

**Enforcing the Right to Clean and Healthy Environment in Kenya Through  
the Polluter Pays principle**

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**Abstract**

*This paper makes a case for the enforcement of the right to clean and healthy environment in Kenya through the internationally recognised polluter pays principle. The author argues that though this right has been legally recognised, placing the obligation to enforce it solely on the state agencies may delay the full realisation of this right for all persons. Effective enforcement of this principle is also important in reducing the economic cost of environmental restoration on the state agencies and acting as an incentive for inculcating a sense of environmental ethics through the precautionary principle.*

**1. Introduction**

The main goal of the environmental law is to ensure the sustainable use of natural resources in accordance with a set of fundamental principles that have been established through time via both local and global procedures. The use of land and resources derived from it should, in an ideal situation, abide by a number of rules. They include intergenerational equity, the precautionary principle, the polluter pays principle, and public engagement. They also include the principles of sustainability and prevention.<sup>1</sup> This paper is mainly concerned with the polluter pays principle. The polluter pays principle was the main topic of debate during a symposium on environmental economics sponsored by the Organization for Economic Co-operation and Development in Paris in 1971. This was the first time the polluter pays notion had been brought up in a global setting. The polluter pays concept was formally recommended by the Organization for Economic Co-operation and Development to be the "Guiding Principle Concerning the International Economic Aspects of Environmental Policy" on May 26, 1972.<sup>2</sup>

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**\*PhD in Law (Nrb), FCI Arb (Chartered Arbitrator), LL. B (Hons) Nrb, LL.M (Environmental Law) Nrb; Dip. In Law (KSL); FCPS (K); Dip. In Arbitration (UK); MKIM; Mediator; Consultant: Lead expert EIA/EA NEMA; BSI ISO/IEC 27001:2005 ISMS Lead Auditor/ Implementer; Advocate of the High Court of Kenya; Senior Lecturer at the University of Nairobi, Faculty of Law [February 2023].**

<sup>1</sup> *Amina Said Abdalla & 2 others v County Government of Kilifi & 2 others [2017] eKLR, ELC Civil Case 283 of 2016, para. 17.*

<sup>2</sup> Nanodkar S, 'Polluter Pays Principle: Essential Element of Environmental Law and Policy' (2018) 1 Int'l JL Mgmt. & Human. 77.

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An important era in the evolution of Kenya's environmental policy was opened with the proclamation of the Constitution in 2010. There are complex provisions in the Constitution that have a big impact on sustainable development. They include the Bill of Rights' guarantee of the right to a clean, safe environment as well as environmental ethics. Land and the environment are the only topics covered in Chapter V of the Constitution. The right to water, food, and shelter are only a few of the many social and economic rights that the Constitution incorporates that are also of an environmental nature.<sup>3</sup>

The preamble of the Constitution states that "We, the People of Kenya... Respectful of the environment, which is our heritage, and determined to sustain it for the benefit of future generations..." This acknowledges the necessity for cautious handling of environmental issues. Clearly implying respect for sustainable development are these lines from the Constitution's preamble.<sup>4</sup> Today's international environmental law encompasses the idea that whomever pollutes the environment and wastes natural resources is to blame for the harm done and must shoulder the cost. Every producer or consumer who harms a third party is subject to this kind of "social tax."<sup>5</sup> It is certain that Article 42 of the Constitution, which declares that everyone has the right to a clean and healthy environment, contains a specific environmental right. This includes the rights to: (a) the environment being safeguarded for the benefit of current and future generations by legislative and other actions, including those envisioned in Article 69; and (b) the environment-related duties under Article 70 to be met.<sup>6</sup>

As per Article 69 of the Constitution of Kenya, all persons must work in collaboration with State agencies in upholding environmental rights for all.

This paper makes a case for the enforcement of the right to clean and healthy environment in Kenya through effectively putting into practice the internationally recognised principle of polluter pays. The author argues that though this right has been legally recognised both domestically and internationally, placing the obligation to enforce it solely on the state agencies may delay the full realisation of this right for all persons. It thus explores how the polluter pays principle can be used

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<sup>3</sup> *Mohamed Ali Baadi and others v Attorney General & 11 others [2018] eKLR*, Petition 22 of 2012, para. 272.

<sup>4</sup> *Ibid*, para. 273.

<sup>5</sup> 'The Polluter Pays, a Pillar Principle of Stockholm | Green Growth Knowledge Partnership' <<https://www.greengrowthknowledge.org/blog/polluter-pays-pillar-principle-stockholm>> accessed 22 February 2023.

<sup>6</sup> *Mohamed Ali Baadi and others v Attorney General & 11 others [2018] eKLR*, Petition 22 of 2012, para. 274.

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to advance the realisation of the right to clean and healthy environment. This is in recognition of the fact that most developing countries have limited financial resources which are necessary in implementation of the right to clean and healthy environment and hence, the need for tapping into resources from the private sector and other persons who interact with the environment and subsequently cause harm to the environment.

### **2. The Right to Clean and Healthy Environment: Legal Foundation**

Kenya's main environmental regulating statute is called the Environmental Management and Coordination Act (EMCA). The law contains general requirements (such as environmental management principles) that apply to all environmental sectors and all public and private acts that may have an impact on the environment. The Act defines the “environment” as follows:<sup>7</sup>

*“environment” includes 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 and includes both the natural and the built environment.*

This definition goes beyond purely ecological concerns. It expressly takes into account components of the environment that go beyond the biophysical ones, such as the relationships between people, the natural environment, and the socioeconomic and cultural foundations of such relationships.<sup>8</sup>

A person who asserts that their rights to a clean and healthy environment have been violated has standing under Article 70 of the Constitution. This means that "the environmental right is sufficiently extensive and all-encompassing to provide 'everyone' with the prospect of seeking legal remedy in the event that any of many conceivable components relating to the right or guarantee derived therefrom is breached. It is undeniable that Kenya's constitution protects environmental preservation."<sup>9</sup>

The State is subject to environmental commitments under Article 69 of the Constitution. The duty to guarantee sustainable exploitation, utilisation, management, and conservation of the environment and natural resources is one of the duties imposed on the State. The State must also make sure that the benefits are distributed fairly. Encouragement of public involvement in

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<sup>7</sup> *Mohamed Ali Baadi and others v Attorney General & 11 others [2018] eKLR*, Petition 22 of 2012, para. 275.

