Case Number:	Petition 1 of 2016
Date Delivered:	16 Jul 2020
Case Class:	Criminal
Court:	Environment and Land Court at Mombasa
Case Action:	Judgment
Judge:	Anne Omollo
Citation:	KM & 9 others v Attorney General & 7 others[2020] eKLR
Advocates:	-
Case Summary:	-
Court Division:	Environment and Land
History Magistrates:	-
County:	Mombasa
Docket Number:	-
History Docket Number:	-
Case Outcome:	Petitioners awrded
History County:	-
Representation By Advocates:	-
Advocates For:	-
Advocates Against:	-
Sum Awarded:	-

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT MOMBASA

PETITION NO. 1 OF 2016

IN THE MATTER OF THE ENFORCEMENT OF THE BILL OF RIGHTS UNDER ARTICLES 22(1) (2) (C) 23, 70, 162, 165(3) (B) AND 258 OF THE CONSTITUTION OF KENYA

AND

IN THE MATTER OF AN ALLEGED CONTRAVENTION OF ARTICLES 2(1) (5) (6), KENYA 10, 19(1) (2) (3), 20(1), (2), 21(1), (3), (4), 26, 35(1), (3), 42, 43(a) (d), 69(1)9d) (f), (g), (2) AND 70 OF THE CONSTITUTION OF KENYA

AND

IN THE MATTER OF AN ALLEGED CONTRAVENTION OF ARTICLE 12(1), (2) (a) (b) OF THE INTERNATIONAL COVENANT ON ECONOMIC SOCIAL AND CULTURAL RIGHTS (ICESCR)

AND

IN THE MATTER OF AN ALLEGED CONTRAVENTION OF ARTICLE 24(2) OF THE CONVENTION OF THE RIGHTS OF THE CHILD (CRC)

AND

IN THE MATTER OF AN ALLEGED CONTRAVENTION OF ARTICLE 4 OF BASEL CONVENTION ON THE CONTROL OF TRANSBOUNDARY MOVEMENT OF HAZARDOUS WASTE AND THEIR DISPOSAL

AND

IN THE MATTER OF AN ALLEGED CONTRAVENTION OF THE BASEL CONVENTION TECHNOCAL GUIDELINES FOR THE ENVIRONMENTALLY SOUND MANAGEMENT OF WASTE LEAD-ACID BATTERIES

AND

IN THE MATTER OF AN ALLEGED CONTRAVENTION OF ARTICLE 16 AND 24 OF THE AFRICAN CHARTER ON HUMAN AND PEOPLE'S RIGHTS (ACHPR)

AND

IN THE MATTER OF AN ALLEGED CONTRAVENTION OF ARTICLE 111 OF THE TREATY FOR THE ESTABLISHMENT OF THE EAST AFRICA COMMUNITY (EAC)

AND

IN THE MATTER OF SECTIONS 58 AND 68 OF THE ENVIRONMENTAL MANAGEMENT AND COORDINATION

ACT CHAPTER 387 OF THE LAWS OF KENYA

AND

IN THE MATTER OF THE ENVIRONMENTAL MANAGEMENT AND COORDINATION (ENVIRONMENTAL IMPACT ASSESSMENT/ENVIRONMENTAL AUDIT) REGULATIONS OF 2003

AND

IN THE MATTER OF THE ENVIRONMENTAL MANAGEMENT AND COORDINATION (WATER QUALITY) REGULATIONS OF 2006

AND

IN THE MATTER OF SECTIONS 24, 36 AND THE SECOND SCHEDULE OF THE PHYSICAL PLANNING CAHPTER 286 OF THE LAWS OF KENYA

AND

IN THE MATTER OF THE PUBLIC HEALTH ACT CHAPTER 252 OF THE LAWS OF KENYA

AND

IN THE MATTER OF SECTION 23(2) (c) OF THE EXPORT PROCESSING ZONES ACT CHAPTER 517 OF THE LAWS OF KENYA

BETWEEN

KM (Minor suing through Mother and Best-friend **SKS .....1ST PETITIONER**

IRENE AKINYI ODHIAMBO.....2ND PETITIONER

MILLICENT ACHIENG AWAKA.....3RD PETITIONER

ELIZABETH FRANCISCA MWAILU.....4TH PETITIONER

ELIAS OCHIENG'..... .....5TH PETITIONER

JACKSON OSEYA.....6TH PEITITONER

HAMISI

TH PETITIONER

DANIEL OCHIENG OGOLA
.....8TH PETITIONER

MARGARET
AKINYI..... 9TH
PETITIONER

CENTER FOR JUSTICE GOVERNANCE AND ENVIRONMENTAL ACTION (suing on their own behalf and

on behalf of all the residents of Owino-Uhuru Village in Mikindani, Changamwe Area Mombasa **.... 10TH PETITIONER**

- VERSUS -

THE HONOURABLE ATTORNEY GENERAL..... 1ST
RESPONDENT

THE CS, MINISTRY OF ENVIRONMENT, WATER AND NATURAL RESOURCES .....2ND RESPONDENT

THE CS, MINISTRY OF
HEALTH .....3RD RESPONDENT

NATIONAL ENVIRONMENT MANAGEMENT AUTHORITY..... 4TH
RESPONDENT

THE COUNTY GOVENRMENT OF MOMBASA.....5TH
RESPONDENT

THE EXPORT PROCESSING ZONES AUTHORITY.....6TH
RESPONDENT

METAL REFINERY (EPZ) LIMITED .....
7TH RESPONDENT

PENGUIN PAPER AND BOOK COMPANY.....8TH
RESPONDENT

J U D G E M E N T

1. This suit was commenced by way of a constitutional petition dated 20th February 2016. The Petitioners are suing on behalf of themselves and fellow residents of Owino-Uhuru Village within Changamwe Division, Mikindani area of Mombasa County. They pleaded that they have been living in the village situate on plot no. 148/V/MN in Mikindani that sits on about 13.5 acres of land. That the village which is a densely populated area was set up in the 1930s and 40s with many of the villagers having lived thereon for several decades. The Petitioners' claim against the respondents is that the 8th Respondent leased a neighbouring plot to the 7th Respondent which set up a lead acid batteries recycling factory which activity produced toxic waste. That the waste seeped into the village causing the Petitioners and area residents various illnesses and ailments as a direct consequence of lead poisoning with more than 20 deaths attributed to it.

2. It is the Petitioners' case that the activities of the 7th Respondent were licensed and sanctioned by State actors contrary to their mandate to observe, respect and promote the Bill of Rights as stipulated by article 21(1) of the constitution. Hence, the Petitioners' seek the following reliefs:

i. A declaration that the Petitioners' right to clean and healthy environment guaranteed by Article 42 of the constitution, Article 12(2)(b) of the International Covenant on Economic, Social and Cultural Rights (ICESR) and Article 24 of the African Charter on Humans and People's Rights (ACHPR) have been contravened by the actions and omissions of the Respondents

ii. A declaration that the Petitioners' right to the highest attainable standard of health and right to clean and safe water as guaranteed by Article 43(1)(a) and (d), Article 12 (1) and (2)(a) of the International Covenant of Economic, Social and Cultural Rights (ICESR), Article 24 of the Convention of the Rights of the Child (CRC) and Article 16 of the African Charter on Humans and People's Rights (ACHPR) have been violated by the actions and omissions of the Respondents.

iii. A declaration that the Petitioners' Right to life as guaranteed by the provisions of Article 26 of the Constitution have been violated by the actions, inactions and omissions by the Respondents.

iv. A declaration that the systematic denial of access to information to the Petitioners by the Respondents about how exposure to lead would affect them and what precautionary measures to be taken violated the Petitioners' right to information as provided under Article 35(1)(a), (b) and (3).

v. An order of compensation to the Petitioners for general damages against the Respondents for the damage of the Petitioners' health and environment and for the loss of life.

vi. An order of mandamus be issued against the 2nd, 3rd, 4th and 5th Respondents directing them to carry out a comprehensive participatory scientific study within 60 days from the date of judgment at Owino-Uhuru village to ascertain the levels of lead in water, soil, animals and human bodies of the residents including the Petitioners.

vii. A mandamus order be issued against the 2nd, 3rd, 4th, 5th, 6th, 7th and 8th Respondents directing them to within 90 days from the date of the judgment to implement recommendations in a report prepared by the Lead Poisoning Investigation Team of the 3rd Respondent dated April 2015 and another by the Senate Standing Committee on Health dated 17th March 2015 including adequately cleaning up and remediating contaminated water and soil in Owino-Uhuru village and offering adequate health services to the residents including the Petitioners and animals affected by the exposure to lead from the 7th Respondent's manufacturing plant.

viii. An order of mandamus be issued against the 1st, 2nd and 4th Respondents directing them to develop and implement regulations adopted from best practices with regard to lead and lead alloys manufacturing plants.

ix. An order of mandamus be issued against the 1st, 2nd and 4th Respondents to take steps towards ensuring that regulations dealing with licensing, setting up, operation, supervision of the activities as well as independent scientific monitoring of all entities dealing in hazardous materials are designed, enacted and implemented to provide effective deterrence against the threats to protected rights under the constitution.

x. Any other relief the Court deems fit.

3. The Petition is opposed vide the following:

i. 1st, 2nd and 3rd Respondent's Grounds of Opposition dated and filed on 16th May 2018

ii. 4th Respondent's Replying Affidavit filed on 2nd March 2018

iii. 5th Respondent's Replying Affidavit filed on 16/3/2018

iv. 6th Respondent's Response in Opposition to the Petition filed on 2nd March 2018

4. In their grounds of opposition, the 1st, 2nd and 3rd Respondents faulted the Petition for being an abuse of court process and defective. That the petitioners have not demonstrated how their constitutional rights have been violated nor has the petition set out the acts and omissions complained of with reasonable precision as against the 1st, 2nd and 3rd Respondents. They contended further that the Court had not been moved appropriately and that there was no legitimate claim against them.

5. Zephania Ouma employed by the 4th Respondent as the Deputy Director Compliance swore the replying affidavit on behalf of the 4th Respondent. He deposed that the 7th Respondent submitted an Environmental Impact Assessment Project Report through Greenworld Ecosystem Consultants to the 4th Respondent on 13th March 2007. That pursuant to the Environmental Management and Co-ordination Act and the Environmental (Impact Assessment and Audit regulations) 2003; the report was circulated to lead agencies. Thereafter, the 4th Respondent gave a cessation and restoration order to the 7th Respondent after a site inspection revealed that they were undertaking smelting of scrap lead acid batteries without an Environmental Impact Assessment License. Later, the 4th Respondent gave the 7th Respondent conditions for approval. Upon compliance, the 7th Respondent was authorised to carry out trial runs vide a letter dated 11th June 2007.

6. The deponent narrated further that an Environmental Impact Assessment License was issued on 5th February 2008. That he was aware that sometime in 2009, the 7th Respondent was closed by the Ministry of Health and Sanitation for 6 months. Thereafter, the National Environment and Management Authority issued the 7th Respondent with an improvement order dated 15th September 2009. That the Municipal Council of Mombasa also conducted inspections at the 7th Respondent's premises on 19th October 2009. Seemingly, the 7th Respondent did not comply with conditions issued by National Environment and Management Authority after its annual audit reports as well as those of the Ministry of Public Health and Sanitation Services after routine inspection.

7. He deposed that National Environment and Management Authority finally decided to close down the factory on 29th November 2013. That way after it was confirmed that the factory was no longer in operation, the 4th Respondent was invited by the Senate Standing Committee to investigate the new factory owners, Max Industries Ltd pursuant to a petition filed by the area residents. It was further pleaded that Max Industries tried to have its EIA Licence transferred to another entity; Kenindo Metals Limited which request the 4th Respondent declined to authorize; reason being that the cessation order was still in force pending investigation. In May 2015, a task force was constituted to initiate a decommissioning strategy. Its resultant report together with a policy paper on remediation was forwarded to the 2nd respondent awaiting policy direction in accordance with the requirements of the Environmental Management and Co-ordination Act. The deponent opines that the 4th Respondent did everything within its mandate to protect the petitioners by taking all necessary steps to ensure that the project was legally compliant.

8. The 5th Respondent's response was vide a replying affidavit sworn by its attorney, Mtalaki Mwashimba. He gave evidence that the 7th Respondent's factory was set up after its owners obtained approvals from all the relevant ministries and departments. That the 5th Respondent played a very minor role which was issuance of a single business permit after inspection to ensure whether the plant complies with physical health requirements such as adequate ventilation, fire exits and presence of fire-fighting equipment. With regard to the subject matter of the suit being excessive lead levels; the deponent stated that the 5th Respondent's predecessor was not involved in determining the toxicity of lead levels encountered by humans.

9. That all necessary Environmental Impact Assessment Tests were done by the 4th Respondent in conjunction with all stakeholders dealing with environmental matters at national level before permitting the setting up of the plant. Since the plant was set up before the establishment of the County Government of Mombasa, the current dispensation. Even so, the Municipal Council of Mombasa acted in accordance with the applicable law thus absolving the 5th Respondent from blame for the misfortune that befell the residents of Owino Uhuru Village.

10. The 6th Respondent's affidavit was sworn by its Chief Executive Officer, Fanuel Kidenda. He deposed that the 7th Respondent applied to the 6th Respondent for an Export Processing Zone Manufacturing License which application was provisionally approved in a principle letter citing certain conditions to be fulfilled before the 7th Respondent could be issued with an EPZ manufacturing licence. The conditions included in part that the 7th Respondent was to submit a certified copy of an Environmental Impact Assessment License from the National Environment Management Authority for the project; and to comply with the provisions of the Export Permit and Mineral Dealers License issued by the Commissioner of Mines and Geology. The said licences were obtained prompting the 6th Respondent to issue the 7th Respondent with an Export Processing License in December 2006 which was valid until 15th December 2007.

11. However, vide a letter dated 12th June 2008, the then Municipal Council of Mombasa (Office of the Medical Officer for Health) shut down the 7th Respondent's company under the Public Health Act Cap 242 which closure notice was lifted barely a month later vide a letter dated 4th July 2008. Concerned by the aforesaid events, the 6th Respondent wrote to the 7th Respondent highlighting environmental and public health compliance issues to be undertaken by the 7th Respondent before their licence could be renewed. It is pleaded further that the Ministry of Public Health and Sanitation services also gave the 7th Respondent recommendations on compliance measures evidenced by various correspondences dated 7th May, 14th July and 2nd and 14th September 2009. The Ministry carried out inspections prior to making its recommendations and after carrying another inspection afterwards gave the 7th Respondent a clean bill of health for having achieved most of the conditions and omissions identified at the earlier inspection.

