



LEGAL EXPERT STUDY REPORT ON THE OWINO UHURU CLASS ACTION LITIGATION SUIT

By Hannah Wamuyu W-K

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Acknowledgement

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Lastly we wish to appreciate Mrs. Hannah Wamuyu the legal expert who conducted the expert study on the Owino Uhuru Class Action Litigation Suit. Her vast knowledge on legal matters ensured the success of the study.

Thank you all.

Executive Summary

In 2006, Metal Refinery EPZ limited started lead extraction operations in close proximity to Owino Uhuru Village. The activities resulted in lead pollution which heavily impacted on the health of the people and their environment. The residents suffered a number of diseases to which they are ailing to date. The community under the guidance of Center for Justice Governance and Environmental Action (CJGEA) sought assistance from government institutions to have the pollution stopped and the contaminated environment restored and affected residents treated but was not successful. However, CJGEA engaged the East Africa Community in protesting the operations of the factory which led to a ban of used acid battery products from East Africa. This led to closure of the lead extraction factory and this helped to stop the continuing harm to the environment.

The residents of Owino Uhuru and CGJEA then pursued the intervention of the judiciary and sued for violation of their right to a clean and healthy environment seeking compensation of harm and remediation of the contaminated environment in the case of **Kelvin Musyoka, & Others v Attorney General and others**¹ in February 2016. On 16th July, 2020, the Environment and Lands High Court of Mombasa issued compensation orders for payment of Kenya Shillings **1,300,000,000** to the residents of Owino Uhuru. The judge further ordered clean-up of the soil, water and removal of any waste deposited within the settlement of the Owino Uhuru community failure to which a sum of **700,000,000** would come payable to CJGEA to coordinate the soil/environmental clean-up exercise.

The report explains measures taken by the residents of Owino Uhuru with the help of Centre for Justice Governance and Environmental Action (CJGEA) in stopping the operations of the lead factory and litigating the case **Kelvin Musyoka, & Others v Attorney General and others**² in court. The report explains the path undertaken by the Owino Uhuru residents in litigating a class action suit in court.

A number of factors contributed to the success of the case related to the activities that were carried out in preparation of the case. They are namely: the establishment of an organization that mobilized the residents of Owino Uhuru in putting up a class action litigation suit; identification of competent advocates; mobilization of funds that were committed to the work of scientific evidence collection and legal fee for the advocates among other related costs.

The report identified a number of legal milestones that led to a favorable decision in favor of the claimants. They are: identifying the proper responsible parties to sue with a clear scope of liability; identifying proper court to handle the matter, collection and presentation of evidence to show proof of violation of their rights; assessment of injury and justification of damages.

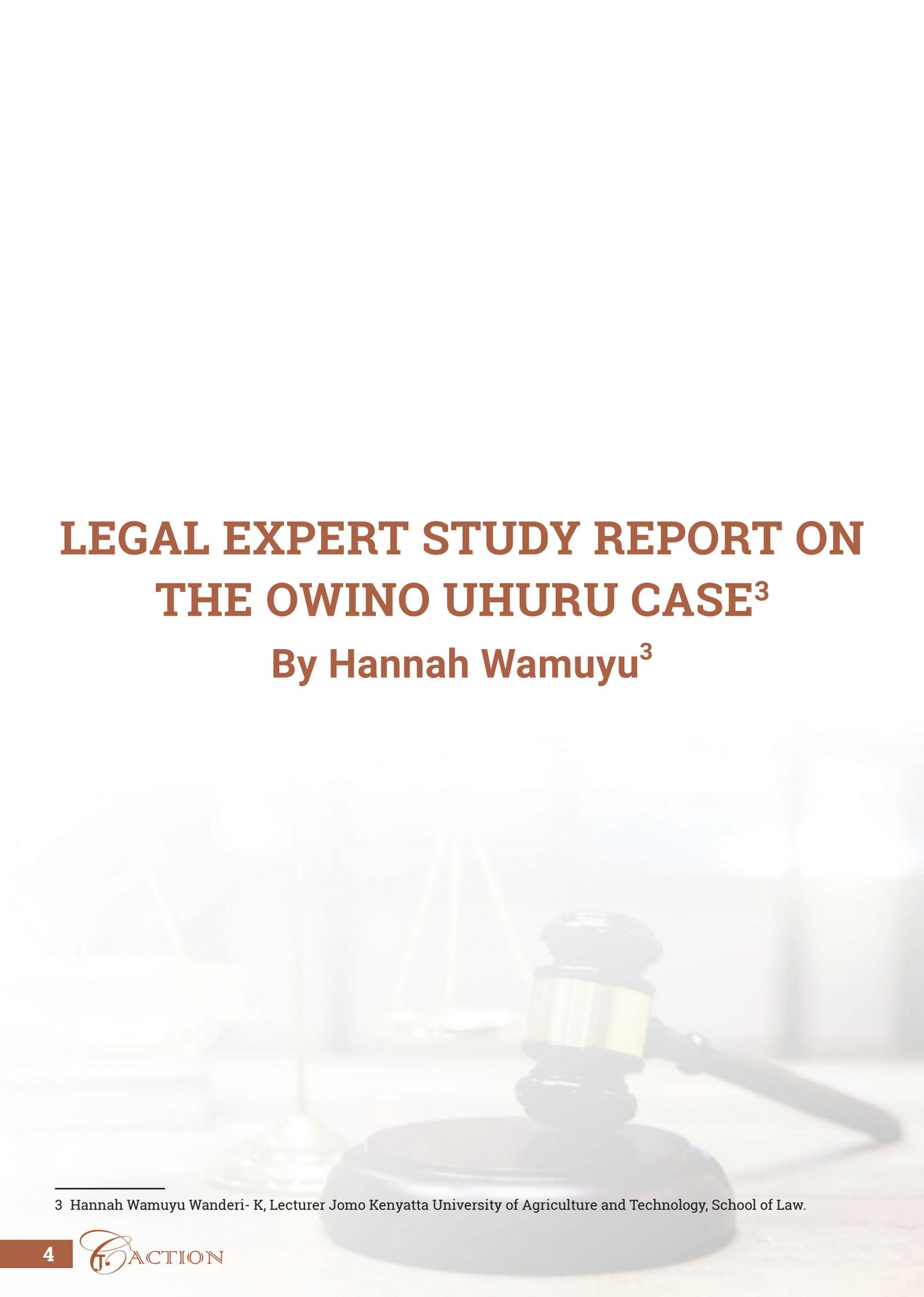
The report will serve as a guide by potential claimants in similar suits for environmental rights violations.