<sup>8</sup> *Ibid*, para. 276.

<sup>9</sup> *Ibid*, para. 277.

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environmental management, preservation, and protection is also necessary. Lastly, the State must prevent using processes and engaging in activities that might threaten the environment.<sup>10</sup>

Article 42 states; “*Every person has the right to a clean and healthy environment which includes the right;*

*“(a) 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*

*(b) to have obligations relating to the environment fulfilled under Article 70”.*

The Constitution confers standing upon a person who alleges that a right to a clean and healthy environment has been violated. It provides: -

*70. (1) If a person alleges that a right to a clean and healthy environment recognized and protected under Article 42 has been, is being or is likely to be, denied, violated, infringed or threatened, the person may apply to a Court for redress in addition to any other legal remedies that are available in respect to the same matter.*

*(2) On application under clause (1), the Court may make any order, or give any directions, it considers appropriate—*

*(a) to prevent, stop or discontinue any act or omission that is harmful to the environment;*

*(b) to compel any public officer to take measures to prevent or discontinue any act or omission that is harmful to the environment; or*

*(c) to provide compensation for any victim of a violation of the right to a clean and healthy environment.*

*(3) For the purposes of this Article, an applicant does not have to demonstrate that any person has incurred loss or suffered injury.*

Section 13 of the Environment and Land Court Act outlines the jurisdiction of the court, stating that it has both original and appellate jurisdiction to hear and resolve all environmental and land-related disputes in accordance with Article 162(2)(b) of the Constitution, the provisions of this Act, and any other Kenyan laws that may be applicable. Subsection (2) provides that in exercise of its jurisdiction under Article 162(2)(b) of the Constitution, the Court shall have power to hear and determine disputes relating to environmental planning and protection, climate issues, land use planning, title, tenure, boundaries, rates, rents, valuations, mining, minerals and other natural

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<sup>10</sup> *Mohamed Ali Baadi and others v Attorney General & 11 others [2018] eKLR, Petition 22 of 2012, para. 278.*

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resources; relating to compulsory acquisition of land; relating to land administration and management; relating to public, private and community land and contracts, choses in action or other instruments granting any enforceable interests in land; and any other dispute relating to environment and land.

The ELC also has powers to hear and determine applications for redress of a denial, violation or infringement of, or threat to, rights or fundamental freedom relating to a clean and healthy environment under Articles 42, 69 and 70 of the Constitution.

Regionally and internationally, there are legal instruments that also recognise the right to clean and healthy environment.

Article 12(2)(b) of the *International Covenant on Economic, Social and Cultural Rights (ICESR)*<sup>11</sup> is to the effect that ‘The steps to be taken by the States Parties to the present Covenant to achieve the full realization of this right (the right of everyone to the enjoyment of the highest attainable standard of physical and mental health) shall include those necessary for: the improvement of all aspects of environmental and industrial hygiene.

Article 24 of the *African Charter on Humans and People’s Rights (ACHPR)*<sup>12</sup> states that ‘All peoples shall have the right to a general satisfactory environment favourable to their development’.

Article 24(1) of the *Convention on the Rights of the Child*<sup>13</sup> is to the effect that ‘States Parties recognize the right of the child to the enjoyment of the highest attainable standard of health and to facilities for the treatment of illness and rehabilitation of health. States Parties shall strive to ensure that no child is deprived of his or her right of access to such health care services’. Article 24 (2) requires that ‘States Parties shall pursue full implementation of this right and, in particular, shall take appropriate measures, *inter alia*:(c) to combat disease and malnutrition, including within the framework of primary health care, through, *inter alia*, the application of readily available technology and through the provision of adequate nutritious foods and clean drinking-water, taking into consideration the dangers and risks of environmental pollution; (e) to ensure that all segments of society, in particular parents and children, are informed, have access to education and are

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<sup>11</sup> UN General Assembly, *International Covenant on Economic, Social and Cultural Rights*, 16 December 1966, United Nations, Treaty Series, vol. 993, p. 3.

<sup>12</sup> Organization of African Unity (OAU), *African Charter on Human and Peoples' Rights ("Banjul Charter")*, 27 June 1981, CAB/LEG/67/3 rev. 5, 21 I.L.M. 58 (1982).

<sup>13</sup> UN Commission on Human Rights, *Convention on the Rights of the Child.*, 7 March 1990, E/CN.4/RES/1990/74.

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supported in the use of basic knowledge of child health and nutrition, the advantages of breastfeeding, *hygiene and environmental sanitation* and the prevention of accidents (emphasis added).

The *Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and their Disposal*<sup>14</sup> under Article 4(2) (c) states that ‘each Party shall take the appropriate measures to: ensure that persons involved in the management of hazardous wastes or other wastes within it take such steps as are necessary to prevent pollution due to hazardous wastes and other wastes arising from such management and, if such pollution occurs, to minimize the consequences thereof for human health and the environment’. Article 4(4) also requires that ‘Each Party shall take appropriate legal, administrative and other measures to implement and enforce the provisions of this Convention, including measures to prevent and punish conduct in contravention of the Convention’.

Article 25 (1) of the *Universal Declaration on Human Rights*<sup>15</sup> states that ‘everyone has the right to a standard of living adequate for the health and well-being of himself and of his family, including food, clothing, housing and medical care and necessary social services, and the right to security in the event of unemployment, sickness, disability, widowhood, old age or other lack of livelihood in circumstances beyond his control’.

Principle 1 of the *1992 Rio Declaration on the Environment and Development*<sup>16</sup> states that “Human beings are at the centre of concerns for sustainable development. They are entitled to a healthy and productive life in harmony with nature”.

It is worth pointing out that most of these international legal instruments captured the right to clean and healthy environment in a very generic manner and was mostly to be implied. However, in 2022, the United Nations General Assembly (UNGA) adopted a resolution declaring a clean, healthy & sustainable environment as a human right.<sup>17</sup> The General Assembly noted that the right

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<sup>14</sup> United Nations, *Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and their Disposal*, Basel, 22 March 1989, United Nations, Treaty Series, vol. 1673, p. 57.

