

The Application of the “Brasilia Declaration of Judges on Water Justice” (The Brasilia Declaration) in Kenya

Prepared and presented by:
Hon. Justice Oscar.A. Angote,
Judge, Environment and Land Court,
Machakos, Kenya.
July 17th 2020

Introduction

- ▶ Attaining water security and sustainable use of water resources are global critical challenges of the 21st Century.
- ▶ About 60% of the world's population lives in water stress areas and one out of 9 people do not have access to clean water(Water Aid Report, 2018).
- ▶ The report ranks Kenya among the ten countries with the lowest access to clean water close to home in relation to its population.
- ▶ The UN also categorizes Kenya as chronically water-scarce(UNDP,2012).
- ▶ Sound regulatory frameworks and strategies that guide the governance of water resources are central to water justice.

Introduction Cont'd...

- ▶ The UN Human Rights Council affirmed the human right to water and sanitation as legally binding (September, 2010).
- ▶ The Council emphasized the right as being derived from the right to an adequate standard of living recognized by ICESCR and UN Convention on the Rights of Children.
- ▶ The Brasilia Declaration of Judges on Water Justice adopted at the 8th WWF recognizes 10 Principles related to environmental stewardship and Sustainable Development .
- ▶ The Declaration is an affirmation of the SDGs, the Paris Agreement and several other MEAs.

Introduction cont'd...

- ▶ Despite the progress in increasing access to clean drinking water and sanitation, billions of people still do not have this access. Covid-19 has further demonstrated the urgent need for the same.
- ▶ The Kenyan government has implemented water sector reforms over the years e.g. Water master plans, National Water Policies, the 2010 Constitution and Water Act 2016 (Article 43 (1) (d))
- ▶ The Constitution/Act recognizes the shared responsibility of water provision between national and county governments.
- ▶ The Act prioritizes the use of water consumption over irrigation and other uses.

Principle 1-Water as a Public Good

- ▶ Obligates states to exercise stewardship over water resources and protect them with their ecological functions for the benefit of current and future generations, and the Earth community of life.
- ▶ Pure public goods have two defining features: '*non-rivalry*,' and '*non-excludability*,'.
- ▶ Public goods are defined in contrast to private goods, which are, by definition, both rival and excludable.
- ▶ Most environmental resources like water are characterized as public goods.
- ▶ This is true only at low demand where water is plentiful and not in scarcity.

Cont'd...

- ▶ States parties have an obligation to meet the minimum water requirements for human survival and dignity for all.
- ▶ There is an increased entrenchment of human rights approach to judicial spheres; internationally, regionally and nationally to secure and clarify the right to water in case of violations.
- ▶ The Kenya Constitution requires affirmative action; to ensure all minorities and marginalised groups have access to water and sanitation.
- ▶ Although the State owns all water resources, the Constitution devolves provision of water and sewerage services to the 47 County Governments.

Role of the Judiciary-Locus classicus cases

- ▶ In *Murang'a County Government v Murang'a South Water & Sanitation Co. Ltd & another* [2019] eKLR , the court upheld the role of county governments concerning approval of water and sewerage tariffs in line with the objects and principles of devolution
- ▶ In *Kapa Oil Refineries Limited & 7 others v Export Processing Zones Authority & 2 others* [2019] eKLR , the court considered the issue of water being a public good and reiterated the 2010 UNGA declaration of safe and clean drinking water and sanitation as a human right under international law.

Role of the Judiciary Cont'd...