1 Petition No.1 of 2016, Environmental Law Court, Mombasa.

2 Petition No.1 of 2016, Environmental Law Court, Mombasa.

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LEGAL EXPERT STUDY REPORT ON THE OWINO UHURU CASE³

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1. Project Outcome

The main outcome is to develop an expert study on the class action litigation, with respect to analysing the proceedings process, monitoring and evaluating compliance by the respondents

1.1 Project Short Term Outcomes

The main outcome is to ensure access to justice for environmental human rights abuses. This is to be achieved by:

- a) proffering solutions to remedy defects of justice
- b) Providing a guide to running a litigation suit by applying the Owino Uhuru class action suit as a case study.

1.2 Project Longer Term Outcomes

To provide effective solutions to defects of justice and promote accountability for human rights abuses by the alleged perpetrators regardless of their state connections and positions in Government

1.3 Project Indicators

To Provide a guide for Environmental Human Rights Defenders (EHRDs) that can be followed in filing of class action suits in environmental related violations

2. Summary of the Case

In 2006, the area plot No.1707/Sect/VMN/MIKINDANI/MOMBASA that was 50 metres away from Owino Uhuru village was let out for lead extraction operations. The activities resulted in lead pollution which heavily impacted on the environment. The community under the guidance of Centre for Justice Governance and Environmental Action (CJGEA) sought help from government institutions to have pollution stopped and the contaminated environment restored and affected residents treated but was not successful. In February 2016, CJGEA and nine other persons from Owino Uhuru filed a class action on behalf of the people of Owino Uhuru against the Metal Refinery EPZ Limited the proprietor to a lead extraction factory and the Attorney General and other state ministries and agencies for lead pollution that caused harm to the residents and their environment. The case is referenced as **Kelvin Musyoka, & Others v Attorney General and others**⁴ (herein referred to as Owino Uhuru case). The area sits on 13.5 acres of land and is 50 meters away from the factory. The class action sought to challenge the responsibility of the state and non-state actors towards the protection of the right to a clean and healthy environment in Article 42 and enforced under section 70 of the Constitution 2010. The petitioners wanted compensation for injuries suffered and remediation of their environment that was contaminated with lead pollution.

The judgment was delivered on 11th July, 2020, 4 years after the case was filed in court. An analysis of the steps taken to put up the class action suit and the conduct of proceedings will help in identifying a road map that can be used by potential litigants in preparing for litigation for environmental rights violations.

2.1 Description of the Petitioners

The petitioners in this case are 10; 9 of whom are the residents in the area under pollution while 1 petitioner is a community based organization CJGEA, engaged in environmental rights advocacy activities that took up the case. The organization listed as the 10th petitioner took a critical role of engaging the affected community; preparing the case and organizing for the actual presentation of the case in court.

2.2 Description of the Respondents

The respondents and their roles are described as follows:

- i. The Attorney General who is the principal adviser of the government was listed as the first respondent
- ii. The Cabinet Secretary in charge of Ministry, Water and Natural Resources was listed as the second respondent and is in charge of formulating policies, standards and programs meant to help in controlling acts of pollution
- iii. The Cabinet Secretary in charge of the Ministry of Health was listed as the third respondent and is mandated to create an enabling environment for a healthy citizenry and to regulate policy and health delivery services.
- iv. The environmental agency known as National Environment Management Authority (NEMA)

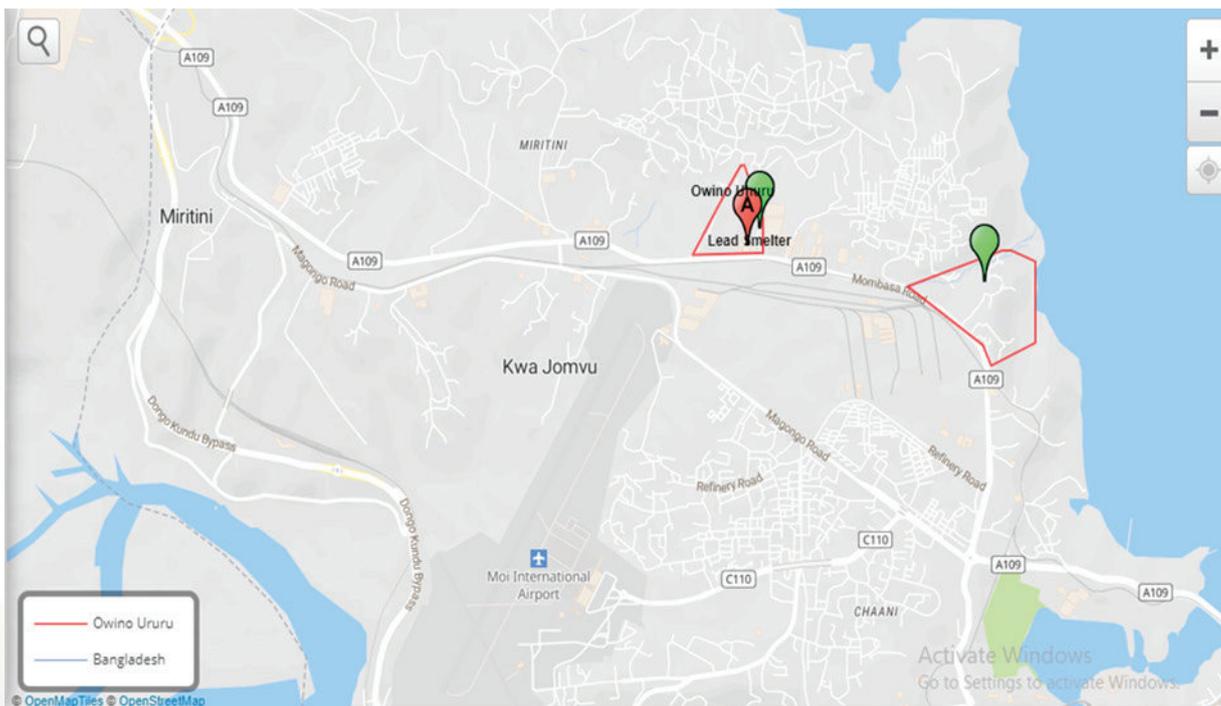
⁴ Petition No.1 of 2016, Environmental Law Court, Mombasa

was listed as the fourth respondent and its mandate is to coordinate management of environmental matters.