12. The deponent continued that vide a letter dated 23rd December 2009, the Ministry of Public Health and Sanitation Services once again directed the 7th Respondent to cease operations for the year 2010. That the 7th Respondent decided to close down its manufacturing unit in July 2012 and was advised by the 6th Respondent on the procedure for closure of their EPZ company. The 6th Respondent also pointed out issues of want of form by faulting the 1st Petitioner for suing as "the mother and best friend" of a minor; and the 10th Petitioner for suing on behalf of the residents of Owino Uhuru Village with no express authority to do so.

13. Further, the allegations of failure to monitor and enforce environmental, health and safety regulations were denied. It is averred that the 6th Respondent executed its mandate under Article 21(1) of the Constitution by monitoring and enforcing the same. That it issued licenses in accordance with the requirements of the EPZ Act. Moreover that the report from Eco-Ethics International- Kenya Chapter relied on by the Petitioner was not a credible authority such as the government chemist or emanating from the Ministry of Health. Causation was also disputed. For instance, the post-mortem report of Linet Nabwire and her death certificate bore no link to lead poisoning. Secondly, Samuel Omondi Okello's death certificate was not presented thus casting further doubt.

14. The main hearing commenced on 17th May 2018. Scholastica Khalai Shikanga testified as PW1. She gave evidence that she has been a resident of Owino Uhuru Estate within Mikindani area, Mombasa County from 2006 to date. That the 1st Petitioner, Kelvin Musyoka and the 7th respondent operated a lead processing plant in their neighbourhood. The plant was built in 2006 but began operations in 2007. Prior to that time no meeting was convened to inform the residents of the 7th Respondent's intended operations. She narrated further that shortly afterwards she observed black smoke emerging from the chimneys which had a bad smell. There was also noise from objects falling on their rooftops which turned black. Further, water passing through the estate was black and smelly. The 7th Respondent had not constructed drainage for its waste water.

15. PW1 continued that the aforesaid discharges started affecting them. Personally, she experienced back-aches and coughs. She was also unable to perform her conjugal duties. Consequently, her husband left her. She then gave evidence that the 1st Petitioner was born normally in 2006.On 24th March 2008, he began suffering coughs, diarrhoea and rashes on his body. He was treated at Coast General Hospital then Forces Memorial Hospital Mombasa. Unfortunately, he did not improve. Later on, the 1st Petitioner stepped on waste water emanating from the 7th Respondent's plant which burned his right leg. Hospital visits proved futile with doctors at Coast General Hospital failing to diagnose his condition. PW1 then took the 1st Petitioner to KEMRI monthly from 2008. They only received assistance after visiting St. Patrick's Bangladesh who recommended that blood samples be taken to Pathcare Laboratories. The results revealed that the 1st Petitioner had lead particles amounting to 26 milligrams per decilitre which were excessive. In 2011, the 1st Petitioner's tests once against showed 28 milligrams per decilitre but rose to 32 milligrams per decilitre in 2012. PW1 was then referred to a paediatrician at Pandya who prescribed medicine. However, the 1st Petitioner continued to suffer diarrhoea which contained smelly black particles. The doctor also recommended that he be placed on a diet of milk and fruits.

16. It was **PW1's** case that the 1st Petitioner has never fully recovered. That his performance at school is dismal. She continued that sometime in 2009, the government chemist tested 50 people including herself and the 1st Petitioner. They both had 4.7 milligrams of lead in their blood. After learning their results; **PW1** went to National Environment and Management Authority and the Public Health Office. That residents of Owino-Uhuru collectively lodged a complaint with the Public Health Officer and other government agencies. However, they did not receive any assistance. The company continued operations causing harm to the community with several members suffering and dying due to their activities.

17. PW1 testified that at one point the area governor took them to Port Reiz for treatment. That they were given calcium drugs that were then stopped because the hospital could no longer afford their treatment costs. **PW1** referred to a medical report by Dr. Odede. She attributed their problem to the metal refinery and the government agencies that licensed it. As a result of the 1st Petitioner's health troubles she lost her job at EPZ as she had to take him to hospital daily. When she could no longer afford to care for him, she took the 1st Petitioner to a children's home. She prayed to be granted the reliefs enumerated in the Petition.

18. On cross-examination, **PW1** asserted that the 1st Petitioner has been tested severally; even by the Kenya Television Network (KTN) and Lancet who did an expose on their situation. She confirmed that she still lives in Owino-Uhuru Estate because she cannot afford to move to any other estate. That she did not contribute to her grandson's ill health because of lack of economic capacity. She continued that she was present when he stepped into the toxic waste water and his development was delayed. Kevin did not begin to speak until 2009. PW1 admitted that she did not have treatment notes indicating what she suffered from. She could not pinpoint any letter they wrote addressed to National Environment and Management Authority but asserted that she blames them because they are in charge of environmental management. This was however resolved on re-examination when her counsel pointed out to her several letters addressed to National Environment and Management Authority. **PW1** was adamant that she was not aware if National Environment and Management Authority conducted inspections at the facility in 2014 nor if it had stopped operations through National Environment and Management Authority's intervention. She opined that National Environment and Management Authority should have acted in 2009 when the residents began suffering. **PW1** similarly laid blame on the County Government of Mombasa, EPZ and the other respondents for owning the factory and issuing licences for its operations.

19. Alfred Ogola Mulo testified as **PW2**. He stated that he is a resident of Owino-Uhuru Village living in a house he built. The village measuring 13.5 acres has 220 houses with approximately 3000 people resident therein. He continued that he was nominated as a clan elder by the chief of Kipembe, Mikindani location. A position he has held for the past 16 years. **PW2** confirmed that no public participation took place before the factory was set up and began operations in 2007. That when area residents complained about the adverse effects they suffered as a result of the effluent from the factory, one Mr. Karanja came to educate them on the dangers of lead. The factory never addressed their issues culminating in the residents' demonstration to the area Chief, District Officer, National Environment and Management Authority and the County Government. However, as a public officer, PW2 did not participate in the demonstrations. He continued that when the government tested them, he was found to have 93.2 milligrams per decilitre in his blood. That some residents who had higher content levels have since died. **PW2's** ailments being loss of appetite, fatigue and having less blood commenced in 2008. Two of his children were also affected.

20. PW2 narrated that after the factory was closed, it would still operate illegally at night. On one occasion he visited the premises and learned that aluminium was extracted from the batteries by burning. That doctors also tested the soil which was found to contain lead. There was temporary redress when the governor ordered that they be treated for 2 months which he benefitted from. **PW2** concluded by praying to the court to hold the respondents accountable.

21. On cross-examination; **PW2** admitted that he has never filed an individual complaint but presented his complaints orally at various meetings. That the Public Health Officer was instrumental in the closure of the company on two occasions. **PW2** only knew of the dangers of the company after he was tested and received the first complaint from a resident on 2007. That he has a home in Siaya but did not move as he earned his income in Mombasa where he sells charcoal and water. He admitted that he had not produced a medical report on his health status before Court. When confronted with the fact that there are other companies operating in the area, **PW2** replied that NRM Ltd that manufactures iron sheets was already operating when he settled in the Village in 1974. He faulted the 7th Respondent for failing to construct proper drainage of its effluent consequently releasing waste water into the village.

22. PW3, Kavumbi Munga gave evidence that she was born at the Village in 1993. That her son, Philemon Otieno born in 2012 has been suffering from rashes on his skin and burns on his left leg as a result of lead poisoning. The skin rash has been progressing in spite of treatment. PW 3 continued that she only learned of the lead poisoning from test results carried out by one Dr. Karanja on 21st January 2015. On cross-examination, she asserted that Philemon was born a normal child whose condition deteriorated as a direct result of the factory's activities. That she also suffers itching but has not sought treatment due to lack of funds. PW 3 admitted however that she did not have a copy of Philemon's birth certificate in Court.

23. Wilfred Kamenju Mkolo, Steven Okelo Mulo and Jackson Wanyama testified as **PW4**, **PW5** and **PW6** respectively. Their evidence was largely in consonance with that of PW1, 2 and 3. **PW6** testified that he has been a resident of Owino-Uhuru village from 2002 where he lives with his family. That sometime in 2008, after the factory began operating they noticed that people were falling ill. They were enlightened by one Mr. Karanja from the Green Belt Movement and Phylis Omido that the waste water and smoke from the factory was causing their ailments. As a community, the residents held demonstrations in 2009, 2010. They presented their complaints to the Chief of Mikindani as well as the provincial administration. The District Officer advised them to cease demonstrations and seek redress from government agencies which measure proved unsuccessful after National Environment and Management Authority and the Public Health Office's intervention only resulted in temporary factory closures. **PW4** relied on letters at page 58 to 71 of the Petition as proof of the correspondence.

24. PW4 narrated further that they resorted back to demonstrations in 2012 on which occasion they were arrested by the police for creating disturbance and charged in Criminal Case No. 1363 of 2012. They were later acquitted and the factory finally closed in 2014. **PW4** continued that they nominated representatives to present their grievances to the Public Complaints Committee in 2009. The meeting also comprised of officers from National Environment and Management Authority, Public Health Office, EPZ and the Metal Refineries. However, the resultant report at page 109-125 of the Petition did not deter the factory from proceeding with its operations. **PW4** faulted the government agencies for their laxity in regulating the factory to the detriment of the residents.

25. PW5 testified that he had a son, Samuel Omondi, born in 2011 who started ailing when he was 2½ years old. He suffered rashes and coughs and when tested by Lancet he was found to have 9% lead content in his blood. Further testing from the government chemist pegged it at 12.6%. Thereafter, the governor directed that his child be treated at Mikindani and his wife who was also affected at Port Reitz. Medication did not improve Samuel's health leading to his demise on 30th September 2016 at the Coast General Hospital. **PW6** on the other hand gave evidence that he was employed by the 7th Respondent in 2010. That he worked in the factory as a general worker for about one year. Towards the end of 2010, his wife, Linet Nabwire Wanyama started ailing. Later on in 2011 she gave birth to a baby who was not in good health. The child died in November 2012. He continued that sometime in 2013, government officers tested some residents prompted by their complaints of smoke and waste water passing through the village. His wife was amongst those tested and found to have a lead content of 238.2 milligrams per decilitre in her blood. PW 6 stated that his wife used to wash his factory overalls. In 2015, they got a second child but Linet's health deteriorated resulting in her death on 27th September 2015. On cross-examination, PW 6 admitted that the post mortem report he produced did not indicate lead poisoning as the cause of death but insisted that she was exposed to poisoning through washing his clothes and from the effluents dumped at Owino-Uhuru Village.

26. Hamisi Mwamero testified as **PW7**. He gave evidence that he was a casual worker at the 7th Respondent's factory from February 2009 and detailed the process by which they would smelt lead. He narrated that the 7th Respondent used to buy used car batteries from which they would remove the plastic cover to separate the cells. That the battery acid was then poured on the floor where they worked. He continued that what was being smelted was the cells which were carried to the smelting area using a hand-cart. The furnace had a burner which would light the battery. For an 8 hour shift they would break not less than a ton of material. The loads per furnace weighed between 2½ to 3 tonnes.

27. PW7 testified that about 50 kilogrammes of magadi soda and coal were used in the smelting process where each would burn for about 2½ hours while emitting smoke. That the 1st process produced impure lead and sludge which was not used and was stored at the go-down. The 2nd process involved heating the impure lead in a sufuria. They would add saw dust, caustic soda, nitrate and sulphuric acid then the heated product was put in another sufuria to cool resulting in pure lead. He continued that the place where the sludge was stored had such toxic fumes that would make people faint. The factory provided them with masks and gloves irregularly which would get worn after a short time. Moreover, there was a bag house purposed to block smoke from getting out of the factory but it was not properly maintained by regular replacement as required. The smoke would therefore escape. There was also a lot of dust caused by the blower that maintained the furnace's high temperatures.

28. PW7 stated further that officers from the government agencies would come to the 7th Respondent's premises but would not inspect the production area. National Environment and Management Authority would direct the 7th Respondent to close but they would flout these directives by operating at night. Upon testing by Lancet in 2015, **PW7** was found to have 33% lead content in his blood. He asserted that he had never been tested while working at the factory and some of his colleagues, called George and Karisa had died mysteriously.

29. PW7 continued that he suffers forgetfulness, lost a tooth after falling in hospital and that his wife has miscarried thrice due to exposure from washing his contaminated clothes. He also suffered from low libido levels and has only received treatment once from Mikindani at the behest of the County Government (5th Respondent). On cross-examination, **PW7** admitted that he did not complain to the Labour office about the poor protective gear and equipment nor did he personally raise any issue about the dirty water being discharged into the village. He however blamed the respondents from failing to discharge their mandate by allowing the factory to operate in dismal conditions and failing to protect their welfare and right to a clean environment.

30. Expert witnesses were called to elucidate the Petitioners' case from a scientific point of view, the first of them was Wandera Chrispus Bideru who testified as **PW8**. He said that he worked with the government chemist from January 1986 to 30th June 2018 when he retired. At the time of his retirement, he was the Deputy Government Chemist stationed at the Nairobi Headquarters. **PW8** holds a Bachelor of Chemistry Degree and a Masters' Degree in Public Administration from the University of Nairobi. He stated that the Government Chemist is an old institution founded in 1912 whose mandate is to chemically analyse elements in materials

and provide forensic evidence to the government. Its clients include government agencies, non-governmental organizations and the general public. They also take a special role in crime investigations.

31. PW8 narrated that during his work, he interacted with the Owino-Uhuru case in 2014 while he was the Head of the Toxicology Laboratory. They received a parcel from the Director of Medical Services, Ministry of Health whose cover letter indicated that it was from the Mombasa County Health Office. The box contained 50 clearly marked blood samples with names. That they had been requested to analyse the blood for lead levels which they duly did. He presented his findings in a report which summary is at page 209-210 of the Petition. **PW8** stated that the results were surprising as some people had such high lead levels that he wondered if they were still alive. For instance, Irene Akinyi Odhiambo's blood bore 420mg/dl; Millicent A. Owaka and Jackson Osea had 234 mg/dl yet the recommended lead level allowable for a child is 5mg/dl and 10 mg/dl for adults. That when lead levels are at 200, the bearer should be dead or in a coma. He had heard of a story in Dakar where people with 100 mg/dl died of lead poisoning.

32. The report was sent back to the Director Medical Services who called a meeting. The ministry gave a directive that a task force be formed to get more information. The team formed collected water and more blood samples from the village to identify the cause of the lead contamination. The team comprised Dr. Nancy Etyang', Longomoi and some of the Government Chemist officers. Analyses of collected samples were codified in a second report at page 182 to 195 of the Petition. Blood samples taken from the children were however presented in a separate report. At page 189, the findings were that the soil from the village had very high lead levels. The acceptable levels under Environmental Protection Agency standards are set at 400 mg/kg; and 1000 mg/kg in areas with no children. At Owino Uhuru, open areas had a reading of 64000 mg/kg while other areas recorded upto, 109,000mg/kg. Further, acceptable EPA lead levels in dust are set at 40mg/ft^2 yet dust drawn from a few houses had readings of 33 and 45 mg/ft^2. Though piped water at the village had very low levels of lead, the residents used water from a shallow well that had lead content of 10mg/l.

