

**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), 10 19(1),(2), (3), 20 (1), (2), 21(1), (3), (4), 26, 35(1), (3), 42,  
43(a)(d), 69(1)(d), (f), (g), (2) AND 70 OF THE CONSTITUTION OF  
KENYA**

**AND**

**IN THE MATTER OF 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 ALLEGED CONTRAVENTION OF ARTICLE 24 (2)  
OF THE CONVENTION ON THE RIGHT OF THE CHILD (CRC)**

**AND**

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

**AND**

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

**AND**

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

**AND**

**IN THE MATTER OF 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 CO-ORDINATION ACT CHAPTER 387 OF THE  
LAWS OF KENYA**

**AND**

**IN THE MATTER OF THE ENVIRONMENTAL MANAGEMENT AND CO-  
ORDINATION (ENVIRONMENTAL IMPACT  
ASSESSMENT/ENVIRONMENTAL AUDIT) REGULATIONS OF 2003**

**AND**

**IN THE MATTER OF THE ENVIRONMENTAL MANAGEMENT AND CO-  
ORDINATION (WATER QUALITY) REGULATIONS OF 2006**

**AND**

**IN THE MATTER OF SECTIONS 24, 36 AND THE SECOND SCHEDULE  
OF THE PHYSICAL PLANNING ACT CHAPTER 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**

**KELVIN MUSYOKA (Minor suing through Mother and best friend  
SCHOLASTICA KHALAYI SHIKANGA) ..... 1<sup>ST</sup> PETITIONER  
IRENE AKINYI ODHIAMBO ..... 2<sup>ND</sup> PETITIONER  
MILLICENT ACHIENG AWAKA ..... 3<sup>RD</sup> PETITIONER  
ELIZABETH FRANCISCA MMAILU ..... 4<sup>TH</sup> PETITIONER  
ELIAS OCHIENG ..... 5<sup>TH</sup> PETITIONER  
JACKSON OSEYA ..... 6<sup>TH</sup> PETITIONER**

HAMISI MWAMERO ..... 7<sup>TH</sup> PETITIONER  
 DANIEL OCHIENG OGOLA ..... 8<sup>TH</sup> PETITIONER  
 MARGARET AKINYI ..... 9<sup>TH</sup> PETITIONER  
 CENTER FOR JUSTICE, GOVERNANCE AND  
 ENVIRONMENTAL ACTION ..... 10<sup>TH</sup> PETITIONER  
 (Suing on their own behalf and on behalf of all the residents of Owino  
 Uhuru Village in Mikindani, Changamwe Area Mombasa)

AND

THE HONOURABLE ATTORNEY GENERAL ..... 1<sup>ST</sup> RESPONDENT  
 THE CABINET SECRETARY MINISTRY OF ENVIRONMENT,  
 WATER AND NATURAL RESOURCES ..... 2<sup>ND</sup> RESPONDENT  
 THE CABINET SECRETARY MINISTRY HEALTH..... 3<sup>RD</sup> RESPONDENT  
 NATIONAL ENVIRONMENT MANAGEMENT  
 AUTHORITY..... 4<sup>TH</sup> RESPONDENT  
 THE COUNTY GOVERNMENT OF MOMBASA ..... 5<sup>TH</sup> RESPONDENT  
 THE EXPORT PROCESSING ZONES AUTHORITY ..... 6<sup>TH</sup> RESPONDENT  
 METAL REFINERY (EPZ) LTD..... 7<sup>TH</sup> RESPONDENT  
 PENGUIN PAPER AND BOOK COMPANY..... 8<sup>TH</sup> RESPONDENT

**THE PETITIONERS’ WRITTEN SUBMISSIONS**

**May it please Your Ladyship,**

These are the humble submissions of the Petitioners in support of the prayers and declarations sought vide their petition dated the 20<sup>th</sup> day of February 2016 and filed in court on the 22<sup>nd</sup> day of February 2016. At the commencement of the hearing of this petition, directions were taken to the effect that the petition shall be heard by way of viva voce evidence. Consequent upon the said directions, the Petitioners called 10 witnesses while the Respondents all together called 7 witnesses. The Petitioners now contend that the issues raised in the petition have been successfully proved and we now urge the court to grant prayers as sought in the petition for the reasons adduced herein under.

