fund, Te Korotete, which provides financial support to the well-being of the Whanganui River.

121. Further afield in Colombia, that country's Supreme Court issued a decision in April 2018 in which it recognised the Amazon River ecosystem as having rights deserving protection in a case filed by a group of young people against the President, ministries, agencies and local governments claiming that the government had violated their rights to life, health and enjoyment of a healthy environment by failing to control deforestation in the Amazon region which contributed to environmental degradation and climate change. The court declared that it would recognise the Colombian Amazon as an entity with rights and entitled to protection, conservation, maintenance and restoration, for the sake of protecting the vital ecosystem for the future of the planet (*Future Generations v Ministry of Environment & Others*; Radicacion no. 11001-22-03-000-2018-00319-01; STC 4360-2018) This decision followed an earlier one made in 2016 that granted legal rights to the Rio Atrato which empties into the Caribbean Sea near Colombia's border with Panama.
122. The Petitioners contended that their rights under Articles 10(2) (b), 26(3), 29(f), 42, 43(1) (d), 47, 69 and 232(1) (c) of the Constitution had been violated. The court has already made a finding regarding the Petitioners' rights under Articles 42 and 43. Articles 10 (2) (b), 69 and 232(1) of the Constitution do not confer any rights on the Petitioners. Article 10 (2) (b) prescribes national values and principles of governance which the Respondents are enjoined to pay heed to when discharging their legal mandate. Article 69 gives the obligations with respect to the environment while Article 232(1) outlines the values and principles of public service. The court agrees with the Respondents and the 5<sup>th</sup> Interested Party that the Petitioners failed to prove that their rights under Articles 26(3) and 29(f) of the Constitution had been violated by the Respondents and the 5<sup>th</sup> Interested Party.
123. The Petitioners seek what they termed as permanent conservatory orders to compel the Respondents to adopt the precautionary principle in environmental management with respect to preventing the upstream and downstream pollution of Nairobi and Athi Rivers. They also seek permanent conservatory orders to compel the Respondents to implement permanent restoration of the Nairobi and Athi River waters. They seek conservatory orders to compel the Respondents to shut down polluters and force industries to treat their waste before disposing it into the rivers and for the Respondents to remove more than 4,000 structures encroaching on riparian land and build embankments and barriers to allow the river to flow free from contamination.
124. These orders which the Petitioners seek are intended for the restoration of the polluted river. To conserve basically entails protecting something or preventing it from being changed or destroyed. The court agrees with the submission by the AG that conservatory orders are interim measures or orders which the court gives pending hearing and determination of the suit or appeal, their aim being to protect and preserve the substratum of the case until the case is heard and determined. Conservatory orders would not encompass the final disposal orders the court makes after hearing a suit.
125. Having found that the Respondents failed to eliminate the processes and activities that cause air and water pollution in Korogocho and Mukuru kwa Reuben slums which are attributed to the Dandora dumpsite and the pollution of the Nairobi River water upstream, does that mean that the court should not grant any reliefs for the protection of the environment?