<sup>15</sup> UN General Assembly, *Universal Declaration of Human Rights*, 10 December 1948, 217 A (III).

<sup>16</sup> UN General Assembly, *Report of the United Nations Conference on Environment and Development, Rio de Janeiro, 3-14 June 1992. Volume 1, Resolutions adopted by the Conference: corrigendum*, A/CONF.151/26/Rev.1(Vol.I)/Corr.1.

<sup>17</sup> United Nations General Assembly, *The Human Right to a Clean, Healthy and Sustainable Environment: resolution / adopted by the General Assembly, UN. General Assembly (76<sup>th</sup> sess.: 2021-2022)*; ‘In Historic Move, UN Declares Healthy Environment a Human Right’ (*UNEP*, 28 July 2022) <<http://www.unep.org/news-and-stories/story/historic-move-un-declares-healthy-environment-human-right>> accessed 22 February 2023; ‘UN General Assembly Declares

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to a clean, healthy and sustainable environment is related to other rights and existing international law.<sup>18</sup> It also affirmed that the promotion of the human right to a clean, healthy and sustainable environment requires the full implementation of the multilateral environmental agreements under the principles of international environmental law.<sup>19</sup> Finally, the UNGA called upon States, international organizations, business enterprises and other relevant stakeholders to adopt policies, to enhance international cooperation, strengthen capacity-building and continue to share good practices in order to scale up efforts to ensure a clean, healthy and sustainable environment for all.<sup>20</sup>

It has been noted that some scientists believe that the "triple planetary catastrophe" of human-caused climate change, widespread biodiversity loss, and unchecked pollution currently threatens to cross the planetary boundaries necessary to live securely on Earth. These dangers, as well as air pollution, polluted water, pollution from plastics, and chemical pollutants, can jeopardise the right to life, dignity, and health. Advocates urged that the U.N. should establish a right to a clean, healthy, and sustainable environment as a result.<sup>21</sup> Notwithstanding eight nations' abstentions—Belarus, Cambodia, China, Ethiopia, Iran, Kyrgyzstan, Russia, and Syria—the resolution on the right to a clean, healthy, and sustainable environment was accepted unanimously.<sup>22</sup>

For the 193 UN Member States, the resolution has no official force. Advocates, however, are optimistic that it will have a domino effect, pushing nations to codify the right to a healthy environment in national constitutions and regional accords and incentivizing governments to put such laws into action. Advocates claim it would offer environmental activists greater tools to fight against laws and initiatives that harm the environment.<sup>23</sup>

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Access to Clean and Healthy Environment a Universal Human Right | UN News' (28 July 2022) <<https://news.un.org/en/story/2022/07/1123482>> accessed 22 February 2023.

<sup>18</sup> United Nations General Assembly, *The Human Right to a Clean, Healthy and Sustainable Environment: resolution* / adopted by the General Assembly, UN. General Assembly (76<sup>th</sup> sess.: 2021-2022), para. 2.

<sup>19</sup> Ibid, para. 3.

<sup>20</sup> Ibid, para. 4.

<sup>21</sup> 'The UN Just Declared a New Human Right' (*World Economic Forum*, 9 August 2022) <<https://www.weforum.org/agenda/2022/08/the-un-just-declared-a-universal-human-right-to-a-healthy-sustainable-environment-here-s-where-resolutions-like-this-can-lead/>> accessed 22 February 2023.

<sup>22</sup> Ibid.

<sup>23</sup> 'In Historic Move, UN Declares Healthy Environment a Human Right' (*UNEP*, 28 July 2022) <<http://www.unep.org/news-and-stories/story/historic-move-un-declares-healthy-environment-human-right>> accessed 22 February 2023.



### **3. The Polluter Pays Principle: The Scope**

The Polluter Pays Principle is part of the customary law and general principles relating to the environment. Before the Organization for Economic Co-operation and Development (OECD) formally recognised it as a fundamental tenet of environmental law in 1972, the notion of polluter pays already existed.<sup>24</sup> According to OECD, the so-called "Polluter-Pays Principle" should be applied when determining how to distribute the costs of pollution prevention and control measures in order to promote the wise use of finite environmental resources and prevent distortions in global commerce and investment. According to this concept, the cost of implementing the aforementioned actions determined upon by public authorities to guarantee that the environment is in an acceptable state should be borne by the polluter. In other words, the price of goods and services that contribute to pollution through production and/or consumption should reflect the cost of these actions. Subsidies that would significantly distort global commerce and investment should not be used in conjunction with such policies.<sup>25</sup>

The polluter pays concept is a foundational economic tenet that requires the incorporation of environmental costs into decision-making for economic and other development plans, programmes, and initiatives that are likely to have an impact on the environment. Hence, the idea is a mechanism to distribute the costs of pollution. It has received a lot of attention in international law and is now recognised as one of the fundamental concepts of that body of law.<sup>26</sup>

By including the cost of waste disposal into the price of the product, the "polluter pays" principle, also known as "Extended Polluter Responsibility" (EPR), aims to transfer the burden of dealing with pollutants from governments to the organisations that produce them. In order to reduce waste and increase opportunities for reuse and recycling, manufacturers will be encouraged to enhance the waste management profile of their businesses.<sup>27</sup>

The *Rio Declaration* passed 27 principles to guide the protection of the environment for the present and future generations. *Inter alia*, principle 8 and 18 states thus; *Principle 8: To achieve*

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<sup>24</sup> Nanodkar S, 'Polluter Pays Principle: Essential Element of Environmental Law and Policy' (2018) 1 Int'l JL Mgmt. & Human. 77; Misra S and Nanda H, 'A Complete Perusal of Polluter Pays Principle "Incorporation and Application in India"' (2020) 14 *Indian Journal of Forensic Medicine & Toxicology* 419.

<sup>25</sup> OECD, *Recommendation of the Council on Guiding Principles concerning International Economic Aspects of Environmental Policies*, OECD/LEGAL/0102 (OECD 1972).