**A. The nature of the proceedings and jurisdiction of this Honourable Court**

- Chapter 4 of the Constitution of Kenya 2010 provides for an elaborate Bill of Rights. Specifically, article 22 of the Constitution grants every person the right to institute court proceedings where he/she believes that a right conferred by the Bill of Rights has been denied, violated or infringed, or his threatened. This rights are further provided for under Article 258 of the Constitution. Article 70 gives specific provisions relating to enforcement of environmental rights.

2. Among other rights, the Petitioners herein claim that their right to the highest attainable standards of health and to live in a clean and healthy environment as provided for under the Constitution and international human rights instruments has been violated by the actions of the Respondents herein, those actions being of commission and of omission.
3. The High Court of Kenya is established under the provisions of article 165 of the Constitution as a superior court of record with unlimited original jurisdiction in criminal and civil matters. Article 23 grants the High Court the power to uphold and enforce the Bill of Rights. Further, Article 165(3)(b) donates jurisdiction to the High Court to determine the question whether a right or fundamental freedom in the Bill of Rights has been denied, violated, infringed or threatened.
4. This Honourable Court is established under the provisions of **Article 162(2)(a) of the Constitution** as a superior court with the status of the High Court of Kenya and is operationalised by the Environment and Land Court Act No. 19 of 2011. Section 13 (3) of the said Act gives power to hear and determine applications for redress of denial, violation or infringement of, or threat to, rights and fundamental freedoms relating to environment and land under Articles 42, 69 and 70 of the Constitution.
5. This Honourable Court is therefore clothed with similar jurisdiction as the High Court to determine the questions raised for its determination in this Petition. This position was affirmed by Justice Emukule in the case of Ken Kasinga -Vs- David Kiplagat & 5 others (2014) eKLR.

**B. APPLICATION ON INTERNATIONAL LAW**

As a monist state, the Constitution under Article 2 (5) and (6) of the Constitution of Kenya provides as follows;

**2 (5) The general rules of international law shall form of the Law of Kenya**

**(6) Any treaty or convention ratified by Kenya shall form part of the law of Kenya under this Constitution.**

6. This Petition will rely on the following international and regional human rights Conventions and Treaties ratified by the state;
  - International Covenant of Economic, Social and Cultural Rights (ICESCR),
  - Convention on the Rights of the Child (CRC)
  - African Charter on Humans and People’s Rights (ACHPR)
  - Basel Convention on the Control of Transboundary Movement of Harzadous Wastes and its Disposal
7. In addition to the above this, Petition will rely on the following 'soft" international human rights documents

- Universal Declaration of Human Rights
- 1992 Rio Declaration on Environment and Development
- United Nations Guiding Principle on Business and Human Rights

**C. Appearances and pleadings filled by the parties**

8. The Respondents were duly served with the Petition herein that caused the 1st to 6<sup>th</sup> Respondents to enter appearance and file the necessary documents.
9. Despite diligent search, the 7<sup>th</sup> and 8<sup>th</sup> Respondents could not be traced for service of the petition documents upon them. An application dated the 7<sup>th</sup> day of April 2016 was then made by the Petitioners for leave to effect service upon the said untraceable Respondents by way of substituted service through newspaper advertisement.
10. By its order given on the 26<sup>th</sup> day of January 2017, the court gave such leave and consequently the 7<sup>th</sup> and 8<sup>th</sup> Respondents were served by advertisement appearing in the Standard Newspaper edition of the 2<sup>nd</sup> day of February 2017. Even after this service, the said Respondents did not enter appearance or otherwise participate in these proceedings.
11. The Petitioners relied on the Petition itself together with the documents forming part of the record of the petition. Additionally, the Petitioners also filed statements of witnesses as well as a Supplementary list of documents in support of this petition
12. The 1<sup>st</sup> to 6<sup>th</sup> Respondents variously relied on their Replying Affidavits filed in response to this petition as well as upon their separate statements of witnesses and list of documents.