33. PW8 opined that Owino-Uhuru was highly contaminated with lead which was the conclusion stipulated in their report at page 194 of the Petition. Recommendations included inter alia that the 7th Respondent as the suspected source of contamination be closed immediately and the report of their findings be disseminated to various government agencies including the residents of Owino-Uhuru, Mombasa County Government, the Senate Committee, National Environment and Management Authority, the Directorate of Occupational Safety and Health and the Mombasa County Commissioner for purposes of co-ordination. **PW8** however could not confirm if the report was disseminated as per the recommendation. It was agreed that interventions were required to reduce lead content from the residents' blood and that further tests needed to be carried out for people living within a 5m radius from the factory. They also recommended that the residents be relocated to avoid further ingestion and that the soil in the area be evacuated and dumped in a landfill.

34. PW8 urged the Court to consider the report by the Government Chemist. He continued that he learned from a colleague in National Environment and Management Authority that they also constituted a task force where he was invited by the Director General of National Environment and Management Authority to be part of the team. The team's terms of reference were to advice National Environment and Management Authority on how to decommission the factory; how to remedy the place and to provide sufficient evidence for possible prosecution. That the task force performed its mandate and prepared a report reproduced at page 157 of the 4th Respondent's documents. It is his evidence that they visited Owino-Uhuru and the factory which was difficult to access. Team members observed that the chimney was facing Owino-Uhuru. Trees growing nearby were all dead and there was no filter to protect what was being "zoomed out." The team took photographs and dust samples from specified areas at the factory. There was also an opening on the wall separating the factory from Owino-Uhuru where waste water was being discharged.

35. PW8 stated further that lead is harmless when dormant but is awakened when smelted. The air in the furnace showed that Carbon Monoxide was at 15 parts per million while Sulphur dioxide and lead was at 1.7. That the raw materials contained lead sulphate and lead oxide. When heated upto 1100°C it becomes liquid. Coal is added during the heating resulting in sulphur dioxide and carbon dioxide which escapes into the atmosphere. Sulphur dioxide then mixes with rain forming sulphuric acid which then erodes iron sheet roofs. It was confirmed that the factory was the source of lead poison. **PW8** also explained that lead makes people anaemic by stopping enzymes responsible for production of haemoglobin. It also leads to low Intelligence Quotient and weakening of the bones. He further confirmed that the village had about 3,000 inhabitants which numbers were ascertained for purposes of determining their treatment costs.

36. On cross-examination, **PW8** was challenged with a report from a neighbouring slum; Bangladesh estate of which he was aware and he termed as "a controlled sample". He explained that the variance between the samples obtained from both localities was because firstly, Bangladesh is across the road from the factory on the leeward side. Secondly, that the test kits used in the

Bangladesh case were different as they were preliminary findings. **PW8** was categorical that his tests were to inform the government the position on the ground. That he was bound by the provisions of the Public Ethics Act and had no political ambitions nor did he have any personal interest in the case. The Government chemist was aware he was giving evidence as the Court summons requiring his attendance was sent through the Permanent Secretary. **PW8** continued that one of his recommendations as a member of the National Environment and Management Authority taskforce was to pursue the owners of the factory in accordance with the polluter pays principle. That under the private public partnership, the factory was responsible to pay for restorative justice. He continued that in as much as the 7th Respondent had changed names, they still remained liable.

37. Dr. Ajoni Adede testified as **PW9**. He stated that he holds a degree in Medicine and Surgery from the University of Nairobi and practices medicine in Mombasa. He narrated that he received requests from the Centre of Justice, Governance and Environmental Action to examine some persons exposed to lead poisoning and prepare a report. That in 2016 he examined Daniel Ochieng' Ogola, Jackson Oseya, Elias Ochieng', Elizabeth Francisca, Kelvin Musyoka, Millicent Achieng' and Irene Akinyi Odhiambo. From their history, he determined that they were exposed to lead by working in and living near the factory. He continued that some of them presented laboratory results from Lancet and The Government Chemist. He determined that impairment on their systems due to lead absorption caused their conditions such as manifestations on their skin/dermatitis; loss of appetite and poor memory. **PW9** confirmed that he prepared the medical reports at pages 216 – 222 of the Petition.

38. On cross-examination **PW9** confirmed that he had not been shown prior medical reports. That none of the seven listed persons in his report were employees of the 7th Respondent. He explained that lead once absorbed through inhalation, ingestion of passing on to a foetus by a mother with high levels attacks all systems in the body. **PW9** admitted that he did not conduct laboratory tests on the patients as he trusted the toxicology reports from the Government chemist. Further, of all the patients examined none complained of fertility problems.

39. Phylis Omido, **PW10** was the final witness on the side of the Petitioners. She gave evidence that she was an Executive Director at the Centre for Justice, Governance and Environmental Action which organization was registered in 2012. That prior to her engagement she worked within the EPZ region for 8 years. In 2009, she joined the 7th Respondent as an Administrative and Human Resource Manager at their offices in Changamwe next to Owino-Uhuru settlement. She worked for the 7th Respondent for 4 months and at the time, she was nursing her son who was 2 years old who would sometimes be brought to the factory premises.

40. That her son started falling sick with symptoms of diarrhoea and watery eyes. That after a month of treatment, he was admitted at Mombasa Hospital in 2009. The doctors were however unable to make a diagnosis as he was not responding to treatment. PW 9 said that her son's blood samples were taken to South Africa for testing through Pathcare whereby her son tested positive at 35mg/dl of lead which was way above toxic levels. The child was put on chelation therapy and they were advised not to go back to the source of exposure.

41. PW10 narrated further that she wrote to the 7th Respondent's directors informing them of her son's exposure and requested help with his medical bills. After 3 days, she was picked by the company vehicle and given a Non-disclosure Agreement to sign barring her from disclosing information about the case. Her employer paid for the treatment and she also resigned. She continued that later on she spoke to the workers and residents of the Owino-Uhuru settlement advising them to go for testing. Some of the children were sickly. The community was agreeable but had a challenge of raising money for testing which was Kshs.3,700 at Pathcare. Sometime in the year 2009, her former colleague, Karisa working for the 7th Respondent collapsed and died because of kidney failure. Factory workers contacted her and they agreed that a post-mortem be conducted on Karisa before his burial.

42. They then wrote to the Public Health Department and copied all relevant government agencies and sought the audience of the area Member of Parliament. They also held demonstrations and after intervention by National Environment and Management Authority and the Public Health Office, the 7th Respondent's factory would be closed but only temporarily. By 2012, mortality rates of foetuses were high in the area. If a pregnancy was terminated at 7 months, the foetus looked sooty. The 7th Respondent undeterred kept replacing sick workers with new ones. With respect to one Linet Nabwire, **PW10** gave evidence that they could only procure her post mortem report from the County with considerable difficulty. That she had died in childbirth but her death was due to lead poisoning.

43. PW10 was adamant that the respondents' intervention measures if any were an exercise in futility. In 2012, they had 3 children; Moses, Catherine and Daniel Basil tested by the Government Chemist on condition that they purchase the re-agents. That all three tested positive for lead poisoning. The results were circulated to National Environment and Management Authority and other agencies. Due to previous charges against them on illegal gatherings, **PW10** decided to register CJGEA. They however faced

resistance from the 7th Respondent who vide a Public Health Inspection Report were found to be 90% compliant. The 7th Respondent vilified **PW10** stating that she was inciting workers because she had lost her job.

44. PW10 continued that they escalated the matter to the East African Community and managed to get a ban on export of used acid battery products from East Africa. That after the ban was put in place, they would follow up on the 7th Respondent's containers and report them to the Kenya Revenue Authority who would in turn impound the containers. She asserted that these were the measures that led to the closure of the 7th Respondent in 2014 because they could no longer operate.

45. PW10 narrated that they then wrote to EPZ to stop Metal Refineries from leaving unless they paid for the damage they caused. That they were unable to file suit due to financial constraints and resorted to petitioning the Senate for treatment of the victims and restoration of the soil. They also petitioned Parliament who agreed to formation of a task force of experts from different government agencies to investigate the pollution. That this resulted in the National Environment and Management Authority report. It was however not disseminated to them. Further, **PW10's** organization introduced the task force to the community and held a second meeting and site visit in Nakuru where an expert, Dr. Simba took them through the steps of the clean-up of a lead smelting factory that had previously been in operation in the area. He prepared a report pursuant to his visit; annexed at page 52-54 of the Petition and gave a proposal of Kshs.146,000,000 as the cost for the clean-up. Contamination levels were also confirmed by tests done by Echo Ethics and the CDC.

46. PW10 concluded by stating that the 8th Respondent was equally to blame as the landlord of the 7th Respondent evidenced by the lease at page 284 of the Petition. That they were responsible for handling the waste emitted by the 7th Respondent. Moreover, the documentation presented as public participation on page 287 was signed by employees of the 8th respondent and its sister company. She continued that so far, only 500 people have been tested with 2500 still in dire need of testing. That the tested persons received drug supplements from the County Government for only 3 months before the treatment was discontinued. That there has been no intervention from government agencies and that is the reason for the treatment and clean up orders sought.

47. On cross-examination **PW10** admitted that she had not brought the Non-disclosure agreement as well as her son's treatment notes before Court because he was not tested together with the Owino-Uhuru children and she did not want compensation for him. Similarly, she did not have Karisa's employment records, medical reports pertaining to the miscarriages, Linet's post-mortem report and receipts of purchases made by their organization. She gave evidence that when she was employed by the 7th Respondent, she was tasked with procuring EIA and EPZ licences which the company had a problem getting.

48. The Defence hearing proceeded on various dates from 29th November 2018. **DW1**; John Ndung'u testifying on behalf of the 3rd Respondent stated that he is a Principal Public Health Officer serving with the Ministry of Health, Nairobi. He adopted his replying affidavit sworn on 5th July 2018 as well as his witness statement in the List of Documents filed on 16th May 2018. **DW1** narrated that he was posted to the Municipal Council of Mombasa in 2004 in charge of Food Quality Control. That in 2007, he was taken back to the Ministry.

49. DW1 continued that sometime that year, he saw demonstrations aired on NTV. On Monday, officers were constituted who visited the village. **DW1** later saw some Indians visiting their offices and inquired what they were doing as the Public Health Office did not deal with non-food companies. Later on, the company was closed by the Municipal Council then re-opened in 2008 eliciting demonstrations from the village. **DW1** was instructed to inspect the facility and prepare a report. He was aware that there had been other visits by the National Government. Thereafter, a big team visited the place and a closure order was made on 26th February 2009. He then visited the facility multiple times to ensure compliance.

50. DW1 asserted that they did their due diligence as they liaised with EPZ, NEMA and the Municipality of Mombasa with regard to disposal of the waste. Further, they did not receive any reports from NEMA. The only report they ever received was by the 7th Respondent on compliance measures set by the Public Health Office that they had to meet for licensing purposes. He continued that in 2013, 50 residents of Owino-Uhuru were tested by the Government Chemist. After results came out, a team was formed and another 200 samples were picked. The government requested other research agencies such as CDC and JKUAT to also conduct studies on the problem to compare with lead contamination levels in Owino-Uhuru village. Remedial action was then handed over to the County Government due to devolution resulting in opening of treatment centres for the village residents at Port Reitz Hospital. He continued that the Ministry spent resources and expertise to address the problem brought to its attention through the media. That public awareness was also done. **DW1** avers that he never received any complaints on lead poisoning from Owino-Uhuru residents. That correspondence referred to at page 58 of the Petition were addressed to the Minister for Environment and only copied to them.

51. When confronted with exhibit No. 7; a letter dated 4th July 2008 where one Dr. Chidanganya lifted the factory's closure notice, **DW1** responded that the said doctor was an employee of the Municipality and that they protested to the same vide their letter of 5th July 2008. That on his visits to the company in 2009, he found it operating despite closure due to noncompliance. Workers were found working without protective equipment such as masks; there was dust as well as a heap of uncrushed and crushed batteries at their workstations and the smelting was emitting toxic fumes. **DW1** made recommendations but could not close the company as he was guided by the provisions of Section 115 of Cap 242. He admitted to proposing the re-opening of the company after implementing of recommendations made in his report. He added that his officers discovered the dumping of 180 tonnes of sludge on the river bed which act they did not permit.

52. In cross-examination by fellow defence counsels **DW1** shifted blame and responsibility to the other government agencies specifically NEMA and EPZ. He denied responsibility for licensing of non-food entities and stated that National Environment and Management Authority should have approached them on the issue of waste management. That the Municipality only showed proposed dumpsites which they were then supposed to approve. Their mandate was strictly to remove nuisance complained of; not to issue licences. That they have never lifted any closure order issued by National Environment and Management Authority.

53. Dr. Nancy Etyang' testified as **DW2** on behalf of the Attorney General. She stated that she works for the Ministry of Health in the Office of the Director of Medical Services. Her testimony was similar to that of **DW1**. She testified that upon learning of the Owino-Uhuru case in the media they visited the village through the County Government and District Commissioner. They also visited the factory which had since closed. Further, they requested expedited ethical approval from KEMRI to enable them to take blood samples for investigation. That in their resultant report which they shared with National Environment and Management Authority, they recommended that the children be stopped from further exposure; the community be relocated and the clean-up of the soil be conducted. Children were given iron and calcium supplements by the County government but National Environment and Management Authority and other relevant agencies were responsible for decontamination of the soil which was not part of the Ministry of Health's mandate. **DW2** admitted that EPZ was not part of the investigative team. Further, bloods samples were taken from 166 children but not all of the children of Owino-Uhuru were tested.

54. Zephania Owuor Ouma and Martin Shimba gave evidence on behalf of the 4th Respondent as **DW3** and **DW4** respectively. **DW3** stated that he is the acting Director, Compliance and Enforcement at National Environment and Management Authority where he has worked for 16 years. He adopted his affidavit sworn on 1st March 2018 and witness statement made on 26th March 2019. **DW3** narrated that the 7th Respondent's operations began sometime in 2007. National Environment and Management Authority issued an EIA License on 5th February 2008 by which time the factory was already in operation. That operation before issuance of the license was illegal. He referred to a letter dated 13th March 2007 directing the 7th Respondent not to carry out any activity until the EIA process was completed. That this was not done prompting National Environment and Management Authority to issue a "cessation order." **DW3** stated that a letter dated 6th December 2006 gave the go-ahead for operations before EIA issuance which anomaly was corrected on 23rd April 2007.

