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REPUBLIC OF KENYA



NATIONAL ASSEMBLY

12<sup>TH</sup> PARLIAMENT – THIRD SESSION - 2019

DEPARTMENTAL COMMITTEE ON ENVIRONMENT AND NATURAL  
RESOURCES

REPORT ON THE INQUIRY INTO THE ENCROACHMENT INTO THE  
RIPARIAN AREAS IN KENYA

DIRECTORATE OF COMMITTEE SERVICES,  
CLERK'S CHAMBERS,  
PARLIAMENT BUILDINGS,  
NAIROBI

THE NATIONAL ASSEMBLY  
PARLIAMENT BUILDINGS

DATE 19 SEP 2019

THURSDAY

Hon. Aden Duale  
Hon. Kerene Mathenge

SEPTEMBER, 2019

Moses Lemana

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## LIST OF ABBREVIATION

CFS	-	Container Freight Station
DO	-	Dissolved Oxygen
EIA	-	Environmental Impact Assessment
EMCA	-	Environmental Management and Coordination Act
FY	-	Financial Year
KFS	-	Kenya Forest Service
KPA	-	Kenya Ports Authority
MICD	-	Makupa International Containers Depot
NEMA	-	National Environment Management Authority
NCWSC	-	Nairobi City Water and Sewerage Company
NLC	-	National Land Commission
WRA	-	Water Resources Authority
WARMA	-	Water Resources Management Authority
WRUAs	-	Water Resources Users Associations

## FOREWORD

Riparian land refers to terrain that is adjacent to rivers and streams and is subject to periodic or occasional flooding. The plant species that grow in riparian areas are adapted to tolerate conditions of periodically waterlogged soils. For all riparian wetlands in the field, these zones of moisture and vegetation gradients occur in an overlapping, intergrading fashion, and the plant species are distributed in varying degrees throughout the riparian zone. They are recognized as interfaces where uplands and aquatic areas meet to form intermediate ecosystems that are themselves unique in their diversity, productivity, and function. They also provide significant economic benefits by minimizing flood and erosion damage.

On 24<sup>th</sup> April, 2018, the Committee on Environment and Natural Resources was considering Question No. 010/2018 by Member for Homa Bay Town Constituency (Hon. Peter Kaluma, MP) on conservation and protection of the riparian land. The Chief Administrative Secretary, Ministry of Environment and Forestry Hon. Mohamed Elmi appeared before the Committee on behalf of the Cabinet Secretary to respond to the concerns raised by the Hon. Peter Kaluma.

The question triggered an enquiry by the Committee which saw it conduct inspection visits to Encroached Riparian Areas Within Nairobi City County and Mombasa County. The inspection visits to encroached riparian areas within Nairobi City County was conducted on Tuesday 26<sup>th</sup> June, 2018 and Thursday 28<sup>th</sup> June, 2018. The following sites were visited:

- a) Fuata Nyayo Estate (South B)
- b) South End Mall, Langata Road
- c) Taj Apartments, Kileleshwa, Near the Arboretum
- d) Gem Suites, Riverside
- e) Alina Villas, Spring Valley
- f) Village Market, Limuru Road
- g) Area Opposite Westgate Mall, Westlands

The Committee then conducted an Inspection Visit to the Sabaki River Riparian Area in Mavoko, Machakos County where the two protagonists involved agreed to resolve their differences amicably and were given timelines to do so. It was further resolved that:

- a) Canon Aluminium Fabricators Ltd and Rogam Investments should implement the orders by WRA with respect to clearing the riparian area within two (2) months;
- b) NEMA and WRA should oversee the implementation the orders by the concerned parties;
- c) NEMA and WRA should ensure that the entire riparian area of River Sabaki from Syokimau Estate to Athi River is cleared;
- d) The Deputy County Commissioner, Mavoko Sub-County should ensure that the resolutions by the Committee on the issue of River Sabaki are implemented; and
- e) The Parties involved should provide the Committee with a weekly progress report on the implementation of WARMA orders from the date of the inspection visit.

The Committee equally held a consultative meeting with the Ministry of Water and Sanitation and that of Environment and Forestry on Tuesday 10<sup>th</sup> July, 2018 on the issue of encroachment on

riparian areas in which it was resolved that the Ministry of Environment and Forestry provides a report containing the following information by 24<sup>th</sup> July, 2018:

- a) All building listed for demolition in the country for being in riparian areas.
- b) The list of the already demolished buildings.
- c) The list of those not demolished and reasons for non-demolition.
- d) The names of the developers and/or companies involved in each case above.

The inspection visits to encroached riparian areas within Mombasa County was conducted on Sunday 29<sup>th</sup> July, 2018. The following sites were visited:

- a) The Kibarani Dumpsite
- b) Makupa Transit Shade CFS
- c) Multiple Hauliers EA Ltd

After a meeting with all involved stakeholders it was resolved that:

- a) There would be no more reclamation of land from the ocean. Even for entities that had title to the ocean, they would only be allowed to use the land as it was and not to change or reclaim it.
- b) NEMA to provide to the Committee the licenses for the approvals granted to Makupa Transit Shade CFS and Multiple Hauliers EA Limited to undertake their operations in the area and/or to reclaim land from the ocean.

The Committee consequently held meeting of all stakeholders involved including the government agencies to receive information and documentation and then chart the way forward with respect to encroachment on riparian areas and its conservation on Thursday, 9<sup>th</sup> August, 2018.

### **Committee Observations**

#### **Makupa Shade CFS and Multiple Hauliers EA Ltd**

1. Makupa Transit Shade CFS and Multiple Hauliers EA Ltd were collaborating with the Kenya Ports Authority to establish container freight stations in the area as part of the KPA master plan to decongest the port. However, there was need to consider environmental conservation and marine life protection in their quest to support the KPA activities. For instance, Multiple Hauliers EA Ltd was storing clinker which is a dangerous pollutant.
2. The design of the bridges linking Makupa Shade CFS and Multiple Hauliers EA Ltd to KPA were wrongly designed as they affected marine life since the area is a fish breeding ground. There was need to demolish them as they were adversely affecting marine life.
3. Reclamation of land from the sea is allowable by law, though only activities relating to water use were permissible on such land. However, the developers had reclaimed the ocean and used the land for alternative purposes like construction of office blocks, stores and yards.
4. Multiple Hauliers EA Ltd was one of the facilities with a special use licence by the Kenya Forest Service within Makupa Creek (Kibarani) Mombasa. The company leased 9.6 hectares for a term of 30 years. One of the conditions of the license was a requirement to rehabilitate 40.0 hectares of mangrove area adjacent to the licenced area within Makupa Creek in conjunction with the local community groups spearheaded by Kenya Forest Service and the Community Forest Association.

## **National Environment Management Authority (NEMA) and Water Resources Authority (WRA)**

5. NEMA treated other relevant government agencies like the WRA as any other stakeholder during the EIA processes instead of having structured consultations and seeking its concurrence as a key government agency.
6. NEMA found out that there was dumping in the ocean as attempts to decommission Kibarani dumpsite got underway. It issued a restoration order to the Mombasa County Executive Committee Member in charge of environment which was ignored. The dumping and pushing of the solid waste into the ocean continued unabated. NEMA had therefore failed in its duty by not stopping the dumping of solid waste into the Indian Ocean during the decommissioning of the Kibarani Dumpsite.
7. NEMA approved reclamation of land from the Ocean at Kibarani but failed to follow up to ensure the licensees stuck to conditions of the licences, including the approved sizes for reclamation. This was a clear dereliction of duty. There appeared to have been laxity on the part of NEMA after issuing conditional licenses to developers. There was no proof of follow up inspection and monitoring to ensure the conditions set in their licenses were adhered to.
8. In accordance with sec143 (1) (b) of Water Act 2016 and the Sixth Schedule – Part A of the Water Resources Management Rules 2007, WRA issued order No. 002860 dated 30<sup>th</sup> July, 2018 to stop the levelling and pushing of the garbage into the sea. However, the said orders were ignored.
9. The WRA denied issuance of license for canalization at Ukay Centre and the South End Mall. However, clear records by proprietors of the Ukay Centre indicated that the agency had licensed the canalization.
10. There appeared to be conflict between NEMA and WRA since they issued various contradictory licenses and/or stop orders which cause confusion among developers. Equally, although WRA would issue stop orders to developers along the riparian areas, their orders were usually ignored.

### **Legal Framework**

11. It was evident that a number of legislations with a bearing on riparian reserve management provide different distances depending on the sector's mandate and priority. This has therefore jeopardized enforcement of these laws and therefore caused encroachment into wetlands and riparian areas. The overlaps in the various laws with respect to the definition of riparian areas was causing implementation challenges. The conflicting laws include: Agriculture Act Cap 318 (Basic Land Usage Rules), 1965, Survey Act, 1989, EMCA (Water Quality Regulations), 2006, Water Resource Management Rules, 2007, Physical Planning regulations, 1998.

### **Kenya Forest Service (KFS)**

12. One of the conditions of the special use license given by the KFS was a requirement to rehabilitate 40.0 hectares of mangrove area adjacent to the licenced area within Makupa Creek in conjunction with the local community groups and the Community Forest Association. However, there was no evidence of forest restoration on the land provided by KFS for the operators to replace the forest area that had been cleared to erect their freight stations. Equally, the CFS operators at Kibarani were not properly utilizing the land as per the licence, especially with the kind of structures they had put up.

### **Kibarani Dumpsite**

13. The dumping of solid waste into the Indian Ocean while decommissioning of the Kibarani Dumpsite by the Mombasa County Government caused water pollution through heavy metals and plastic material which pose a threat to marine life. Additionally, it had narrowed the creek almost to an extent of Mombasa losing its island status. Decommissioning was done by pushing solid waste into the ocean instead of moving/ferrying it away. The action risked delisting of the Mombasa Island from the UNESCO World Heritage site list.

### **The National Land Commission (NLC)**

14. The Kibarani Dumpsite area had been decommissioned by the Mombasa County Government to ensure environmental protection, however there was need for the County Government of Mombasa in conjunction with the National Land Commission to ensure that the land is secured for public utility: preferably recreational services.

### **Nairobi Regeneration Program**

15. The Inter-Government Agencies that were in-charge of the Nairobi Regeneration Program, while executing their mandate, were not giving due consideration such as adequate notices to the owners and the tenants occupying the buildings erected along the riparian areas. Equally, some of the structures were in place before the applicable laws were enacted. For instance, the Ukay Mall in Westlands which was demolished despite the owner having all the requisite approvals.

### **Gemsuite Investment Limited**

16. Gemsuite Investment Limited had demolished its perimeter wall that had encroached the riparian area along Kirichwa River, Riverside Lane. This was after demolition orders issued by NEMA and an inspection visit to the establishment by the Committee.

### **The Greenhill Ltd (Village Market)**

17. The Greenhill Ltd had erected a sewerage treatment plant on a wetland awaiting the construction of the sewer line by the County Government of Nairobi. The company, in its effort at environmental protection, had adopted the modern technology and subjected the plant to regular self-tests for water quality to ensure it maintained the standards provided for in EMCA and the water quality regulations.

### **Seefar Apartments/Nairobi Dam**

18. The notices for demolition issued by NEMA and WRA on the Seefar Apartments were wanting since the same entities gave approvals for the construction of the apartments. The doublespeak by the government agencies could scare away investors in real estate sector in the country. Equally, there was no technical report by experts on the status of the Nairobi dam to warrant the demolition orders issued against the Seefar Apartments.

### **South End Mall, Langata Road**

19. The Ngong River passes right under the parking lot of the building having been canalized in the compound allegedly after authorization by the Water Resources Authority (WRA). Although Canalization is allowable, it's not meant to facilitate building of structures in the

riparian area. NEMA had issued stop and ultimately demolition orders on the project severally but was overruled by the court orders sought by the proprietor. Equally, under the Nairobi regeneration program, the project has since been demolished.

#### **Ukay Centre, Nairobi**

20. The Ukay Centre had been built on the Nairobi River riparian area. This posed a risk to those who were working there during rainy seasons when the river floods. The *Centre* was earmarked for demolition but the same had not been effected at the time of the visit. However, the proprietor, in his presentation to the Committee provided documentary evidence indicating that the canalization done at his premises had been approved by WRA and NEMA as improvements to conform to EMCA and other applicable laws since the building was constructed before enactment of the said laws. Equally, the parking lot along Mwanzi Road, adjacent to the then Ukay Centre was built on one of the canalised Nairobi River tributary. The Centre has since been demolished.

#### **Committee Recommendations**

Consequently, the Committee recommends that:

#### **National Environment Management Authority (NEMA) and Water Resources Authority (WRA)**

1. The National Environmental Management Authority (NEMA) should;
  - a) have structured and documented consultations with various other government agencies, especially WRA, before issuing the licences on Environmental Impact Assessment to the developers for proper coordination and conservation of the environmental matters relating to riparian areas.
  - b) always have continuous monitoring on the conditions it issues to developers to ensure adherence by the licencees.
  - c) hold to account its officials who may have irregularly issued developers with licences and/or may have failed to follow up on the conditionalities issued at the point of licensing the developers.
  - d) lobby for adequate resource allocation through its parent Ministry to facilitate it in execution of its mandate.
  - e) withdraw the demolition notices issued against the Seefar Apartments since they had no technical report backing them up. Consequently, NEMA jointly with the Multi-Agency Team should prepare a technical report on the safety and the Utility of the Nairobi Dam and share with the National Assembly before charting the way forward.
  - f) ensure that no further unlawful reclamation of the sea is done in Mombasa to ensure the protection of the marine life and conservation of Mombasa as an island as rated by the UNESCO World Heritage.
2. The Water Resource Authority (WRA) should:
  - a) Initiate, through the parent Ministry, the process of reviewing the Water Act, 2016 to ensure that any inadequacies in the implementation of the act were addressed.
  - b) lobby for adequate resource allocation through its parent ministry to facilitate it in execution of its mandate.

- c) withdraw the demolition notices issued against the Seefar Apartments since they had no technical report backing them up. Consequently, WRA jointly with the Multi-Agency Team should prepare a technical report on the safety and the Utility of the Nairobi Dam and share with the National Assembly before charting the way forward.
- d) ensure that no further unlawful reclamation of the sea is done in Mombasa to ensure the protection of the marine life and conservation of Mombasa as an island.