126. The ELC is mandated by Section 3 of EMCA to make orders, issue such writs or give directions it may deem appropriate to prevent, stop or discontinue any act deleterious to the environment. The court may also compel a public officer to take measures to prevent or discontinue any act or omission deleterious to the environment or compel the persons responsible for the environmental degradation to restore the environment to the position it was in before the damage, and to provide compensation for any victim of pollution and the cost of beneficial uses lost as a result of the act of pollution. That section stipulates that a person bringing a suit regarding the entitlement to a clean and healthy environment does not need to show that the defendant's act or omission caused him personal injury or loss. All the person needs to show is that his suit is not frivolous, vexatious or an abuse of the court process. Contrary to what the AG contended, EMCA does not require a person who claims that their right to a clean and healthy environment has been violated to establish a prima facie case with probability of success and show the harm they stood to suffer if the orders were not granted.
127. Article 70 of the Constitution stipulates that where a person alleges that their right to a clean and healthy environment protected under Article 42 has been, is being or is likely to be denied, violated, infringed or threatened, the person may apply to the court for redress in addition to any other legal remedies that are available in respect to the same matter. On such an application the court may make any order, or give any directions, it considers appropriate to prevent, stop or discontinue any act or omission that is harmful to the environment. The court may also compel any public officer to take measures to prevent or discontinue any act or omission that is harmful to the environment; or to provide compensation for any victim of a violation of the right to a clean and healthy environment.
128. Under Article 70 (3) of the Constitution, an applicant bringing a claim relating to contravention or threat of violation of his right to a clean and healthy environment does not have to demonstrate that any person has incurred loss or suffered injury. Contrary to the AG's argument, the Petitioners did not have to demonstrate that they had suffered injury from the air and water pollution they complained of because they and all other persons are entitled to clean and healthy environment that is not polluted. They also have a right to seek redress from this court. The court is empowered by the Constitution and EMCA to make appropriate orders to prevent, stop or discontinue the air pollution attributable to the Dandora dumpsite and the pollution of the Nairobi and Athi River.
129. NMS outlined measures it intended to take concerning the Dandora dumpsite and other forms of pollution affecting the Petitioners' access to a clean and healthy environment. The court notes that the deed of transfer was signed in February 2020. While it may be too early to gauge the success of the measures NMS had taken up, nevertheless, the court can issue a structural interdict to ensure that there are remedies in place to redress the Petitioners' concerns regarding the pollution of the environment.
130. One of the means of stopping the air and water pollution of the Nairobi River as the 5<sup>th</sup> Interested Party submitted, would be for the court to issue an order to compel the NMS through structural interdicts to implement the Integrated Solid Waste Management Plan for the City of Nairobi, Kenya, 2010-2020.
131. Wikipedia describes a continuing mandamus or structural interdict or structural injunction as a relief given by the court through a series of ongoing orders over a long period of time, directing an authority to fulfil its obligation in general public interest. Such an order is issued in a situation which cannot be remedied instantaneously but requires a solution over a long time and may even go on for years. It is a procedural innovation through a writ of mandamus or a mandatory order through which the court monitors compliance with its orders by seeking periodic reports from the authorities on the progress in implementing the court orders.
132. In this court's view, owing to the nature of pollution and the harm caused to the Nairobi and Athi River, the aquatic life in it and the effects of the polluted water on human health, the ELC needs to



- issue a structural interdict or injunction to be enforced by the Respondents for the period of time that it will take for the Nairobi and Athi River water to be restored to a point where it is free from the pollution. Ridding the Nairobi River of the pollution cannot be done instantaneously and would certainly require a long period of time.
133. Granting a statutory interdict or continuing orders would give effect to Article 70 (2) of the Constitution which gives the ELC the discretion to make orders or give directions which it considers appropriate to prevent, stop or discontinue any act or omission that is harmful to the environment.
  134. An applicant seeking redress for breach or threat of breach of the right to a clean and healthy environment does not have to demonstrate that any person has incurred loss or suffered injury under Article 70 of the Constitution. The Petitioners sought compensation of Kshs. 70 billion for approximately 7 million people in the counties of Nairobi, Kiambu, Machakos, Makueni, Tana River and Kilifi counties. They submitted that this number was based on the last census but did not avail any material to confirm that that was the number of persons in those counties or that they were directly affected by the pollution so as to be entitled to compensation. The court notes that only Wilson Yata signed the consent to act dated 29/8/2019 which authorised Isaiah Luyara Odando to swear affidavits in the petition. One cannot tell with certainty the number of people who have been affected by the pollution from the Dandora dumpsite and the Nairobi River. The court can only order that compensation be paid to specific persons whose details were supplied in the suit, which in this case is the two Petitioners.
  135. The court commends the Petitioners, the Respondents and the 5<sup>th</sup> Interested Party for presenting materials and documents regarding the subject matter of this petition which greatly assisted the court in its determination of the dispute. These parties did good research on the issues raised by the petition generally and the application of the precautionary principle which the court found very useful. Having succeeded substantially on the petition, the Petitioners are entitled to the costs of the petition, which will be borne by the Respondents because they bear a bigger responsibility in the management and protection of the environment.
  136. Based on this court's findings, the Respondents are directed to adopt the precautionary principle in the management of the environment in which the Petitioners reside by taking the following measures to stop the air pollution and prevent the pollution of the Nairobi and Athi River by:
    - i. Within 30 days of the date of this judgement, the Respondents shall identify materials and processes that are dangerous to the environment and human health in relation to the people living in Nairobi and more specifically in Korogocho, Mukuru, and the areas surrounding the Dandora dumpsite. They are also directed to prescribe measures for the management of the materials and processes identified as obligated by Section 86 of EMCA.
    - ii. The Respondents are directed to prescribe measures and formulate methods for the management and safe disposal of waste from the City County of Nairobi in accordance with Section 86 of EMCA read with Part 2 (2) (g) of the Fourth Schedule to the Constitution.
    - iii. The Nairobi Metropolitan Services is to ensure that all the waste from the City County of Nairobi is disposed of in an environmentally sound manner in accordance with the Environmental Management and Coordination (Waste Management) Regulations of 2006.
    - iv. The Nairobi Metropolitan Services is directed to take steps to decommission the Dandora dumpsite and relocate it to another site within six months of the date of this judgement. The Nairobi Metropolitan Services shall shut down the Dandora dumpsite within six months of the date of this judgement and rehabilitate the dumpsite.