**C. A Brief Factual background to the petition.**

13. The 1<sup>st</sup> to the 9<sup>th</sup> Petitioners are residents of Owino Uhuru Village, an informal settlement located in Mikindani Area, Changamwe Division within Mombasa County. The 10th Petitioner is a registered Community Based Organisation (CBO) based in Kilifi County and which is engaged in advocacy in the area of human rights through the realisation of a clean and healthy environment. The 10th Respondent has been particularly involved in the amplification of the voices of the members of Owino Uhuru Community in seeking justice and reparation for the harm caused to them and to their environment by the actions and omissions of the Respondents herein.
14. Collectively, the Petitioners have brought this Petition on their own behalf and as well as on behalf of the other members of Owino Uhuru Community.
15. Sometime in the year 2006, the 7th Respondent herein began the process of setting up a factory on plot no. 1707/SECT/V/MN/MIKINDANI/MOMBASA.

The said parcel of land and the premises standing thereon belong to the 8th Respondent herein.

16. Unknown to the Petitioners herein as well as the other members of Owino Uhuru Community at the time the said factory was engaged in the business of recycling Used Lead Acid Batteries (ULABs) by smelting them at extremely high temperatures, extracting the lead components therefrom, packaging the same and exporting it to markets out of the country.
17. The process of extracting lead from the ULABs produces bi-products in the form of smoke, dust, fluid like substances as well as solid waste. This smoke or gaseous emissions, fluids and solid waste contain concentrated levels of lead particulates which was not properly disposed of and thus the same was released in to the environment.
18. The 7<sup>th</sup> Respondent did discharge gaseous emissions, dust, fluids and solid waste in to the environment inhabited by the 1st to the 9<sup>th</sup> Petitioners and the other members of Owino Uhuru Community with the result that the soil, air and water within the community became contaminated with lead. The incidence of disease within the community increased and other adverse effects of lead poisoning was observed among members of the community. This aspect has been ably testified to by various witnesses for the Petitioners.
19. The 7<sup>th</sup> Respondent was the direct polluter of the environment and which caused damage to the environment and harm to the Petitioners and fellow community members. However, the pollution was greatly aided by the 8<sup>th</sup> and the gross dereliction of duty and outright negligence by the 1st to 6<sup>th</sup> Respondents who are duty bearers with the responsibility, the opportunity and capacity to prevent and/or put a stop to the pollution, but who wilfully and deliberately refused to discharge their statutory functions.
20. The refusal by the duty bearers to act is particularly glaring on account of the fact that from the initial stages of the operation of the 7<sup>th</sup> Respondent legitimate concerns were raised about the adverse effects such operations were having on the environment and on the health of those working in the factory. Within just a few months of its operations in the year 2007, the 7<sup>th</sup> Respondents operations were shut down but later reopened soon thereafter and was thus allowed to operate intermittently till it was eventually closed **seven (7)** whole years later in the year 2014.
21. It is even more perplexing and perturbing that the 1st to 6th Respondents allowed the 7th Respondent to operate in the face of determined opposition by the members of Owino Uhuru Community through regular demonstrations, and even after carrying out inspections and studies by themselves or agencies under them, which studies documented the scale of the pollution and the adverse effects it has had on the health of the community members.

22. In the result, the members of Owino Uhuru Community suffered harm to their health on account of the environmental degradation and contamination wrought on by the activities of the 7<sup>th</sup> Respondent and aided in no small measure by the indolence of the responsible duty bearers. Some members of the community, as testimony revealed, have indeed died, having succumbed to the effects of lead poisoning on their bodies. Collectively and individually, the Petitioners blame the Respondents herein for the harm, loss and damage that they have suffered through violation of the Petitioners' constitutionally guaranteed rights.
23. To further exhibit the disdain and callousness with which the Respondents treated the plight of the Owino Uhuru Community members, the Respondents have to date refused to act on their own and other relevant reports which recommended widespread testing for the community members exposed to the lead poisoning, treatment for those found to have been adversely affected and the cleaning up of the environment to prevent further contamination.
24. This petition now represents the real last and only hope for the Petitioners and the rest of the community members to alleviate their suffering and to get justice on account of their suffering and pain from this unfortunate incident.