### **The Directorate of Criminal Investigation (DCI)**

- 3. The Directorate of Criminal Investigation (DCI) should:
  - a) investigate NEMA and WRA officials who may have irregularly issued developers with licences and/or may have failed to follow up on the conditions issued at the point of licensing the developers. If criminal culpability is established, the said individuals should be prosecuted.
  - b) investigate how the entities acquired titles to the land around Kibarani area and take necessary actions, if fraudulent acquisition is proven i.e. Makupa Shade CFS and Multiple Hauliers EA Ltd and Civicon Limited and other companies.

### **Ministry of Environment and Forestry**

- 4. Ministry of Environment and Forestry should:
  - a) lobby for and allocate adequate resources to NEMA to build its capacity in environmental conservation in light of the fact that the Environmental Impact Assessment (EIA) fees payments to NEMA were abolished thereby reducing the funds available to the Authority.
  - b) in conjunction with the County Government of Mombasa and other state agencies ensure that the solid waste dumped into the ocean during the decommissioning of the Kibarani dumpsite was removed and safely disposed.
  - c) in conjunction with the Nairobi City County Government and the Ministry of Water and Sanitation, rehabilitate the Nairobi dam to its former state or otherwise decommission it.

### **Ministry of Water and Sanitation**

- 5. The Ministry of Water and Sanitation should:
  - a) lobby for and allocate adequate resources to WRA to build its capacity in its function of protecting and conserving water resources.
  - b) collaborate with the Ministry of Environment and Forestry and the Nairobi City County Government to ensure that the Nairobi regeneration program achieves the intended results especially in the construction and maintenance of sewer line in a bid to ensure that the rivers are well protected from solid waste.
  - c) work at rehabilitating the Nairobi dam so that it can resume its former utility and glory, in conjunction with the Ministry of Environment and Forestry and the Nairobi City County government.
  - d) put up a sewer line to the village market area (Greenhill Ltd), in conjunction with the Nairobi City County Government, and subsequently ensure the treatment plant on the wetland next to the premises was decommissioned.

### **Legal Framework**

6. The Ministry of Water and Sanitation should initiate a multi-agency discussion with the Council of Governors, office of the Attorney General, Ministry of Environment and Forestry, Ministry of Agriculture, and Ministry of Lands and other stakeholders to harmonize the definition of the riparian land/area to avoid conflict in the implementation by the various government agencies on matters regarding riparian conservation.

### **Kibarani Dumpsite**

7. The Ministry of Environment and Forestry in conjunction with the County Government of Mombasa and the Ministry of Water and Sanitation should:
  - a) prevent future setting up of dumping sites near water bodies in order to protect and conserve the water resources.
  - b) ensure that the decommissioned Kibarani Dumpsite land is well protected and reserved for public utility.

### **Makupa Shade CFS and Multiple Hauliers EA Ltd**

10. NEMA and WRA should ensure demolition of the bridges linking Makupa Shade CFS and Multiple Hauliers EA Ltd to KPA **within six (6) months** of adoption of this report by the National Assembly. The bridges were wrongly designed and hence adversely affected marine life, especially the area being a fish breeding ground. Equally, they were posing life threatening danger to the fishermen due to their interference with the tidal waves.

### **National Land Commission (NLC)**

11. National Land Commission (NLC) should:
  - a) investigate how the following entities acquired titles to the land in the ocean and revoke the titles, if fraudulent acquisition is proven: Makupa Shade CFS and Multiple Hauliers EA Ltd and Civicon Limited.
  - b) ensure that all public land fraudulently acquired around Kibarani Area is reverted to be public land and secured.

### **Nairobi Regeneration Program**

12. The Inter-Governmental Agencies team in charge of the Nairobi Regeneration Program should:
  - a) act within the legal limit providing adequate notice to the owners and the tenants occupying the buildings constructed along the riparian areas.
  - b) not apply EMCA and other relevant laws retrogressively to affect structures put up before the laws were enacted. Instead special consideration on conformity should be given to buildings constructed before the laws were enacted.

### **Kenya Forest Service (KFS)**

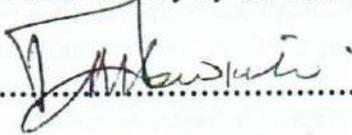
13. The Kenya Forest Service should ensure that Multiple Hauliers EA Ltd rehabilitates 40 hectares of mangrove area adjacent to the licensed area within Makupa Creek in conjunction with other stakeholders as part of the conditions in the special license issued.

**Kenya Ports Authority (KPA)**

14. The Kenya Ports Authority should ensure that environmental protection and conservation is prioritized by partners who support port activities in the development of the containers freight stations.

**Greenhill Ltd (Village Market)**

15. Greenhill Ltd should decommission the sewer treatment plant upon the construction of the sewer line in its vicinity by the County Government of Nairobi.

SIGNED:  .....

**THE HON. KAREKE MBIUKI, M.P.**  
**CHAIRPERSON,**  
**DEPARTMENTAL COMMITTEE ON ENVIRONMENT AND NATURAL RESOURCES**

DATE: 18/9/2019 .....

## 1.0 PREFACE

### 1.1 Establishment and Mandate of the Committee

The Departmental Committee on Environment and Natural Resources is one of the fifteen (15) Departmental Committees of the National Assembly established under *Standing Order 216* whose mandates, pursuant to the *Standing Order 216 (5)* are as follows:

- a) **To investigate, inquire into, and report on all matters relating to the mandate, management, activities, administration, operations and estimates of the assigned ministries and departments;**
- b) To study the programme and policy objectives of Ministries and departments and the effectiveness of their implementation;
- c) To study and review all the legislation referred to it;
- d) To study, access and analyze the relative success of the Ministries and departments as measured by the results obtained as compared with their stated objectives;
- e) To investigate and inquire into all matters relating to the assigned Ministries and departments as they may deem necessary, and as may be referred to them by the House;
- f) To vet and report on all appointments where the Constitution or any law requires the National Assembly to approve, except those under Standing Order No.204 (Committee on appointments);
- g) To examine treaties, agreements and conventions;
- h) To make reports and recommendations to the House as often as possible, including recommendation of proposed legislation;
- i) To consider reports of Commissions and Independent Offices submitted to the House pursuant to the provisions of Article 254 of the Constitution; and
- j) To examine any questions raised by Members on a matter within its mandate.

The subject matter of the Departmental Committee on Environment and Natural Resources are stated in the Second Schedule of the National Assembly Standing Orders No. 216 (f) as follows: climate change, environment management and conservation, forestry, water resource management, wildlife, mining and natural resources, pollution and waste management.

### 1.2 Oversight

In executing its mandate, the Committee oversees the following Ministries and State Departments, namely:

- The Ministry of Water and Sanitation;
- The Ministry of Environment and Forestry;
- The State Department for Wildlife; and
- The State Department for Mining.

### 1.3 Committee Membership

The Committee on Environment and Natural Resources was constituted by the House in December, 2017 and comprises of the following Members: -

No.	Name	Constituency	Party
1.	The Hon. Kareke Mbiuki, M.P., Chairperson	Maara	Jubilee Party
2.	The Hon. Sophia Abdi Noor, M.P. Vice Chairperson	Ijaara	PDR
3.	The Hon. Benjamin Jomo Washiali, M.P., CBS	Mumias East	Jubilee Party
4.	The Hon. David Kangogo Bowen, M.P.	Marakwet East	Jubilee Party
5.	The Hon. Francis Chachu Ganya, M.P.	North Horr	FAP
6.	The Hon. Ali Wario Guyo, M.P.	Garsen	Wiper Party
7.	The Hon. Beatrice Cherono Kones, M.P.	Bomet East	Jubilee Party
8.	The Hon. Charity Kathambi Chepkwony, M.P	Njoro	Jubilee Party
9.	The Hon. Hilary Kiplang'at Kosgei, M.P.	Kipkelion West	Jubilee Party
10.	The Hon. Peter Kimari Kihara, M.P	Mathioya	Jubilee Party
11.	The Hon. Benjamin Dalu Tayari, MP.	Kinango	ODM
12.	The Hon. Charles Ong'ondo Were, M.P.	Kasipul	ODM
13.	The Hon. Nasri Sahal Ibrahim, M.P.	Nominated	FORD K
14.	The Hon. Rozaah Buyu. M.P.	Kisumu County	ODM
15.	The Hon. Said Hiribae, M.P.	Galole	FORD K
16.	The Hon. Hassan Oda Hulufu, M.P.	Isiolo North	KPP
17.	The Hon. Amin Deddy Mohamed Ali, M.P.	Laikipia East	Jubilee Party
18.	The Hon. Rehema Hassan, M.P.	Tana River County	MCC
19.	The Hon. (Eng.) Paul Musyimi Nzengu, M.P.	Mwingi North	Wiper Party

#### COMMITTEE SECRETARIAT

- |                             |                                     |
|-----------------------------|-------------------------------------|
| 1. Ms. Esther Nginyo        | - Second Clerk Assistant/Lead Clerk |
| 2. Mr. Dennis Mogare Ogechi | - Second Clerk Assistant            |
| 3. Mr. Sydney Lugaga        | - Legal Counsel II                  |
| 4. Ms. Winnie Kulei         | - Research officer III              |
| 5. Ms. Yunis Amran          | - Fiscal Analyst III                |
| 6. Mr. Stanley Lagat        | - Serjeant At Arms I                |

## 2.0 BACKGROUND INFORMATION

Riparian land refers to terrain that is adjacent to rivers and streams and is subject to periodic or occasional flooding. The plant species that grow in riparian areas are adapted to tolerate conditions of periodically waterlogged soils. For all riparian wetlands in the field, these zones of moisture and vegetation gradients occur in an overlapping, intergrading fashion, and the plant species are distributed in varying degrees throughout the riparian zone. They are recognized as interfaces where uplands and aquatic areas meet to form intermediate ecosystems that are themselves unique in their diversity, productivity, and function. They also provide significant economic benefits by minimizing flood and erosion damage.

In Kenya, the riparian conservation is covered under various laws. For instance, the Survey Act of 1969 provides for reservation of 30 metres reserve above the highest water mark for all the tidal rivers. The Agriculture Act that governs all the agricultural lands prohibits any farming activities within two metres of the water courses. The Physical Planning Regulations of 1996 requires a reservation of not less than 10 metres when submission of sub-division plans for consideration and approval to the authorities. While EMCA 2015 empowers the Cabinet Secretary to issue regulations and management of river banks, the 2006 Regulations prohibits development activities within a minimum of six and a maximum of 30 metres from the highest flooding level. The Water Act, 2016 which establishes the Water Resources Authority that is mandated to regulate the management of water resources in Kenya does not however expressly provide for the riparian land distance. The developers therefore could be at a loss on which law is to be complied with.

On 24<sup>th</sup> April, 2018, the Committee on Environment and Natural Resources was considering Question No. 010/2018 by Member for Homa Bay Town Constituency (Hon. Peter Kaluma, MP) on conservation and protection of the riparian land. The Chief Administrative Secretary, Ministry of Environment and Forestry Hon. Mohamed Elmi appeared before the Committee on behalf of the Cabinet Secretary to respond to the concerns raised by the Hon. Peter Kaluma.

The question triggered an inquiry by the Committee. The inquiry saw it conduct inspection visits to encroached riparian areas within Nairobi City County and Mombasa County. The inspection visits to encroached riparian areas within Nairobi City County was conducted on Tuesday 26<sup>th</sup> June, 2018 and Thursday 28<sup>th</sup> June, 2018. The following sites were visited:

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- ii. South End Mall, Langata Road
- iii. Taj Apartments, Kileleshwa, Near the Arboretum
- iv. Gem Suites, Riverside
- v. Alina Villas, Spring Valley
- vi. Village Market, Limuru Road
- vii. UKAY Centre Opposite Westgate Mall, Westlands

The Committee equally held a consultative meeting with the Ministry of Water and Sanitation and that of Environment and Forestry on Tuesday 10<sup>th</sup> July, 2018 on the issue of encroachment on riparian areas in which it was resolved that the Ministry of Environment and Forestry provides a report containing the following information:

- i. All building listed for demolition in the country for being in riparian areas.
- ii. The list of the already demolished buildings.
- iii. The list of those not demolished and reasons for non-demolition.
- iv. The names of the developers and/or companies involved in each case above.

The Committee then conducted an Inspection Visit to the Sabaki River Riparian Area in Mavoko, Machakos County on 12<sup>th</sup> July, 2018 where the two protagonists involved agreed to resolve their differences amicably and were given timelines to do so. It was further resolved that:

- i. Canon Aluminium Fabricators Ltd and Rogam Investments should implement the orders by WRA with respect to clearing the riparian area within two (2) months;
- ii. NEMA and WRA should oversee the implementation the orders by the concerned parties;
- iii. NEMA and WRA should ensure that the entire riparian area of River Sabaki from Syokimau Estate to Athi-River is cleared;
- iv. The Deputy County Commissioner, Mavoko Sub-County should ensure that the resolutions by the Committee on the issue of River Sabaki are implemented; and
- v. The Parties involved should provide the Committee with a weekly progress report on the implementation of WARMA orders from the date of the inspection visit.

The inspection visits to encroached riparian areas within Mombasa County was conducted on Sunday 29<sup>th</sup> July, 2018. The following sites were visited:

- i. The Kibarani Dumpsite
- ii. Makupa Transit Shade CFS
- iii. Multiple Hauliers EA Limited

After a meeting with all involved stakeholders it was resolved that:

- i. There would be no more reclamation of land from the ocean. Even for entities that had title to the ocean, they would only be allowed to use the land as it was and not to change or reclaim it.
- ii. NEMA to provide to the Committee the licenses for the approvals granted to Makupa Transit Shade CFS and Multiple Hauliers EA Limited to undertake their operations in the area and/or to reclaim land from the ocean.

The Committee consequently held meeting of all stakeholders involved including the government agencies to receive information and documentation and then chart the way forward with respect to encroachment on riparian areas and its conservation.

### **Objective of the Inquiry**

The Committee undertook the enquiry with the following objectives:

- i. To establish the extent of the encroachment into the riparian and the effects of the encroachment;
- ii. To recommend mechanisms and ways of protection of the riparian area.