- v. The County Government of Mombasa was sued as the fifth respondent and is the successor in title to the defunct Municipal council of Mombasa which assumes powers, responsibilities, functions and liabilities of the defunct local authority under the provisions of section 33 of the 6th schedule, Constitution of Kenya.
- vi. the Export Processing Zone Authority was sued as the sixth respondent and the principal objectives of the authority is development of all aspects of export processing zones, the regulation and administration of all activities within the zones
- vii. The Metal Refinery (EPZ) Limited listed as the seventh respondent was a company licensed by the sixth respondent to operate a lead acid battery recycling factory in the Owino Uhuru area.
- viii. The Penguin Paper and Book Company as the eight respondent was the land lord of the company that operated the lead factory.

2.3 Area of Environmental Harm

Owino Uhuru village, Changamwe division, Mikindani Area in Mombasa County



2.4 Laws under which the claim was brought under

The petition was based on national and international law with respect to protection of environment. The following instruments were applied:

- i. Constitution of Kenya
- ii. International Covenant on Economic, Social and Cultural Rights.⁵
- iii. Convention on the Right of the Child.⁶

⁵ United Nations, Treaty Series, vol. 993, p. 3.

⁶ United Nations, Treaty Series, vol. 1577, p. 3.

- iv. The Basel Convention on the Control of Trans-boundary Movement of Hazardous Waste and Their Disposal.⁷
- v. Basel Convention Technical Guidelines for the Environmentally Sound Management of Waste Lead- Acid Batteries.⁸
- vi. The African Charter on Human and Peoples Rights.⁹
- vii. The Treaty of the Establishment of the East Africa Community.¹⁰
- viii. The Environmental Management and Coordination Act.¹¹
- ix. Environmental Management and Coordination (Environmental Impact Assessment/Environmental Audit) Regulations of 2006.
- x. The Physical Planning Act.¹²
- xi. Public Health Act¹³ (242 Laws of Kenya).
- xii. Export Processing Zones Act¹⁴

The provisions of law were applied on the basis of a number of acts and omissions by state actors that contributed to violations of various rights of the petitioners as follows:

- i. Permitting, authorizing and licensing of the lead manufacturing plant without reasonable measures to prevent environmental harm was a violation of the right to a clean and healthy environment; right to highest attainable standard of health and right to a clean and safe water in adequate quantities.
- ii. Denial of access to information that could have enabled the petitioners to participate in development decisions. This was in violation of the right to access information;¹⁵ which is an element public participation¹⁴ required in the approval of development projects.
- iii. Failure to undertake appropriate monitoring and evaluation exercises on the polluting company which would have helped to control and mitigate environmental harm was a violation to the right to a clean and healthy environment and the right to life.
- iv. Failure to act on recommendations made on reparation and mitigation of harm made by the parliamentary taskforce hence denying the petitioners the right to a clean and healthy environment and right to highest attainable standard of health.

Due to the above listed offensive acts the petitioners sought a number of remedies from court.

2.5 Remedies sought by the Owino Uhuru residents the (petitioners)

The persons affected by the lead pollution were residents of Owino Uhuru and the former employees of the lead extraction factory operated by Metal Refinery (EPZ). The petitioners sought

⁷ 1673 UNTS 5, 28 ILM 657 (1989)

⁸ Basel Convention Series/SBC No.2003/9

⁹ CAB/LEG/67/3 rev. 5, 21 I.L.M. 58 (1982)

¹⁰ Adopted 1999-11-30

¹¹ Act No.8 of 1999.

¹² Chapter 286, Laws of Kenya (now repealed), the current Act is Physical and Land Use Planning Act, No.13 of 2019.

¹³ Chapter 242 Laws of Kenya

¹⁴ Section 23 (2) (c), Chapter 517 of the Laws of Kenya

¹⁵ Article 35, Constitution of Kenya

remedies from court which were in form of declarations, injunctions and a compensation order. The remedies are explained as follows:

- i. A declaration that the Petitioners' right to clean and healthy environment as 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) had been violated through 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) had 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 had been violated by the actions, inactions and omissions by the Respondents.
- iv. 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.
- v. An order of mandamus be issued against the Cabinet Secretaries to the Ministry of Environment and Natural resources and Ministry of Health, The National Environmental and Management Act and the County Government of Mombasa who were listed as 2nd, 3rd, 4th and 5th Respondents respectively; 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.
- vi. A mandamus order to be issued against the respondents mentioned in v. above together with Export Processing Zone Authority , Metal Refinery (EPZ) Limited and Penguin Paper and Book Company listed as , 6th, 7th and 8th Respondents respectively; 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. The petitioners sought further orders as against the same respondents for 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 manufacturing plant.
- vii. An order mandamus be issued against the Attorney General, the Cabinet secretary Ministry of Environment and Natural Resources and the National Environmental Management Authority directing them to develop and implement regulations adopted from best practices with regard to lead and lead alloys manufacturing plants.

The following section explains the case process engaged by the petitioners with the help of advocates for which remedies were sought.

3. Case Process

The following steps were vital to the successful litigation of a case. The petitioners acted on them with the help of their advocates. The processes are highlighted as follows:

- i. identifying a representation of the residents of Owino Uhuru area in order to give evidence
- ii. Identifying witnesses
- iii. Identifying proper parties to sue
- iv. Collection of evidence of pollution in the environment
- v. Collection of evidence showing causation of harm to the residents - blood tests were undertaken.
- vi. Preparing the proceedings
- vii. Pre-trial preparation
- viii. Trial process.
- ix. Submissions.
- x. Receiving Judgment

The petition was heard by way of giving oral evidence after having filed relevant pleadings, documentary evidence and witness statements. The petitioners called 10 witnesses while the respondents all together called 7 witnesses.

Before moving to court, CJGEA engaged various institutions in trying to get a remedy to the pollution problem and the next section describes the extra judicial means used.

3.1 Use of Extra Judicial means

Before moving to court the organization took a step in mobilizing the state and non-state actors to shut down the industry before more damage could be done. These involved engagements with the relevant entities through protests, physical visits to their offices, constant communication through letters and using the media as a tool for amplifying the plight of the residents.

CJGEA wrote to the East Africa Community and requested for ban of exports of used lead acid battery products which was granted. A ban was issued for export of the products from East Africa. This helped in closure of the company in Mombasa.

CGJEA also engaged media in exposing the environmental and health challenges that the people were suffering from as a result of the lead pollution that had taken place for seven years since the company began operating. The company had started operations in the year 2006 or thereabout. An expose on the challenges faced by the people of the Owino Uhuru was done by Kenya Television Network (KTN TV) known as “Plague for profit” in English and “Futari ya Sumu” in Swahili in 2015. It was out of this expose that the Department of Public Health made an inquiry of the matter.