**D. What is Lead and what are its effect on the human body**

25. The answer to this question lies at the heart of the determination of this Petition and in understanding the reckless disregard for human life and well -being which the Respondents herein exhibited in dealing with the issue of pollution by the 7<sup>th</sup> Respondent and complaints in respect to the same emanating from members of Owino Uhuru Community, of which the Petitioners are members.
26. We invite the court to consider the document titled "**EXPOSURE TO LEAD: A MAJOR PUBLIC HEALTH CONCERN**" appearing at **pages 37 to 42 of the record of this Petition**. In the document, the World Health Organisation (WHO) describes lead as a toxic metal whose widespread use has caused extensive environmental contamination and health problems in many parts of the world. We also urge the court to consider and place strong reliance on the evidence of **Chrispus Bideru Wandera (PW8)**. This particular expert witness described in material detail what lead is and how it negatively affect the body if ingested beyond a certain level.
27. Though naturally occurring in low levels in rocks and soil, the widespread occurrence of lead in the environment is mainly due to industrial processes, the smelting of lead acid batteries being currently at the top among factors causing lead contamination in the environment.
28. The WHO has stated that lead is toxic to the human body even at very low levels of contamination. There is thus no acceptable levels of lead concentration in the human body. Lead is an element which means that it does not break down when it enters the environment or the human body. Its contamination of the environment is thus permanent unless remediation is carried out.

29. Young children and pregnant women are most susceptible to the adverse effects of lead contamination. It is now accepted by the WHO that blood lead levels of **5ug/dl** or above in children and **10ug/dl** and above in adults will have adverse effects on human health.
30. In children, some of the effects that manifest themselves pursuant to lead contamination include low intelligence quotient (IQ), stifled development of the nervous system, attention deficit disorder and aggression and anaemia among other effects.
31. Lead exposure in pregnant women has been known to cause miscarriages, stillbirth, premature birth and low birth weight as well as minor malformations.
32. In adults, chronic lead exposure causes haematological effects such as anaemia, or neurological disturbances, including headaches, irritability, lethargy, convulsions, muscle weakness, ataxia, tremors and paralysis. Acute exposure to lead has been known to cause gastrointestinal disturbances such as anorexia, nausea, vomiting, and abdominal pain. Also hepatic and renal damage, hypertension and neurological effects like malaise, drowsiness, encephalopathy that may lead to convulsions and death.
33. Lead enters the body through exposure to contaminated material whether by touch, breathing in lead contaminated gases or ingesting lead particulates in food. It is thus imperative that all contact with lead contaminated material be avoided to avert lead contamination in humans.

**E. Summary of the testimony of witnesses**

34. Your Ladyship, at the commencement of the hearing of this petition, directions were taken to the effect that this petition shall be heard by way of viva voce evidence. Consequently, the Petitioners called a total of 10 witnesses while the Respondents called altogether 7 witnesses. Herein below is a summary of their respective testimonies:

**PW1 – SCHOLASTICA KHALAYI SHIKANGA**

35. *This is the grandmother to the 1<sup>st</sup> Petitioner herein. Her evidence was that she is a resident of Owino Uhuru Village. The 7<sup>th</sup> Respondent set up a factory in the year 2007. With the passing of time, the operations of the factory brought with it adverse health and environmental effects.*
36. *The witness started developing constant joint pains, respiratory problems, fatigue and lower sexual drive. Visits to the local hospital did not help much.*
37. *As for the 1<sup>st</sup> Petitioner herein, his situation was even worse. The minor was born in 2006 in good health. However, in 2008, he started developing constant fever, running stomach and constant cough. With time, the minor developed rashes all over the body.*
38. *Upon the minor's blood samples being examined on 8/9/2010, it was discovered that he had blood lead level (BLL) of **26ug/dl**, which was way*

above the recommended lead level of a child at 5ug/dl. The level of lead poisoning was severe. The resultant effect is that the said minor developed severe skin lesions, his liver and severe skin pigmentation on his right leg.