### **3.0 INSPECTION VISITS AND SUBMISSIONS BY THE STAKEHOLDERS**

#### **3.1 Inspection Visits**

The Committee undertook inspection visits to various affected areas by the riparian encroachment on 26<sup>th</sup> June, 2018, 28<sup>th</sup> June, 2018, 12<sup>th</sup> July, 2018 and 29<sup>th</sup> July, 2018. The following affected areas were visited:

- i. Fuata Nyayo Informal Settlement in South B;
- ii. South West Mall along Langata Road
- iii. Aquilla Properties proposed construction site along Chiromo/Arboretum Roads;
- iv. Taj Apartments along Riverside Drive
- v. Gem Investment Ltd – Gemsuite Hotel and Apartments along Riverside Drive
- vi. The Tribe Hotel, Village Market along Limuru Road
- vii. M/S Sound Equipment proposed housing Development along Kabete Road
- viii. UKAY Centre in Westland opposite the Westgate Mall
- ix. River Sabaki in Mavoko Sub-County
- x. The Kibarani Dumpsite
- xi. Multiple Hauliers EA Limited
- xii. Makupa Transit Shade Container Depot at the Makupa Creek.
- xiii. Seefar Apartments/ Nairobi Dam

#### **3.1.1 Committee findings from the Inspection Visits**

##### **1. Fuata Nyayo Estate (South B)**

After conducting an inspection of the encroachment of the riparian area of Ngong River along Fuata Nyayo informal settlements on 26<sup>th</sup> June, 2018, the following observations were made:

- a) There were many buildings, both permanent and semi-permanent structures right on the riparian area of the river.
- b) There was a sewer line running right under the structures constructed on the riparian area.
- c) There was clear disposal of human waste and other solid waste directly into the river causing massive pollution of the river.
- d) There institutions like schools constructed on the riparian area.

##### **2. South End Mall, Langata Road**

After conducting an inspection of the encroachment of the riparian area of Ngong River at the South End Mall, Langata Road on 26<sup>th</sup> June, 2018, the following observations were made:

- a) The Ngong River passes right under the parking lot of the building.
- b) The river had been canalised in the compound allegedly after authorization by the Water Resources Authority (WRA).
- c) Although Canalization is allowable, it's not meant to facilitate building of structures in the riparian area next to the river

- d) NEMA had stopped the project severally but was overruled by the court orders sought by the proprietor.
- e) Demolition had also been ordered by NEMA but the same was not effected due to court orders against its demolition.
- f) Under the Nairobi regeneration program, the project was still listed for demolition.

### **3. Taj Apartments, Kileleshwa, near the Arboretum**

After conducting an inspection of the encroachment of the riparian area along the arboretum area (Taj Apartments) on 26<sup>th</sup> June, 2018, the following observations were made:

- a) There was a house constructed right on the riparian area. However, NEMA claimed that it was constructed before the Environmental Management and Coordination Act came into force, therefore no action could be taken against the owner since the law would not be applied retrogressively.
- b) The walls done to protect and secure the Taj Apartments were on the riparian area leading to partial reclamation of the river to secure the wall.
- c) There was need to establish remedial action for such buildings that were erected before the enactment of EMCA in regards to the riparian encroachment.

### **4. GemSuites Investment Ltd, Riverside**

After conducting an inspection of the encroachment of the riparian area along the Gem Suites, Riverside on 26<sup>th</sup> June, 2018, the following observations were made:

- a) The wall along the river encroaches on the riparian area. There was need to demolish and move it away from the riparian area.
- b) NEMA and WRA ought to establish if the conditions in their licencing papers were met by the establishment with respect to the wall constructed on the riparian area.

### **5. Alina Villas, Spring Valley**

After conducting an inspection of the encroachment of the riparian area along Alina Villas, Spring Valley on 26<sup>th</sup> June, 2018, the following observations were made:

- a) The proprietor had stuck to the recommended distance with respect to the riparian area.
- b) The Alina Villas was an example of best practices with respect to keeping of riparian areas intact.

### **6. Village Market, Limuru Road**

After conducting an inspection of the encroachment of a wet land and its riparian area along Limuru Road, Village Market on 28<sup>th</sup> June, 2018, the following observations were made:

- a) The proprietors of *Village Market* had set up a waste treatment plant right on the wetland next to its premises.
- b) The wetland had been allocated to individual owners who had titles to the land hence the basis for licencing of the establishment of the waste treatment plant.
- c) The management of Village Market alleged that the waste treatment plant was temporal waiting establishment of a sewer line in the area after which it will be demolished.
- d) There was an advertisement for sale of the wetland next to the waste treatment plant at the time of the visit.

- e) *The Tribe Hotel, Nairobi* had part of its compound and its perimeter wall in the wetland and its riparian area.

#### **7. Ukay Centre Opposite Westgate Mall, Westlands**

After conducting an inspection of the encroachment of the Nairobi river riparian area along Westgate, Westlands area on 28<sup>th</sup> June, 2018, the following observations were made:

- a) The parking lot of the *Westgate Mall* was built on top of the Nairobi River and its riparian area.
- b) The *Ukay Centre* and buildings adjacent to it were built on top of the Nairobi River and its riparian area. This posed a risk to those working there during rainy seasons when the building flood.
- c) The *Ukay Centre* was earmarked for demolition but the same had not been effected at the time of the visit.

#### **8. Sabaki River in Mavoko Sub-County**

After conducting the visit along the Sabaki River in Mavoko Sub-County on 12<sup>th</sup> July, 2018, it was observed that:

1. A wall marking the boundary on the side of Canon Aluminum Fabricators was erected on the riparian area.
2. In the past, Canon Aluminum Fabricators erected a wall on a surveyed public road. However, the wall had since been brought down and moved away from the area meant for an access road.
3. The River Sabaki had been diverted from its original flow as indicated by the difference in the gradient on both sides of the river, clear deposits of soil on one side of the river bordering Canon Aluminum Fabricators and stagnation of the flow of water due to unusual, forced gradient of flow. The representative of Canon Aluminum Fabricators agreed with this observation.
4. River Sabaki had been encroached on by private developers along its course from Syokimau area (360 Estate) to the Athi River area occupied by industries leading to the river changing its original course and massive flooding during rainy seasons. There was therefore need to address the encroachment of the River Sabaki riparian area comprehensively by both WRA and NEMA.
5. There was clear evidence of effluent from Canon Aluminum Fabricators being discharged into the River Sabaki.
6. Water Management Resource Authority (WARMA) had issued orders for riparian area on the river to be cleared off development activity which had not been heeded to;
7. The parties involved (Canon Aluminium Fabricators Ltd and Rogam Investments) had disagreements but they were willing to settle them and vacate the riparian area.

#### **9. Kibarani Dumpsite**

After conducting the visit, the Kibarani Dumpsite in Mombasa County on 29<sup>th</sup> July, 2018, it was observed that:

- a) The Kibarani Dumpsite is the main solid waste disposal site for Mombasa County that had been in existence for 60 years. The Mombasa County Governor had ordered for its

decommissioning. However, the solid waste and the leachate were being pushed into the sea causing a lot of pollution affecting the marine life and also raising fears of sea reclamation.

- b) Due to outcry from various government agencies on the manner in which the dumpsite was being decommissioned, an inter-governmental stakeholder comprising the County government officials and the Ministry of Environment and Forestry was engaging on the process of decommissioning and the way forward after decommissioning.
- c) Mombasa Cement Ltd machineries and equipment were being used to level the solid waste in the dumpsite. The Company was said to be engaging in Corporate Social Responsibility to create a public park in the dumpsite area. However, the leveling was pushing the solid waste into the ocean raising concerns on the safety of the marine life.
- d) There were trees that were being planted in the cleared areas of the dumpsite. However, concerns were raised on the suitability of the species of the trees that had been planted as the areas was said to be good for the mangrove trees being that it was near the ocean.
- e) There was need to establish the ownership of the Kibarani Dumpsite to know whether it was registered as a public land or private land.
- f) Although there were negotiations that were ongoing on the proper way of decommissioning the dumpsite, heavy machinery could be seen moving solid waste into the ocean raising concern of why the decommissioning could not be halted to await a compromised position from the negotiations.

#### **10. Multiple Hauliers EA Limited**

After conducting the visit, the Multiple Hauliers EA Ltd in Mombasa County on 29<sup>th</sup> July, 2018, it was observed that:

- a) Multiple Hauliers EA Ltd is located on the left shores of Makupa Creek between the Mombasa Road/Old Railway line. The area occupied by the MICD storeyed building was next to the Kibarani dumpsite.
- b) Multiple Hauliers EA Ltd started the development of the area around Kibarani in 2009 after acquiring NEMA licenses no. 0009479, 0000580, 0014548, 0008286 and 0003679 for reclamation of land from sea and the necessary building permits from Mombasa Municipal Council.
- c) It was alleged that in September 2016, Water Resources Authority officers had observed that Multiple Hauliers EA Ltd had encroached into the sea front. The officers had therefore requested Multiple Hauliers EA Ltd to provide documentations to verify the extent of their land and approvals for their project from the relevant government agencies. A stop order was issued on 22<sup>nd</sup> September, 2016 by WRA to stop any further work on site. The company however submitted the requisite documentation to WRA through their letter of 3<sup>rd</sup> October, 2016.

#### **11. Makupa Shade Transit Container Depot**

After conducting the visit the Makupa Shade Transit Container Depot in Mombasa County on 29<sup>th</sup> July, 2018, it was observed that:

- a) Makupa Shade Transit Container Depot is located adjacent to and south eastern of the MICD. Their development project included land reclamation from the sea and was said to be an extension of container depot for the Kilindini Port. The company had never applied for permit from WRA.
- b) The proprietor had reclaimed about 400 square metre of land from water. Further, the sea had been blocked and culverts erected creating narrow passage of water from one side of the sea to the other affecting marine life and causing safety issues for the fishermen in the neighbourhood.
- c) WRA had on 3<sup>rd</sup> October, 2016 written to the NEMA County Directors for Mombasa, Kwale, Kilifi and Taita Taveta raising alarm over the issuance of approvals to developers on riparian land without permits from WRA.

## **12. Seefar Apartments/ Nairobi Dam**

The Committee undertook an inspection visit to the Seefar Apartment on Wednesday, 6<sup>th</sup> March, 2019. During the Visit, Mr. Joel Kitili, Ministry of Environment and Forestry briefed the Committee on site that:

- a) The Seefar Apartments were sitting on part of the dam embarkment hence compromising the integrity off the embarkment and the safety of the residents.
- b) There was need to rehabilitate the dam and were plans to have independent engineers to make a technical assessment of the dam before charting the way forward.
- c) The dam was initially used for recreational purposes.

After assessing the state of the Nairobi Dam/Seefar Apartments, members made the following observations, that:

- a) The dam was not operational as it was choked by vegetation and including the water hyacinth. It was serving as a sewage repository from the neighbouring residents.
- b) On the proposal for seeking to have independent consultants to assess the status of the dam, it was noted that it was wasteful of public resources when there existed public institutions whose mandate would include the same.
- c) The ministry ought to urgently ensure the technical report on the dam was provided to the National Assembly as the way forward is charted.

## **3.2 Meeting with the stakeholders on the issue of Riparian Encroachment**

The Committee held meetings with officials from the Ministry of Water and Sanitation and the Ministry of Environment and Forestry on 10<sup>th</sup> July, 2018; Ministry of Environment and Forestry on 22<sup>nd</sup> November 2018 and 7<sup>th</sup> March, 2019 and with the stakeholders and developers on 9<sup>th</sup> August, 2018. Their submissions are as detailed here below;

### **3.2.1 Ministry of Environment and Forestry**

Mr. Julius Sunkuli, the then Principal Secretary in the Ministry of Environment and Forestry appeared before the Committee on 10<sup>th</sup> July, 2018 and briefed as follows, that:

- a) Since the year 2010, the National Environment Management Authority (NEMA) established that there were serious encroachments of the riparian reserves of the rivers within the Country. In some occasions part of these rivers were deliberately diverted from

their course, some portions reclaimed for informal settlement while other sections are narrowed hampering smooth flow of the rivers. During heavy rains, there were flood disasters within close proximity of some parts of these rivers.

- b) To address such incidents that would likely lead to severe impacts on the environment and the lives of the urban dwellers, the Ministry has undertaken several interventions as follows:

i) Legislative Interventions

- a. There were several laws on the protection and management of riparian reserves including: - The Environmental Management and Coordination Act, CAP 387, Environmental Management and Coordination (Water Quality) Regulations, 2006, Water Act, 2002, Surveys Act, Cap 299; Agriculture Act, Cap 318, Survey Act Cap 299, The Physical Planning Act (PPA) Cap 286 and The Water Resources Management Rules (WRMR), 2007.

Legislation	Distance
Proposed Addendum to the Wetlands Regulations , 2009 (not yet gazetted)	<ul style="list-style-type: none"> <li>• Maintain 30m distance from the highest water mark for major rivers (second Schedule)</li> <li>• Twice the rivers width for Other rivers</li> </ul>
Agriculture Act Cap 318 (Basic Land Usage Rules), 1965	<ul style="list-style-type: none"> <li>• Minimum of 2m and a max of 30m but not indicated from what point</li> </ul>
Survey Act, 1989	<ul style="list-style-type: none"> <li>• Minimum of 30m for tidal rivers, no mention of other rivers.</li> </ul>
EMCA (Water Quality Regulations), 2006	<ul style="list-style-type: none"> <li>• Minimum of 6m and a maximum of 30m from the highest water mark.</li> </ul>
Water Resource Management Rules, 2007	<ul style="list-style-type: none"> <li>• Minimum of 6m and a maximum of 30m from the highest water mark.</li> </ul>
Physical Planning regulations, 1998	<ul style="list-style-type: none"> <li>• Minimum of 10m as per the Act</li> </ul>
Physical Planning Handbook (not yet approved)	<ul style="list-style-type: none"> <li>• The Part Development Plan (PDP) of 1998 indicates minimum of 30m for Nairobi River between the Museum Hill and Racecourse round about.</li> <li>• Other rivers, Minimum 10m to a maximum of 50m</li> </ul>

- b. It was with the foregoing that NEMA had spearheaded the development of National Harmonized Riparian Reserves for various water bodies in Kenya.
- c. The harmonized riparian reserves for various water bodies/wetlands in Kenya had been proposed as follows.
- i. For rivers, a minimum of 6m and maximum of 30m measured from the highest water mark (HWM) had been proposed.
  - ii. For the oceans, a riparian reserve of 60m measured from the highest water mark should be maintained.
  - iii. For swamps of average of one (1) acre and above, a riparian reserve of 20m measured from the highest water mark should be maintained
  - iv. For springs, a minimum of 3m and a maximum of 15m of the land adjacent to the eye of the spring should be maintained.
  - v. For Lakes a 30m riparian reserve measured from the highest water mark should be observed.