CGJEA petitioned the Kenyan Senate and Parliament (National Assembly) to look into the lead poi-

soning complaints that had been raised by the residents of Owino Uhuru village. A parliamentary standing committee was tasked to investigate the issue of lead poisoning at Owino Uhuru. The committee made a fact finding mission to Owino Uhuru village and engaged officials from various departments namely: Mombasa County Health Department, Public Complaints Committee¹⁶, and NEMA. The Committee came up with the following recommendations which were never effected:

- 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 had disposed of over the years and continues to dispose of at Mwakirunge Dumpsite

The Senate Standing Committee on Health made a site visit to Owino Uhuru for investigations which revealed that there were serious health impacts suffered by the residents and detrimental environmental impacts as a result of the pollution in the area. The Senate recommended remediation of the environment which was never done.

The only thing that was achieved in the engagement of out of court processes was closure of factory. The residents never received compensation and neither was there a clean-up of the environment. The following sections will describe the case as put forward by the petitioners and the respondents.

3.2 Case for the petitioners

Witness statements were taken from 10 witnesses. 3 of the witnesses were former employees and seven were residents in the area. The witnesses stated that after the factory started operations, the residents and the employees started experiencing health problems. They complained of: respiratory problems such as difficulty in breathing, collapsing for employees during operations erectile dysfunction, low sex drives, premature births, miscarriages, fatalities, memory lapse, joint aches, kidney ailments, developmental challenges, skin ailments and affected learning abilities.

The residents and employees complained that waste water was drained into the village and as a result one of the children had been burnt by the acidic water in the drains after dipping his leg. There were dangerous emissions as the residents complained of black smoke, pungent smell and difficulty in breathing during the time of operations. They averred that the filters were not kept in good working condition and complained of other poor industrial practices. Some residents complained that the smoke was laden with dark lead particles that were deposited on the resident iron sheets causing corrosion. The employees' relatives were affected by virtue of contact with the clothes worn by the employees.

3.3 Respondents' case

The government institutions thus the 2nd respondent, 4th respondent and the 6th respondent as sued had participated in licensing the 7th respondent the operator of the lead extraction factory. The

¹⁶ The committee was established under EMCA, it is now National Environmental Committee

Environmental Impact Assessment (EIA) licence was the main bone of contention as it had been issued by NEMA after the factory had commenced operations. All other licences were based on the notion that an EIA licence had properly been issued which was erroneous.

The Ministry of Health was blamed for not taking action upon getting information about the pollution incident. The witness from the Ministry stated that they issued closure orders upon complaints of pollution. The Ministry had also taken part in testing of the residents. According to them, remedial action was handed over to the County Government which would organize to have the residents treated at the local hospital. The ministry had made further recommendations that: The children be stopped from further exposure; the community be relocated and the clean-up of the soil be conducted. The Ministry explained that the county had given the children iron and calcium supplements for the management of lead poisoning.

NEMA in their evidence stated that the company started operations in 2006 and was issued with an environmental impact assessment licence in 2008 which was an illegality. The company was advised to cease operations but refused and as a consequence, NEMA issued a cessation order. There was also an indication that an epidemiological research had been done and which revealed that there were lead levels in the suit land of up to 420.04mg/dl. NEMA then prepared a policy paper in which they had proposed remedial action. The paper was forwarded to Cabinet for directions but was never acted upon. The court was informed that intervention of the Cabinet Secretary was also required to gazette an area for contamination.

Physical evidence was adduced showing that Metal Refinery Ltd shared a boundary with the Owino Uhuru settlement and the harm suffered by the residents emanated from the company. The 6th respondent witness from the EPZ authority confirmed that they had licensed the lead extraction company to operate without an EIA licence.

The next section explains the nature of injuries suffered by the residents of Owino Uhuru which was a great indication that the environment was heavily contaminated with lead.

3.4 Nature of Personal Injuries caused by Lead Poisoning

Lead is a heavy metal and is toxic when introduced to the environment. The Used Lead Acid Batteries (ULABs) are categorized as a hazardous waste under the Basel convention. Lead elements can easily leak into the soil and as a result can pollute ground and surface water systems used for domestic purposes. Lead is an element that does not break down easily when released into the atmosphere or ingested. Therefore, there are no acceptable levels or tolerance levels of lead into the human body.¹⁷

The metal is toxic when introduced to the body in large quantities. It affects multiple body systems including neurological, gastrointestinal, hematological, cardiovascular and renal systems. Young children absorb 4-5 times as much lead as adults. Pregnant women are also vulnerable. Miscarriages for pregnant women, still births, premature birth weight, minor malformations. Subtle effects on intelligent quotient, attention deficit disorder and aggression can be noted for children

¹⁷ WHO, 'Lead Poisoning and Health' 23 August 2018 < <https://www.who.int/news-room/fact-sheets/detail/lead-poisoning-and-health> >

even where the levels are 5ug/l or below for children. The injuries are latent in nature thus take time to manifest. This is a fact that should have been taken into consideration by the court in the life of the case. The case ought to have been heard as a matter of urgency for the purpose of securing treatment and clean up processes.

The nature of injuries caused by lead is devastating and therefore such cases should be heard without delay. Within the time of hearing of the cases most people became chronically ill with some of their organs failing while others succumbed to their injuries. The next section explains the process undertaken for collection of evidence which was important in establishing the link of lead pollution to the injuries suffered by the people and the environment.

3.5 Collection of Scientific Evidence

The process of collection of evidence of showing causation of harm was very important in proving the petitioners' case in court. The process of collection of evidence was costly as it took a number of experts to collect and present the evidence in court. Blood samples were taken for testing of lead levels in the blood. A son to a former employee to the factory was tested for lead after being hospitalized and lacking a proper diagnosis. The test had to be done in South Africa as Kenya did not have the capacity to test such. He was immediately put on medication which was expensive. A few other blood samples of a few children from the community were taken and upon being tested they came out positive for lead. The county government was requested to conduct testing of lead in Owino Uhuru upon being presented with the evidence that had been collected that indicated lead contamination. The county failed to conduct testing and the reason given was lack of capacity. CJGEA, the 10th petitioner sought financial help elsewhere.