39. *My Lady, in the year 2011, the minor's blood samples were taken by Pathcare and the result showed that his blood lead level was **28ug/dl. (See page 213 of the petition)**. In the year 2012, his blood lead level had increased to 32 ug/dl (See page 212 of the petition). The minor has not recovered owing to lack of adequate treatment which ought to be provided by the 3<sup>rd</sup> and 5<sup>th</sup> Respondent.*
40. *On cross examination, the witness blamed the 4<sup>th</sup> and 6<sup>th</sup> Respondent for the harm and damage suffered by them. According to her, the 4<sup>th</sup> Respondent as the agency responsible for the management of the environment, ought to have ensured that the 7<sup>th</sup> Respondent has acquired an EIA licence prior to commencing its operations. Similarly, the 6<sup>th</sup> Respondent was under a duty to ensure that licence was issued to the 7<sup>th</sup> Respondent only after satisfying itself that it had complied with all the requirement laid down by the law and specifically obtaining the EIA licence. According to her, the 6<sup>th</sup> respondent was the one that brought the 7<sup>th</sup> Respondent factory to the village.*

#### **PW2 – ALFRED OGOLA**

41. *My lady, this witness was also a resident of Owino Uhuru village, having been a resident there for over 40 years and married with nine wives and the Chairman of Owino Uhuru village.*
42. *Prior to the establishment of the 7<sup>th</sup> Respondent's factory, he led a normal a healthy life. Subsequent to the establishment of the factory, notable changes to their environment began. These were black emissions of smoke which corroded the roofs to their houses. This also resulted in the villagers developing respiratory diseases, coughing and sneezing. The witness himself has as a result of the contamination suffered erectile dysfunction, severe joint pains, respiratory problems, blurred vision, headaches and insomnia.*
43. *Meetings were organized with the factory management to discuss way of containing the factory pollution but the same did not yield much result. Later soil, water and air samples were taken for examination and analysis and it was established that there was high contamination of the air, water and soil within the Owino Uhuru village.*
44. *My Lady on cross examination, the witness confirmed that as a result of the emissions and effluent discharge from the 7<sup>th</sup> Respondent factory he became weak, and suffered from low blood count and fatigue. It was his evidence that the 4<sup>th</sup> Respondent was entirely responsible for issuance of a licence to the 7<sup>th</sup> Respondent and that the 4<sup>th</sup> Respondent failed in its duty of ensuring that the 7<sup>th</sup> Respondent's operations did not cause harm to the residents of Owino Uhuru.*

45. *My Lady, it was further the evidence of this witness that the 6<sup>th</sup> Respondent being the licensing authority to facilitate the operations of the 7<sup>th</sup> Respondent, they were thus culpable for the harm caused to the residents of Owino Uhuru.*
46. *As regards the 5<sup>th</sup> Respondent, the witness testified that having permitted the 7<sup>th</sup> Respondent to operate within the village of Owino Uhuru, they were equally to blame for the damage to the environment and harm cause to the residents thereof.*

**PW3 – KAVUMBI MUNGA**

47. *This witness was born in Owino Uhuru village. She had a son born in the year 2012. Clear and apparent health defects which can only be attributed to the emissions and water effluent which was acidic and passing though the village from the 7<sup>th</sup> Respondent factory are visible on her child's body. The growth and development of the child has been poor. Upon being examined for lead poisoning, it was established that the child was suffering from lead poisoning. In fact, the left leg of the child was shown to be **gangrenous**. Despite treatment, the scars and rashes in the minor's body have refused to heal.*
48. *The challenge that this witness has is that the suitable drugs for treatment are out of her reach owing to their expensive nature. There is hence the need that the Respondents do compensate her for the harm and damaged cause to her and her child as well as provide adequate treatment.*