55. DW3 continued that he did not take part in the exercise of epidemiological research whose executive summary indicated that there were lead levels in the suit land of up to 420.04mg/dl. They however prepared a policy paper forwarded to Cabinet to share the report for finance directions. He was not aware if it was acted upon. Further, recommendations in the report enumerated under Chapter 5 thereon required the intervention of the Cabinet Secretary who was mandated to gazette an area for contamination. That page 3 of the report shows physical evidence that Metal Refinery Ltd shared a boundary with the Owino-Uhuru settlement and the harm suffered by the residents emanated therefrom. **DW3** added that Environmental Audit was routinely done in 2009, 2010 and 2011 but only one EIA License was issued to the 7th Respondent. He had no knowledge that National Environment and Management Authority received petitions from the community. He also admitted that the Epidemiology Report was not disseminated to the residents of Owino-Uhuru as they were awaiting permission from the Cabinet Secretary.

56. DW3 testified further that other government agencies were involved in inspection of the factory. That they interacted with the 5th Respondent upon receipt of the EIA report which was forwarded to them for comments. National Environment and Management Authority also referred to the 5th Respondent on the existing planning and zoning framework in the area that informed their report. He continued that it is National Environment and Management Authority's mandate to measure lead levels in the air while content in water is the responsibility of the Water Resources Authority and in the workplace it is the mandate of the Directorate of Occupational Safety and Health under the Ministry of Labour. Further, initially the 6th Respondent was not involved but at enforcement stages, their intervention was sought in degazzetting Legal Notice No. 227 of 1990 which exempted EPZ establishments from the provisions of the Factories Act; currently the Occupational Safety and Health Regulations. This was due to the impact of the company's activities on its workers.

57. DW4 on the other hand is an Environmental Officer and Inspector, Mombasa Office and has worked at National Environment and Management Authority since 2002. He adopted his statement dated 29th March 2019 as evidence. **DW4** narrated that he visited the 7th Respondent's premises and interviewed the residents of the neighbouring Owino Uhuru settlement for completeness of the EIA Report. He also denied seeing letters copied to National Environment and Management Authority and stated that he was unaware if an EIA License was issued in 2007.

58. Jimmy Waliaula, the County Attorney, Mombasa testified as **DW5** on behalf of the 5th Respondent. He gave evidence that he has worked with the Mombasa County Government since 2014 and adopted his statement filed on 22nd July 2019. **DW5** continued that the Municipal Council of Mombasa's role was limited to issuance of a single business permit. Considerations include whether there is proper ventilation, fire extinguishers and clearance from the relevant authorities like Kenya Revenue Authority, National Environment and Management Authority and National Construction Authority. He continued that the County government as the successor of the municipal council inherited its assets and liabilities. However, it was not within the mandate of the Council to check adherence. That they performed periodic inspection but when the lead poisoning incident occurred, it was not the County government's mandate to order the 7th Respondent's closure. He admitted that the Municipal Council had a Health and Environment Department. That it was their duty to do zoning for residential and industrial areas; planning and change of user. **DW5** opined that where there is proper planning, industries should not operate alongside human settlements. Regardless, the 7th Respondent was licenced by the council to operate next to Owino-Uhuru village.

59. DW5 stated further that the PCC report at page 46-57 of the Petition had representation from the Municipal Council of Mombasa. On the issue of the 7th Respondent's closure, **DW5** stated that he did not know why the Council did not order or recommend it as it should have. He admitted that the certificate at page 97 of the petition issued by the Council to the 7th Respondent indicates that a drainage system was provided and inspected, tested and approved by the Council. He however was not aware of the protocols put in place for disposal of lead waste and admitted that it was not proper for the Municipal Council to authorize dumping at Mwakuruinge.

60. The 6th Respondent's evidence was presented by two of its officers, Francis Wakahiu and Mathew Oliechi Were as **DW6** and **DW7** respectively. **DW6** stated that he works for EPZ Mombasa Regional Office as a liaison officer. He adopted the affidavit sworn by Fanuel Kidenda as evidence. The said officer was no longer in employment. **DW6** testified that they license industries manufacturing products that are for export. For an entity to obtain an EPZ License, the project they intend to undertake must be viable. Prerequisites are that the EPZ Company must be registered; it must have a market and clearance from relevant agencies. In this case, the 7th Respondent required an EIA license and a letter from the Mines and Geology Department. When both were obtained, the 6th Respondent did not have authority to refuse to license them and the same was issued on 13th December 2006. **DW6** however admitted that they had not received a license from National Environment and Management Authority by December 2006. The company therefore operated for 1 year and 2 months without a National Environment and Management Authority License. Moreover, the site initially applied for was in Kilifi; not Mombasa.

61. DW6 stated further that they took part in several inspections of the factory. When referred to Notes of the Inspection Meeting held on Monday 29th April 2009 by EPZ at the factory; PW6 was confronted with the conclusion they made to the effect that the 7th Respondent had complied with almost 80% of the recommendations made by the health authority. He responded that it was just a recommendation and that they did not coerce the public health department to reopen the factory. Similarly, they were not advised by any government agency to revoke or suspend the 7th Respondent's EPZ License.

62. DW7 stated that he works at EPZ as an assistant manager for environment. That he attended an inspection meeting whose minutes are at page 74-80 of the Petition and authored the same. He asserted that corrective actions were taken by not renewing the 7th Respondent's license for non-compliance with EPZ recommendations. **DW7** agreed that section 23 of the EPZ Act required that they ensure factories do not abuse the environment. He admitted on cross-examination that there should have been a provisional license for the Mombasa site. That the granting of an EPZ License without the National Environment and Management Authority license was a misstep. He was aware that there was a litany of complaints on Public Health violations by the 7th Respondent but denied knowledge of National Environment and Management Authority's and any other government agency's involvement.

63. The hearing completed, respective parties filed their final submissions. The 7th and 8th Respondents did not participate in these proceedings.

PETITIONERS' SUBMISSION

64. The Petitioners' submissions were filed on 14th October 2019. Counsel for the Petitioners began by laying basis of the jurisdiction of the Court granted by articles 23, 165 (2) (a) and (3) (b) to determine the claim in accordance with its nature. He submitted that the Petitioners sought the Court's redress in accordance with articles 22, 70 and 258 of the Constitution. Further, that Kenya is a monist state by dint of Articles 2(5) and (6) of the Constitution that allow direct application of international and regional human rights conventions and treaties ratified by the state namely;

i. International Covenant of Economic, Social and Cultural Rights (ICESCR)

ii. Convention on Rights of the Child (CRC)

iii. African Charter on Humans and People's Rights(ACHPR)

iv. Basel Convention on Transboundary Movement of Hazardous Wastes and its Disposal

v. Universal Declaration on Human Rights

vi. 1992 Rio Declaration on the Environment and Development

vii. United Nations Guiding Principle on Business and Human Rights

65. The Petitioners submitted further that the Respondents violated various provisions of the Constitution and Statute law that bestow upon them responsibilities safeguarding the welfare of the Petitioners and the community in general; namely Articles 10, 26, 35, 42, 43; section 58 of the Environmental Management and Coordination Act and section 115 of the Public Health Act. After a synopsis of evidence tendered on opposing sides the Petitioners detailed violations committed by all the Respondents as well as the resultant repercussions suffered by the Petitioners and the Owino Uhuru Community.

66. The Petitioners presented the following questions as arising for determination of the dispute;

i. Whether the Petitioners suffered violations to their constitutionally guaranteed rights to life, clean and healthy environment, health, clean and safe water and information at the instance of the Respondents

ii. Whether the Petitioners are entitled to compensation in general damages against the Respondents for damage to their health, environment and loss of life

iii. Whether orders of mandamus ought to issue against the 2nd to 8th Respondents to remediate the contaminated environment of Owino Uhuru as well as the remedies sought in prayers h, i and j of the Petition

iv. Who shall bear costs

67. In response to issue (i), it was submitted that the 1st Respondent was sued in its representative capacity of government bodies in suits as per Section 13 of the Government Proceedings Act. That the 2nd and 3rd Respondents being the Cabinet Secretaries for the Ministries of Environment, Water and Natural Resources; and Health are directly responsible for ensuring that policies are put in place to ensure that the constitutional guarantee of a clean and healthy environment and health under Articles 42 and 43 are protected and progressively realized. That they failed to do so by their action and inaction.

68. Even after the 7th Respondent's harmful activities were brought to the attention of the 3rd Respondent but it failed to order the removal or destruction of any matter constituting a nuisance which action it is statutorily empowered to take under section 115 of the Public Health Act. Moreover, the effluent discharged by the 7th Respondent squarely falls within the definition of nuisance under section 118 (e) of the Public Health Act. The situation was further exacerbated by the routine closure and re-opening of the factory resulting in intermittent operation and further pollution.

69. The 4th Respondent is faulted for flouting its mandate to exercise general supervision and coordination and to implement policies regarding the environment under section 9 of the Environmental Management & Coordination Act. It also violated Section 58 thereof by issuing an EIA License to the 7th Respondent in 2008 one year post-operation by which time massive pollution had occurred which fact was admitted. Further, the EIA report was considered and approved without the consultation of immediate neighbours of the premises such as the residents of Owino-Uhuru.

70. The 5th Respondent on the other hand is responsible for planning and zoning as provided by sections 29, 30, 33 and 36 of the Physical Planning Act meaning they have the power to prepare physical development plans, consider and deny or approve applications for development. That contrary to the aforementioned provisions they proceeded to approve and license the setting up and operation of the 7th Respondent's lead factory next to a human settlement. The County government is also guilty of reopening the factory intermittently despite it failing to meet waste management standards after several inspections and investigations which the County participated in.

71. It was submitted that the 6th Respondent through licensing the 7th Respondent contravened Section 23 of the Export Processing Zones Act which provides at subsection 2(c) that an EPZ License shall not be granted if the proposed business enterprise will have a deleterious impact on the environment or engage in unlawful activities or impinge on national security or prove to be a health hazard. That the 6th Respondent disregarded the said condition by issuing a license despite the 7th Respondent not having obtained an EIA License from National Environment and Management Authority which is a mandatory pre-requisite. Further, instead of seeking to enforce compliance of safety standards by the 7th Respondents they called for its re-opening in their correspondence in discordance with other government agencies calling for its closure.

72. The Petitioners submitted that the 7th Respondent should ideally be the party to bear the cost of remediation and compensate the Petitioners in accordance with the Polluter Pays principle as per Principle 16 of the Rio Declaration. The said principle does not however take away the responsibilities of the 1st to 6th Respondents as State duty bearers to ensure that international human rights laws and standards are respected protected and fulfilled. The said duties are stipulated in article 21 of the Constitution with those pertaining to environmental rights in article 69(1) (d), (f), and (g). That the provisions of article 69 in line with Principle 15 of the 1992 Rio Declaration on application of the precautionary approach in environmental protection are to the effect that where there are threats of serious or irreversible damage, lack of full scientific certainty shall not be used as a reason for postponing cost-effective measures to prevent actual degradation.

73. Counsel for the Petitioners cited the European Court of Justice case of **Muhammad Kaya vs Turkey 22535/63** (the Ogoni decision) and the **Association of Victims of PEV and Interights vs Cameroon 272/03** determined by the African Commission on Human and Peoples Rights where it was ruled that state parties have a positive obligation not only to protect rights through legislation and enforcement but by also protecting citizens from damaging acts that may be perpetrated by private parties. They also cited the case of ***Charles Murigu Muriithi & 2 Others vs the Attorney General (2015) eKLR*** where Justice Lenaola ruled as follows:

"...the state shall in appropriate cases be held liable in cases where violations of the rights enshrined in the Bill of Rights are proven even when those violations are occasioned by non-state actors provided that the duty of care is properly activated..."

74. The Petitioners then submitted extensively on the violation of their rights to a clean and healthy environment, highest attainable standard of health, right to clean and safe water and right of access to information as violated by the Respondents' actions and omissions. On the right to life, they cited the case of ***T. Damodar Rao v The Special Officer, Municipal Council of Hyderabad*** quoted in the case of ***Mohammed Ali Baadi & Another vs the Hon. Attorney General & 11 Others (2018) eKLR (the LAPPSET Case)*** which stated as follows concerning the right to life corresponding to article 26 of our Constitution;

"…...There can be no reason why practice of violent extinguishment of life alone should be regarded as violative of Art. 21 of the Constitution. The slow poisoning of polluted atmosphere caused by environmental pollution and spoliation should be regarded as amounting to a violation of Art 21 of the constitution…"

75. These sentiments were echoed in the cases of ***Peter K. Waweru vs The Republic (2006) eKLR*** and ***Friends of Lake Turkana Trust vs the Attorney General & 2 Others (2014) eKLR***. In the latter case the Court while referring to the ***human rights principle of indivisibility*** observed that the right to life, dignity and economic and social rights are all connected and it cannot be stated that one set of rights is more important than the other. Moreover, the said right is guaranteed by Article 3 of the Universal Declaration

of Human Rights, Articles 2, 6 and 26 of the International Covenant on Civil and Political Rights as well as Article 4 of the African Charter of Human and People's Rights and finally Article 5 of the African Charter on Rights and Welfare of the Child all of which are applicable in this jurisdiction by dint of Article 2(6) of the Constitution.

76. That the 2nd, 3rd and 4th Respondents violated the Petitioners' rights to a clean and healthy environment under articles 42 and 69 of the Constitution by failing to close down the 7th Respondent's factory until it was too late. The 4th Respondent in particular failed to conduct its mandate of routine environmental audit and monitoring; in contravention of Article 12 of the International Covenant on Economic, Social and Cultural Rights and Article 24 of the African Charter on Human and People's Rights on entitlement to a general satisfactory environment.

77. On the right of access to information under article 35 and the Access to Information Act it was submitted that the residents of Owino-Uhuru should have been involved at the conceptualisation or implementation stage of the project. Having no knowledge of the effects of lead smelting in such close proximity to the residents and discharge of resultant effluents in the area put them at a serious disadvantage. They had no idea of the dangers thereof or how to even remedy the adverse effects they experienced. Counsel once again cited the case of ***Mohammed Ali Baadi & Others vs The Attorney General (supra)*** where the court observed that the state has an active role to ensure that the public likely to be affected by a proposed project, plan or development are provided with all relevant information pertaining to it, including the environmental impact assessment report which must contain all relevant information necessary for the competent authority to consider the application.