- d. NEMA had recommended an implementation strategy with a strong component on harmonization of sectoral Laws and stakeholders sensitization and awareness on the importance of riparian reserves.

ii) Licensing and Development Controls

- a. The Environmental (Impact assessment and Audit) Regulations, 2003 came into force in 2004. Projects which existed before 2004 were required to submit Initial Environmental Audit Reports by the end of the year 2005.
- b. Projects that were proposed after coming into force of the Environmental Impact Assessment/Audit Regulations, 2003, were required to conduct Environmental Impact Assessment (EIA) for licensing by NEMA prior to commencement of the proposed developments. The EIA license had conditions for protection of riparian reserves.
- c. The Environmental Management and Coordination (Waste Management) Regulations of 2006 provide for licenses for collection and disposal of different waste streams which are supposed to ensure that no waste is dumped on the riparian reserves.
- d. The Environmental Management and Coordination (Water Quality) Regulations of 2006 provides for Effluent Discharge licenses to ensure that sewage is treated to acceptable standards before disposal to water bodies including riparian reserves.

iii) Environmental Audit, Inspection, Monitoring and enforcement

- All projects were supposed to submit annual environmental Audit indicating compliance to the EMP for the project which is reviewed and revised throughout the project cycle. NEMA's inspectors periodically been conducting on-site inspections to ensure compliance with the set standards, guidelines and licence conditions. NEMA acts swiftly through its Rapid Environment Response Unit to any reported cases of environmental pollution to ensure the integrity of the environment is maintained some of which include riparian reserves.

iv) Development and implementation of Athi- Sabaki River Pollution Prevention and Control Strategy.

- NEMA had been implementing Athi-Sabaki River pollution prevention and control Strategy that seeks to achieve sustainable pollution prevention and control of the River Athi-Sabaki. The implementation of this strategy would put in place the Pollution Management Program and implementable action plan setting targets, timelines, indicators and actors. The implementation of the strategy had achieved the following: -
  - a. Mapping of most discharges, responding to environmental incidences of septic tanks and sewer systems discharges reported by members of the public. NEMA ensures follow ups and stoppage of the discharges.
  - b. NEMA had issued numerous Environmental Restoration Orders to the NCWSC and Athi Water Service Board to stop discharge of untreated sewage from its systems. There had been follow up meetings by NEMA, NCWSC, Athi Water Services Board and with individual members of the public.
  - c. Inventory of sources of pollution had established that most pollution experienced in the rivers had been due to *failed sewerage infrastructure*, Sewage discharge from informal settlements and Industrial Effluents, in addition to illegal disposal of solid waste.

v) Decentralized Functions of the Authority

- NEMA had decentralized its functions to all the 47 Counties and had deployed the County Directors of Environment with delegated powers in line with EMCA, Cap 387. Furthermore, the 47 counties through the County Environment Committees were responsible for the proper management of the environment within the county for which it was appointed and development of County Environmental Action plan every five years. Key among the functions is the protection and management of riparian reserves.

### Other Interventions

#### i. Presidential Directive on audit of Buildings:

Following the tragedy at Huruma Estate in April 2016, H.E. the President ordered an audit of all buildings to assure the public of their safety. A Multi-Sectoral Agency Team was formed to check on encroachment of riparian reserves by illegal developers and demolish the illegal structures and unsafe buildings. The Multi-Sectoral team was chaired by the Secretary National Building Inspectorate (NBI) in the State Department of Housing & Development. The Team consists of the following membership:

1.National Building Inspectorate(NBI)- Chair	7.Kenya Power (KPLC)
2.National Environment Management Authority (NEMA)	8.National Youth Service (NYS)
3.Water Resources Authority (WRA)	9.(Kenya Police Service (KPS)
4.National Construction Authority (NCA)	10.Kenya Pipeline Company (KPC )
5.National Disaster management unit (NDMU)	11.Kenya Urban Roads (KURA)
6.Nairobi City County Government(NCCG)	12.Kenya Railway Corporation (KRC)

*Other agencies and interested parties are co-opted when need arises*

#### ii. Activities of the Multi-Sectoral Agency Team

##### a. Audit and Demolitions

Since its inception the team had audited 4,901 buildings country wide according to their January 2018 report. (Most of the buildings audited were in Nairobi County, with other audits in Kisii, Kiambu and Mombasa). The team inspected, audited and identified buildings for evacuation, demolition or stoppage of on-going project. The recommended action was forwarded to the county government e.g. NCCG for further actions.

*For example; in their meeting of 26/9/17 the team reported audits 25 Buildings along Mombasa Rd (Athi River) and another 11 Buildings at Everest Park, Mombasa Rd, Athi River. Inspected KMA H/Qs in Upperhill where there were complaints of vibrations caused by excavations in Upper Hill Area; Visited the site of the building that collapsed in Kapsabet. Samples for testing were collected for investigations to establish cause of the collapse.*

##### b. Issues demolition Notices

The team issued notices directly to the developer whose building had been identified for demolition or recommended to the respective County Government issued notices and made for follow-up.

##### c. Recommendation for revocation of title deeds

In August 2016, the team requested National Land Commission (NLC) to revoke a lease hold for a plot located in the lower end of Village Market, Gigiri. The plot is on a wetland riparian and should not have been hived off and allocated as a plot for development. The developer had dumped soil in the river to create a firm ground from the wetland leading to diversion of the river from its original course. The request to NLC was to revoke all the certificate of lease to the plot and any other plots allocated along Karura River riparian reserve so as to allow the river to flow to its original course.

d. Carry out Training, sensitization and public awareness campaign

Members of the public were informed of the dangers of encroaching and putting shelter into unstable reclaimed riparian areas, compromising their safety when they encroach into power line, pipeline or railway reserves. The Multi- Sectoral Agency team recommended resettlement of informal settlements (slums) from the reserves.

e. Order Vacation Notices for Building.

The Team could order vacation notices for building identified as unsafe either due to site location, e.g. build in unstable riparian reserve or unsound structural integrity or constructed under power lines.

**On the complementary roles of NEMA and WRA in protection of water resources/riparian areas he stated that:**

- a) To ensure that the River riparian zones (river banks) are conserved in line with the, Wetland Regulations 2009, Water Quality Regulations 2006 and Water Resources Management (WRM) Rules 2007, NEMA together with the Water Resources Authority (WRA) undertakes a comprehensive assessment and pegging of the riparian zone. The assessment then prescribes appropriate riparian zone within which no development is undertaken. The Regulations forbid activities such as building of permanent and temporary structures and clearing of indigenous trees or vegetation on the riparian zone. The proponent is required to consent to and abide by the prescribed conditions of an EIA License.
- b) Furthermore, NEMA in collaboration with the relevant stakeholders had already mapped major wetlands in the country and would soon embark on mapping of other wetland ecosystems in a bid to gazette them and promote sustainable use. Currently, a National Wetlands Atlas and a Water Master Plan for the country's water catchment areas had been developed as important planning and decision-making tools on matters relating to sustainable environmental and wetlands management in the country.

With respect specifically to Seefar Apartments, the Hon. Mohamed Elmi, Chief Administrative Secretary, Ministry of Environment and Forestry appeared before the committee on 22<sup>nd</sup> November, 2018 and informed it that:

1. Edermann Property Limited submitted an Environmental Impact Assessment for the development of 3 blocks of Apartments on Plot L.R. No. 209/12108 in Kibera Highrise, off Mbagathi Way on 18<sup>th</sup> February, 2011.
2. As required by law, the report was dispatched to the following lead agencies seeking their comments, recommendations or objections on the proposed project:

- a) The Director of Housing, Nairobi.
  - b) The Director, Directorate of Occupational Health and Safety Services, Nairobi
  - c) Department of Physical Planning, Ministry of Lands, Nairobi
  - d) The Managing Director, Nairobi City Water and Sewerage Company Limited
  - e) Karen and Lang'ata District Association
  - f) Chief Architect, Ministry of Public Works, Nairobi.
  - g) District Environment Committee/District Environment Officer, Westlands and Lang'ata
  - h) The Town Clerk, City Council of Nairobi,
- 3 A technical review was undertaken on 23<sup>rd</sup> May, 2011 taking into consideration the public disclosure and use of the decision-making principles.
  - 4 Conditions for licensing the project were prepared on 31<sup>st</sup> May, 2011 and the proponent consented to adhere to the conditions of the license on 7<sup>th</sup> June, 2011.
  - 5 The project was issued with an EIA license with conditions on 29<sup>th</sup> June 2011 vide License No. 0008382 and given the following conditions amongst others:
    - (a) Condition 2.1 which stated that the proponent shall ensure protection of the Nairobi Dam and the Ngong River by maintaining a 30M riparian reserve from the water bodies
    - (b) Condition 1.5 which stated that the Authority shall take appropriate action against the proponent in the event of breach of any of the conditions stated herein or any contravention to the Environmental Management and Coordination Act, 1999 and Regulations thereunder.
    - (c) Condition 1.6 which states that the license shall not be taken as a statutory defense against charges of environmental degradation or pollution in respect of any manner of degradation/ pollution not specified herein.
    - (d) Condition 1.9 which states that the proponent shall comply with NEMA's improvement orders throughout the project cycle.
  6. On 14<sup>th</sup> January, 2013, the developer was issued with an Improvement Notice by NEMA Environmental Inspectors requiring them to stop dumping of excavated materials on the riparian land.
  7. During the ongoing Nairobi Regeneration Program, a team of Environmental Inspectors, jointly with officers from Water Resources Authority (WRA) undertaking inspections along Ngong River on 12<sup>th</sup> October, 2018, observed that Edermann Property had encroached into the riparian reserve of the Nairobi Dam as well as Ngong River. The Apartments, as was the case with other structures on riparian reserve, was marked and an Order issued to Erdemann Property Ltd as the proponent in the EIA process. Several structures along Ngong River observed to be within the riparian reserve were also marked and issued with orders, for example 6 houses within the Civil Servant Estate in South "C" and Godowns near Mater Hospital. The identification and marking of structures on the riparian reserve was on-going.
  8. Further investigations indicated that there was violation of Condition 2.1 of the EIA license and hence the order issued was in accordance with Section 117(3)(g) of the Environmental Management and Coordination Act Cap 387;

9. On 15<sup>th</sup> October, 2018, Seefar Homeowners wrote to the Authority challenging the orders by NEMA and WRA. They proposed a joint inspection with NEMA and WRA officers to ascertain their compliance level to condition 2.1. NEMA responded, and informed the home owners on the extension of the order pending consultation with relevant Lead Agencies.
10. On 15<sup>th</sup> October, 2018, Erdemann Property Limited also wrote to NEMA asking that the Order issued to them on 12<sup>th</sup> October, 2018 be revoked immediately. NEMA responded to Erdemann Limited indicating that NEMA would organize and invite their representatives for the requested joint inspection. Further, the Authority extended the Notice for thirty (30) days upto 15<sup>th</sup> November, 2018 to allow consultation and investigation to guide its decision. However, the Assessment and Technical reports were taking a longer time and therefore the ministry had requested the Director General NEMA, to extend the Order from 30 days for a further 90 days upto 15<sup>th</sup> February, 2019 to allow conclusive engagement.

Further, the Cabinet Secretary for Environment and Forestry, Mr. Keriako Tobiko appeared before the Committee with respect to the Seefar Apartments on Thursday, 7<sup>th</sup> March, 2019 and informed it that:

1. On the Status of the Notice issued for the demolition of the Seefar Apartment he stated that:
  - a) Both the Water Resources Authority (WRA) and the National Environment Management Authority (NEMA), extended the period of their respective Orders for a further ninety (90) days. The extension was effective from 13<sup>th</sup> February 2019, the date when the period of previous Orders expired (*he provided the Extension Notices by NEMA and WRA, respectively*).
  - b) The Notices were extended in order to give time to the Multi-Agency Technical Team to carry out a comprehensive study on the safety of the Dam, its potential and the socio-economic implications of rehabilitating or decommissioning it as agreed upon during the meeting held between the Ministry and the Committee on 4<sup>th</sup> December, 2018.
2. On the Multi-Agency Comprehensive report on Safety of Nairobi Dam and the Socio-Economic Implications of Sustaining the Dam he stated that:
  - a) The Committee had given the Ministry a time line of up to end of February to finish the report. However, the report had not been finalized because the Technical Committee resolved to engage a dam expert to carry out the study since two of the key members of the Multi-Agency Technical Team namely WRA and NEMA, were interested parties in the issue. It is therefore prudent to have independent experts to carry out the study to avoid possible conflict of interest.
  - b) The Inter-Agency Technical Team had drawn the Terms of Reference for the study and the process of procuring the dam expert was ongoing. Among the outputs expected from the Study were: -
    - i) Report on Inspection and safety review of the Dam
    - ii) Current built engineering drawings for the Dam infrastructure
    - iii) Dam break analysis and inundation maps: - to show the residences and investments that are at risk should the Dam break and recommend the best way of protecting them

- iv) A detailed analysis on the economic value of the Dam and recommendations on its future existence and use.