**PW4 – WILFRED KAMENCHU**

49. *My Lady, this witness is a resident of Owino Uhuru village and a Nyumba Kumi representative. Prior to the setting up of the factory, he lived a normal and healthy life. With the setting up of the 7<sup>th</sup> Respondent's factory in 2008, the villagers and himself started experiencing various health problems especially in breathing, persistent coughing, chest pains and skin ailments. This was as a result of smoke and dust emissions from the factory.*
50. *One Professor Karanja did visit the village and took samples from three (3) children from the village for analysis to determine their blood lead level and it confirmed that indeed they were suffering from lead poisoning.*
51. *Prior to the first closure of the factory, Public Health officials and officers from the 4<sup>th</sup> Respondent and specifically DW 1–JOHN NDUN'U did make numerous visits to the village for fact finding and later assured them that the 7<sup>th</sup> Respondent factory would be closed. This was not to be.*
52. *Owing to the adverse health effects on the residents of Owino Uhuru, the witness and PW10 – PHYLLIS OMIDO, led several demonstration to agitate for the closure of the 7<sup>th</sup> Respondent. There were meeting held with the Public Complaints Committee of the 4<sup>th</sup> Respondent held in 2009 as well as a complaint to the Senate. The recommendation made by the Senate was that the 7<sup>th</sup> Respondent be closed. **(See the Report at page 109 – 125 of the petition)***

53. *Indeed, the 7<sup>th</sup> Respondent was eventually closed albeit after several residents had died from lead poisoning and women suffering miscarriages and some residents being arrested and arraigned in court for agitating for closure of the factory!*
54. *My Lady, the cross examination by the Respondents' advocates did not shake the evidence of this witness but indeed affirmed that there was effluent discharge by the 7<sup>th</sup> Respondent and the 4<sup>th</sup> Respondent did not do much to in terms of investigations and arresting the menace caused by the 7<sup>th</sup> Respondent.*

**PW5 – STEPHEN OKELO MULO**

55. *My Lady, this witness is also a resident of Owino Uhuru Village. His, is a tragic story of the death of his 5<sup>th</sup> born son (SAMUEL OMONDI - now deceased). This started in the year 2011 when the deceased started developing skin rashes and respiratory problems which was on and off. In the year 2014, Kenya Television Network (KTN), carried out an investigative story which subsequently led to screening and examination of the villagers and it was established that the deceased had BLL of up to 9ug/dl in 2014. Subsequent analysis by the Government Chemist did show that the deceased's blood lead level had increased to 12ug/dl.*
56. *Though there was an attempt at medical intervention by the 5<sup>th</sup> Respondent by providing free medical treatment to the residents at Port Reitz Hospital, the same did not yield much as in 2015, he died.*
57. *Attempts by this witness to establish the cause of his son's death were futile as the hospital did not disclose much information on the cause of his death. As for this witness and his wife, the analysis of their blood samples has shown that they had high lead poisoning in their blood.*
58. *My Lady, on cross examination, this witness blamed the 5<sup>th</sup> Respondent for permitting the establishment of the 7<sup>th</sup> Respondent factory within a residential area where they were living. The witness further blamed the 4<sup>th</sup> Respondent as being the statutory body in charge of environment and dereliction of duty.*

**PW6 - JACKSON WANYAMA**

59. *This witness testified that he has been a resident of Owino uhuru village within Changamwe for the last 11 years since 2005. He was married to one Linnet Nabwire and they were blessed with two children namely Esther Anyango and Paul Odhiambo. In the year 2010 he was employed by the 7<sup>th</sup> Respondent, where his work was to physically remove battery terminals from batteries before they were smelted. The witness testified that due to direct exposure to lead poisoning, all his family member's got unwell and this is proved by the Government chemist report report on page 209 of the petition. Linet Nabwire had the second highest level of lead poisoning at 238.2ug/dl. The lead poisoning directly lead to the death of his daughter ESTHER ANYANGO in June 2011, and later his wife LINNET NABWIRE in September 2015.*

60. The petitioner and his remaining child Paul Odhiambo survived but they too have been suffering from adverse effects of the lead poisoning. He was categorical that the lead poisoning was as a direct result of poor industrial practices undertaken by the 7<sup>th</sup> Respondent and also blamed the other respondents for failing in their statutory duties by licensing the 7<sup>th</sup> respondent and allowing them to operate while disregarding all basic / mandatory safety guidelines.