KIOS the Finnish Foundation for Human Rights gave assistance by randomly collecting blood samples and taking them to South Africa for testing. It was confirmed that there was lead poisoning. The samples collected from employees recorded very high levels of lead in the blood due to the fact that they worked right inside the lead smelter and lived in close proximity to the smelter. The process of collecting the scientific evidence came with a lot of challenges explained below:

- i. The technology for conducting the test was not yet within the Kenyan medical sector
- ii. The cost of having the samples tested in South Africa was very expensive and the process of having them taken there was time consuming and cumbersome.
- iii. The medication for lead poisoning is very limited and so expensive
- iv. No support was forthcoming from the Kenyan Government.
- v. The testing kits were not enough to test all the over 3000 residents of the Owino Uhuru community.

A doctor was also involved in compiling clinical evidence of harm suffered by the petitioners. This involved preparation of medical reports based on the narrations given by the petitioners and available medical documents showing treatment. The Ministry of Health was involved in collection of a number of samples from the residents and had them tested by the government chemist who appeared as a witness for the petitioners. There was confirmation that the residents had suffered lead poisoning.

CGJEA also petitioned the Kenyan Senate and Parliament to look into the lead poisoning complaints that had been raised by the residents of Owino Uhuru village. A parliamentary special taskforce was formed by the parliament to investigate the issue of lead poisoning in Owino Uhuru. The senate standing committee on health made a site visit to Owino Uhuru for investigations which revealed that there were serious health impacts suffered by the residents and detrimental environmental impacts as a result of the pollution in the area.

The organization further made efforts to collect evidence showing causation of harm to the environment. A health expert from Nigeria, Dr. Simba assisted in collecting and testing samples from the soil, water, roofs, playgrounds and the entire surrounding of the Owino Uhuru community. The results showed that the environment was extremely polluted and toxic with the lead metal. The blood samples were also taken and tested positive for lead toxicity with the highest person recording a reading of 428 mg/dl of lead in blood against the WHO recommended standard of 10mg/dl of lead in blood.

The expert also moved to a neighboring community called Bangladesh and tested similar samples for lead levels and the results there compared to those of Owino Uhuru showed that the environment in Owino Uhuru contained elevated lead levels in the soil, water and entire surrounding and it confirmed that the residents were suffering from acute lead poisoning due to the exposure to lead from the lead smelting factory.

The organization further helped in conducting postmortems on the corpses of both children and adults who died and the results showed excessive lead in their bodies as one of the contributing factor to death. Most of the women who also miscarried at 7months gave birth to still born babies who were covered in black soot. According to the experts these were signs of excess lead in the body.

It was after collecting all the evidence of causation of harm that CJGEA and the other residents of Owino Uhuru moved to court to challenge the responsibility of both the state and non-state actors in protecting the right to a clean and healthy environment. The process adopted for collection of evidence was a good strategy that enabled proof of violation of rights. After the petitioners and respondents gave evidence, the court identified issues for determination which then guided the court in giving a final decision on the matter.

3.6 Issues before Court

The court had to determine the following issues in order to fully settle the matter before it;

- i. The jurisdiction of the court to hear the matter
- ii. Proof of violation of the petitioners' right to clean and healthy environment.
- iii. Proof of causation of injury.
- iv. Liability with respect to the respondents.
- v. The question whether the petitioners had negligently contributed to their harm.
- vi. The question whether damages are payable in a representative suit.

vii. The remedies the court could give if they held the respondents liable.

The above highlighted issues present important milestones that will be applicable in other similar cases and are discussed in the following sections.

3.7 Remedies by the Court

After determining the above listed issues the court made a decision that respondents were liable for harm suffered by the petitioners. The court made declaratory orders that the petitioners were entitled to the: right to a clean and healthy environment; right to the highest attainable standard of health and right to clean and safe water guaranteed by Article 42 of the Constitution; Right to life as guaranteed by the provisions of Article 26 of the Constitution.

The court made an award of compensation to the petitioners and persons claiming through them in the amount of Kshs 1, 300, 000, 000 (1.3) billion Kenya shillings. The sums would be paid in the ratios in the following manner as assigned by the court to the respondents.

<i>Cabinet Secretary, Ministry of Environment, Water and Natural resources</i>	- 10%
<i>Cabinet Secretary, Ministry of Health</i>	- 10%
<i>National Environmental and Management Authority</i>	- 40%
<i>Export Processing Zones Authority</i>	- 10%
<i>Metal Refinery (EPZ) Limited</i>	- 25%
<i>Penguin Paper and Book Company</i>	- 5%

The respondents were given 90 days to pay up compensation without which the petitioners would execute upon the expiry of 90 days. The court further directed the state actors to within 4 months (120 days) from date of the judgment clean-up the soil, water and remove any wastes deposited within the Owino Uhuru settlement. 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.

The Attorney General, the Cabinet Secretary Ministry of Environment and the National Environmental Management Authority were further ordered to develop and implement regulations adopted from best practices with regard to lead and lead alloys manufacturing plants.

The conduct of the case reveals important legal aspects that are key to the successful litigation of similar cases.

4. Milestones in the Case

The report identifies various milestones that must be addressed for one to successfully litigate similar environmental liability cases such as the subject case. Potential litigants must get a number of things to get their case right. They must identify the proper responsible parties to sue and blameworthiness of the responsible parties appearing as respondents; identify proper court to handle the matter, collect enough evidence to have proof of violation of their rights; and assess and justify damages that are payable.

4.1 Access to Justice

A review of the case gives an opportunity to understand access to justice as an element of procedural rights that enable enjoyment of the right to enjoy a clean and healthy environment. Access to justice entails “the provision of dispute resolution mechanisms which are affordable, proximate and ensure speedy justice and whose processes and procedures are understood by users.”¹⁸ Access to justice in Kenya has been hampered by a number of challenges including high court fees, geographical location, complexity of rules and procedure, use of legalese, understaffing, lack of financial independence, lack of effective remedies, a backlog of cases that delays justice, lack of awareness on alternative dispute resolution mechanisms (ADR) and traditional dispute resolution mechanisms.¹⁹

The legal and institutional framework in Kenya gives direction in the manner in which the challenges to access to justice can be dealt with. Article 48 of the constitution requires the state to ensure access to justice for all persons and if any fee is required to ensure that it is reasonable and it does not impede access to justice. Article 159 (1) of the Constitution directs on the principles that should guide the judiciary in enabling access to justice. The courts and tribunals are to be guided by the following principles some of which are: “justice shall be done to all, irrespective of status; justice shall not be delayed; alternative forms of dispute resolution including reconciliation, mediation, arbitration and traditional dispute resolution mechanisms shall be promoted and justice shall be administered without undue regard to procedural technicalities.”