<sup>26</sup> Elvis-Imo G, 'An Analysis of The Polluter Pays Principle In Nigeria' (2017) 1 *Ajayi Crowther University Law Journal* <<https://aculj.acu.edu.ng/index.php/lj/article/view/4>> accessed 22 February 2023.

<sup>27</sup> *Ibid*, p. 3.

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*sustainable development and a higher quality of life for all people, States should reduce and eliminate unsustainable patterns of production and consumption and promote appropriate demographic policies.”* The duty is explained in principle 13 which provides thus; “States shall develop national law regarding liability and compensation for the victims of pollution and other environmental damage. States shall also cooperate in an expeditious and more determined manner to develop further international law regarding liability and compensation for adverse effects of environmental damage caused by activities within their jurisdiction or control to areas beyond their jurisdiction”.

According to the EMCA, the "polluter-pays concept" states that the person found guilty of polluting under the Act or any other relevant legislation should pay or bear the expense of restoring any aspect of the environment that has been harmed by pollution. The polluter should essentially pay the costs associated with preventing pollution or covering any harm it does. This is what the "polluter pays" idea says.<sup>28</sup>

In the case of *Michael Kibui & 2 others (suing on their own behalf as well as on behalf of the inhabitants of Mwamba Village of Uasin Gishu County) v Impresa Construzioni Giuseppe Maltauro SPA & 2 others [2019] eKLR*, Constitutional Petition 1 of 2012, the Court stated as follows:

*64. On the issue, as to who is liable to pay, this court is called upon to apply environmental law principles under Kenyan Law jurisprudence. Environmental law is principally concerned with ensuring sustainable utilization of natural resources according to a number of fundamental principles developed over the years through both domestic and international processes. Ideally, the utilization of land and land-based resources should adhere to the principles of sustainability, intergeneration equity, prevention, precautionary, polluter pays and public participation.*

*65. The principle of polluter pays entails that a person involved in any polluting activity should be responsible for the costs of preventing or dealing with any pollution caused by that activity instead of passing them to somebody else. The polluter should bear the expenses of carrying out pollution prevention and control measures to ensure that the environment is in an acceptable state. In international law, the principle is embedded in the Rio Declaration on Environment and Development (1992) which reads at principle 16 as national authorities should endeavor to promote the internalization of environmental costs and the use of economic instruments taking into*

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<sup>28</sup> *Kenya Association of Manufacturers & 3 others v Cabinet secretary, Ministry of Environment and Natural Resources & 3 others [2018] eKLR*, Petition 32 & 35 of 2017 & Judicial Review Application 30 of 2017 (Consolidated), para. 150.

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*account the that the polluter should, in principle bear the costs of pollution with due regard to the public interests and without distorting international trade and investment. In this case, the 1st respondent is held liable as he is the polluter.*

In the Kenyan case of *Dobs Entertainment Limited v National Environment Management Authority [2021] eKLR, Tribunal Appeal 016 of 2019*, the National Environment Tribunal quoted a Ugandan case as follows:

**33. In the Supreme Court of Uganda, at Kampala Constitutional Appeal No. 05 Of 2011 Amooti Godfrey Nyakaana and National Environment Management Authority & Attorney General, Advocates Coalition for Development & Environment Alert Vs Greenwatch, Uganda Wildlife Authority Quoting the Environmental Action Network & Attorney General –Vs- Salvatori Abuki Supreme Court Const. App. No. 1/98.**

*“The principle applicable is that in determining the Constitutionality of legislation, its purpose and effect must be taken into consideration. Both purpose and effect are relevant in determining Constitutionality of either an unconstitutional purpose or unconstitutional effect animated by an object the legislation intends to achieve. This object is realized through the impact produced by the operation and application of the legislation. Purpose and effect respectively, the sense of the legislation’s object and ultimate impact are clearly linked if not indivisible. Intended and actual effect has been looked up for guidance in assessing the legislation’s object and thus its validity. See THE QUEEN –Vs- BIG DRUG MARK LTD 1996 CLR 332.”*

*The Petitioner is not challenging the Constitutionality of these restrictions. In my view, it is these restrictions which gave the first respondent power to carry out inspection on the petitioner’s property to ascertain whether the activities he was carrying out on the land was in conformity with the provisions of the section – hence the service of the Restoration Order. The restoration order is like a charge sheet that commences the prosecution of a person who is charged with a criminal offence. Normally a Police Officer does not give a hearing to a suspect before charging him or her. The purpose of the Act is to give the first Respondent power to deal with and protect the environment for the benefit of all including the Petitioner. The impugned sections in my view have in built mechanisms for fair hearing as enshrined in Article 28.”*

*In the same case the court went on and stated that; “The Petitioner failed to show that the safeguards contained in the impugned sections are insufficient to accord him or anyone else a fair hearing. I have not been persuaded that the Petitioner’s proprietary rights were infringed by the acts of the first respondent. What was taken away from him was misuse of the land and this was done to protect the environment.”* The Court discussed the concept of sustainable development as it has evolved in international law and adopted the definition contained in the report of the **WORLD COMMISSION ON ENVIRONMENT and DEVELOPMENT** (the “Brundtland Report). That Report defined “Sustainable

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*Development” as “Development that meets the needs of the present without compromising the ability of the future generations to meet their own needs.” The Court stated thus: -*

*“We have no hesitation in holding that “sustainable Development” as a balancing concept between ecology and development has been accepted as part of the customary international law though its salient features have yet to be finalized by the international law jurists.....*

*We are, however, of the view that “The Precautionary Principle” and “The Polluter Pays Principle” are essential features of “Sustainable Development.” The “Precautionary Principle” – in the context of municipal law – means:*

*(i) The Environmental measures – by the State Government and the Statutory authorities must anticipate, prevent, and attack the causes of environmental degradation.*

*(ii) 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.*

*(iii) The “Onus of proof” is on the actor or the developer/industrialist to show that his action is environmentally benign.”*

34. In the same case, on “the Polluter Pays Principle” the court had this to say: -

*“The “Polluter Pays Principle” as interpreted by this Court means that the absolute liability for harm to the environment extends not only to compensate the victims of pollution but also the cost of restoring the environmental degradation. Remediation of the damaged environment is part of the process of “sustainable Development” and as such the Polluter is liable to pay the cost to the individual sufferers as well as the cost of reversing the damaged ecology.”.*