78. The second issue pertains to the prayer for compensation by way of general damages for damage to the Petitioners' health, environment and loss of life. It is submitted that article 23(3) (a) of the Constitution empowers the Court to make such orders as a remedy for infringement of rights under article 22. A list of 9 petitioners selected randomly and the damage and loss suffered evidenced by their medical reports was presented as representative of all Owino-Uhuru residents. Counsel for the Petitioners propose an award of 2 Billion Kenya Shillings (Kshs.2,000,000,000) as compensation to the area residents for breach of their right to life; clean and healthy environment; right to information and on account of their failing health. Further, for restoration of soil, walls, water and general clean-up to get rid of lead in the 13.5 acre village the Petitioners propose Kshs.1 Billion; based on the recommendations of the Report of the Taskforce on Decommissioning and Remediation strategy for Metal Refinery Ltd. The figures factored inflation costs and recent case law on the same specifically the LAPSSET case where an award of Kshs.1,760,424,000.00 was made.

79. Issue No. (iii) concerned mandamus orders directing the 2nd to 5th Respondents to carry out a comprehensive participatory study within 60 days of the judgment date at Owino-Uhuru Village to ascertain lead levels in the water, soil, animals and human bodies of the residents including the Petitioners. This prayer ties in with prayers (h) to (j) calling for the respondents' adoption of best practices with regard to lead alloy manufacturing plants and formulation of regulations dealing with licensing, setting up, operation, supervision and independent scientific monitoring of all entities dealing in hazardous materials to prevent recurrence of such cases. On this point the Petitioners relied on the National Environment and Management Authority taskforce report on the far-reaching dispersal of contaminants likely to have affected not only the Owino-Uhuru residents but also neighbouring settlements. They cited the South African case of ***Fose vs Minister of Safety and Security (1997)*** where the Court ruled thus:

"Appropriate relief will in essence be relief that is required to protect and enforce the Constitution. Depending on the complexities of a particular case, the relief may be declaration of rights, an injunction or mandamus or such other relief as may be required….if necessary, the Court may even have to fashion new remedies to secure the protection and enforcement of these very important rights".

80. The Petitioners also buttressed their entitlement to these orders on the provisions of the Basel Convention on Transboundary Movement of Hazardous Wastes and its Disposal which was ratified by Kenya on 1st June 2000. That the said convention categorizes lead as hazardous waste with the main activity practiced currently being recycling of used lead acid batteries. That our state agencies are therefore duty bound to observe and implement the Basel Convention Technical Guidelines for Environmentally Sound Management of Waste Lead-Acid Boundaries. If the same had been observed as intended, the 7th Respondent would not have been allowed to perpetrate the massive scale contamination that it did; with the 5th Respondent even granting them permission to dump lead waste in a public dumping site. That these lacunae on lack of regulation should be remedied by the Court.

81. On costs, it was submitted that costs ideally follow the event. That the Petitioners enlisted the services of 3 learned advocates due to the complexity of the petition and the extraordinary skill expended in preparing and prosecuting this unique petition evidenced by the collation of extensive evidence and documents presented. To this end they cited the ***Equality Court of South***

Africa Case NO. 26926 of 2005; Johan Daniel Strydom vs Nederduitse Gereformeerde Gemeente Moreleta Park.

THE 1ST, 2ND, AND 3RD RESPONDENTS SUBMISSIONS

82. They raised 3 questions as arising for determination of the Petition:

a. Whether they were in violation/breach of the petitioners' rights.

b. Who should take fault"

c. Whether damages are payable in a representative suit.

83. The 1st – 3rd Respondents cited the Case of ***Anarita Karimi Njeru Vs Republic (1979) KLR 184*** where Trevelyan and Hancox JJ held thus **"We would however again stress that if a person is seeking redress from the High Court on a matter which involves reference to the Constitution, it is important (if only to ensure that justice is done to his case) that he should set with reasonable degree of precision that of which he complains the provisions said to be infringed and the exact manner in which they are alleged to be infringed. The principle was resounded in Matiba Vs. AG. High Court Misc. 66/1990 also as contained in the case of Ben Kipeno & Others Vs the Attorney General & Another (2007) eKLR."**

84. They argue that they were not involved in the lincensing stage and only came into the picture after receiving complaints that the 7th Respondent was releasing pollutants into the environment that was harming the residents of Owino-Uhuru. That as soon as they became aware of the complaint, the 3rd Respondent took necessary measures within their capability to deal with the situation.

85. On who is at fault, the 1st – 3rd Respondent urged the court to adopt the polluter pays principle embedded in the RIO Declaration on Environment and Development (1992) principle 6 and find the 7th Respondent was solely liable for the pollution.

86. Whether damages are payable in a representative suit, the 1st – 3rd Respondents posed that the petitioners also owed themselves a duty of care. That some of the petitioners were working in the factory and despite the negative effects, they continued working thus endangering their lives. Secondly, the petitioners continued living in the affected area thus exposing themselves to further adverse effects of lead contamination. That there can be no lawful occupation on land which is private property. It is the 1st – 3rd Respondents' further submissions that where a procedure is provided under the Constitution or statute for the redress of a particular grievance, that procedure should be followed. They cited the Case of ***Gedion Mbuvi Kioko Vs Attorney General and Another (2017) eKLR*** where the trial court stated thus;

"I consider that the matter of the claim for personal injury herein which is based on alleged breach of rights and fundamental freedoms may properly and fully be redressed without resort to the Constitution by a suit in negligence." It is their argument that if any damage was suffered, it was personal and every person who suffered such damage ought to prove the damage suffered and such damage cannot be awarded in a representative capacity. For the reasons given, they urged the Court to dismiss the petition with costs.

87. In brief analysis of the 1st – 3rd Respondents submissions vis-a-vis the evidence adduced, I note that the 1st- 3rd Respondents relied on principle 6 of the RIO Declaration and urged the Court to find that only the 7th Respondent should be found liable for any damage. The Rio Declaration passed 27 principles to guide the protection of the environment for the present and future generations. Inter alia, principle 8 and 18 states thus;

Principle 8: To achieve sustainable development and a higher quality of life for all people, States should reduce and eliminate unsustainable patterns of production and consumption and promote appropriate demographic policies."

88. This principle imposes upon the State a responsibility to ensure that activities within their jurisdiction to eliminate unsustainable patterns of production and consumption. The inference being that before the 1st to 3rd Respondents can argue that the polluter shall pay, they have a duty to regulate. The duty is explained in principle 13 which provides thus; **"States shall develop national law**

regarding liability and compensation for the victims of pollution and other environmental damage. States shall also cooperate in an expeditious and more determined manner to develop further international law regarding liability and compensation for adverse effects of environmental damage caused by activities within their jurisdiction or control to areas beyond their jurisdiction".

89. The 1st Respondent is sued as the legal advisor to the government of the Republic of Kenya. The 2nd Respondent, is the Cabinet Secretary for Environment and Natural Resources while the 3rd Respondent is the Cabinet Secretary for Health. They are sued as part of the State actors in the preservation and restoration of the environment. Article 2(5) of the Constitution provides that the general rules of International Law shall form part of the laws of Kenya. Article 2(6) states that any treaty or convention ratified by Kenya shall form part of the laws of Kenya. Kenya has ratified most of the international environmental covenants/agreements and is therefore bound by their provisions.

90. The 1st – 3rd Respondents' selective reliance on principle 6 and not the whole covenant in pushing the blame at the doorstep of the 7th Respondent contravenes both the RIO Declaration and Articles 2, 42, 69 and 70 of the Constitution which imposes a responsibility on the State to ensure that her citizens enjoy the right to a clean and healthy environment. Consequently, where there is a breach/violation to any of the rights guaranteed under our Constitution and International law by virtue of omission or commission by the State or its actors, that liability falls squarely at the doorstep of the State who in this case is the 1st – 3rd Respondents.

91. Are damages payable in a representative suit" The 1st – 3rd Respondents case is that the damage suffered was personal therefore every person ought to have proved their case. From the prayers sought in the petition, it is my considered opinion that the injuries suffered were both personal and environmental. I say so because one of the prayers in the petition is for soil clean up within the areas of Owino-Uhuru settlement. The petitioners also urged the Court to direct the concerned state actors to come up with policies on lead manufacturing in Kenya. It would amount to duplicity of suits if each of the petitioners filed their separate petitions seeking similar orders. As residents of Owino-Uhuru which was the area affected, I find nothing wrong in the suit having been brought for singular and communal purposes/capacities.

92. Further some of the effects of the soil and water pollution unless cleaned up will not affect just the present Petitioners but also the future settlers of Owino-Uhuru. We all owe a duty to protect the environment both for the present and future generations. On the particulars of claim/violations not being specified, the case of Anarita (supra) cited by these Respondents have since been overtaken by the provisions of Articles 159(2) and 42 of the Constitution. In any event, this Petition was about lead poisoning suffered by the residents of Owino-Uhuru. I did not find anything ambiguous on the claim.

THE 4TH RESPONDENT'S SUBMISSIONS

93. The 4th Respondent filed its submissions on 11th December 2019. It raised the following 3 questions as arising for determination of the dispute;

i. Did the 4th Respondent carry out its statutory mandate within the legal parameters permitted by law"

ii. Was there causation" Is the 4th Respondent liable for the alleged lead exposure"

iii. Are the petitioners guilty of contributory negligence"

94. In answering the first question posed, the 4th Respondent submitted that it fully complied with its mandate as set out in Section 58 of Environmental Management and Coordination Act (EMCA). That it gave a cessation and restoration order to the 7th Respondent after the site inspection revealed that the 7th Respondent was undertaking smelting of scrap lead acid batteries without an Environmental Impact Assessment (EIA) license. The 4th Respondent submitted that in compliance with its mandate, it issued various improvement orders to the 7th Respondent and also wrote to the Director Medical Services twice requesting for epidemiological results to take measures. That the Director Medical Services has never responded to date.

95. In support of the above submissions, the 4th Respondent cited the Case of ***Kenya National Examinations Council Vs Republic exparte Geoffrey Gathenji Njoroge and 9 others (1997) eKLR*** where the Court of Appeal held thus;

"As a creature of statute, the council can only do that which its creator (the Act) and the rules made thereunder permit it to do. If it were to purport to do anything outside that which the Act and the rules permit it to do, then like all public bodies created by parliament, it would become amenable to the supervisory jurisdiction of the High Court, which, for simplicity is now called "Judicial Review."

96. In response to the question of causation, the 4th Respondent submitted that the Petitioners were obligated to prove that the pollutant which caused the harm was discharged by a known defendant. It is their submission that according to World Health Organisation (WHO), **"Lead is a naturally occurring toxic metal found in the Earth's crust. Its widespread use has resulted in extensive environmental contamination, human exposure and significant public health in many parts of the world. Important sources of environmental contamination include mining, smelting, manufacturing and recycling activities, and, in some countries, the continued use of leaded paint, leaded gasoline, and leaded aviation fuel. More than three quarters of global lead consumption is for the manufacture of lead-acid batteries for motor vehicles. Lead is, however, also used in many other products, for example pigments, paints, solder, stained glass, lead crystal glassware, ammunition, ceramic glazes, jewelry, toys and in some cosmetics and traditional medicines. Drinking water delivered through lead pipes or pipes joined with lead solder may contain lead. Much of the lead in global commerce is now obtained from recycling".**

97. The 4th Respondent states that there is no result presented to Court of the level of lead in the area before the alleged incidence occurred. Further that the area is zoned as industrial area and there are multiple sources of lead pollution. That it was possible no one source of the pollution is more likely to have caused the harm since the area is zoned as industrial area with other factories within the vicinity. To support this submission, the 4th Respondent cited inter alia ***Elijah Ole Kool Vs George Ikonya Thuo (2001) eKLR*** where Visram J stated thus **"In other words, the defendant's negligent act or omission is the cause of the Plaintiff's injury unless it is shown that there was some voluntary responsible human intervention in the chain of events between the original negligent act or omission and the plaintiff's injury: the inquiry will be whether the injury can be treated as flowing directly or substantially from the negligence. In the *Oropesa [1943] 1 all E.R 211 at 213 LORD WRIGHT*** said as follows: **"Certain well-known formulae are invoked, such as that the chain of causation was broken and there was a novus actus interveniens. These phrases, sanctified as they are by standing authority, only mean that there was not such a direct relationship between the act of negligence and the injury that the one can be treated as flowing directly from the other."**

"In a general sense, the defendant remains liable for all results which follow in the ordinary cause of things of which reasonable human conduct by those sustaining the injury is a part. It remains upon the Defendant to show that some other action or omission other than his own caused the injury."

98. The 4th Respondent submitted that the petitioner's continuous stay (to the present) at the contaminated site even after there were allegations and fears of lead poisoning amounts to contributory negligence on their part a fact which cannot be ignored. Therefore, the 4th Respondent states that the Petitioners are liable in contributory negligence.

Analysis of the 4th Respondent's Submissions

99. The 4th Respondent states that it fulfilled its mandate under the Act by doing the following;

a. Reviewing the Environment Impact Assessment report submitted in March 2007.

b. Stopped the subject project of lead manufacture in April 2007 as the same was proceeding without National Environment Management Authority approval.

c. Conducted several day and night operations.

d. Conducted several test runs before an okay for the project operations was given.

e. Recommended the prosecution of the offenders by writing to the Office of Director of Public Prosecution (ODPP).

100. The question posed by the Petition was that the 4th respondent was negligent in carrying out its mandate. Section 58(1) and (2)

of Environmental Management and Coordination Act provides thus;

"**(1) Notwithstanding any approval, permit or license granted under this Act or any other law in force in Kenya, any person, being a proponent of a project, shall before for an financing, commencing, proceeding with, carrying out, executing or conducting or causing to be financed, commenced, proceeded with, carried out, executed or conducted by another person any undertaking specified in the Second Schedule to this Act, submit a project report to the Authority, in the prescribed form, giving the prescribed information and which shall be accompanied by the prescribed fee.**

(2) The proponent of a project shall undertake or cause to be undertaken at his own expense an environmental impact assessment study and prepare a report thereof where the Authority, being satisfied, after studying the project report submitted under subsection (1), that the intended project may or is likely to have or will have a significant impact on the environment, so directs."

101. This section was relied upon by the 4th Respondent to demonstrate that it executed its mandate. Subsection (1) worded in mandatory terms by the use of the word **"SHALL"** requires a project proponent not to undertake/execute any project before submitting a project report to the Authority. Once the Environment Impact Assessment has been submitted, Sections 60, 61, and 62 provides room for the 4th Respondent to study the project report submitted and obtain comments from lead agencies as well as demand for additional evidence to ascertain that the report is exhaustive and accurate.

102. The 4th Respondent submitted that in complying with Section 58(2), it reviewed the Environment Impact Assessment Report submitted in March 2007. There is no evidence of what was the 4th Respondent's findings after studying/reviewing the report before the Environment Impact Assessment license was issued on 5th February 2008. Their findings ought to have been shared with the other lead agencies in light of their finding that the 7th Respondent began operations before they were issued with the Environment Impact Assessment license. It seems an exhaustive assessment was not done yet the project was of serious magnitude. DW3 for the 4th Respondent stated during cross-examination that pursuant to the illegality undertaken by the 7th Respondent, they drew the letter dated 13th March 2007 directing them to stop operations until the Environment Impact Assessment was completed.