The framework embraces public interest litigation (PIL) which promotes access to justice. People whose rights have been violated can be represented by individual or institutions that are able to push through with litigation as seen through the role played by CGJEA. PIL relates to cases that are of public importance, that is, those that focus on either individuals or groups seeking a broader impact on the pressing and contemporary social issues.²⁰ Article 22 (1) (c) of the constitution allows public interest litigation with respect to violation of a right or threat of violation of a right.

18 Draft Report on Audit of Laws on Access to Justice, KLRC (March, 2012) in Kariuki Muigua, *Improving Access to Justice: Legislative and Administrative Reforms under the Constitution* <https://kmco.co.ke/wp-content/uploads/2018/08/A-Paper-on-Improving-Access-to-Justice-2.pdf> accessed December 11, 2019.

19 Strengthening Program, 2011.2 Strengthening Judicial Reform in Kenya; Public Perceptions and Proposals on the Judiciary in the new Constitution, ICJ Kenya, Vol. III, May, 2002.

20 KPTJ, AfriCog. et al. “A Guide to Public Interest Litigation in Kenya” < <https://kptj.africog.org/wp-content/uploads/2015/03/PIL-24032015.pdf> > accessed 30 August, 2020.

CGJEA played a critical role in assisting the residents of Owino Uhuru access justice for harm suffered from lead pollution. The organization helped in articulating the concerns of the Owino Uhuru with regard to getting justice for harm suffered. They also helped in collection of evidence of harm from the residents and the environment. The activity involved various experts which called for utilization of a lot of resources. The organization helped in the mobilization of funds which were utilized for collection of evidence of causation of harm.

Access to justice remains a challenge as demonstrated in this case. The case having been filed in 2016 took four years to conclude. The push to have the environmental pollution problem addressed started way back in 2009 when the residents organized demonstrations to push for their environmental rights, engaged the duty bearers, employed the use of media as a tool to amplify their plight, approached the County of Mombasa, the Parliament, Senate and NEMA for a remedy to no success. The residents continued living in the contaminated environment. As a result, the health of the residents deteriorated while others succumbed along the way. Such delay in completing the case, compromises the notion of effective remedies as some of the injuries have progressed whereas others succumbed to their injuries. The process of collecting scientific evidence was very expensive and cumbersome. The petitioners had to bear the burden of collecting such evidence without any financial support from the government.

Even after compensation orders were issued, the justice process has stalled as the State has appealed the decision of the court. The law in place is not clear with regard to the processes of initiating clean up and restoration of the areas under pollution. There are no provisions of emergency clean-ups where toxic pollution is detected therefore endangering the population living in proximity.

4.2 Responsible Parties

The case gives an opportunity to understand to nature of parties who can be held to account where a pollution problem arises. The process of allocating pollution costs entails identifying parties responsible for pollution. The state actors in the case were identified for allowing the operator to operate without an EIA licence; a useful tool for control of pollution and mitigation of environmental harm. The state actors were further blamed for failing to provide treatment for the affected residents and restorative action for the environment. The Ministry of Health was held responsible for not taking action against the company on discovery of acts of nuisance by the company. The ministry was further blamed for not providing diagnostic services and treatment services for the residents hence a violation to the right to health and right to life.

The landlord was further blamed for various reasons. They bore the responsibility of handling waste which was carelessly released into the environment. The landlord had allowed the company to operate without the approvals. It was also noted that the landlord had participated in the public participation exercise on behalf of the company operating the facility therefore privy to the operations of the company. In all these allegations, the landlord opted not to participate in the proceedings. All these informed the court to subject the landlord to 5% liability.

4.3 Jurisdiction

The 1st to 3rd Respondents contested jurisdiction of the court in determining the case before it. The court dismissed the issue by affirming that the petition was properly before court and went on to explain. The court explained that the petition revolved 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. Further provisions in article 70 indicate that one could approach court for violation of right or threat of violation. It says, “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 gives a clear indication that the proper court to be approached for violation of environmental rights, is the Environmental and Land Court.

4.4 Proof of violation of rights

The petitioners bear the responsibility of proving violations of rights by showing harm suffered in terms of linking injury to the violation which is otherwise known as proving causation. The petitioners must also show proof of injury to the environment. The Kenyan constitution however in article 70(1) states that if a person alleges that a right to a clean and healthy environment recognised and protected under Article 42 has been, is being or is likely to be, denied, violated, infringed or threatened, the person may apply to a court for redress in addition to any other legal remedies that are available in respect to the same matter. It further states in 70(3) that for the purposes of this Article, an applicant does not have to demonstrate that any person has incurred loss or suffered injury. In terms of personal injury the petitioners and the other Owino Uhuru residents had suffered fatalities and diseases which were attributed to lead pollution. The petitioners called 10 witnesses, one of whom was a minor whose injuries were visible to the court and also had testimony that he had been born normal but started getting sick upon reaching two years.

Several experts were involved in giving evidence showing causation of harm to the people and the environment. In addition a number of committees from Senate, Parliament and NEMA also contributed in providing evidence of harm. The process of collecting evidence and processing it in court helped to attain the threshold required to prove a case in court. To show violation of right, the person must state with a reasonable degree of precision. The applicable standard of proof is on a balance of probabilities.

NEMA contested that the petitioners had not linked their injuries to lead emissions and had further not linked the facility to the pollutant. They argued that there was no evidence of lead levels before the alleged incident of pollution happened. NEMA further contested that there were several possible sources of lead pollution as the area was an industrial zone hence the petitioners had no evidence showing source of pollution that caused their injuries. According to NEMA, there had to be absolute scientific proof of causation by a show of recorded lead levels in the environment to

show pollution which had to be compared with the levels prevailing at the pre-incident period. The court rejected their argument by explaining various provisions of the law. According to the court, in article 69 of the constitution, the state was duty bound to eliminate processes and activities that are likely to endanger the environment and in article 42 and 70 it was upon the state to ensure that the citizen enjoyed the right to live in a clean and healthy environment.

The court explained that NEMA as a state actor bore the mandate to protect the environment and therefore, NEMA was required to measure the lead levels in the air. The statute law did not impose obligations on the citizens to present pre-incident reports to show pollution. The burden was upon the state actor to discharge their duty before issuance of a licence to a project proponent.

The respondents sought to limit their liability by blaming the petitioners for contributory negligence for the failure to relocate to safer areas. The court pointed out that the residents had not been given alternative land for relocation. Further, there was no evidence showing that the Owino Uhuru area had been declared an industrial zone therefore the petitioners could not partly be held responsible for harm suffered from pollution.