According to the OECD, there are four aspects that must be considered in the enforcement of the polluter-pays principle, which are: First, is the issue of identifying the polluter. This is crucial to the allocation of costs and making the polluter take responsibility for his pollution, as stipulated by the OECD definition given above; It is necessary to ascertain the extent of damage done to the environment and establish the extent of the polluter’s liability so that precise monetary value can be attached to the degradation; Pollution caused must be identifiable. This is necessary to prove that the polluter is responsible for that resulting pollution; and, there must be a damage that must

be compensated. The damage caused must be real and identifiable as compensable under a compensatory regime provided by the relevant laws.<sup>29</sup>

#### **4. Enforcing the Right to Clean and Healthy Environment in Kenya Through the Polluter Pays principle for Sustainable Development**

Section 3(3) of the Environmental Management and Coordination Act 1999, gives any party who alleges that his right to a clean and healthy environment has been or is likely to be violated to apply to the Environment and Land court for redress.

According to Article 70 of the Constitution, anybody who believes that their right to a clean environment is being denied, violated, threatened, or infringed upon in violation of Article 42 may seek recourse from the court. Kenyans have recourse to the courts under the Constitution even when there are merely implied violations.<sup>30</sup>

In *Waweru v. Republic* (2006) eKLR, the applicants—property owners—were accused of violating the Public Health Act's regulations by dumping raw sewage into a public water source. The court agreed with the petitioners, but it then began to consider how the applicants' conduct would affect sustainable development and environmental management on its own. The court determined that Section 71 of the Kenyan Constitution contains the right to life, which also includes the right to a clean and healthy environment.<sup>31</sup>

In the LAPSSET case, also known as the case of Mohamed Ali Baadi and others vs. A.G. & 11 others (2018) eKLR, the project proponent agreed to pay Kshs. 1,760,424,000 in monetary compensation to the individuals who were impacted. The petitioners and the other residents of Lamu Island were to be consulted regarding how the LAPSSET project might affect their culture as a district indigenous community and how to mitigate any negative effects on culture. Because this project was still in progress, the court ordered the project proponent to include a demonstrably specific consultation plan.<sup>32</sup>

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<sup>29</sup> Elvis-Imo G, "An analysis of the polluter pays principle in Nigeria," *Ajayi Crowther University Law Journal* 1, no. 1 (2017), pp. 4-5.

<sup>30</sup> *KM & 9 others v Attorney General & 7 others* [2020] eKLR, *Petition 1 of 2016*, para. 134.

<sup>31</sup> *KM & 9 others v Attorney General & 7 others* [2020] eKLR, *Petition 1 of 2016*, para. 163.

<sup>32</sup> *KM & 9 others v Attorney General & 7 others* [2020] eKLR, *Petition 1 of 2016*, para. 164.

The Court in *KM & 9 others v Attorney General & 7 others [2020] eKLR, Petition 1 of 2016*, cited *Rylands Vs Fletcher (1861-73) ALL ER REPI* case on strict liability as follows:

165. Further the rule of strict liability on the owner of land for damage caused by the escape of substances to his neighbour's land set in the Case of *Rylands Vs Fletcher (1861-73) ALL ER REPI* is in favour of the petitioners' case. The court held thus, **"We think that the true rule of law is that the person who, for his own purposes, brings on his land, and collects and keeps there anything likely to do mischief if it escapes, must keep it at his own peril, and, if he does not do so, he is prima facie answerable for all the damage which is the natural consequence of its escape. He can excuse himself by showing that the escape was owing to the plaintiff's own default, or, perhaps that the escape was a consequence of vis major, or the act of God; but as nothing of this sort exists here, it is unnecessary to inquire what excuse would be sufficient. The general rule, as above stated, seems on principle just. The person whose grass or corn is eaten down by the escaped cattle of his neighbour, or whose mine is flooded by the water from his neighbour's reservoir, or whose cellar is invaded by the filth of his neighbour's privy, or whose habitation is made unhealthy by the fumes and noisome vapours of his reasonable and just that the neighbour who has brought something on his own property but which he knows will be mischievous if it gets on his neighbour's, should be obliged to make good the damage which ensues if he does not succeed in confining it to his own property. But for his act in bringing it there no mischief would have accrued, and it seems just that he should at his peril keep it there, so that no mischief may accrue, or answer for the natural and anticipated consequences."**

**"If it does escape and cause damage, he is responsible, however careful he may have taken to prevent the damage. In considering whether a defendant is liable to a plaintiff for the damage which the plaintiff may have sustained, the question in general is not whether the defendant has acted with due care and caution, but whether his acts have occasioned the damage."**

166. The Supreme Court of India in *M C Mehta Vs Union of India (1987) 1 SCC 395* introduced the concept of absolute liability where the defendant is engaged in industrial activities resulting in pollution. The court stated thus,

**"The enterprise must be held to be under an obligation to provide that the hazardous or inherently dangerous activity in which it is engaged must be conducted with the highest standards of safety and if any harm results on account of such activity, the enterprise must be absolutely liable to compensate for such harm and it should be no answer to the enterprise to say that it had taken all reasonable care and that the harm occurred without any negligence on its part. Since the persons harmed on account of the hazardous or inherently dangerous activity carried on by the enterprise would not be in a position to isolate the process of operation from the hazardous preparation of the substance of any other related element that caused the harm, the enterprise must be held strictly liable for causing such harm as part of the social cost of carrying on the hazardous or inherently dangerous activity. If the enterprise is permitted to carry on a hazardous or inherently dangerous activity for its profit, the law must presume that such permission is conditional on the enterprise absorbing the cost of any accident arising on account of such hazardous or inherently dangerous activity as an appropriate item for its overheads. Such hazardous or inherently dangerous activity for private profit can be tolerated on condition that the enterprise engaged in such hazardous or inherently dangerous activity indemnifies all those who suffer on account of carrying on**

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such hazardous or inherently dangerous activity regardless of whether it is carried out carefully or not ... we would therefore hold that where an enterprise is engaged in a hazardous or inherently dangerous activity, resulting for example in escape of toxic gas, the enterprise is strictly and absolutely liable to compensate all those who are affected by the accident and such liability is not subject to any of the exceptions which operate vis-à-vis the tortious principle of strict liability under the rule in Rylands Vs. Fletcher (1986) LR 3 HL 330, (1861 – 73).”