103. DW3 continued that the 7th Respondent did not comply with the letter of 13/3/2007 necessitating the 4th Respondent to issue a stop order. However, the stop order given is contradicted by another of the 4th Respondent's letters dated 6th December 2006. DW3 said this anomaly was corrected on 23rd April 2007. Further that no audit was done to assess if any damage was done by the 7th Respondent's operations between December 2006 and April 2007. This shows the 4th Respondent in the process of carrying out its mandate was also encouraging the 7th Respondent through the 4th Respondent's inaction to effectuate the illegality by contravening the provisions of section 58(1).

104. Part of the process of conducting an Environment Impact Assessment is to engage stakeholders likely to be affected by the project. The 4th Respondent did not lead evidence that from the project report presented for their assessment, any of the residents of Owino-Uhuru participated. The petitioners' evidence is that they were not consulted yet they are neighbouring the project site. The 4th Respondent was in a position to determine this when they visited the project which according to DW4 was operational before the license was issued. Therefore, the 4th Respondent would have taken note of the presence of the occupants of the settlement while they were reviewing the report for purposes of licensing. This shows there was a lacuna in the manner that the 4th Respondent executed its mandate.

105. The 4th Respondent also argued that the petitioners did not prove Causation in regard to identifying the pollutant among the several defendants some of whom did not submit themselves to the jurisdiction of this Court. The petition was served by way of substituted service by placing an advertisement in the local dailies. All the Respondents entered appearance except the 7th Respondent - Metal Refineries Company Limited and 8th Respondent. Once service was determined to be properly effected as provided for under Order 5 of the Civil Procedure Rules it was incumbent on the parties sued to submit themselves to the jurisdiction of the Court.

106. On whether the Petitioners discharged the burden of Causation, the 4th Respondent submitted that there was no pre-incident reporting. Article 69(1)(g) of the Constitution provides that **"the State shall eliminate processes and activities that are likely to endanger the environment".**

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

"(a) to have the environment protected for the benefit of present and future generations through legislative and other measures, particularly those contemplated in Article 69; and

(b) to have obligations relating to the environment

fulfilled under Article 70".

107. The Constitution thus bestows a responsibility on the State to ensure that her citizens enjoy a clean and healthy environment. One of the State actors that are obligated to ensure this right is realized is the 4th Respondent. DW3 conceded that it was the mandate of National Environment Management Authority to measure the lead levels in the air; the Water Resources Management Authority to measure the levels of lead in water and the Ministry of Labour to ensure the Occupational Safety of workers in the work place. The statute law thus does not impose an obligation on the citizens of this country and the petitioners in particular to present a pre-incident report that shows there is contamination of the atmosphere where an allegation of a breach has been made. This burden in my view is upon the State actors' to discharge before they issue a license to a project proponent and not vice versa.

108. Lastly, the 4th Respondent urged the Court to find that the petitioners were liable in contributory negligence. The petitioners' evidence was led that they have lived on this land for eons. There is no one who came forth to claim this land. I am also aware the Petitioners acquired it by mode of adverse possession vide **Mombasa Court of Appeal Case No. 84 of 2015**. ***Alfeen Mehdimohammed Vs Basil Feroz Mohamed & 223 others (2016) eKLR;***

"The history of the title to the suit land stretches back to 1922, changed in 1932 twice, 1936, 1995, 2009, 2010 2012. Of relevance, are the transfers for the period between 1936 to 2012. It was the uncontroverted evidence of the respondents that they occupied the suit land around 1975/1976. It is uncontroverted because the appellant in an honest testimony admitted that he only went to the suit land in 2012 when he found people living on the suit land and that he did not know when the respondents occupied it. When the respondents occupied the suit land the owner was Lalji Maghalji to whom the property was transferred on 15th September, 1936. So that by the time the respondents occupied it, he had been registered owner for 39 years."

109. Article 40(1) grants every person the right either individually or in association with others to acquire and own property of any description and in any part of Kenya. Article 40(3) states; **"The State shall not deprive a person of property of any description, or of any interest in, or right over, property of any description, unless the deprivation -**

(a) results from an acquisition of land or an interest in land or a conversion of an interest in land, or title to land, in accordance with Chapter Five; or

(b) is for a public purpose or in the public interest and is carried out in accordance with this Constitution and any Act of Parliament that -

(i) requires prompt payment in full, of just compensation to the person; and

(ii) allows any person who has an interest in, or right over, that property a right of access to a court of law."

110. The 4th Respondent argues that the manner of contributory negligence arises from the fact of the petitioners living in an area gazetted as an **"Industrial area"** and that the petitioners did not move out after learning of the alleged poisoning. There was no evidence presented to show that the gazetting was done prior to the occupation by the petitioners. Consequently, for them to leave the suit land, the State was under obligation to compensate them and no evidence was led of any compulsory acquisition process that was on going. The 4th Respondent did not lead evidence to suggest that the petitioners had alternative residents to relocate to away from the **"polluted area".**

111. Further, the State actors are constitutionally obligated under Article 42 to protect the environment of the entire country. It does not give leeway that industrial areas can be polluted with abandon. Equally, once pollution has been discovered, it should be remedied. I find it escapist for the 4th Respondent to shift blame on the petitioners for not moving away once the pollutant was

established instead of taking steps to remedy the situation by directing the polluter to clean up. I conclude that no proper basis was led to enable the Court to make a finding on contributory negligence.

THE 5TH RESPONDENT'S SUBMISSIONS

112. The 5th Respondent opened its submissions by listing the prayers set out in the petition. The 5th Respondent submits that Metal Refinery (EPZ) set up the factory after obtaining all the approvals of the relevant ministries at the national level before coming to the devolved system of government hence it (5th Respondent) played a minimal role. According to the 5th Respondent, the 4th Respondent remains wholly responsible for measuring the lead levels in the environment while the 3rd Respondent had a duty at all material times to carry out regular inspections to ascertain that the 7th Respondent complied with the Standards of the Public Health Act.

113. The 5th Respondent further submitted that the 4th Respondent did not carry out its mandate since vide a letter dated 6th December 2006 and 11/6/2007 it allowed the 7th Respondent to begin operations/trial runs before issuing the Environment Impact Assessment license. That National Environment Management Authority (4th Respondent) is mandated to protect and safeguard the environment. The 5th Respondent stated that it played its role when on 12/6/2008 it issued a closure order to the 7th Respondent due to the unsightly conditions. The 7th Respondent was later reopened vide a notice dated 4/7/2008 subject to compliance of a number of conditions. That this shows the 5th Respondent carried out its statutory duties to ensure residents of Owino-Uhuru village enjoyed their right to a clean and healthy environment.

114. On the claim for compensation in the sum of Kshs.2,000,000,000 the 5th Respondent urged the Court not to grant the same because the petitioners are not the only residents of Owino-Uhuru and they should not be allowed to use this petition for personal gain. The 5th Respondent relied on the holding of ***Benson Ambuti Adega and 2 others Vs Kibos Sugar Allied Industries & 4 others (2019) eKLR*** where the Court stated thus;

"That the petitioners have sought for damages and submitted an award of Kshs.100,000,000. They have referred to the Case of *Mwangi Stephen Muriithi Vs the Hon. Daniel Arap Moi, Nairobi H.C. Petition No. 625 of 2006, Arnacherry Limited Vs The Attorney General Nairobi H.C. Petition No. 248 of 2013, "Attorney General Vs Ramanpoop (2005) LRC 303"* and *Macharia Vs Mwangi (2001) EA 110*. The court has after considering the entire petition taken the petitioners to be public spirited individuals exercising their constitutional and statutory obligation to ensure the pollution to the environment being done by the 1st to 3rd Respondents, under the 4th and 5th Respondents' disinterested eyes, is stopped for the good of the residents of the area and the public. That the petition is not about their personal and individual satisfaction only. That for that reason and further considering there are many other persons in the area and beyond, who have been affected and continue to be affected by the effects of the 1st to 3rd Respondents discharging raw effluent into the environment, the court considers an award of damages to the Petitioners as individuals not appropriate in the circumstances".

SUBMISSIONS BY THE 6TH RESPONDENT

115. The 6th Respondent took issue with the evidence adduced by the Petitioners' witnesses as well as those of the 1st – 5th Respondents. I will make references to the 6th Respondent's comments on the witnesses' evidence in my determination. The 6th Respondent framed one question for determination i.e.:

(a) Whether the petitioners right to clean and health environment as guaranteed by Article 42 of the Constitution, Article 12(2)(b) of the International Covenant of Economic Social and Cultural Rights (ICESCR), Article 24(f) of the African Charter on Humans and People's Rights (ACHPR) were violated and if so the culpability of the Respondents.

116. The 6th Respondent submitted thus; **"It is not in doubt that everyone is entitled to a clean and healthy environment as enshrined in Article 42 of the Constitution of Kenya, the International Covenant of Economic Social and Cultural rights and the African Charter on Humans and Peoples rights. It is also not in doubt that there has been some level of pollution by the 7th Respondent herein"** and that the only contention was the culpability of the 6th Respondent.

117. It is the 6th Respondent submission that their mandate provided in Section 9 of the EPZ Act is to provide for the promotion and facilitation of export oriented investments and the development of enabling environment for such investment and for connected

purposes. That in complying with the law, the 6th Respondent issued the 7th Respondent with an *approval in principle* letter with conditions that needed to be fulfilled before any license can be issued. That on 6th December, 2006, the 4th Respondent gave the 7th Respondent a go ahead with the project which letter stated thus; **"we would like to advise you that the manufacture of lead alloys using scrap metal batteries from the region as raw materials can carry on. The Environment Impact Assessment license will be given to you in due course."**

118. The 6th Respondent contends that it is on the strength of the 4th Respondent's letter of 6/12/2006 that they issued the 7th Respondent with license No.000768. That the 6th Respondent did not abdicate its duties as is alleged by the petitioners. The 6th Respondent also submits that they did not participate in violating the petitioners' right to a clean and healthy environment. Further that the 6th Respondent does not have mandate to ascertain whether an activity is harmful or not as it relies on approvals from other government agencies.

119. On proposed compensation of Kenya shillings Two billion only (Kshs.2,000,000,000), the 6th Respondent submits the same is not payable to the petitioners because their petition was not backed by any sufficient proof. That the petitioners did not provide the cost of chelation treatment which they alleged they required. It is the 6th Respondent's submissions that the government cannot waste its resources on unsupported estimates. The 6th Respondent urged the Court to dismiss the petition for want of proof within the required standards.

Analysis of 6th Respondent Submissions

120. The 6th Respondent submitted that it is aware that the right to clean and healthy environment is an entitlement given under Article 42 of the Constitution of Kenya and the respective International Covenants. However, they contend that the petitioners failed to prove their case because their witnesses did not:

- Provide documentation to show their suffering emanating from lead poisoning.
- Some of their witnesses (PW8) relied on samples collected by other people.
- The petitioners never forwarded their complaints to the 6th Respondent.

121. On its culpability, the 6th Respondent submitted that they issued the 7th Respondent with *an approval in principle letter* subject to the 7th Respondent availing these;

i. Incorporate an EPZ company.

ii. Proof of availability of space in a validly gazetted processing zone.

iii. Certified copy of Environment Impact Assessment.

iv. Comply with provisions of Export Permit and Mineral Dealers License.

v. Pay USD 1000.

122. The 6th Respondent states that they have no capacity to ascertain which activities are harmful to the environment therefore they rely on other government agencies. In this case, the 6th Respondent submitted that it relied on the 4th Respondent's letter dated 6th December 2006 to issue their license. My question is why could the 6th Respondent run away from its responsibility by relying on a letter to issue a license when the EPZ Act requires a project proponent to present a certified Environment Impact Assessment license" The 6th Respondent does not explain why they switched the E.I.A license requirement for a letter. Secondly there were experts' reports relied on by both the Petitioners and the 1st to 4th Respondents which reports showed evidence of lead poisoning. The 6th Respondent is thus not truthful in submitting the Petitioners did not prove they suffered from pollution on their environment.

DETERMINATION

123. Questions for determination:

1. Whether or not this court lacked jurisdiction to entertain the petition.

2. Whether there was proof of violation of the petitioners' right to clean and healthy environment"

3. Who among the Respondents is guilty of the violations"

4. Whether the petitioners should be held responsible for contributing to the violation of their rights.

5. Whether or not the petitioners are entitled to the reliefs sought in the petition.

A. Jurisdiction

124. The 1st – 3rd Respondents raised the lack of jurisdiction of this court to determine the dispute in their submissions. It is well settled in law that a court without jurisdiction should put its pen down and proceed no further. This was the holding in the renowned Case of ***Motor Vessel Lilian 'S' Vs Caltex Oil(K) Limited (1989) eKLR***. Recently the Court of Appeal in the Case of ***Kibos Distillers Limited & 4 others Vs Benson Ambuti Adega & 3 others (2020) eKLR*** stated that jurisdiction cannot be inferred by lack of knowledge of the parties.

125. The gist of this petition revolves around the violations of the rights of the petitioners towards a clean and healthy environment as provided for in Article 42; the rights to life espoused in Article 26; right to the highest attainable standard of health care and sanitation as guaranteed by Article 43 of the Constitution. Article 70 of the Constitution **provides that any person who alleges that a right to a clean and healthy environment has been breached or is likely to be denied, violated or infringed may apply to a court for redress in addition to any other legal remedies that are available in respect of the same matter**. Section 3(3) of the Environmental Management and Coordination Act No. 8 of 1999, gives any party who alleges that his right to a clean and healthy environment has been or is likely to be violated to apply to the Environment and Land court for redress. The 1st – 3rd Respondents did not give in detail the reason why they held the view that this court lacked jurisdiction. However, going by the provisions of the Constitution and EMCA, I am satisfied that this petition was properly before this court.

B. Whether there was proof of violations of the rights of the petitioners as pleaded.

126. The 1st to 6th Respondents argue that the Petitioners did not prove within the required standards the alleged violations of their rights. The petitioners called a total of 10 witnesses. PW1–7 who were petitioners and also residents of Owino-Uhuru. They gave narrations of the injuries suffered or loss of loved ones as the case may be. This court had the opportunity to see the minor Kelvin Musyoka and observed the unsightly rashes/wounds that were spread out on his limbs (legs and hands) discharging fluids. The minor was said to have been born normal within the settlement but started developing problems at age 2 years.