**PW6- HAMISI MWAMERU**

61. PW7 too testified that he was not a resident of Owino Uhuru village but worked at the 7<sup>th</sup> Respondent Company for two years from February 2009 to February 2011, where he carried out manual work of cracking open used motor vehicle batteries brought into the factory and removing battery cells to extract lead. Later after 6 months he was taken to the production area where he first deputised one Erick Otieno who taught him how to do smelting and operate the smelting machine/rotary machine.
62. He went at length to explain how the whole process was carried out and how at the end of the entire process they were required to remove the slag by hand and after it piled up in the compound it would later be removed from the factory at night for disposal. He confirmed that they were never given any protective clothing and were fully exposed to the lead during the extraction and manufacturing process. He further testified that the smelting process would produce such a strong pungent smell that every half an hour or so they would leave the factory to go outside and get fresh air. At times this pungent smell would knock out factory workers and they would faint at the work place as a direct result of the said pungent smell.
63. The witness testified that as a direct result of the work they were carrying out they developed respiratory problems and despite complaining to the factory management, they failed to improve the work environment as demanded in law. To make matters worse the factory had a discharge pipe which they used to directly drain off the contaminated water directly into Owino Uhuru village, while the factory bell house/chimney would blow out dirt directly into the environment, and this dirt had small lead particles which would rain over the mabati structures within Owino Uhuru Vilage and this is what corroded the corrugated iron sheets and created holes in them .
64. He further testified that due to persistent complaints from the workers and the Owino Uhuru community, the factory would be closed for short periods of time on intervention of the county public heath office but they would shortly thereafter reopen and operate, and in some instances during the “alleged closure”, operate at night to avoid scrutiny.
65. The witness did confirm that working in the factory did adversely affect his health. Lancet laboratory tests confirmed that he had blood lead levels of 33ug/dl which was quite high. As a result of this he developed chest congestion, fatigue, erectile dysfunction and forgetfulness, while his wife also experienced

three premature births and excessive bleeding due to direct effects of lead poisoning. He blamed all the respondents for failing to undertake their statutory duties to prevent the 7<sup>th</sup> Respondent from polluting the environment and also failing to intervene even when the Petitioners raised their concerns about the ongoing pollution.

**PW8: WANDERA CHRISPINUS BIDERU**

66. **PW8** testified that he is a career civil servant, holder of a Bsc, Degree In Chemistry from University of Nairobi and a Master degree in Public Administration from the same university. He worked for the Government of Kenya from January 1986 to June 2018 when he retired while holding the position of Deputy Chief Government Chemist { he served for 32 years and 6 months}.
67. In 2014 as head of forensic toxicology they did receive a parcel of 50 blood samples taken by the Mombasa county public health office, which were carefully packed in small vials with a letter from the director of medical services directing them to test/analyze the same with the purpose of determining the level of lead in the blood.
68. He stated that he assembled a team and carried out the task required and thereafter generated a summary brief, which report is on page 209 -210 of the petition which he confirmed were the accurate results of their findings. He stated that he was shocked by the levels of lead they found in the blood samples as they were extremely high and he had to re run the tests again to reconfirm the levels. Some were so high that he did not expect the persons to be alive. Eg IRENE AKINYI ADHIAMBO -420ug/dl, MILLICENT ACHIENG-234 ug/dl, JACKSON WABEDHA- 234.4ug/dl. These were as against the recommended upper limit of 5ug/dl for a child and 10ug/dl for an adult. The adult's having more than 200ug/dl should have been long dead and buried in the view of this expert witness.
69. He stated that they did their report to the director of medical services who later called him and gave him a directive that he will be included in a task force- Technical team to be dispatched to Mombasa to investigate the issue further. The team did visit Owino Uhuru Village and carried out sampling of the soil, water, collected dust from roof tops at the said village which were all tested and returned positive result for lead exposure. {The report of this team is at page 182-195 of the petition}. This report was compiled and signed by the said witness. Specifically in the final analysis it was clear beyond any peradventure that Owino Uhuru village was highly contaminated and nakedly exposed to extremely high and unacceptable levels of lead poisoning.
70. He stated that they did recommend that;
  - There be immediate intervention in the form of treatment to the victims.

- Persons within 500m radius to be examined to determine blood lead levels, while persons beyond the 500m radius be presented for testing to also determine lead presence in their blood
- Soil at Owino Uhuru village which is already contaminated to be excavated and relocated to other areas where it can be excavated and be buried to stop any further exposure.