In the case of *National Environment Management Authority & 3 others v Maraba Lwatingu Residents Association & 505 others* [2020] eKLR<sup>33</sup>, the Environment and Land Court at Kakamega, while making a determination on whether orders for costs and restoration of the environment issued by the National Environment Tribunal were inordinately too high, harsh and punitive for a public project funded by donors, made the following observation:

In this case it is the 2<sup>nd</sup> appellant who undertook the project and the Tribunal used its discretion judiciously in this matter. In the case of *Michael Kibui & 2 others* (suing on their own behalf as well as on behalf of the inhabitants of Mwamba Village of Uasin Gishu County) v *Impressa Construzioni Giuseppe Maltauro SPA & 2 others* (2019) eKLR the court held that;

*“The principle of polluter pays entails that a person involved in any polluting activity should be responsible for the costs of preventing or dealing with any pollution caused by that activity instead of passing them to somebody else. The polluter should bear the expenses of carrying out pollution prevention and control measures to ensure that the environment is in an acceptable state. In international law, the principle is embedded in the Rio Declaration on Environment and Development (1992) which reads at principle 16 as national authorities should endeavor to promote the internalization of environmental costs and the use of economic instruments taking into account the that the polluter should, in principle bear the costs of pollution with due regard to the public interests and without distorting international trade and investment. In this case, the 1st respondent is held liable as he is the polluter.*

Similarly, in the case of *Mohamed Ali Baadi and others v Attorney General & 11 others*[2018] eKLR<sup>34</sup>, the case underscored the importance of public participation as follows:

227. The involvement of the public in environmental decision and policy making must be regarded as important for various reasons. First, the utilization of the views gathered from the public in governmental decision-making on environmental issues results in better implementation of the goals of environmental protection and sustainable development. This is because the resultant decisions raise an expanded knowledge base on the nature of environmental problems that are to be met by the decision. The decisions help to enrich and cross-fertilize environmental rights.

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<sup>33</sup> *National Environment Management Authority & 3 others v Maraba Lwatingu Residents Association & 505 others* [2020] eKLR, Environment and Land Appeal 5 of 2019.

<sup>34</sup> *Mohamed Ali Baadi and others v Attorney General & 11 others* [2018] eKLR, Petition 22 of 2012.

228. Secondly, developing environmental laws and policies is a very resource-intensive area. Hence, the public input comes in handy, especially in developing countries, in supplementing scarce government resources for developing laws and policies. In addition, at the implementation stage, public vigilance is critical for monitoring, inspection and enforcement of environmental laws and policies by identifying and raising with appropriate authorities, environmental threats and violations.

229. Thirdly, public participation can help identify and address environmental problems at an early stage. This helps to save reaction-time, energy and the scarce financial resources, at least in the long run. In addition, it improves the reactive and, often, adversarial nature of government action which operates by promising solutions to environmental problems mostly *post-facto*, and only following an actual complaint by a citizen.

254. The importance of being informed of basic facts about the quality of their environment is, therefore, well established in different international conventions. Increasing access to environmental information also allows for competing interests to be balanced. Access to information permits all relevant factors to be taken into account as part of decision making process. Environmental information is a self-standing regulatory instrument and serves to inform the public of environments risks. Citizens must not only have access to information but must also be entitled to participate in decision-making and have access to justice in environmental matters. Only this way will they be able to assert their right to live in a safe environment, and fulfil their duty to protect, and improve the environment for the benefit of future generations. In addition to enhancing the quality and implementation of decisions, improved access to information and public participation contributes to public awareness of environmental issues and provides more opportunities for the public to express their concerns to relevant authorities.

256. In addition, if rights are to be effective, the public must have a way of seeking justice when those rights are accidentally, or deliberately, denied. For purposes of enforcement of environmental rights, Article 70 of the Constitution provides a framework to meet this need. It highlights rights of a citizen to move to Court citing violation of rights to clean and healthy environment. For a citizen to exercise these rights, access to environmental information is a necessity.

Under EMCA, any individual who has harmed the environment or who is still doing so may be subject to an environmental restoration order from the court.<sup>35</sup>

EMCA stipulates various environmental offences which including offences related to *inspection*, offences *related to Environmental Impact Assessment*, offences related to records and *standards and offences related to hazardous wastes* (emphasis added).<sup>36</sup> The Act also prescribes

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<sup>35</sup> S. 111(1), Act No. 8 of 1999.

<sup>36</sup> EMCA, s. 137-146.



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penalties for these offences.<sup>37</sup> Offences under EMCA relate among other things, failing to submit to inspection<sup>38</sup>, offences relating to Environmental Impact Assessment<sup>39</sup>; offences relating to records<sup>40</sup>; offences relating to standards<sup>41</sup>; offences relating to hazardous waste<sup>42</sup>; offences relating to pollution<sup>43</sup>; and offences relating to restoration orders<sup>44</sup>.

The effectiveness of the polluter pays principle is also captured under Section 108 of EMCA which provides for restoration orders to be issued by the National Environment Management Authority (NEMA) to violators under the Act. Notably, the command and control mechanism involves the ‘command’ of the law and the legal authority of the State. This entails regulatory law, backed by criminal sanctions.<sup>45</sup> It is based on potential coercion rather than voluntary goodwill and on penalties rather than positive incentives.<sup>46</sup> The command and control mechanism is what has predominantly informed the development of Kenya’s natural resources protection regime.<sup>47</sup>

The criminality component of regulation is what makes command and control methods successful.<sup>48</sup> It establishes a form of societal control over the use of natural resources.

Under command and control approaches, criminal law is used as a preventative tool by use of punitive sanction.<sup>49</sup> This is because from an economic perspective, criminal sanctions when effectively enforced raise the cost of certain conduct and therefore encourages compliance with laws.<sup>50</sup> The EMCA proposes further sanctions in addition to fines, including the seizure of used products and the cancellation of licences.<sup>51</sup>

The nexus between sustainable development and the right to clean and healthy environment, as well as the place of the polluter pays principle in enhancing this connection, was captured in the

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<sup>37</sup> Ibid.