127. I shall not repeat the evidence of PW1–7 in regard to the injuries/loss they suffered as the same is already summarized in paragraphs 14 – 29 of this judgment. The Respondents stated that the petitioners failed to show that their injuries were a result of the lead poisoning emanating from the 7th Respondent's premises. Infact the 6th Respondent submitted that PW8 Wandera Chrispus Bideru who was the deputy government chemist relied on samples collected by other people so his report could not be relied on. The samples the 6th Respondent is casting doubts on was forwarded to this witness by the Director of Medical Services, Ministry of Health. The Ministry of Health was sued as the 3rd Respondent herein. PW8 prepared his report while working for the Government of Kenya. The government was also sued through the Attorney General as the 1st Respondent.

128. The report presented by PW8 was in effect the report by the 1st – 3rd Respondents. Since this witness (PW8) was not declared as a hostile witness, there was no basis laid to doubt his findings. The findings of PW8 which were very detailed is found at pages 182-195 of the petition. All the people whose samples were tested were residents of Owino-Uhuru. Amongst these were Alfred Mullo (PW2), Margaret Akinyi – 9th Petitioner, Elias Ochieng Oseya - 5th Petitioner, Daniel Ochieng Ogola – 8th Petitioners and Elizabeth Francisca – 4th Petitioner.

129. Paragraph 3 of the report (187 – 188 of the petition) gave a summary of Blood lead (Pb) levels results for the 50 residents of Owino-Uhuru and Table 2 gave summary of persons (which included petitioners) with elevated blood lead levels which required one form of intervention or another. The government chemist report also included soil lead levels and their findings. At page 189 of the petition was table 3 which gave the sample points; table 4 was summary of dust levels and also water levels. Foot note to table 4 stated thus;

i. Lead at levels ?40mg/ft^2 on floors is a hazard.

ii. Lead levels ?250mg/ft^2 on interior windows is a hazard.

iii. There are pockets of dust with high lead levels which is hazardous especially for children in play areas including persons who spend time in enclosed places.

130. Besides the report of the government chemist, the petitioners' filed a report by the Parliamentary Standing Committee on Health on the Owino-Uhuru Petition. This is found at pages 109–125 of the petition. The committee held it sittings pursuant to a petition they received from residents of Owino-Uhuru alleging violation of their rights stipulated in Article 42, 43, 69 and 70 of the Constitution. The committee which comprised members of the 11th Parliament stated that they did a fact finding tour in Owino-Uhuru village as well as the 7th Respondent's premises. They also held meetings with various stakeholders such as Mombasa County Health Department officials, Public Complaints Committee and National Environment and Management Authority officials.

131. The committee further stated that they reviewed documents presented and the reports of the different institutions charged with protection of the Environment such as Public Complaints Committee (PCC), National Environment and Management Authority, Public Health e.t.c. For instance at page 25 of the report (page 121 of the petition), the PCC stated thus under paragraph 3.8.1.2;

i. *The PCC team observed evidence suggestive of air pollution i.e corrosion of corrugated iron sheets on the rooftops of homes of the residents of Owino-Uhuru.*

ii. The factory has been discharging effluent through a hole in their boundary wall into a trench that runs through Owino-Uhuru village and into the municipal drainage system. That this effluent posed a significant health risk to human and animal health life; and

iii. Lead dust produced from the factory had had negative impact on the health of workers therein.

132. The Parliamentary Committee in their report made a raft of recommendations *inter alia;*

a. The immediate cleaning of the environment including detoxifying and restoring the soil.

b. The replanting of destroyed trees.

c. The immediate testing of all the residents of Owino-Uhuru village for lead exposure.

d. The removal of hazardous waste slug the plant has disposed of over the years and continues to *dispose of at Mwakirunge Dumpsite* (underline mine for emphasis).

133. The Petitioners took their petition very seriously because inspite of having the two reports from the government agencies, they proceeded to engage the services of Dr. Ajoni Adede who testified as PW9. Dr. Ajoni said he practices medicine in Mombasa. It is his evidence that he was engaged by the 10th petitioner to carry out tests on the named persons who are 1st – 9th petitioners. That from his examination and history given he determined that the impairments on their systems was due to lead absorption which

caused manifestations on their skin, loss of appetite and poor memory.

134. To protect the right to a clean environment guaranteed under Article 42 of the Constitution, Article 70 states that any person who alleges that this right is being or is likely to be denied or violated, infringed or threatened; the person may apply to the court for redress. The Constitution gives Kenyans access to court even where there are only threats of violation. In the instant petition, I am satisfied that the Petitioners did not just demonstrate that their rights under the stated articles were likely to or were threatened to be violated. They proved the actual violation which was to their personal life, the environment (soil and dust) where they stayed and the water (sanitation) which they consumed. None of the Respondents who participated in these proceedings gave any reports to contradict the scientific reports produced on record.

C. The 3rd question is whether or not the Respondents are culpable for the violations suffered by the Petitioners.

135. From the evidence adduced, the source of the pollutant was the 7th Respondent that engaged in lead smelting. The 7th and 8th Respondents did not file anything to contradict the violations levelled against them by the Petitioners. The 5th and 6th Respondents however blamed the 4th Respondent for the negligence. The 4th Respondent on its part apportioned the blame on the petitioners for continuing to live in an area that was zoned as industrial and also for failing to move out after learning of the pollution.

136. From the evidence on record, the 7th Respondent's operations commenced late 2006 – at least according to the evidence of the 6th Respondent's witnesses. The Petitioners' evidence is that they have lived in the same place for several years. For instance, PW2 said he started living there around 1972. The 1st Petitioner (Kelvin Muysoka – Minor) was born within Owino-Uhuru village. The long and short of the petitioner's evidence is that the 1st – 6th Respondents were aware of their presence on the land at the time they were licensing the operations of the 7th Respondent. There was no evidence led that the petitioners were engaged through public participation before the commencement of the operations of the 7th Respondent.

137. The 4th Respondent who attempted to apportion blame on the petitioners did not lead evidence to ascertain that Owino-Uhuru village is also gazetted as an EPZ region or that the petitioners had alternative accommodation to move to. In any event availability of alternative accommodation does not grant permission for pollution of the environment which here includes both human and natural environment. This would go against principle 6 of the Stockholm Declaration 1972 which states thus; "*the discharge of toxic substances or of other substances and the release of heat in such quantities or concentration as to exceed the capacity of the environment to render them harmless must be halted in order to ensure that serious or irreversible damage is not inflicted upon the ecosystems. The just struggle of the peoples of all countries against pollution should be supported.*"

138. The Attorney General is sued generally as the principal legal representative of the government and its agencies. The 2nd Respondent is the Cabinet Secretary Ministry of Environment Water; and Natural Resources. It is the parent Ministry for the 4th Respondent. The role of the ministry is to formulate policies and also co-operate with other stakeholders towards the realization of the spirit of our Constitution.

139. The 2nd Respondent in undated letter to the Chief Executive of EPZ Authority and in reply to the 6th Respondent's letter dated 12th June 2006 stated thus at paragraph 2 and 3, "As stated in our letter reference No. M/2273/B/(151) of 20th April 2006 a copy of which is hereby attached for ease of reference, exports of lead are still allowed for those who have the necessary licenses from our Department and NEMA. Further, the export of lead from scrap batteries should be done in accordance with the provisions of the Mining Act Cap. 306 of the Laws of Kenya."

140. The 2nd Respondent then proceeded to issue license No. 78 of 2006 to the 7th Respondent valid until 31st December 2006 for operations at Penguin Paper and Book Company EPZ Limited Godowns. The license was issued prior to the issuance of the National Environment and Management Authority license which was given on 5th February 2008 yet the 2nd Respondent had acknowledged the role of NEMA in their letter quoted herein above. In opposing the petition, the 1st to 3rd Respondents filed grounds of opposition dated 16th May 2018 which grounds do not amount to a denial of facts set out in the affidavit in support of the Petition. Article 69 of the Constitution imposes on the State a duty to:

"69(a) ensure sustainable exploitation, utilisation, management and conservation of the environment and natural resources, and ensure the equitable sharing of the accruing benefits;

69(f) establish systems of environmental impact assessment, environmental audit and monitoring of the environment;

69(h) utilise the environment and natural resources for the benefit of the people of Kenya."

141. The 2nd Respondent as the office in charge of the environment and natural resources further contravened the law when they failed to encourage public participation (Article 89(d)) and licensing processes and activities that are likely to endanger the environment (Article 69(g)) when they issued the 7th Respondent a license without supportive documents. Further, the 2nd Respondent had just began working on an environmental policy in 2006 when they were issuing the 7th Respondent with the license. The policy came to fruition in the year 2013 hence it is questionable what policy document gave the 2nd Respondent confidence in issuing a license as well as advising the 6th Respondent to authorize the operations of the 7th Respondent.

142. The Public Health Act Cap 242 is one of the sectoral laws that governs the government. Section 118 thereof list several Acts which shall be deemed to be nuisances liable to be dealt with in the manner provided in this part. Amongst these are:

"118(e) any noxious matter, or waste water, flowing or discharged from any premises, wherever situated, into any public street, or into the gutter or side channel of any street, or into any nullah or watercourse, irrigation channel or bed thereof not approved for the reception of such discharge;

(h) any accumulation or deposit of refuse, offal, manure or other matter whatsoever which is offensive or which is injurious or dangerous to health."

143. Section 119 gives the Medical Officer of Health powers to serve notice to remove nuisance on the author of the nuisance. In case the author does not comply, Section 120(1) provides thus;

"If the person on whom a notice to remove a nuisance has been served as aforesaid fails to comply with any of the requirements thereof within the time specified, the medical officer of health shall cause a complaint relating to such nuisance to be made before a magistrate, and such magistrate shall thereupon issue a summons requiring the person on whom the notice was served to appear before his court. and **120(3) "The court may by such order impose a fine not exceeding two hundred shillings on the person on whom the order is made, and may also give directions as to the payment of all costs incurred up to the time of the hearing or making of the order for the removal of the nuisance."**

144. The 3rd Respondent said they did due diligence in dealing with pollution caused by the 7th Respondent. Yet in his evidence, DW1 testified that workers were found working without protective equipment such as masks, there was dust as well as a heap of uncrushed and crushed batteries and the smelting was emitting toxic fumes. DW1 said he made recommendations but he could not close the factory. He also admitted proposing re-opening of the company after implementing of the recommendations made in his report. That the officers discovered tonnes of sludge on the river bed which act they did not permit. In spite of all these observations, the 3rd Respondent did not invoke the provisions of Section 115 – 120 of the Act to have the author remove the nuisance.

145. DW2 who is the director of Medical Services also stated that she visited the village and the factory. That in their report which they shared with NEMA they recommended that the children be stopped from further exporsure. DW2 stated that the children were given iron and calcium supplements by the County Government. From the petitioners evidence, they stated that the supplements were only given for a period of 3 months then stopped. There has been no follow up or plan of action put in place by the 3rd Respondent to ensure that the petitioners receive the necessary treatment until the lead levels in their blood are reduced to allowable levels. On account of taking steps to have the 7th Respondent remove the nuisance and for failure to provide required treatment to the petitioners, I find the 3rd Respondent also liable for breaching the rights to life and clean and healthy environment of the petitioners.

146. Did the 4th Respondent fulfil its mandate as set out in Section 58 of Environmental Management and Coordination Act" In stating that it did, it relied on the documents annexed to Mr. Zephania Ouma's replying affidavit sworn on 1st March 2018. According to the 4th Respondent's evidence, an Environment Impact Assessment license was issued in February 2008 pursuant to an Environment Impact Assessment project report submitted on 13th March 2007. The 4th Respondent annexed a letter dated 26th September 2006 (page 70 of Ouma's affidavit) which approved the 7th Respondent's project to be undertaken on L.R No.

MN/II/3697, Kilifi District and letter by the 7th Respondent dated 1/6/2006 requesting for change of address on the National Environment Management Authority license and Environment Impact Assessment approval (NEMA/PR/5/1213) to the 8th Respondent's premises.

147. However, on 6/12/2006, the 4th Respondent issued another letter to the 7th Respondent which stated thus, **"Further to the approval letter dated 26th September 2006, and your letter of compliance to the conditions of approval sent to us on 24th November, we would like to advice you that the manufacture of lead alloys using scrap metal batteries from the region as raw material can carry on. The EIA license will be given to you in due course. However, do ensure that the conditions set out in the approval letter will be strictly adhered to".**

148. The question which arises, was the 4th Respondent approving another project after it already did so on 26/9/2006 for the project in the Kilifi land" Secondly the 6th Respondent stated that it relied on this letter to issue the 7th Respondent with a license. Yet the letter referred to L.R No. MN/III/3697 Kilifi District while the 6th Respondent was stationed in Changamwe Mombasa. As at March 2007, the project on the 8th Respondent's land had not been issued with approval to operate as the 4th Respondent did not provide evidence on its response for the request to transfer the license from Kilifi District to Mombasa.

149. It is interesting to note that while the 4th Respondent was considering the Environment Impact Assessment project report dated 13/3/2007, it went ahead to issue a letter dated 23/4/2007 referenced **"Cessation and Restoration Order for the Scrap Battery processing plant, Birikani area off New Holland/CMC Yard Nairobi Road, Mombasa".** The letter directed the 7th Respondent to do the following;

a. Cease operations immediately.

b. Initiate an Environmental Impact Assessment (EIA) Study to facilitate in depth evaluation of the potential impacts associated with the project and to materialize harmony with the affected and interested stakeholders.

c. Submit a letter of commitment to the Authority to the effect that you will comply with the above requirements within seven (7) days from the date of receipt of this letter.

d. Call Environmental Inspectors from NEMA to inspect the level of the compliance, which should be to the satisfaction of the Authority on such terms and conditions as may be deemed appropriate and necessary.

150. Within 3 weeks of the cessation and restoration order, the 4th Respondent on 16th May 2007 proceeded to approve the 7th Respondent's project. The 4th Respondent's action in my view amount to assisting the 7th Respondent in breaching the law instead of holding them to account. If the law allowed them to issue a cessation order why issue an Environment Impact Assessment (E.I.A.) license before confirming that their letter of 23/4/2007 had been complied with" To show the contradiction by the 4th Respondent in carrying out its mandate, it issued another letter dated 11th June 2007 stating thus, **"This is to inform you that the authority has reviewed your request and hereby grant you permission to carry out trial runs."** The letter of 16/5/2007 had in conclusion asked the 7th Respondent to, **"Kindly confirm in writing that the condition shall be complied with prior to commencement of the project to enable the authority process the Environment Impact Assessment license."** The 7th Respondent gave the commitment vide their letter of 17th May 2007. So was the letter of 17/5/2007 the basis for giving permission for trial runs before a license was issued" Does the law allow for trial runs before an Environment Impact Assessment license is given"

151. The 4th Respondent said that it again issued an important order to the 7th Respondent vide its letter dated 3rd October 2011 copied to the Provincial Director of Environment. The improvement order listed *inter alia* the following;

a. To ensure that the remnant acid from the used lead acid batteries is drained and neutralized before discharge into the storm drain.

b. To prevent fugitive emissions from the factory floor.

c. To clean or wash all the split bottom from the air pollution control unit area.