### 3.2.2 Ministry of Water and Sanitation

Mr. Joseph Irungu, CBS, the Principal Secretary, Ministry of Water and Sanitation appeared before the Committee on 10<sup>th</sup> July, 2018 and briefed it as follows, that:

1. Whereas the Water Act, 2016 defined what constitutes “riparian habitat”, the Act did not define what comprises “riparian land”. One of the amendments proposed to both Committee of the National Assembly and Senate declined the proposal for the inclusion of this important definition. It may therefore be necessary for this to be considered through an amendment to the Act.
2. The Water Resources Management Rules, 2007 having not been repealed by the Water Act, 2016 empowered the Authority to instruct by an Order, a riparian land owner or user, at his or her cost, to develop and implement a soil and water conservation plan. The activities prohibited on riparian area include: -
  - Tillage or cultivation
  - Clearing of Indigenous trees or vegetation
  - Building of permanent structures
  - Disposal of any form of waste within the riparian land.
  - Excavation of soil or development of quarries
  - Planting of exotic species that may have adverse effect to the water resource.
  - Or any activity that in the opinion of the Authority and other relevant stakeholders may degrade the water resource.
3. Whereas the Water Resources Management Rules, 2007 continued to be in application in respect to Soil and Water Conservation, the function would be ultimately transferred to County Governments for implementation as contemplated under the Fourth Schedule to the Constitution of Kenya, 2010.
4. efforts by the Ministry of Environment and Forestry and the Ministry of Water and Sanitation in the restoration and protection of the riparian areas across the country  
The interventions that were being undertaken by WRA included the following:
  - Gazettement and conservation of Lamu Sand dunes as a Groundwater conservation area. Development of the Lamu Groundwater Conservation Area Management plan and guidelines is underway. WRA is currently working with National Land Commission (NLC) to facilitate the procedural revocation of private titles issued over the groundwater conservation area for purposes of reclamation.
  - Gazettement of Kikuyu Springs Groundwater conservation area (160sqkm) which include Ondiri, Manguo and Lari Swamp and their catchments is ongoing. The gazettelement request, guidelines and conservation plan has been prepared and public participation undertaken. The draft Gazette Notice is due for submission to the Attorney General’s Office for review and Gazettelement.

- Initiated annual Catchment rehabilitation days to create awareness of critical catchment areas in the country. In 2017-2018 catchment fora were held in Lake Victoria North and South, Rift valley and Ewaso Ngiro North water catchments.
  - Conservation of riparian areas by WRA in collaboration with Water Resources Users Associations (WRUAs) in partnership with development partners including World Bank under the Kenya Water Security and Climate Resilience Project in Nzoia and Mwache watersheds.
  - WRA has been carrying out a rapid assessment of the riparian land in all basins across the county for purposes of identifying encroachers. Consequently, it has issued stop orders for encroachers and given conditions for remedial measures and even in some cases prosecuted those found noncompliant.
5. Complementary roles of NEMA and WARMA in protection of water resources / riparian areas. Under Environmental Management Coordination Act and Water Act, 2016 NEMA and WRA have synergized in a number of ways, notable include: -
- Representation of Ministry of Environment and Forestry in WRA governing board where policy issues are synchronized to make them more responsive.
  - NEMA has developed various guidelines on environmental management such as those regulating water quality and wetlands management. Effluent discharge standards have also been put in place under the Water Resources Management Rules 2007 and are implemented by WRA.
  - Banning of plastic paper has enhanced pollution control in water bodies.
  - WRA relies on provisions of the Water Act 2016, Water Resources Management Rules 2007 and EMCA to prosecute pollution related offences under the respective Statutes.
  - Issuance of permits for water projects and schemes are subject to issuance of EIA licences by NEMA. Water Management conditions form part of the licensing requirement of EIA by NEMA.
  - In the event of non-implementation of the provisions of the Water Act, 2016 in respect to aspects of Water Quality, NEMA may invoke the provisions of EMCA to remedy any defects.
  - The Cabinet Secretary for Environment is mandated under EMCA to declare protected areas in respect to water resources. WRA is also mandated under the Water Act to declare protected areas in respect to water resources.
  - WRA issues WRMA Orders to remedy any violations under the Water Act, 2016 while NEMA issues Environmental Restoration orders in respect to contraventions under EMCA.

#### **Observation**

1. There was need to harmonize the definition of a riparian area across the different legal provisions governing different sectors.
2. The National Building Inspectorate ought to implement the 2016 multi sectoral report with respect to encroachment on riparian areas.
3. The approvals issued by NEMA were fast losing credibility since its report on encroachment on riparian areas were not taken seriously.

With respect to the Seefar Apartments specifically, Mr. Mohamed Shuriye the CEO, Water Resources Authority representing the Ministry of Water and Sanitation appeared before the Committee on 22<sup>nd</sup> November, 2018 and informed it that:

1. Between June and August 2011, there were media reports on the impending collapse of Nairobi dam due to excavation done on the Dam embankment during construction works of Seefar Apartments. WRMA responded to this by undertaking an inspection that revealed the following:
  - a) It is true while the Seefar Apartments were being constructed, excavations were made into the dam embankment to create space for the building. In accordance with normal practice, excavating a dam wall weakens it. In this regard a stop was issued on 05/March/ 2011.
  - b) The building site was located on the immediate downstream of the dam wall which is not advisable in law for safety reasons.

As a result:

- i. WRA issued Order No 315 on 20<sup>th</sup> July, 2011 stopping excavation on the plot until Nairobi Dam and Ngong River riparian areas were demarcated and pegged;
- ii. On 22<sup>nd</sup> July, 2011, WRA pegged and demarcated as well as 22m from the highest water mark from Nairobi dam and 15m from Ngong River.
- iii. In 2012 WARMA issued another further order in April stopping further backfilling of the reservoir and returning the water flow through original spillway.
- iv. Erdeman Properties wrote to WRA vide letter Ref. EPL/0172/PRT dated 10<sup>th</sup> April, 2015 requesting for confirmation of the pegging of the riparian land and their compliance with the same. Consequently, WRA staff visited the site on 13<sup>th</sup> and 14<sup>th</sup> April, 2015 and inspected both the riparian and dam repair works. The staff confirmed compliance by the developer. However, the request by the developer and the subsequent inspection and confirmation were not tallying with earlier determinations of the riparian area in 2011. Disciplinary action against the concerned staff was being pursued.
- v. On 12<sup>th</sup> October, 2018, Mr Michael Muturi, a Surface Water Officer with WRA had earlier inspected on 13<sup>th</sup> and 14<sup>th</sup> April, 2015 and confirmed compliance by the developer again issued a demolition order. Consequently, a compliance letter was issued by the then Sub-Regional Manager Samson Oiro to the developer.
- vi. WRA had extended the validity of its Order No 30365 for 90 days from 13<sup>th</sup> November 2018 to give room for further consultations, survey work and investigations before the execution of the order; However, caution needed to be taken because of the eminent danger posed by the dam.
- vii. Due to the complexity of the matter, the developer and house owners requested for a joint multi agency (NEMA, WRA and Survey of Kenya) inspection of the Nairobi Dam and Ngong River riparian reserve in order to address the issue exhaustively. WRA had already written to Survey of Kenya to establish the exact river course of Ngong River.
- viii. On 25<sup>th</sup> October, 2018, WRA wrote to the dam owner (Nairobi City County Government) requesting for a dam safety analysis report within 21 days expiring on 25<sup>th</sup> November 2018.
- ix. There was need to consider the usefulness of the Nairobi dam considering its current status and propose the next course of action for the dam;

x. In conclusion he stated that:

- Seefar apartments were within the riparian land as per 2011 determination. But the original course of Ngong River would be determined by the Survey of Kenya.

There was eminent threat to lives, environment and property due to the likelihood of Nairobi dam breaking since its bank has been weakened by excavation and construction works as per the 2012 order.

### **3.2.3 Meeting with the Stakeholders and Developers from Nairobi and Mombasa Counties**

The Committee met with various stakeholders on the issue of riparian encroachment and conservation on 9<sup>th</sup> August, 2018. Their submissions were as follows:

The following state agencies made submissions:

#### **1. The Village Market**

Mr. Sanjay Shah, Director Village Market, appeared before the Committee and also provided a detailed brief vide a letter Ref: GH/VM/TH/NA/MBR/1 dated 23<sup>rd</sup> August, 2018 submitting that:

- a) Greenhills Investments Limited was the developer of the Village Market hosting a large shopping and entertainment complex. This development was a flagship project supporting the Vision 2030 and the Big Four Initiative.
- b) The settlement NAIROBI/BLOCK/91, Gigiri on which the Village Market stood was created by the government in 1970s after the plots were surveyed by the Director of Surveys and allocated to various individuals. Most of the plots had been developed, others had been subdivided while others had been sold and transferred to other buyers.
- c) NAIROBI/BLOCK/91 was a dense area without a public sewerage network with the main method of waste water disposal being through septic tanks which were largely unhygienic and therefore posed a threat to the underground water.
- d) The Village Market was established in 1995. However, after running the business for several years, and after the completion of other high-end utility facilities such as hotels, considerations were made to come up with a modern and the most environmentally sustainable sewerage plant for use by the entire facility.
- e) Greenhills opted to install the highly advanced, environmentally safe tertiary standard of membrane filtration. Since it required adequate space, Greenhills purchased a high value plot NAIROBI/BLOCK/91/165 to erect the sewerage plant in order to preserve the environment and the ecosystem. The relevant government agencies authenticated the ownership of the property and approved the said purchase as required by law.
- f) The treatment plant occupied a portion of the plot. The plant was neither on riparian nor is it on a wetland as it was over 30 metres from the edge of the river as provided by the regulations.
- g) NAIROBI/BLOCK/91/165 was not a wetland based on the fact that Section 42 of EMCA required the Minister to gazette protected wetlands whereas Part III of the Wetland Regulations required the authority to keep an inventory of wetlands.
- h) The Greenhills' membrane treatment plant was erected with the approvals from the relevant government agencies as provided in the NEMA EIA Licence no. NEMA/EIA/PSL/4522 issued on 3<sup>rd</sup> April, 2017 and WARMA Authorization Ref.No.WARMA/30NRB/BA/14234/E and WARMA/30NRB/3BA/16492/E issued on 20<sup>th</sup> January, 2015 and 9<sup>th</sup> March, 2017 respectively.

- i) The treatment plant was constructed as a temporary measure and would be dismantled immediately the County Government of Nairobi constructed a public sewerage system for the area and connected it to Greenhills.
- j) Greenhills had never blocked any environmental enforcement agencies from accessing or monitoring the operation of the sewerage treatment plant and instead, it encouraged them to inspect frequently.
- k) Greenhills continued to subject the treatment plant to a regular water quality self-test and quality monitoring for effluent discharge into the environment by external or third-party laboratory testing. The relevant government enforcement agencies were continuously monitoring the treatment plant. The results after testing provided high water quality levels of 99.9% safety.

### **Observations**

- i. The Greenhill Investments Ltd, had erected a treatment plant in a wetland next to the Village Market as there was no sewer line to service the area.
- ii. There were plans by the County Government of Nairobi to construct a sewer line from Runda downstream to service the area. Greenhills Investment Ltd had offered to pull down the treatment plant upon the completion and operationalization of the sewer line.
- iii. NEMA and WRA should ensure frequent inspect visits at the Village Market to ascertain that the water quality being discharged into the wetland meets the required standards.

### **2. Gem Suites Investment Limited**

Arch. Nelson Otieno appeared before the Committee and informed it that:

- a) The wall along the Kirichwa River at the Gem Suites facility encroached on the riparian area.
- b) The wall had been put up 9 metres from the centre of the river but due to soil erosion, the distance had drastically reduced to 4 metres.
- c) There was need to demolish and move it away from the riparian area.
- d) NEMA had ordered for the demolition of the wall and installation of a grill that would not obstruct the free flow of the river.
- e) The wall had since been brought down and establishment of the grill was ongoing at the time of the meeting.

### **Observations**

- i. There is need for Gemsuites Investment Limited ensure that the perimeter wall that had encroached into the riparian area is brought down and that it maintains the required distance by law.
- ii. There is need for NEMA and WRA to conduct regular monitoring visits to ensure that the conditions they issue upon licencing developers are adhered to.

### **3. Multiple Hauliers EA Ltd**

Mr. Rajinder Singh, Director at Multiple Hauliers EA Ltd appeared before the Committee and informed it that;

- a) Multiple Hauliers EA Limited land had been acquired from third party owners after doing due diligence on the dates as follows:

- i. LR No: MN/VI/4404 (CR No: 40734) measuring 0.809 Ha – Acquired on 29th October 2007 from Umer Suleman Kara
  - ii. LR No: MN/VI/4405 (CR No: 40733) measuring 1.531 Ha – Acquired on 29th October 2007 from Umer Suleman Kara
  - iii. LR No: MN/VI/4178 (CR No: 36032) measuring 1.730 Ha – Acquired on 29th October 2007 from Umer Suleman Kara
  - iv. LR No: MN/VI/4180 (CR No: 36430) measuring 1.303 Ha – Acquired on 29th October 2007 from Kara Oil Terminal Limited
  - v. LR No: MN/VI/4803 (CR No: 46798) measuring 5.000 Ha – Properties under 1) to 4) were duly consolidated in September 2009 upon surrender of the original titles and a new Title for MN/VI/4803 issued thereafter.
  - vi. LR No: MN/VI/4181 (CR No: 36314) measuring 4.416 Ha – Acquired on 23rd February 2009 from African Banking Corporation as a distress sale by the Bank.
- b) Approval for Project works to commence were provided by the Municipal Council of Mombasa on 18<sup>th</sup> April, 2008 and 9<sup>th</sup> July, 2009 (for some variations were done) respectively.
- c) Multiple Hauliers EA Ltd applied for a NEMA License and obtained approval prior to the commencement of the Project on 20<sup>th</sup> November 2008 and License No: 0003679 dated 22<sup>nd</sup> June, 2009 was issued. Consequently, a further approval dated 9<sup>th</sup> September, 2010 was also issued with some variations/ amendments.
- d) Project Construction works commenced in July 2009
- e) On 22<sup>nd</sup> September, 2010 NEMA issued a cancellation order on their earlier approval of 9<sup>th</sup> September, 2010 along with all other earlier approvals granted.
- f) Upon receipt of the same, Multiple Hauliers EA Ltd filed for an appeal to be heard by the National Environment Tribunal (NET) on 12<sup>th</sup> November, 2010 who deliberated on the matter and issued their conditional ruling dated 31<sup>st</sup> December, 2010 in its favour.
- g) Multiple Hauliers EA Ltd adhered to all conditions of the Ruling under close supervision of NEMA and all other relevant Governmental bodies involved and thereafter, NEMA:
- i. issued Multiple Hauliers EA Ltd with License No: 0008286 dated 21<sup>st</sup> April, 2011 for the Construction of the Project; and,
  - ii. subsequent License Nos: 0009479 dated 7<sup>th</sup> September, 2011 and License No: 0000580 dated 4<sup>th</sup> October 2011 to proceed with the proposed reclamation of the areas where parts of the beacons of the Multiple Hauliers EA Ltd Property fell in the sea along with other areas as defined by the coordinates provided for in the Special Use Licenses dated November 2013 (of an area of 9.6 Ha) and December 2013 (of an area of 34.028 Ha) respectively by the Kenya Forestry Services (KFS). Notably, Multiple Hauliers EA Ltd had been making settlement of the annual fees applicable for all the areas leased to us by KFS since the provision of these Licenses.
- h) Other approvals and licenses obtained by Multiple Hauliers EA Limited as required by law for this development include the following:
- i. Kenya Ports Authority – Approving the project as planned as per their letter dated 23<sup>rd</sup> December, 2008 and 10<sup>th</sup> June, 2010 respectively.