<sup>38</sup> Sec. 137, EMCA.

<sup>39</sup> Sec. 138, EMCA.

<sup>40</sup> Sec. 139, EMCA.

<sup>41</sup> Sec. 140, EMCA.

<sup>42</sup> Sec. 141, EMCA.

<sup>43</sup> Sec. 142, EMCA.

<sup>44</sup> Sec. 143, EMCA.

<sup>45</sup> Hutter, B.M., ‘Socio-Legal Perspectives on Environmental Law: An Overview,’ *op. cit.*, pp.3 & 5.

<sup>46</sup> Davies J.C. & Mazurek, J., *Pollution Control in the United States: Evaluating the System*, *op. cit.*, p.15.

<sup>47</sup> Ochieng’, B.O., ‘Institutional Arrangements for Environmental Management in Kenya,’ in Okidi C.O., et al, *Environmental Governance in Kenya: Implementing the Framework Law*, (East African Educational Publishers Ltd, 2008), p.200.

<sup>48</sup> Hutter, B.M., ‘Socio-Legal Perspectives on Environmental Law: An Overview,’ *op. cit.*, pp. 3 & 5; cf. Ashworth, A., ‘Conceptions of Over criminalization,’ *Ohio State Journal of Criminal Law*, Vol. 5, 2008. pp. 407-425.

<sup>49</sup> Mbote, P.K. ‘The Use of Criminal Law in Enforcing Environmental Law’ in Okidi, C.O., et al, *Environmental Governance in Kenya: Implementing the Framework Law* (East African Educational Publishers Ltd, 2008) 110, p.112.

<sup>50</sup> *Ibid*, p. 110.

<sup>51</sup> S.146, Act No. 8 of 1999.

case of *John Muthui & 19 others v County Government of Kitui & 7 others [2020] eKLR*<sup>52</sup> in the following excerpt:

**83. Indeed, Section 18 of the Environment and Land Court Act and Section 3(5) of the Environmental Management and Co-ordination Act provides that this court should be guided by the principle of *intergenerational equity* while resolving environmental disputes. Section 2 of the Environmental Management and Co-ordination Act defines *intergenerational equity* as follows:**

*“intergenerational equity” means that the present generation should ensure that in exercising its rights to beneficial use of the environment the health, diversity and productivity of the environment is maintained or enhanced for the benefit of future generations.”*

**84. The quality of life for the future generation depends on our decisions today. The need for change in human development for them to lead happy lives has been debated for decades. The sustainability discourse started in the 1970s, and the 1992 UN Conference on the Environment and Development recognized intergenerational equity as central for policymaking that safeguards the future - this principle is now found in the constitutions of many countries, including Kenya.**

**85. Indeed, the World Commission on Environment and Development noted as follows: “We borrow environmental capital from future generations with no intention or prospect of repaying.... We act as we do because we can get away with it: future generations do not vote; they have no political or financial power; they cannot challenge our decisions.”**

**86. Some countries, most notably Israel and Hungary, have created their own guardian or commissioner for future generations, independent voices for the long term that act as temporal checks and balances. Based on the human right to a healthy environment (*Hungary*) and on a basic law concerning sustainable development (*Israel*), the Commissioners in each country have unrestrained access to the information behind policymaking; respond to citizens’ concerns; and publicly expose the long-term implications of current decisions.**

**105. The right to a clean and healthy environment is bestowed on every person, and has been considered by the courts and eminent authors to be essential for the existence of mankind. In *Adrian Kamotho Njenga vs. Council of Governors & 3 others [2020] eKLR*, it was held that:**

*“18. Article 42 of the Constitution guarantees every person the right to a clean and healthy environment and to have the environment protected for the benefit of present and future generations through the measures prescribed by Article 69. The right extends to having the obligations relating to the environment under Article 70 fulfilled.*

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<sup>52</sup> *John Muthui & 19 others v County Government of Kitui & 7 others [2020] eKLR*, ELC. Petition No. E06 of 2020.

*19. Unlike the other rights in the bill of rights which are guaranteed for enjoyment by individuals during their lifetime, the right to a clean and healthy environment is an entitlement of present and future generations and is to be enjoyed by every person with the obligation to conserve and protect the environment. The right has three components; the right itself, the right to have unrestricted access to the courts to seek redress where a person alleges the right to a clean and healthy environment has been infringed or is threatened; and the right to have the court make any order or give any directions it considers appropriate to either prevent or discontinue the act harmful to the environment, or compel any public officer to take measures to prevent or discontinue the act that is harmful to the environment or award compensation to any victim of a violation of the right to a clean and healthy environment.”*

107. This position was elaborately considered in the case of *Martin Osano Rabera & Another vs. Municipal Council of Nakuru & 2 others* [2018] eKLR where the court adopted the decision in *Communication No.155/96: The Social and Economic Rights Action Centre and the Centre for Economic and Social Rights vs. Nigeria* where the African Commission on Human and People’s Rights stated as follows:

*“These rights recognize the importance of a clean and safe environment that is closely linked to economic and social rights in so far as the environment affects the quality of life and safety of the individual. As has been rightly observed by Alexander Kiss, “an environment degraded by pollution and defaced by the destruction of all beauty and variety is as contrary to satisfactory living conditions and the development as the breakdown of the fundamental ecologic equilibria is harmful to physical and moral health.”*

*The right to general satisfactory environment, as guaranteed under article 24 of the Africa Charter or the right to healthy environment, as it is widely known therefore imposes clear obligations upon a government. It requires the State to take reasonable measures to prevent pollution and ecological degradation, to promote conservation, and to secure an ecologically sustainable development and use of natural resources.”*

123. *Sustainable Development* is one of the national values and principles of governance in the Constitution that bind all State organs, State officers, public officers and all persons. In its report, *Our Common Future*, the *Brundtland Commission* defined Sustainable as *development that meets the needs of the present without compromising the ability of future generations to meet their own needs*’.