152. Besides issuing the improvement order, there was no evidence presented to ascertain the 7th Respondent complied with the requirements of the letter of 3/10/2011. And if they did not comply, what steps the 4th Respondent took. Further in their letter of 27/11/2013, they alluded that the 7th Respondent had been closed in 2012. The 4th Respondent still went ahead and issued a certificate of transfer of Environment Impact Assessment licence No.0001375 issued to Metal Refineries (7th Respondent) and it transferred it to Max Industries Limited on 26th April 2013. What was being transferred if the factory had been closed" Inspite of this anomaly, the 4th Respondent wants this Court to find that it properly executed its mandate"

153. The 4th Respondent on 29th November 2013 issued a closure order under Section 117 of Environmental Management and Coordination Act (EMCA) to Max Industries Limited for operating a lead recycling plant without Waste Recycling license contrary to Waste Management Regulations 2006. The letter asked Max Industries to address violations to the satisfaction of the Authority (the 4th Respondent). The Authority did not however demonstrate that it invoked the principle of polluter pays as envisaged in Environmental Management Coordination Act (EMCA) and the International Covenants since all these time no prosecution had been undertaken nor payment from the polluter ordered for restoration of the environment. All they did was write letters to demand for improvement until the residents of Owino-Uhuru petitioned parliament which then constituted a committee and whose committee's recommendations resulted into tests being done both on humans and the environment.

154. The 6th Respondent vide its letter dated 27th June 2006 acknowledged receipt of the 7th Respondent's application for EPZ Enterprise License on 26th May 2006. The copy of the 7th Respondent's application was not attached. The 6th Respondent however responded to the application and granted the 7th Respondent approval in principle. The approval in principle required:

a. Proof of space in a validly gazzetted EPZ.

b. Submission of copy of EIA license from NEMA for the project.

155. The 6th Respondent issued license No. 000768 (FK-4) valid from 13th December 2006 – 18th December 2007 for operations on plot No. MN/V/1707-Penguin Paper Book EPZ – Mombasa. The NEMA license was issued on 5th February 2008 for operations located on plot No. MN/V/1707 Mombasa. The 6th Respondent relied on NEMA's letters dated 26th September 2006 and 6th December 2006 for issuing the license. The two letters were merely letters not an EIA license. Secondly the letters referred to plot No. MN/II/3697 Kilifi District. Kilifi District is within Kilifi County while the license given for operations was on land said to be in Mombasa. The 6th Respondent was thus in violation of the law when it issued the 7th Respondent with a license without prior submission of an EIA license and premised on letters that were in respect of distinct parcels of land and is wrong to state that it complied with the EPZ Act.

156. There is an argument by the Respondents that the petitioners should bear part of the blame. Nowhere in the affidavit of Fanuel Kidenda was it deposed that the petitioners were living in a gazetted space of the Export Processing Zone. The 6th Respondent did not lead evidence to suggest that the petitioners moved into Owino-Uhuru village in the recent past. Further even export processing zones have neighbourhoods which ought to be protected whether they are residential or commercial/industrial to protect our environment for intra & inter-generational equity. This is in accordance with principle 2 of the Stockholm Declaration 1973 which states thus; "The natural resources of the earth including the air, water land flora and fauna especially representative samples of natural ecosystems must be safeguarded to the benefit of the present and future generations through careful planning or management as appropriate."

157. Having said the above in regard to the roles of the 2nd, 3rd, 4th and 6th – 8th Respondents, my analysis of the evidence adduced is that I find no liability attaching on the 5th Respondent. The evidence adduced by both sides does show there was no direct role of the 5th Respondent in failing to comply with the environmental laws. The Physical Planning Act cited by the petitioners ceased to apply to the EPZ zone once the area was gazetted as such under the EPZ Act. Secondly the issuance of single business permit is not attached to fulfilment of any conditions prior to its being issued.

158. In summary under liability I find the liability of the 5th Respondent is neglible. For the remainder of the respondents I apportion liability in the following ratio:

i. 2nd Respondent – 10%

ii. 3rd Respondent – 10%

iii. 4th Respondent – 40%

iv. 6th Respondent – 10%

v. 7th Respondent – 25%

vi. 8th Respondent – 5%

C. Compensation

159. The Petitioners are seeking to be compensated as set out in the reliefs prayed for in the petition. They also prayed for an award for damages in monetary terms in the sum of Kshs.2 billion. The Respondents did not give a counter proposal in the event the court found there was monetary award payable. The 1st – 3rd Respondents argued in their submissions that no compensation should be paid in a representative suit such as this petition. The 6th Respondent submitted that the proposed sum of Kshs.2 Billion is merely estimates that is unsupported by evidence. Thus the government should not be ordered to pay compensation premised on estimates.

160. From the evidence on record, it is indeed not in doubt that the petitioners suffered individually through inhalation/absorption of pollutants from the 7th Respondent. Further the environment where they lived (Owino-Uhuru Settlement) was affected as there was evidence of soil and water pollution from the experts and report produced in evidence. Are they entitled to any compensation" Principle 13 of the RIO Declaration imposes an obligation on the State to develop law regarding liability and compensation for victims of pollution. The principle states thus, “States shall develop national law regarding liability and compensation for the victims of pollution and other environmental damage. States shall also cooperate in an expeditious and more determined manner to develop further international law regarding liability and compensation for adverse effects of environmental damage caused by activities within their jurisdiction or control to areas beyond their jurisdiction.”

161. The petitioners would not have moved the court had the State actors performed their roles immediately the adverse effects of the 7th Respondent were established. The 2nd Respondent for instance would have engaged in the soil and water clean-up without a case filed to obtain an order compelling it to do so while the 7th Respondent was still in operation. After all that is a duty bestowed on it by Article 70(c) of the Constitution and Section 108(1) of the Environmental Management and Coordination Act (EMCA). The said Section provides thus;

“Subject to any other provisions of this Act, the Authority may issue and serve on any person in respect of any matter relating to the management of the environment an order in this Part referred to as an environmental restoration order.”

162. Similarly, the 3rd Respondent would have provided treatment to the petitioners and all persons affected from costs factored in during the process of the project approval as stated in principle 16 of Rio thus;

“National authorities should endeavour to promote the internalization of environmental costs and the use of economic instruments, taking into account the approach that the polluter should, in principle, bear the cost of pollution, with due regard to the public interest and without distorting international trade and investment.” In the Case of ***Indian Council for Enviro Legal Action Vs Union of India (1996) 2 JT 196: (1996 AIRSCW 1069)*** it was stated thus,

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

163. In the Case of ***Waweru Vs Republic (2006) eKLR,*** the applicants who were property owners had been charged with the offence of discharging raw sewage into a public water source contrary to the provisions of the Public Health Act. The court agreed with the applicants but it went on sua sponte to discuss the implications of the applicants’ actions for Sustainable Development and

Environmental Management. The court held that the constitutional right to life is enshrined in Section 71 of the Kenyan Constitution but it includes the right to a clean and healthy environment.

164. In the Case of **Mohamed Ali Baadi and Others Vs A.G & 11 others (2018) eKLR** commonly referred to as the LAPSSET case, the project proponent agreed to pay monetary compensation to the persons who were affected to the tune of Kshs.1,760,424,000. Since this was still an ongoing project, the court ordered the project proponent to include a demonstrably specific programme for consultation with the petitioners and the other Lamu Island residents about the impact the LAPSSET project is likely to have on their culture as a district indigenous community and how to mitigate any adverse effects on the culture.

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

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

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

"The enterprise must be held to be under an obligation to provide that the hazardous or inherently dangerous activity in which it is engaged must be conducted with the highest standards of safety and if any harm results on account of such activity, the enterprise must be absolutely liable to compensate for such harm and it should be no answer to the enterprise to say that it had taken all reasonable care and that the harm occurred without any negligence on its part. Since the persons harmed on account of the hazardous or inherently dangerous activity carried on by the enterprise would not be in a position to isolate the process of operation from the hazardous preparation of the substance of any other related element that caused the harm, the enterprise must be held strictly liable for causing such harm as part of the social cost of carrying on the hazardous or inherently dangerous activity. If the enterprise is permitted to carry on a hazardous or inherently dangerous activity for its profit, the law must presume that such permission is conditional on the enterprise absorbing the cost of any accident arising on account of such hazardous or inherently dangerous activity as an appropriate item for its overheads. Such hazardous or inherently dangerous activity for private profit can be tolerated on condition that the enterprise engaged in such hazardous or inherently dangerous activity indemnifies all those who suffer on account of carrying on such hazardous or inherently dangerous activity regardless of whether it is carried out carefully or not … we would therefore hold that where an enterprise is engaged in a hazardous or inherently dangerous activity, resulting for example in escape of toxic gas, the enterprise is strictly and absolutely liable to compensate all those who are affected by the accident and such liability is not subject to any of the exceptions which operate vis-à-vis the tortious principle of strict liability under the rule in Rylands Vs. Fletcher (1986) LR 3 HL 330, (1861 – 73)."

167. The above two Cases were cited in the Case of ***David M Ndetei Vs Orbit Chemical Industries Ltd (2014) eKLR*** where at page 6 Justice Anyara Emukule stated thus,

"However, the defendant argued that its processes were legal having obtained permits, licences and approvals to set up and run its plant and its manufacturing processes have at all times been carried out in compliance with the various regulations.

The fact that the Defendant's activities amounted to a reasonable use of land for a lawful purpose is not in my view an automatic defence to strict liability under the Rylands rule. This is more so in the instant case where although the defendant had been granted change of user of the parcel of land from agricultural/residential to industrial, the land was still situated in a neighbourhood that was still largely agricultural and residential."

The judge proceeded to award the plaintiff. A mandatory injunction directing the defendant by itself, its servants or agents to re-direct all storm water that originates from the defendant's premises away from the plaintiff's property using drainages with impervious lining:

i. Costs of restoration of the soil Kshs.267,439,464.15.

ii. General damages for nuisance Kshs.500,000.

iii. Cost of the suit and counter-claim.

168. In light of the provisions of Article 70(c) of the Constitution; Section 108 of EMCA and the Case law highlighted hereinabove, I am persuaded to make a finding that the petitioners are entitled to compensation in monetary and non-monetary reliefs as pleaded in the petition which reliefs I had set out at the beginning of this judgment. On whether or not the petitioners are entitled to the:

i. Declaration of their rights to a clean and healthy environment.

ii. Declaration of rights to the highest attainable standard of health and right to clean and safe water guaranteed by Article 43 of the Constitution.

iii. Declaration on the Right to life as guaranteed by the provisions of Article 26

I allow all the above

169. The petitioners also prayed under paragraph (iv) a declaration that the systematic denial of access to information about how exposure to lead would affect them amounted to a violation of Article 35. In my opinion, this prayer has been overtaken by events. I say so because following the petitioners' petition to the 11th parliament, a committee was constituted which recommended several testing to be done both on the residents of the settlement and the soil, dust and water in the area. The reports were subsequently shared out to the Respondents. Although this right was breached at the commencement of the project, the information has since been shared. Secondly during the hearing of the petition, it was confirmed that the 7th Respondent had ceased operations. If any company were to continue the project, the petitioners are now well informed. There is no need in my opinion to now grant the orders.

170. The petitioners further asked for compensation for general damages as a result of damage to their health, the environment and for loss of life. They have proposed a sum of Kshs.2,000,000,000 for the damage to humans and Kshs. One Billion (Kshs.1,000,000,000) for soil clean up. The 1st – 6th Respondents urged the court to dismiss the prayer for compensation. Not even the 2nd and 4th Respondent proposed that they can undertake to do the soil clean up nor the 3rd respondent propose a module to provide the chelation treatment of some of the ailing petitioners yet it is a mandate imposed on them under statute. The dismissive approach demonstrates a lack of commitment on the part of the Respondents to protect the right to clean and healthy environment as well as the ecosystem. The petitioners cited the ***LAPSSET and David Ndetei Cases (supra)*** to support their submission for an award of a total sum of Kshs.3 Billion.

171. In the absence of alternate proposals, this court is persuaded to adopt the proposal given by the petitioners in regard to the sum awardable. I have considered the fact that the comparative Case law cited awarded amounts which is close to the submitted amount. Consequently: in place of Kshs. 2 billion proposed for personal injury and loss of 1 life, I shall award Kshs.1.3 Billion due and payable to the 1st – 9th petitioners and persons claiming through them. The 2nd, 3rd, 4th, and 6th – 8th Respondents shall pay in accordance with apportionment of their liability in paragraph 158 above the total sum of Kshs.1.3 Billion within a period of 90 days from the date hereof and in default, the petitioners are at liberty to execute. The court further direct the named liable respondents to within 4 months (120 days) from date of this judgment to clean-up the soil, water and remove any wastes deposited within the

settlement by the 7th respondent. In default, the sum of Kshs.700,000,000 comes due and payable to the 10th petitioner to coordinate the soil/environmental clean-up exercise.

172. The exercise in prayer (vi) had also been done going by the reports filed in this petition. I decline to grant the same. **Prayer (vii)** shall lie in the event that the monetary award given in terms of **prayer (v)** is not honoured. Otherwise granting this prayer will amount to doubling the award on compensation and soil clean up.

173. I also allow **prayer (viii)** and do hereby issue an order of mandamus against the 1st, 2nd and 4th Respondents directing them to develop and implement regulations adopted from best practices with regard to lead and lead alloys manufacturing plants. Prayer (ix) is declined as in this court's opinion the provisions of the Constitution and EMCA together with other sectoral laws on the environment is sufficient if adhered to.

174. The petitioners also prayed to be awarded costs of the petition. The 1st – 6th Respondents also submitted that the petition should be dismissed with costs. The practice of the courts has been not to award costs in constitutional petitions. However before costs are waived a basis must be laid for the same. The history of this petition reveals non-action by the Respondents inspite of several complaints received from the petitioners and failing to act on their own (Respondents) recommendations to remedy the environment. Therefore their inaction having led to the filing of this suit, it is my considered view and I so hold that the petitioners are entitled to costs of the petition.

175. Lastly I must commend the advocates who participated in this petition for their commitment to have the petition fast tracked as well as indepth presentations of their clients' cases.

176. Judgment accordingly.

Judgment Dated and signed at Busia this 16th day of July 2020.

A. OMOLLO

JUDGE

And delivered electronically by email this 16th Day of July, 2020 due to Covid-19 pandemic.

A. OMOLLO

JUDGE