4.5 Applicability of the Polluter Pays Principle

The polluter pays principle is one which is applicable in such environmental liability cases. The principle helps in defining the liability of responsible parties. The Attorney General, the Cabinet Secretary of the Ministry of Environment, Natural Resources and Health urged the court to apply the polluter pays principle as explained under principle 16 of the Rio Declaration. The principle states that, "National authorities should endeavor 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."

According to the State, this meant that the polluter was solely responsible for pollution and therefore ought to bear liability for the cost of pollution. The court decided that the State as well bore responsibility for harm caused by pollution. Principle 8 of the Rio Declaration provided that the state bore the responsibility of reducing and eliminating unsustainable patterns of production in order to promote sustainable development and a higher quality of life. According to the court, this was a duty to regulate which was reflected in principle 13 which says that, "States shall develop national law regarding liability and compensation for the victims of pollution and other environmental damage." The provisions further stated that, "States are required to 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." The principle is reflected in our national law vide in the constitution in article 2, 42, 69, and 70 of the constitution which imposes a duty upon the state to ensure that their citizens live in a clean and healthy environment and upon failure by virtue of omissions or commission by the state or its actors, who will be held liable.

The components of the polluter pays principle are well explained in Section 2 of the Environmental

anagement and Coordination Act²¹ to entail the cost of cleaning up any element of the environment damaged by pollution, compensating victims of pollution, cost of beneficial uses lost as a result of an act of pollution and other costs that are connected with or incidental to the foregoing, is to be paid or borne by the person convicted of pollution under this Act or any other applicable law. Under section 3 of EMCA one of the principles that guides the court when determining question of violation of a clean and healthy environment is the polluter pays principle and compensation as a remedy, in light of sec 3 (3e) of EMCA, is,

“compensation for any victim of pollution and the cost of beneficial uses lost as a result of an act of pollution and other losses that are connected with or incidental to the foregoing.”

Therefore restoration and clean-up costs and any other remediation cost for the repair of the environment operate as compensation. In the Case of Indian Council for *Enviro Legal Action Vs Union of India*²³ the polluter pays principle was explained to mean

“... 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.”

The polluter pays and upon failure, the community through government upon which the public trust is bestowed does the clean-up and restoration where there is need.²²

4.6 Liability of State Actors

This is a case where state actors were found liable for failure to conduct their duties in protecting the citizens and the environment. The foundational principles governing liability of public authorities or state actors are formulated in light of statutory and public law dimensions, unlike for private persons which liability is based wholly on common law principles. Difficulties tend to arise when the alleged negligence of a public body derives from its exercise or failure to exercise, statutory powers which are designed to ensure provision of some public function or other.²³

Many such claims are met with obstacles in trying to establish duty of care for various reasons. Many statutory powers confer on the authority a measure of discretion as to how the relevant powers should be exercised. Mostly the public body is blamed for a negligent omission to do something; which is difficult to use in making a case for liability for public bodies. The courts also are reluctant to second guess certain decisions of public bodies made in accordance with the statutory powers of those bodies.

Where the statutory powers of a public authority is called into question the challenge for the courts is when to impose private law liability in respect of negligence non-performance of the authorities public functions.²⁴ Corrective justice demands that a remedy in damages suffices where

21 Act Number 8 of 1999

22 Boris Mamlyuk, 'Analysing the Polluter Pays Principle through Law and Economics' (2010) 18[1] South Eastern Environmental Law Journal 46,47.

23 John Murphy, Street on Torts (11th Ed. Oxford University Press 2005) 201.

24 Street on torts 201.

a claimant suffers loss or injury because of public authority's negligence.²⁵ There are only certain cases in which a case brought against a public authority can stand before court. Where a decision falls outside statutory discretion, it can give rise to common law liability.²⁶

The Ministry of Environment had written to the Export Processing Zone Authority saying that exports for lead were still allowed for those with licences. The Cabinet Secretary (CS) issued a licence to operate before prior to issuance of NEMA licence which was issued two years later.

The CS Ministry of Environment was in further violation of the law when they failed to overlook process of public participation when they carried out the licensing process. Failure to carry out full process of EIA denied the residents of Owino Uhuru an opportunity for public participation in operationalizing the activities of the factory. The CS, Ministry of Health was blamed for not complying with the provisions of Public Health Act when they failed to initiate the removal of nuisance posed by the hazardous materials dumped by the polluter.²⁷

The Ministry of Health through their director had also recommended that the children be protected from further exposure to lead pollution. They initiated treatment for 3 months of calcium and iron supplements but stopped. There was no treatment plan thereafter to manage the lead levels in the blood up to a manageable level. The Ministry was blamed for stopping the treatment without providing any further action plan to help the residents.

NEMA is a public authority established under Environmental Management and Coordination Act whose mandate is to exercise general supervision and co-ordination over all matters relating to the environment and to be the principal instrument of Government in the implementation of all policies relating to the environment.²⁸ The authority is responsible for issuance of an EIA licence after an environment impact study is completed. The project report gives details of the impact of project on the environment and mitigation to be provided once a licence to operate is given.²⁹ NEMA was found liable for allowing the polluting company to operate without issuing an environmental impact assessment and failure to take action on the company for polluting the environment. Further, neither did NEMA initiate any prosecution for the polluters nor order for restoration of the contaminated environment.

The EPZ authority is a public authority established under Exports Processing Zone Act.³⁰ One of the objectives is regulation and administration of approved activities within the export processing zones, through implementation of an administrative system. The authority was blamed for issuing a licence to operate before prior submission of an EIA licence had been issued by NEMA.

All the public authorities were blamed for failure to carry out their duties in accordance with the constitution and statute as a result of which the residents of Owino Uhuru suffered environmental harm. Some of the duties violated defined in article 69 of the Constitution. It provides that:

25 street on torts 202.