124. Under Section 2 of the Environmental and Management Co-ordination Act, sustainable development is defined as follows:

*“sustainable development” means development that meets the needs of the present generation without compromising the ability of future generations to meet their needs by maintaining the carrying capacity of the supporting ecosystems.”*

125. In the *Case Concerning the Gabčíkovo-Nagymaros Project, (Hungary v Slovakia), 1997 WL 1168556 (ICJ)*, it was held as follows:

*“Throughout the ages, mankind has, for economic and other reasons, constantly interfered with nature. In the past this was often done without consideration of the effects upon the environment. Owing to new scientific insights and to a growing awareness of the risks for mankind - for present and future generations - of pursuit of such interventions at an unconsidered and unabated pace, new norms and standards have been developed [and] set forth in a great number of instruments during the last two decades. Such new norms have to be taken into consideration, and such new standards given proper weight, not only when States contemplate new activities, but also when continuing with activities begun in the past. This need to reconcile economic development with protection of the environment is aptly expressed in the concept of sustainable development. For the purposes of the present case, this means that the Parties together should look afresh at the effects on the environment of the operation of the Gabčíkovo power plant. In particular, they must find a satisfactory solution for the volume of water to be released into the old bed of the Danube and into the side-arms on both sides of the river.”*

126. Essentially, sustainable development seeks to address *intra-generational equity*, that is equity among the present generation and *inter-generation equity*, that is equity between generations. As opined in *Gabčíkovo* case (*supra*), sustainable development reaffirms the need for both development and environmental protection, and neither can be neglected at the expense of the other.

127. The four (4) recurring elements that comprise the concept of ‘*sustainable development*’ is the need to preserve natural resources for the benefit of future generations (*the principle of intergenerational equity*); exploiting natural resources in a manner which is ‘*sustainable*’, ‘*prudent*’, ‘*rational*’, ‘*wise*’ or ‘*appropriate*’ (*the principle of sustainable use*); the ‘*equitable*’ use of natural resources, and the need to ensure that environmental considerations are integrated into economic and other development plans, programmes and projects, (*the principle of integration*).

128. The principle of sustainable development seeks to limit environmental damage arising from anthropogenic activities and lessen the depletion of natural resources and pollution of the environment (See Cullet P., *Differential Treatment in International Environmental Law and its Contribution to the Evolution of International Law* (Aldershot: Ashgate, 2003) pp 8-9).

129. Sustainable development is a principle with a normative value, demanding a balance between development and environmental protection, and as a principle of reconciliation in the context of conflicting human rights, that is the right to development and the right to protecting the environment.

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In the case of *Martin Osano Rabera & another v Municipal Council of Nakuru & 2 others* [2018] eKLR<sup>53</sup>, the Court stated as follows:

48. I have considered the petition, the evidence both in support and opposition to it and the submissions. That a clean and healthy environment is a fundamental prerequisite for life is not a matter that needs belabouring. It is for this reason that the drafters of the Constitution of Kenya, 2010 saw it fit to provide for the right to a clean and healthy environment at **Article 42** within the Bill of Rights. Needless to state, Kenyans voted overwhelmingly in favour of the draft, thus giving their seal of approval to its provisions. **Article 42** states as follows:

*Every person has the right to a clean and healthy environment, which includes the right—*

*(a) 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*

*(b) to have obligations relating to the environment fulfilled under Article 70.*

49. A duty to have the environment protected for the benefit of present and future generations is imposed on both the State and every person under Article 69 which among others requires the state to ensure sustainable exploitation, utilisation, management and conservation of the environment and natural resources, and ensure the equitable sharing of the accruing benefits; to establish systems of environmental impact assessment, environmental audit and monitoring of the environment and to eliminate processes and activities that are likely to endanger the environment. Under the same article, every person has a duty to cooperate with State organs and other persons to protect and conserve the environment and ensure ecologically sustainable development and use of natural resources. In short, the obligation to ensure a clean and healthy environment imposed on everybody – from the state to all persons be they natural, juridical, association or other group of persons whether incorporated or not.

50. So as to further safeguard environmental rights and to facilitate access to court for purposes of enforcing the right secured by Article 42, Article 70 of the constitution provides that if a person alleges that a right to a clean and healthy environment recognised and protected under Article 42 has been, is being or is likely to be, denied, violated, infringed or threatened, the person may apply to court for redress in addition to any other legal remedies that are available in respect to the same matter and that he does not have to demonstrate that any person has incurred loss or suffered injury.

51. Provisions similar to those at **Article 42** are found at **Section 3** of the **Environmental Management and Co-ordination Act, 1999** (EMCA). Under **Section 3 (3)** of EMCA, if a person alleges that the right to a clean and healthy environment has been, is being or is likely to be denied, violated, infringed or threatened, in relation to him, then without prejudice to any other action with respect to the same matter which is lawfully available, that person may on his behalf or on behalf of a group or class of persons, members of an association or in the public interest may apply to this court and this court may make such orders, among others, to prevent, stop or discontinue any act or omission deleterious to the environment; to compel the persons responsible for the environmental degradation to restore the degraded environment as far as practicable to its immediate condition prior

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<sup>53</sup> *Martin Osano Rabera & another v Municipal Council of Nakuru & 2 others* [2018] eKLR, Petition No. 53 of 2012.

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to the damage; and to provide compensation for any victim of pollution and the cost of beneficial uses lost as a result of an act of pollution and other connected losses.

52. I have outlined all these provisions to underscore the importance placed by the constitution and statute law on protection of the right to a clean and healthy environment and conservation of the environment generally.

It is thus recommended that the country and courts actively enforces the polluter-pays principle as a way to not only restore the environmental areas that have been degraded but also as an incentive to curb environmental degradation.

### **5. Conclusion**

While the Rio Declaration which in Principle 16 embodies the polluter pays principle, does not impose any obligation on states to enforce those principles, Kenya, under section 3 (5) of EMCA and other various laws have incorporated this principle as part of the guiding principles that must be considered in enforcement of environmental law in Kenya. What is now required is for the Courts to strictly enforce it and hold more violators of environmental law culpable in order to enforce positive change towards environmental protection and conservation. Making violators bear the cost of environmental restoration will go a long way in not only guaranteeing the right to clean environment but also in achieving sustainable development.

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