- v. In the intervening period, the Nairobi Metropolitan Services will take all practical steps to ensure that the waste in the Dandora dumpsite is managed in a manner which protects human health and the environment against adverse effects from the waste. The Nairobi Metropolitan Services must ensure that there is no burning of plastic or other waste in the Dandora dumpsite.
- vi. In establishing the new landfill for the safe disposal of the waste from Nairobi County, the Nairobi Metropolitan Services will in conjunction with NEMA, make concerted efforts aimed at waste reduction, separation of biodegradable and organic waste, and prioritise the implementation of recycling strategies.
- vii. The Respondents are directed to develop a plan and strategy for the cleaning up of the Nairobi and Athi River. The Respondents are directed to undertake an urgent clean-up of the Nairobi River from the source up to the estuary at Sabaki River in Malindi until the whole river is clean and free of pollution. NEMA will take the lead role in the development of an environmental action plan for the cleaning up of the Nairobi and Athi River.
- viii. The Respondents will file reports in court every four months showing the water quality of samples of water taken from a minimum of twelve different points of the Nairobi and Athi River, including samples of water taken from all the counties which River Athi passes through.
- ix. NEMA will oversee the survey of the Nairobi and Athi River for purposes of protecting it from encroachment and other harmful activities.
- x. NEMA is directed to perform its duties under EMCA and the Environmental Management and Coordination (Water Quality) Regulations of 2006 and to file reports in court every four months showing the measures taken to rid the Nairobi and Athi River of pollution such as stopping the discharge of effluent, poison, toxic, noxious, radioactive waste or other pollutants which do not conform to the standards set by law into the river.
- xi. All the counties which the Nairobi and Athi River courses through are directed to eliminate all pollution from the river and to act in a precautionary manner by eliminating activities along the river which may pose a risk to human health or the environment.
- xii. The Nairobi Metropolitan Services and NEMA will ensure that they comply with the requirement for public participation in the implementation of this judgement.
- xiii. The court directs NEMA to undertake programmes intended to create public awareness, enhance environmental education on the pollution of the Nairobi and Athi River and to develop and disseminate guidelines relating to the prevention of pollution and degradation of the Nairobi and Athi Rivers in accordance with Section 9 of EMCA. This will be done with the relevant lead agencies and the necessary public participation.
- xiv. The court awards the 1<sup>st</sup> and 2<sup>nd</sup> Petitioners compensation of Kshs.10, 000/= each against the Respondents. The Petitioners are awarded the costs of the petition, which will be borne by the Respondents.

**DELIVERED VIRTUALLY AT NAIROBI THIS 15<sup>TH</sup> DAY OF JULY 2021.**

**K. BOR**

**JUDGE**

**In the presence of: -**

**Mr. Kenneth Amondi for the Petitioners**



**Mr. Erastus Gitonga for the 1<sup>st</sup> Respondent**

**Ms. Jeptoo Adomeyon for the 2<sup>nd</sup> and 3<sup>rd</sup> Respondents**

**Mr. David Chege for the 1<sup>st</sup> Interested Party**

**Ms. P. Mueke holding brief for Mr. D. Makau for the 5<sup>th</sup> Interested Party**

**Mr. V. Owuor- Court Assistant**

**No appearance for the 2<sup>nd</sup>, 3<sup>rd</sup>, 4<sup>th</sup> and 6<sup>th</sup> Interested Parties**