- ▶ In the same case, the court addressed the issue of *commodification* of water as follows: *“Commodification of water is undemocratic and centralizes the control over decision making and resources; destroys natural resources and erodes the democratic base of politics.”*
- ▶ On the issue of privatization, the court stated as follows: *“The Water Act, 2016 recognizes that water belongs to the State and is to be managed and supplied for the benefit of the people, the negative effects of privatization of the provision of water and sewerage services points to the contrary.”*
- ▶ The above decisions lend credence to the Brasilia Declaration’s 1st Principle that the *State should exercise stewardship over all water resources for the benefit of the current and future generations.*

Principle 2 - Water Justice, Land Use, and the Ecological Function of Property

- ▶ “Any person with a right or interest to use water resources or land has a duty to maintain the ecological functions and integrity of water resources and related ecosystems.”
- ▶ The ecological functions and integrity of water resources are supposed to be protected by riparian land owners and upstream users.
- ▶ This principle has been reinstated by the courts in Kenya in a number of cases, alongside *Principle 3* which provides as follows: “*Indigenous and tribal peoples’ rights to and relationships with traditional and/or customary water resources and related ecosystems should be respected, and their free, prior, and informed consent should be required for any activities on or affecting water resources and related ecosystems.*”

Cont'd...

- ▶ In *Friends of Lake Turkana Trust vs Attorney General & 2 others [2014] eKLR*, court stated as follows:
 - ▶ “That the Petitioner has shown that the harnessing of such electricity in Ethiopia is likely to affect its right to life and livelihood and its cultural and environmental heritage;
 - ▶ The Government to take the necessary steps and measures to ensure that the natural resources of Lake Turkana are sustainably managed, utilized and conserved in any engagement with, and in any agreements entered into or made with the Government of Ethiopia, relating to the purchase of electricity generated from Gibe Dam III.”

Cont'd...

- ▶ The importance of maintaining the ecological functions and integrity of water resources and related ecosystems was emphasized in the case of *Luo Council of Elders & 8 others v County Government of Bomet & 24 others [2018] eKLR* in which the court found the down stream users of river Sondu and Itare will not be affected by the construction of Itare Dam upstream. The court stated as follows:
- ▶ “Only 6% of the total Sondu Miriu Water Catchment area would be affected by the construction of the dam and only about 4% of the water flow from the Itare River would be utilized for the Dam; that the water flow of the river will not be significantly interfered with and that the Dam will harvest and store flood water from the rains and an environmental water spillway would ensure there was uninterrupted water flow downstream throughout the year.”

Principle 5 & 6 - Water Justice and Precautionary principle

- ▶ *“Consistent with the principle in dubio pro natura, in case of uncertainty, water and environmental controversies before the courts should be resolved, and the applicable laws interpreted, in a way most likely to protect and conserve water resources and related ecosystems.”*
- ▶ This principle has been applied by Judges in Kenya, requiring that environmental justice should be upheld in water disputes.

Con'td

- ▶ In *County Government of Kitui v Sonata Kenya Limited & 2 others [2018] eKLR* the court stated as follows:
- ▶ “It is not plausible to argue, as the Respondents have argued, that there is no evidence to show that the asbestos are likely to degrade the water catchment area. Under the precautionary and prevention principles, lack of full scientific certainty of what will happen to the underground water cannot be a reason for this court not to issue interim conservatory orders.”

Cont'd...

- ▶ Water Justice, like environmental justice, entails the right to have access to environmental information, participation and involvement in decision making.
- ▶ In the Friends of Lake Turkana case (supra), the court stated as follows:
- ▶ *'The Court is alive to the right to access information that is provided under Article 35 of the Constitution, public participation can only be possible where the public has access to relevant information, and is facilitated in terms of reception of views. It is the view of this Court that access to environmental information is therefore a prerequisite to effective public participation in decision-making and to monitoring governmental and private sector activities on the environment.'*

Conclusion

- ▶ ‘Water Justice’ examines issues of procedural equity and access to the processes of justice in the utilization of fresh water.
- ▶ The necessary policies, legal and institutional framework is crucial in ensuring that water justice has been attained in a uniform and consistent manner.
- ▶ In Africa, water justice entails the right to have access to, use and control over water by communities, which is in tandem with Principle 8 on water justice and good water governance.
- ▶ The Principle of Water Justice has been reinstated in numerous decisions by the courts in Kenya.
- ▶ The courts in Kenya have been consistent in upholding the internationally accepted principles meant to attain the principles of water justice, including the ‘The Brasilia Declaration of Judges on Water Justice.’

THANK YOU
(ASANTE)