- ii. Ministry of Livestock & Fisheries Development (Fisheries Department) dated 15<sup>th</sup> April 2010
  - iii. Water Resources Management Authority dated 14<sup>th</sup> December, 2010; a further approval letter dated 3<sup>rd</sup> May for the reclaimed area. However, upon an ad-hoc inspection carried out by Officers of WRMA on-site, they issued the Company with a Stop-Order dated 22<sup>nd</sup> September, 2016, followed thereafter another letter dated 3<sup>rd</sup> October, 2016 claiming that the project had encroached on riparian reserve. Multiple Haulier EA Ltd nonetheless, issued supporting documents evidence that it had complied with all necessary protocols and requirements that authorised it to reclaim the land.
- i) Multiple Hauliers EA Ltd had reclaimed 5.740 out of 9.789 hectares whose title number was CR. No. 46798 that had been consolidated from 5 titles (MN/VI/4404, MN/VI/4405 MN/VI/, MN/VI/4178, MN/VI/4180, MN/VI/4181).
  - j) The reclamation of the land was supervised and monitored by GAUFF INGENIEURE (JBG) a renown International Engineering Company from Germany from design to its completion to the required standards.
  - k) The bridge link to Multiple Hauliers EA Ltd to the Port that had 8 box culverts with openings of 2.5 x 2 metres was designed by JBG considering the mitigation of any detrimental effects to the marine life within the creek. However, due to the tidal flow during the high tide at the creek being one directional coming from the Indian Ocean, the water flow was somewhat restricted. The size of these culverts was bigger than those constructed by a neighbouring container depot.

#### Observations

- i. Multiple Haulier EA Ltd had reclaimed 5.740 out of 9.789 hectares of the sea with the approvals from NEMA, WRA, Kenya Ports Authority and Ministry of Livestock and Fisheries.
- ii. It had installed 8 box culverts measuring 2.5 x 2 metres making a bridge that connected the facility to the port. There was therefore need to ascertain that the bridge was not affecting marine life.

#### 4. Ukay Centre (Kental Enterprises Ltd), Westlands

Bimal Shah, Director, Kental Enterprises Ltd (Ukay Centre) appeared before the Committee and informed it that:

- a) Kentel Enterprises Limited were the owners of plot NO LR. 209/11307, LR 209/11308, on which is erected UKAY CENTRE. The original tittle deeds of the above two references plots were issued to 1107- AFRICANA APARTMENTS LIMITED and 11308-MAGUS LIMITED and a term of 99 years on 18<sup>th</sup> May 1990 by the registrar of titles. These companies were owned by the family of the late Gulab R. Raja.
- b) UKAY centre was constructed between 1994 and 1995 after approval of all building plans by the Nairobi City Council on Plot Nos. 11308 and 11307. Architect Satish Shah and Soli Shroff and associate handled all the drawings, approvals and construction of the building. The whole building was leased to UKAY Estate Limited-which was a subsidiary of Nakumatt Limited
- c) In December 2003, Kental Enterprises Limited, purchased both the plots from the First American Bank for Kshs 275,000,000(two hundred and seventy-five million). This transfer

was stamped on the title deeds. A lease for a term of 11 years was registered with Nakumatt Holdings Limited from 1<sup>st</sup> January 2007 and they were responsible to collect all the rents from the tenants as well as maintain the building. Minor internal alterations were done with the City Council's approvals during the years.

- d) In March 2009, they were issued with notices by the Commissioner of Lands for both the titles. They quickly got a court injunction and defended the notices in the High Court of Kenya. Wanjohi consulting engineers were appointed to prepare the canalizing report which was presented to the court together with all the approved plans.
- e) On 12<sup>th</sup> November, 2010 they received revocation of titles by the office of the Town Clerk-Nairobi City Council. Another notice dated 16<sup>th</sup> November 2010 was issued by the City Council of Nairobi regarding encroachment on Mwanzi Road. This case was again defended in the High Court. Survey of the beacon was carried out and no encroachment was found. On 3<sup>rd</sup> August 2011, the Town Clerk City Council of Nairobi withdrew the notice after independent verification and the case was withdrawn. On the 24<sup>th</sup> July 2012, judgement in favour of Kental Enterprises Limited against both cases was entered by Justice Majanja including gazettelement that the said titles cannot be revoked.
- f) In 2001, they had various meetings with City Council officers and Westlands Associations regarding widening of the Mwanzi Road, requesting Kental Enterprises to release ten (10) metres of the plot. However, NO compensation was being paid.
- g) In 18<sup>th</sup> October 2016, a grant of easement was registered with Ministry of Lands and a portion of the land was leased to Sony Holdings Limited belonging to the owners of Westgate Mall to widen Mwanzi Road. This was given for the benefit of the community. The road was widened by the approval of County Council of Nairobi but somehow the levels were raised above the UKAY plot level. This caused flooding at UKAY Centre for the first time in 22 years.
- h) In 2017, Kental Enterprises Ltd appointed Wanjohi Consulting Engineers again to prepare a report on how the canal could be widened to prevent future flooding. They prepared an environment impact report, got all the necessary approvals from NEMA, Water Resources Authority, County Government of Nairobi and paid all the necessary fees, however no work had commenced.
- i) In July 2017 lease with Nakumatt Holdings was terminated due to them not having paid rent for more than 10 months amounting to approximately Kshs. 90,000,000. New leases were registered from December 2017 with all the tenants. Also as tenants were leaving, they decided to refurbish the whole centre by painting, refurbishing the toilets and putting up a mezzanine floor for the members of the public to sit and relax. Approvals of the same were granted by the County Council of Nairobi.
- j) On 23<sup>rd</sup> May 2018, Kental Enterprise Ltd were issued with a notice by the enforcement officers of the County Council of Nairobi which was quickly replied to by the Architect. Another letter dated 6<sup>th</sup> July 2018 was addressed to Architect Satish, regarding building structures and related development by the Chief Officer, Urban Planning.
- k) In view of the negative publicity, most of the tenants had vacated the premises as at 8<sup>th</sup> August 2018. This was a threat to their business.

### Observations

- i. UKAY Centre under Kental Enterprise Ltd had been constructed upon all the requisite approvals been secured from the relevant government offices.

- ii. There had been flooding at the UKAY Centre in October 2016 occasioned by the expansion of the Mwinzi Road. This necessitated the developers of the UKAY Centre to seek necessary approvals to widen the canal underneath the building to avoid future flooding. They sought all the necessary approvals from the relevant authorities. They were however not able to expand the canal as intended as the building was demolished.

#### **4. Makupa Transit Shade Limited**

Mr. Dennis Keiser, Managing Director, Makupa Transit Shade Limited appeared before the Committee and informed it that:

- a) They had reclaimed land from the ocean and it was on one title deed i.e. Plot L.R. No. 4106/VI/MN. A copy of the said title was provided to the Committee.
- b) Plot L.R. No. 4106/VI/MN was owned by Matt International Limited who had granted Makupa Transit Shade Limited exclusive user rights.
- c) On 30<sup>th</sup> January, 2018, the company sought details from the Ministry of Lands and Physical Planning on the process of allocation of Plot L.R. No. 4106/VI/MN. The Ministry confirmed that the land was procedurally allocated (letter dated 9<sup>th</sup> February, 2018).
- d) The development plan was prepared and circulated to the following who supported the allocation of the land: the then Provincial Commissioner, the Director, Land Reclamation Department, the Executive Director, KPA, the Provincial Surveyor, the District Land Officer, and the Town Clerk, Municipal Council of Mombasa.
- e) The Chairman, National Land Commission on 17<sup>th</sup> November, 2016 issued a no objection letter to the company for the reclamation process subject to compliance to the NEMA licence.
- f) The following agencies gave their approval to the company to undertake reclamation on various dates:
  - NEMA
  - County Government of Mombasa
  - Kenya Forest Service
  - Water Resources Authority
- g) The company had applied and was granted approvals to reclaim 9 acres. However, it had reclaimed approximately 6.5 acres and there were no plans for further reclamation since the project had been completed.

#### **Observations**

- i. Makupa Transit Shade Ltd had reclaimed land plot No. Plot L.R. No. 4106/VI/MN from the ocean upon seeking the necessary approvals. The Company had reclaimed approximately 6.5 acres of the 9 acres it had been granted approval for reclamation.
- ii. The government agencies that had issued approvals for reclamation were not keen on ensuring that the conditions set in the approvals were adhered to.
- iii. Makupa Transit Shade Ltd had constructed a bridge with culverts that was constricting the movement of the marine life.

#### **5. Civicon Ltd**

Mr. Geoffrey Muthee, Chief Finance Officer appeared before the Committee and informed it that:

- a) CIVICON Ltd had been granted a special use licence by the Kenya Forest Service for 25 years commencing from 13<sup>th</sup> January, 2009.
- b) The company had obtained approvals from NEMA, KFS and the WRA prior to establishment of its Mombasa facility.
- c) The Environmental Impact Assessment Report by NEMA had been done approving the development of the berthway and shipway.
- d) The company had a special use licence issued to them by the Kenya Forest Service on 13<sup>th</sup> January, 2009.
- e) The company had not reclaimed any land from the Indian Ocean.

His presentation of evidence was however interrupted as it was ruled that he was an employee and not a proprietor of the company and as such would not make any commitments with respect to the company.

#### **6. Mombasa Cement Limited**

Mr. Akram Mohamed Director, Mombasa Cement Limited, appeared before the Committee and informed it that:

- a) The company never owned any land in Kibarani.
- b) The Company was engaged in vibrant Corporate Social Responsibility that had benefitted the locals in Mombasa and beyond.
- c) Mombasa Cement Limited as part of its CSR activities, had lent out its equipment to the Mombasa County Government to help in its efforts to decommission the Kibarani Dumpsite.
- d) The equipment was being utilized under the direction and supervision of the County Government of Mombasa.

#### **Observations**

- i) Mombasa Cement Limited had loaned its equipment to the County Government of Mombasa as part of its Corporate Social Responsibility to assist in decommissioning the Kibarani Dumpsite. However, the Company was not keen to ensure that its equipment were being utilized in a law abiding manner.
- ii) Although the Company was engaging in CSR activities with the County Government of Mombasa, it was not clear on the its terms of reference for the same.

#### **7. National Environmental Management Authority**

Mr. Zephania O. Ouma, Deputy Director NEMA, appeared before the Committee and informed it that:

- a) On EIA Study Report for Multiple Hauliers (EA) Ltd he stated that:
  - i) Multiple Hauliers (E.A) Limited proposed to undertake development of an inland container depots, office block and support facilities on a site whose sections (appr 30% were initially used as a dumping ground by the Municipal Council of Mombasa. The site is situated along the Port Reitz Creek of the Indian Ocean overlooking the Kenya Ports Authority (KPA) to the South. To the North, the site neighbours a railway line, an upcoming development and the Makupa Causeway linking Mombasa Island to West

area. To the East and West it neighbours the old dumpsite area and veterinary offices respectively.

- ii) NEMA granted the approval for the development of an inland container depot and Warehouses to Multiple Hauliers (E.A) Limited on 20<sup>th</sup> November 2008 and an EIA licence No. 0003679 on 22<sup>nd</sup> June, 2009. However, on 27<sup>th</sup> January, 2010 the Authority wrote to the proponent on the following grounds;
  - a. The lack of a decommissioning plan for the site, part of which had previously been used as a dumping site;
  - b. Observation of the riparian reserve setback line;
  - c. That the proponent submits a further EIA with appropriate disclosure of all project activities and anticipated environmental impacts;
  - d. That the proponent submits a decommissioning plan for the sections of the site that had previously been used as a dumpsite; and
  - e. Retrieval of solid wastes pushed into the sea/restoration.
  
- b) On EIA study report for Makupa Transit Shade Limited he stated that:
  - i) An EIA project report (for the proposed reclamation of land from the sea at Makupa Creek on plot L.R No. 4106/VI/MN off Makupa causeway in Mombasa, for the purposes of light industrial use in port related activities was prepared and submitted to NEMA on 18<sup>th</sup> of July 2012 referenced as NEMA/PR/5/2/10,135.
  - ii) After review of the project report, the authority wrote to the proponent on the need to undertake a full EIA study pursuant to section 58 of the Environmental Management and Coordination Act, vide a letter dated 25<sup>th</sup> July 2012. In the letter, the authority stated the need for the following:
    - a. An in-depth evaluation of the potential impacts associated with the proposed reclamation
    - b. Wider public consultation to materialize harmony with the affected and interested stakeholders
  - iii) In this regard, the Terms of Reference (ToRs) for the EIA study were prepared and submitted to NEMA. These were approved on 6<sup>th</sup> August, 2012.
  - iv) The EIA was done and a report prepared and submitted on 22<sup>nd</sup> August, 2012.
  - v) The EIA report and project report were sent to the lead agencies for comments. Upon perusal of the comments and considering all concerns, the NEMA County Director of Environment, Mombasa concluded that adequate public consultation had been done and the project site was appropriate for the kind of project proposed.
  - vi) The project was subsequently licensed with conditions on 17<sup>th</sup> December, 2012.

### **Observations**

- a) There was disconnect between NEMA issuance of EIA licensing with conditions as the developers disregarded the conditions issued by the Authority.
- b) On public participation, NEMA engaged the other state agencies like any other public thereby leading to disconnect between the Authority and the other state agencies.