26 Street on Torts, 205, **Xv Bedfordshire County Council** [1995] 2 AC 633, HL.

27 Section 119, Public Health Act.

28 Sec 9 (1), EMCA 1999.

29 Sec 58, EMCA 1999.

30 Act number 12 of 1990.

“the state shall ensure sustainable exploitation, utilization, management and conservation of the environment and natural resources, and ensure the equitable sharing of the accruing benefits;³¹ encourage public participation in the management, protection and conservation of the environment;³² establish systems of environmental impact assessment, environmental audit and monitoring of the environment;³³ eliminate processes and activities that are likely to endanger the environment;³⁴ and utilize the environment and natural resources for the benefit of the people of Kenya.³⁵

4.7 Damages Payable in a Class Action Suit

The 10 petitioners were selected to present the case of Owino Uhuru area in the matter of lead poisoning caused by pollution. The 10 represented a class of people from Owino Uhuru area. Evidence was led showing nature of personal injuries suffered and environmental harm. The court ordered the respondents to pay up Kshs 1, 300,000,000 as compensation to the area residents for harm suffered. The respondents had contested against such amounts being paid to petitioners as representatives of the residents of Owino Uhuru. In reply the petitioners clarified that the suit was a class action suit and hence compensation would be advertised so that other claimants would present themselves. The state actors were further ordered to clean up the contaminated areas failure to which Kshs 700,000,000 would become payable to the 10th petitioner, CJGEA to coordinate the soil/environmental clean-up exercise of the contaminated area.

4.8 Assessment of Damages

The “polluter pays principle” defined in section 2 EMCA as compensating environment and includes the cost of cleaning up any element of the environment damaged by pollution, compensating victims of pollution, cost of beneficial uses lost as a result of an act of pollution and other related costs.” Assessment of damages is a process which helps the court to fix amount of damages to be awarded.

The petitioners presented similar cases of environmental harm showing amounts awarded in compensation. In the case of *Mohammed Ali Baadi & 4 others v A.G and 11 others*³⁶ an award of compensation was given to the affected fishermen in the amount of Kshs.1, 760, 424,000. The other case is *David Ndeti v Orbit Chemical Industries Limited*³⁷ where a defendant had contaminated the plaintiff’s land with industrial effluent. The court awarded Kshs 500, 000,000 for nuisance and Kshs 267, 439, 464 for the cost of restoration regarding contaminated soil. The amounts were considered by the court to arrive at the amount of damages payable to the petitioners; Kshs 1,300,000,000 to the payable and 700,000,000 to CJGEA for clean-up in case the state actors failed to do so.

31 article 69 (a) Constituion of Kenya.

32 article 69 (1) (d).

33 article 69 (1) (f) CoK.

34 article 69 (1) (g) CoK.

35 article 69 (1) (h) CoK.

36 [2018]eKLR 51.

37 [2014 eKLR.

5. Challenges

A number of challenges were experienced by the petitioners that require interventions.

5.1 Delay

There was delay in hearing of the case because of non-attendance of the witnesses of the respondents. Some of the witnesses of government agencies had since been transferred to other areas. The judge hearing the case was also transferred just as she finished hearing the case and was remaining with the final submissions but nonetheless managed to give judgement from another court station.

5.2 Witness intimidation

The petitioners suffered intimidation in the life of the case. This compromises the principle of access to justice when there are attempts to subvert the cause of justice. Wilfred Kamenchu was picked up randomly by the police and detained while on his way to CJGEA from Owino Uhuru. He was arraigned in court and charged with loitering. Thereafter his son was kidnaped with the demand to pull the case out of court.

CJGEA and witnesses in the litigation came under immense threat during the electioneering period. Threats varied from sexual assault, kidnapping, burning of their houses and death threats. This problem was made worse because of the delay in hearing the suit. It would be in the best interest of the petitioners that such cases are heard without delay.

5.3 Delays in Service

The 7th and 8th respondents could not be located for service of suit papers and this prompted the petitioners to undertake the process of substituting service which took about a year for the process to be completed and effected. This caused a delay to the hearing of the suit. Upon complaints of pollution the 7th respondent closed shop and went back to their country of origin. This points out to an enforcement lapse. The authorities should have reigned in the factory owners before they could close shop. The parties should have been subjected to criminal enforcement regulations under legislation such as EMCA and Public Health Act.

5.4 Lack of an interlocutory relief for the changing nature of harm

The nature of harm suffered by the residents is as a result of exposure to lead therefore the claims laid are in the nature of toxic torts. The nature of harm is latent where the harm manifests at a later date once the toxins start interfering with the body systems. It was evident the residents health continued deteriorating and for some it resulted in death. There is need for a remedy that ensures that the affected persons are provided for treatment either by the government and/or the culpable parties during the pendency of the suit.

There is also the challenge of the person who should bear the cost of diagnosis. The poor cannot meet the cost of diagnosis. There is no provision of medical monitoring claims in Kenya. There is

need of embracing such claims in order to alleviate the suffering of people who are involuntarily exposed to pollution. There is need for such cases to be heard without delay in order to mitigate any continuing harm.

The delay in the litigation process extends the scope of injuries suffered by the victims. There is need for practice rules that recognize the nature of injuries associated with pollution. Thus time should be set within which a case should be concluded. Such cases should be heard on a daily basis until completion.

6. Lessons Learnt

Some of the lessons drawn from the Owino Uhuru Class Action Litigation Suit are as explained below:

6.1 Right to a clean and healthy Environment

The recognition of the Right to a clean and healthy environment in the Kenyan constitution gave the community and CJGEA a basis to bring the case to court. Recognition of other procedural environmental rights e.g. access to information, participation and effective remedy also favored the petitioners in the case enabling them to argue their case in court.

6.2 Existence of the Land and Environment Court in Kenya

It would have been hard for any other court to have understood the environmental Issues discussed in court. This included the EIA processes the EMCA Act etc. which were critical in the building of the public interest litigation. The existence of the Environment and Lands Court in Kenya is thus very vital in ensuring access to environmental justice.

6.3 Lack of legislation to regulate lead and lead alloys manufacturing plants.

There is need to develop legislations that regulate the lead and lead alloys manufacturing plants in Kenya. In her Judgement, on page 100 point 173, the Hon. Justice Anne Amollo asked the 1st, 2nd and 4th respondents who are the relevant state agencies to develop and implement regulations adopted from best practices with regard to lead and lead alloy manufacturing plants. This would ensure that the Owino Uhuru lead poisoning scenario is not replicated elsewhere in future.

7. Conclusion

The case puts to test the legal and institutional framework that underpins the protection of environmental rights. There was failure by state actors in fulfilling their duties to protect the citizens and environment as provided for in the law. The report identifies several legal issues which are relevant in cases of environmental harm. The issues discussed are: liability of state actors; identifying responsible parties; showing proof of violation of rights, damages payable in a class action suits, assessment of damages and the application of the polluter pays principle. The issues help to define areas of focus when litigating similar cases. The role played by organizations such as CJGEA in enabling access to justice by helping the residents of Owino Uhuru in litigation of their case is underscored.



Court Proceedings



Smelter Factory



Demonstration



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