### **8. Water Resources Authority**

Mr. Mohamed M. Shurie, Chief Executive Officer, Water Resources Authority, appeared before the Committee and informed it that:

- a) On the Authority's position with respect to reclamation of the Indian Ocean he stated that:
- i) WRA was not opposed to the reclamation of the sea as long as it was undertaken in line with the Water Act 2016 (Third Schedule Sec 6 (1) and Water Resources Management Rules 2007 (sec116, 117, 118, 119) (on riparian land conservation). In this regard the Authority may consider allowing reclamation of the sea for purposes of water use but not for construction of permanent structures.
  - ii) Within Makupa creek, WRA had two main concerns, these were:
    - **The Kibarani Dumpsite** where the Municipal Council of Mombasa had been dumping solid waste from the town. Though it had since been decommissioned, it had continued to extend beyond the riparian land into the sea adversely affecting the water quality. Due to its proximity to the sea it was polluting the sea affecting the marine life. In addition to the decommissioning, the Mombasa County Government had been flattening and pushing the garbage into the sea which was introducing pollutants, including heavy metals, grease, plastics and oils into the sea water. To avoid further pollution of the creek and in accordance with sec143 (1) (b) of Water Act 2016 and the Sixth Schedule – Part A of the Water Resources Management Rules 2007, WRA issued order No. 002860 dated 30<sup>th</sup> July, 2018 to stop the levelling and pushing of the garbage into the sea. Water samples were also taken for analysis to determine the extent of pollution. The results from the sample analysis would be analyzed and appropriate measures taken to protect the water resources from further pollution.
    - There were two (2) **Companies** that had been allocated land in the sea and had been issued with licenses and approvals from the other government agencies for the purposes of land reclamation. This reclamation was encroaching into the riparian land which the authority was opposed to as it was for permanent structures and infrastructure, these firms were **Multiple Hauliers EA Ltd and Makupa Transit Shade Container Depot**. On 3<sup>rd</sup> October, 2016, WRA Mombasa office wrote to the NEMA County Directors of Environment raising alarm over the issuance of approvals to developers on riparian land without permits from WRA. These include the requirement for demarcation and observance of the riparian area including the proscribed activities as outlined in the sixth schedule of the Water Resources Management Rules 2007.
- b) On the rationale and copies of the stop orders it gave with respect to on-going constructions by the 2 Companies he stated that the Orders issued to the concerned parties were intended to:-
- i. Stop illegal reclamation of the sea;
  - ii. Stop the prescribed activities from taking place within the riparian;
  - iii. It was done in line with the third schedule of Water Act 2016 and Sec 116-119 of WRM Rules;
  - iv. To instruct the person /agents undertaking these activities to take specific actions as remedial measures under the instruction and supervision of the authority

- v. The orders were to serve as the basis for further legal action, including prosecution and/or removal/demolition/disconnection or any other necessary action that the Authority may deem fit for the preservation and conservation of riparian are.
- c) He concluded by recommending the following:
- i. Survey for Makupa and Tudor creeks to be done a fresh to establish the original boundaries for the sea and the riparian land including beaconing and pegging;
  - ii. A cutline be established to separate and safeguard the sea riparian are from encroachment;
  - iii. The encroached area be recovered and restored to its original states as a riparian land;
  - iv. Remove the sanitation facilities that are on site or near the riparian land and connect to the Mombasa Water and Sewerage Company sewer system;
  - v. The land backfilled and reclaimed by the two (2) companies from the sea should be reverted back to the sea.

### Observations

- i. The Water Resource Authority despite issuing stop orders to various proponent appeared not to utilize all the available mechanisms to enforce compliance as most of their orders were defied.
- ii. The Authority was financially handicapped to facilitate it carry out inspection exercise in the country to ensure compliance.
- iii. The Authority and the National Environment Management Authority appeared to have been working independent of each other which resulted into conflict and confusion in ensuring compliance on the part of the proponents.

### 9. Kenya Forest Service (KFS)

Ms. Monica Kalenda, Acting Chief Conservator of Forests appeared before the Committee and informed it that:

- a) The Kenya Forest Service was formed in 2007 when the Forests Act 2005 was operationalized. The service took over the forest department assets of which forest area was one of them. The service realized that there were many forest encroachers and it embarked on removing them from the forest and mangrove areas.
- b) Due to the absence of clearly marked boundaries between the mangroves areas and land parcels bordering it, many facilities had encroached in. The neighbouring land owners while developing land parcels undertook backfilling and reclamation of the mangrove areas thus interfering with the high tide level. There was also high degradation of the mangrove next to the encroached areas, fishing and landing sites as a result of increased activities.
- c) As a result of the above, Kenya Forest Service assessed the encroached areas to ascertain the illegality. The Service embarked on issuance of special use licences for the purpose of sustained management, control of the site use and to ensure that the environmental standards are followed. This exercise was still ongoing. So far fourteen (14) special use licences had been issued, 16 encroaching facilities had been identified and no new ones were allowed within the mangrove areas.
- d) Multiple Hauliers EA Ltd was one of the facilities with a special use licence and its within Makupa Creek (Kibarani) Mombasa. The special use licence was granted by the Kenya Forest Service to the Multiple Hauliers EA Limited on 7<sup>th</sup> November, 2013. The license

- was for the purposes of permitting the licensee to develop an inland depot, office block and support services and link road to Mombasa port.
- e) KFS evaluated and was satisfied that the proposed activity was in the public interest and agreed to grant a special use licence to the licensee in Makupa Creek Mangrove area. The company licensed 9.6 hectares for a term of 30 years from the date of its execution and upon payment of the required fees and charges.
  - f) The licensee was further required to rehabilitate 40.0 hectares of mangrove area adjacent to the licenced area within Makupa Creek in conjunction with the local community groups spearheaded by Kenya Forest Service and the Community Forest Association.

### **Observations**

- i. The Kenya Forest Service appeared to be lax in mangrove forest protection as they issued special use licence to the developers who had destroyed the mangroves without enforcing for replacement of alternative forest cover for the reclaimed forest areas.
- ii. There was need for a concerted effort from the government agencies mandated to protect the natural resources to work together for conservation purposes.

### **10. Kenya Maritime Authority (KMA)**

Mr. George N. Macgoye, Acting Managing Director Kenya Maritime Authority appeared before the Committee and informed it that:

- a) The Authority had relentlessly continued to pursue efforts to address the growing concern on status and management of Kibarani Dumpsite. This was demonstrated by its actions to organize stakeholders' consultative meetings to address this matter. So far 5 such engagements had been held.
- b) KMA concerns on the Kibarani dumpsite included:
  - i) KMA remained committed to the protection of the marine environment and therefore did not support any unregulated and uncoordinated reclamation of the sea and any dumping of wastes into the sea
  - ii) The reclamation of the sea and dumping of wastes increased the total suspended matter within the water column and sediments within the sea-bed and therefore affected the water quality and consequently threatening the survival of marine life
  - iii) The deposition of bio-degradable wastes into the sea increases the decomposition activity of organic matter by aerobic microorganisms. This increased the demand for dissolved oxygen (DO). Depletion of DO causes stress on aquatic organisms, leading to hypoxia or anoxic environments unsuitable for marine life.
  - iv) Such wastes could entangle marine life and cause death or injuries while some could be mistaken as food by marine life which then would feed on them and cause negative impacts on marine life and human through bioaccumulation.

## Observations

- i. There appeared to have been no demonstratable evidence on the part of the KMA on the action taken to protect the encroachment and polluting of the ocean despite the authority having been mandate to be in charge of the marine.
- ii. The KMA should have worked closely with other agencies such as NEMA and WRA to enforce marine protection from the dumping and reclamation of the ocean.

### 11. The National Land Commission

Prof. Muhammad Swazuri, Chairman, National Land Commission appeared before the Committee and informed it that:

- a) On the ownership details for parcel of land occupied by the decommissioned Kibarani Dumpsite, Multiple Hauliers EA Ltd and Makupa Transit Shades (Mat International), he stated that:

#### i) Land occupied by the Decommissioned Dumpsite

- a. MN/VI/2079: Owned by Ancient Inland Seas Ltd.
- b. MN/VI/1793: Search not obtained. Land owned by Halid Ahmad courtesy of information provided by County Government of Mombasa.
- c. MN/VI/3995: owned by Ancient Inland Seas Ltd, 1.332ha with 99 year lease from 1.3.1996.
- d. MN/VI/4812: Search obtained. Land owned by M-TECH courtesy of information provided by County Government of Mombasa.

#### ii) Plots owned by MULTIPLE HAULIERS EA LTD

- a. MN/VI/4180: CR.No. 36430, Area 1.303Ha. Tenure- leasehold 99 years from 1.10.2002
- b. MN/VI/4404: CR.No. 40734, Area 0.8090 Ha. Tenure- Leasehold, 99 years from 1.10.2002
- c. MV/VI/4405: CR.No. 40733 Area 1.531 Ha. Tenure- Leasehold, 99 years from 1.10.2002
- d. MV/VI/4178: CR.No. 36032 Area 1.730 Ha. Tenure- Leasehold, 99 years from 1.9.2002
- e. MV/VI/4173: Search not obtained. Information provided by the County Government of Mombasa.

#### iii) Plots owned by Makupa Transit Shade Ltd

- a. MV/VI/3910: CR.No. 29322 Area 3.390 Ha. Tenure- Leasehold, 99 Years from 1.1.1996. The plot is in the ocean and part of it was reclaimed
- b. MV/VI/4106: CR.No. 33638 Area 15.27 Ha. Tenure- Leasehold, 99 years from 1.5.1999. The plot is in the ocean.

- b) He had visited the Kibarani area on Friday 3<sup>rd</sup> August, 2018 and observed the high level of encroachment on the ocean. On the particular day, the commission invoked its powers under Section 6 of the National Land Commission Act compelling parties to provide ownership documents to the Commission within seven days.
- c) The Commission's power to review public grants of land as provided in Section 14 of the National Land Commission Act lapsed in May, 2017. The commission had already applied for extension of the review mandate and period before its expiry. There is an urgent need therefore, for the National Assembly to extend the time frame for review of public grants to enable the commission to revert grabbed public land to the public.

#### **Observations**

- i. The National Land Commission was complacent in its duty as the grabbing of the public land around the Makupa area and reclamation of the ocean was going on without its intervention.
- ii. The Commission had instituted the investigation on the area in question after the issue of sea reclamation was highlighted. It ought to have been more proactive.

#### **12. The Kenya Ports Authority**

Although the Kenya Ports Authority wasn't represented in the meeting, it presented through written submissions that:

- An agreement dated 6<sup>th</sup> December, 2011 on Container Freight Stations (CFS) Operations Service Level Agreement Between itself and Makupa Transit Shade.
  - A deed of wayleave dated January, 2013 between itself and Multiple Hauliers EA Limited.
- a) On the agreement between itself and Makupa Transit Shade its stated that:
    - The purpose of the agreement was to enable the authority to monitor the effectiveness of controls and performance of the Container Freight Station operator.
    - The agreement covered the documentation and transfer of containers from the port of Mombasa to the CFS and the delivery of such containers to the end receivers upon fulfilment of statutory requirements.
  - b) On the deed of wayleave between itself and Multiple Hauliers EA Limited its stated that:
    - The purpose of the deed was to grant wayleave rights to the licensee over the plan area under set out terms and conditions.
    - The deed specifies the obligations of the licensee, the obligations of the land lord and other conditions and obligations of the parties.

#### **Observations**

- i. The Kenya Ports Authority despite having signed for agreements for the establishment of the container freight stations to enhance the port effectiveness needed to have worked closely with other government agencies so as to pay more regard to environmental conservation and protection.

### **13. Big Ship Environmental Community Organization**

Mr. Bosco John Juma, Executive Director, Big Ship Environmental Community Organization appeared before the committee and informed it that:

- a) Big Ship was a community driven organization working with the youths, and their communities in conserving the environment and promoting their sustainable development through empowerment programs.
- b) The main problems affecting the marine ecosystem in the Makupa Creek included:
  - **Infrastructural Development** - The destruction of mangroves in Mombasa can be traced back to 1920 and 1940 where the Kipevu Bridge and Makupa Causeway was built respectively. Later over the years the expansion and refurbishment of the infrastructure has continued on the Makupa Creek which has negatively affected the mangrove forests and the marine ecosystem. Currently there are a number of developers reclaiming the Makupa Creek. The area reclaimed is more than 30 acres of the approx. 210 Acres for development facilities and overpasses. Issue of concern on infrastructural compliance includes the size and the dimensions of the openings beneath the two overpasses for free water flow in and out of the Creek. It has been observed that the creek depth is increasing due to high pressure of water passage by the small openings through the overpass built. This development has a lot of negative impacts that include: Reduction in the habitat surface area and fragmentation of the Creek, Cutting of mangrove trees, Reduction in the population of fish.
  - **Oil Spillage** - Oil spillage had also affected the marine ecosystem with five major oil spills in a period of 1983-1993. A major spill in 1988 destroyed 10ha of mangroves in Makupa Creek (FAO, 2005) with its effects, where dried up mangrove tree stood, could still be seen up to date more than twenty years later.
  - **Illegal Waste Dumping** - Illegal dumping site at Kibarani was one of the biggest problems in the Makupa Creek. Solid waste and leachate dumped into the ocean negatively affected the growth and the regeneration of mangroves. The dumping site also destroyed the aesthetic value of the marine ecosystem that could be well seen while passing through the Makupa causeway. While burning waste, smoke from the site filled the air along the causeway and affects the users especially when stuck in traffic.
  - **Urban Settlements** - At Makupa causeway, encroachment on the mangrove forest was rampant. People settled in the mangroves, clear the forest to build settlement structures and dump all their waste into the ocean. The settlers lived not more than 10 meters from the shore of the ocean right into the mangrove forest and solemnly depend on fishing and the marine ecosystem for their livelihood.
  - **Illegal Logging** - It was done along Tudor Creek commercially for timber and charcoal. Most locals cut the mangroves for firewood. Illegal logging reduces the mangrove cover and consequently affects the marine life.
- c) There were three principal developers on Makupa Creek: Multiple Hauliers EA Ltd, Makupa Transit Shade Ltd and Mombasa County Government.
- d) In order to achieve environmental justice in Mombasa, the organization recommended that:
  - There should be accountability of all the parties involved in exploitation of the environmental resources.

- There should be ethical balance between infrastructural development and environmental conservation. Mitigating measures through Corporates Community Social Responsibility initiatives.
- The public should participate as equal partners at every level of decision making in environmental matters
- The creeks need time to recover from the pollution and distraction, part of the Makupa Creek is proposed as a public utility for recreational services. Through the county planning the site to be designed as a landing sight and recreational facility.
- The donor world, and funding institutions should consider directing interventions to the Mombasa Peri-urban mangroves that is experiencing anthropogenic pressure.

**Observation**

Although the Community Based Organization was playing a critical role in championing the cause of environmental protection, they needed to work closely with the government agencies mandated to protect and conserve the environment so as join forces together

#### **4.0 COMMITTEE OBSERVATIONS**

The Committee having conducted inspection visits to various affected areas by the riparian encroachment and having received evidence from various government agencies, the developers and other stakeholders made the following observations that:

##### **Makupa Shade CFS and Multiple Hauliers EA Ltd**

1. Makupa Transit Shade CFS and Multiple Hauliers EA Ltd were collaborating with the Kenya Ports Authority to establish container freight stations in the area as part of the KPA master plan to decongest the port. However, there was need to consider environmental conservation and marine life protection in their quest to support the KPA activities. For instance, Multiple Hauliers EA Ltd was storing clinker which is a dangerous pollutant.
2. The design of the bridges linking Makupa Shade CFS and Multiple Hauliers EA Ltd to KPA were wrongly designed as they affected marine life since the area is a fish breeding ground. There was need to demolish them as they were adversely affecting marine life.
3. Reclamation of land from the sea is allowable by law, though only activities relating to water use were permissible on such land. However, the developers had reclaimed the ocean and used the land for alternative purposes like construction of office blocks, stores and yards.
4. Multiple Hauliers EA Ltd was one of the facilities with a special use licence by the Kenya Forest Service within Makupa Creek (Kibarani) Mombasa. The company leased 9.6 hectares for a term of 30 years. One of the conditions of the license was a requirement to rehabilitate 40.0 hectares of mangrove area adjacent to the licenced area within Makupa Creek in conjunction with the local community groups spearheaded by Kenya Forest Service and the Community Forest Association.

##### **National Environment Management Authority (NEMA) and Water Resources Authority (WRA)**

5. NEMA treated other relevant government agencies like the WRA as any other stakeholder during the EIA processes instead of having structured consultations and seeking its concurrence as a key government agency.
6. NEMA found out that there was dumping in the ocean as attempts to decommission Kibarani dumpsite got underway. It issued a restoration order to the Mombasa County Executive Committee Member in charge of environment which was ignored. The dumping and pushing of the solid waste into the ocean continued unabated. NEMA had therefore failed in its duty by not stopping the dumping of solid waste into the Indian Ocean during the decommissioning of the Kibarani Dumpsite.
7. NEMA approved reclamation of land from the Ocean at Kibarani but failed to follow up to ensure the licensees stuck to conditions of the licences, including the approved sizes for reclamation. This was a clear dereliction of duty. There appeared to have been laxity on the part of NEMA after issuing conditional licenses to developers. There was no proof of follow up inspection and monitoring to ensure the conditions set in their licenses were adhered to.
8. In accordance with sec143 (1) (b) of Water Act 2016 and the Sixth Schedule – Part A of the Water Resources Management Rules 2007, WRA issued order No. 002860 dated 30<sup>th</sup> July, 2018 to stop the levelling and pushing of the garbage into the sea. However the said orders were ignored.
9. The WRA denied issuance of license for canalization at Ukay Centre and the South End Mall.

However, clear records by proprietors of the Ukay Centre indicated that the agency had licensed the canalization.

10. There appeared to be conflict between NEMA and WRA since they issued various contradictory licenses and/or stop orders which cause confusion among developers. Equally, although WRA would issue stop orders to developers along the riparian areas, their orders were usually ignored.

#### **Legal Framework**

11. It was evident that a number of legislations with a bearing on riparian reserve management provide different distances depending on the sector's mandate and priority. This has therefore jeopardized enforcement of these laws and therefore caused encroachment into wetlands and riparian areas. The overlaps in the various laws with respect to the definition of riparian areas was causing implementation challenges. The conflicting laws include: Agriculture Act Cap 318 (Basic Land Usage Rules), 1965, Survey Act, 1989, EMCA (Water Quality Regulations), 2006, Water Resource Management Rules, 2007, Physical Planning regulations, 1998.

#### **Kenya Forest Service (KFS)**

12. One of the conditions of the special use license given by the KFS was a requirement to rehabilitate 40.0 hectares of mangrove area adjacent to the licenced area within Makupa Creek in conjunction with the local community groups and the Community Forest Association. However, there was no evidence of forest restoration on the land provided by KFS for the operators to replace the forest area that had been cleared to erect their freight stations. Equally, the CFS operators at Kibarani were not properly utilizing the land as per the licence, especially with the kind of structures they had put up.

#### **Kibarani Dumpsite**

13. The dumping of solid waste into the Indian Ocean while decommissioning of the Kibarani Dumpsite by the Mombasa County Government caused water pollution through heavy metals and plastic material which pose a threat to marine life. Additionally, it had narrowed the creek almost to an extent of Mombasa losing its island status. Decommissioning was done by pushing solid waste into the ocean instead of moving/ferrying it away. The action risked delisting of the Mombasa Island from the UNESCO World Heritage site list.

#### **The National Land Commission (NLC)**

14. The Kibarani Dumpsite area had been decommissioned by the Mombasa County Government to ensure environmental protection, however there was need for the County Government of Mombasa in conjunction with the National Land Commission to ensure that the land is secured for public utility: preferably recreational services.

#### **Nairobi Regeneration Program**

15. The Inter-Government Agencies that were in-charge of the Nairobi Regeneration Program, while executing their mandate, were not giving due consideration such as adequate notices to the owners and the tenants occupying the buildings erected along the riparian areas. Equally, some of the structures were in place before the applicable laws were enacted. For instance, the Ukay Mall in Westlands which was demolished despite the owner having all the requisite approvals.

### **Gemsuite Investment Limited**

16. Gemsuite Investment Limited had demolished its perimeter wall that had encroached the riparian area along Kirichwa River, Riverside Lane. This was after demolition orders issued by NEMA and an inspection visit to the establishment by the Committee.

### **The Greenhill Ltd (Village Market)**

17. The Greenhill Ltd had erected a sewerage treatment plant on a wetland awaiting the construction of the sewer line by the County Government of Nairobi. The company, in its effort at environmental protection, had adopted the modern technology and subjected the plant to regular self-tests for water quality to ensure it maintained the standards provided for in EMCA and the water quality regulations.

### **Seefar Apartments/Nairobi Dam**

18. The notices for demolition issued by NEMA and WRA on the Seefar Apartments were wanting since the same entities gave approvals for the construction of the apartments. The doublespeak by the government agencies could scare away investors in real estate sector in the country. Equally, there was no technical report by experts on the status of the Nairobi dam to warrant the demolition orders issued against the Seefar Apartments.

### **South End Mall, Langata Road**

19. The Ngong River passes right under the parking lot of the building having been canalised in the compound allegedly after authorization by the Water Resources Authority (WRA). Although Canalization is allowable, it's not meant to facilitate building of structures in the riparian area. NEMA had issued stop and ultimately demolition orders on the project severally but was overruled by the court orders sought by the proprietor. Equally, under the Nairobi regeneration program, the project has since been demolished.

### **Ukay Centre, Nairobi**

21. The Ukay Centre had been built on the Nairobi River riparian area. This posed a risk to those who were working there during rainy seasons when the river floods. The *Centre* was earmarked for demolition but the same had not been effected at the time of the visit. However, the proprietor, in his presentation to the committee provided documentary evidence indicating that the canalization done at his premises had been approved by WRA and NEMA as improvements to conform to EMCA and other applicable laws since the building was constructed before enactment of the said laws. Equally, the parking lot along Mwanzi Road, adjacent to the then Ukay Centre was built on one of the canalised Nairobi River tributary. The Centre has since been demolished.

## **5.0 COMMITTEE RECOMMENDATIONS**

The Committee, having conducted inspection visits to various encroached riparian areas, and having received evidence from various government agencies, the developers and other stakeholders, made the following recommends that:

### **National Environment Management Authority (NEMA) and Water Resources Authority (WRA)**

1. The National Environmental Management Authority (NEMA) should;
  - a) have structured and documented consultations with various other government agencies, especially WRA, before issuing the licences on Environmental Impact Assessment to the developers for proper coordination and conservation of the environmental matters relating to riparian areas.
  - b) always have continuous monitoring on the conditions it issues to developers to ensure adherence by the licencees.
  - c) hold to account its officials who may have irregularly issued developers with licences and/or may have failed to follow up on the conditionalities issued at the point of licensing the developers.
  - d) lobby for adequate resource allocation through its parent Ministry to facilitate it in execution of its mandate.
  - e) withdraw the demolition notices issued against the Seefar Apartments since they had no technical report backing them up. Consequently, NEMA jointly with the Multi-Agency Team should prepare a technical report on the safety and the Utility of the Nairobi Dam and share with the National Assembly before charting the way forward.
  - f) ensure that no further unlawful reclamation of the sea is done in Mombasa to ensure the protection of the marine life and conservation of Mombasa as an island as rated by the UNESCO World Heritage.
2. The Water Resource Authority (WRA) should:
  - a) Initiate, through the parent Ministry, the process of reviewing the Water Act, 2016 to ensure that any inadequacies in the implementation of the act were addressed.
  - b) lobby for adequate resource allocation through its parent ministry to facilitate it in execution of its mandate.
  - c) withdraw the demolition notices issued against the Seefar Apartments since they had no technical report backing them up. Consequently, WRA jointly with the Multi-Agency Team should prepare a technical report on the safety and the Utility of the Nairobi Dam and share with the National Assembly before charting the way forward.
  - d) ensure that no further unlawful reclamation of the sea is done in Mombasa to ensure the protection of the marine life and conservation of Mombasa as an island.

### **The Directorate of Criminal Investigation (DCI)**

4. The Directorate of Criminal Investigation (DCI) should:
  - a) investigate NEMA and WRA officials who may have irregularly issued developers with licences and/or may have failed to follow up on the conditions issued at the point of licensing the developers. If criminal culpability is established, the said individuals should be prosecuted.

- b) investigate how the entities such as Makupa Shade CFS and Multiple Hauliers EA Ltd and Civicon Limited and other companies acquired titles to the land around Kibarani area and take necessary actions, if fraudulent acquisition is proven.

### **Ministry of Environment and Forestry**

8. Ministry of Environment and Forestry should:

- a) lobby for and allocate adequate resources to NEMA to build its capacity in environmental conservation in light of the fact that the Environmental Impact Assessment (EIA) fees payments to NEMA were abolished thereby reducing the funds available to the Authority.
- b) in conjunction with the County Government of Mombasa and other state agencies ensure that the solid waste dumped into the ocean during the decommissioning of the Kibarani dumpsite was removed and safely disposed.
- c) in conjunction with the Nairobi City County Government and the Ministry of Water and Sanitation, rehabilitate the Nairobi dam to its former state or otherwise decommission it.

### **Ministry of Water and Sanitation**

9. The Ministry of Water and Sanitation should:

- a) lobby for and allocate adequate resources to WRA to build its capacity in its function of protecting and conserving water resources.
- b) collaborate with the Ministry of Environment and Forestry and the Nairobi City County Government to ensure that the Nairobi regeneration program achieves the intended results especially in the construction and maintenance of sewer line in a bid to ensure that the rivers are well protected from solid waste.
- c) work at rehabilitating the Nairobi dam so that it can resume its former utility and glory, in conjunction with the Ministry of Environment and Forestry and the Nairobi City County government.
- d) put up a sewer line to the village market area (Greenhill Ltd), in conjunction with the Nairobi City County Government, and subsequently ensure the treatment plant on the wetland next to the premises was decommissioned.

### **Legal Framework**

10. The Ministry of Water and Sanitation should initiate a multi-agency discussion with the Council of Governors, office of the Attorney General, Ministry of Environment and Forestry, Ministry of Agriculture, and Ministry of Lands and other stakeholders to harmonize the definition of the riparian land/area to avoid conflict in the implementation by the various government agencies on matters regarding riparian conservation.

### **Kibarani Dumpsite**

11. The Ministry of Environment and Forestry in conjunction with the County Government of Mombasa and the Ministry of Water and Sanitation should:

- a) prevent future setting up of dumping sites near water bodies in order to protect and conserve the water resources.
- b) ensure that the decommissioned Kibarani Dumpsite land is well protected and reserved for public utility.

#### **Makupa Shade CFS and Multiple Hauliers EA Ltd**

11. NEMA and WRA should ensure demolition of the bridges linking Makupa Shade CFS and Multiple Hauliers EA Ltd to KPA **within six (6) months** of adoption of this report by the National Assembly. The bridges were wrongly designed and hence adversely affected marine life, especially the area being a fish breeding ground. Equally, they were posing life threatening danger to the fishermen due to their interference with the tidal waves.

#### **National Land Commission (NLC)**

16. National Land Commission (NLC) should:
  - a) investigate how the following entities acquired titles to the land in the ocean and revoke the titles, if fraudulent acquisition is proven: Makupa Shade CFS and Multiple Hauliers EA Ltd and Civicon Limited.
  - b) ensure that all public land fraudulently acquired around Kibarani Area is reverted to be public land and secured.

#### **Nairobi Regeneration Program**

17. The Inter-Governmental Agencies team in charge of the Nairobi Regeneration Program should:
  - a) act within the legal limit providing adequate notice to the owners and the tenants occupying the buildings constructed along the riparian areas.
  - b) not apply EMCA and other relevant laws retrogressively to affect structures put up before the laws were enacted. Instead special consideration on conformity should be given to buildings constructed before the laws were enacted.

#### **Kenya Forest Service (KFS)**

18. The Kenya Forest Service should ensure that Multiple Hauliers EA Ltd rehabilitates 40 hectares of mangrove area adjacent to the licensed area within Makupa Creek in conjunction with other stakeholders as part of the conditions in the special license issued.

#### **Kenya Ports Authority (KPA)**

19. The Kenya Ports Authority should ensure that environmental protection and conservation is prioritized by partners who support port activities in the development of the containers freight stations.

#### **Greenhill Ltd (Village Market)**

20. Greenhill Ltd (Village Market) should decommission the sewer treatment plant upon the construction of the sewer line in its vicinity by the County Government of Nairobi.