71. Later the witness received a second letter from Director General of NEMA inviting him to join a second task force which had the TOR of decommissioning the factory, advising on rehabilitation of Owino Uhuru Village, and recommend possible prosecution of the culprits. After interviewing all the concerned parties and taking into consideration the scientific evidence availed, the committee found for a fact that;

- Metal Refinery EPZ Ltd operated its business enterprise without due regard to the health and safety of its workers, the local community and its surrounding environment.
- There was evidence to show that the factory workers and residence of Owino Uhuru settlement were exposed to life threatening lead levels {blood level of 420ug/ml as against the conservative maximum threshold of 10ug/ml}.
- The soil and dust in the play area and non play area's within the factory and Owino Uhuru Village were exposed to high lead levels. In particular the top soil outside Godown number 8 hosting the plant had a lead level of 11942mg/kg as against the recommended level of 400mg/kg.
- The shallow well {subterranean} water and open stream{surface} water, including vegetation within the factory compound had high lead levels of {10mg/l or ppm as against WHO/UNDP maximum permissible or action level of 0.05mg/l}.
- Plant operation released toxic fumes containing lead particulars and oxides of sulphur into the air and also discharged toxic effluent which had lead sediments were observed in the storm water drains.
- Lastly, the task force found that based on clinical evidence, residents of Owino Uhuru settlement had been affected by lead and showed signs of ill health directly attributed to lead poisoning **{See the report on pages 157 to 203 of the Replying affidavit of the 4<sup>th</sup> Respondent}****{These finding are on the executive summary on page 165 and 166 of the said report}**. The witness finally clarified that ordinarily lead is harmless but in smelting it in the furnace it had to be mixed with lead oxide and lead sulphate to yield more lead. Sulphur dioxide which was released during the process escaped into the atmosphere and if it mixed with rain it would cause sulphur rain which corroded the roofs at Owino Uhuru. He was categorical that

the residence of Owino Uhuru {about 4000} of them suffered lead poisoning as a direct result of the activities of the 7<sup>th</sup> respondent. On cross examination he confirmed that the names of all individual affected at Owino Uhuru were not in the reports but he insisted that all facts were captured in the two reports clearly detailing the pollution that happened and how it affected the petitioners and residents of Owino Uhuru. He also confirmed that there are correspondences to show that the factory was closed down by the Ministry of health but later reopened and allowed to operate, though him he did recommend complete closure of the said factory .He said that he never went back to the affected area and he could not confirm if the NEMA report was acted upon.

**PW9 - DR AJOWI ADEDE**

72. Dr. Adede stated that he was a qualified Doctor having obtained a degree in Medicine and Surgery. He runs a private practice known as GAMA MEDICAL CLINIC in Mombasa. He stated that he did get a request from CJGEA{ the 10<sup>th</sup> Petitioner} to examine and prepare medical reports with respect to certain persons who had been exposed to lead poisoning at Owino Uhuru village. The said persons were Daniel Odego Ogolla , Jackton Hosea, Elias Ochieng, Elizabeth Francis Mailu , Kelvin Musyoka , Millicent Achieng Awaka , Irene Akinyi Odhiambo. He did examine the said persons and found as a fact that they had been exposed to lead poisoning which resulted in them having the following symptoms;
- a. Heavy blood lead poisoning/Heavy metal poisoning as confirmed by the various laboratory tests
  - b. Chest infections/cough
  - c. Anemia
  - d. Depigmentation of the skin, skin eruptions resulting in itchiness.
  - e. Painful joints
  - f. Loss of Appetite
  - g. Poor memory & swollen legs

73. He did confirm that they had suffered from lead poisoning and proceeded to make medical reports {On page 216 to 222 of the Petition}.

**PW 10-PHYLLIS ISSA INDIATSI OMIDO**

74. PW 10 who is also a director of the of the 10<sup>th</sup> petitioner CENTER FOR JUSTICE, GOVERNANCE & ENVIRONMENTAL ACTION was the last witness of the petitioners;
- a. She stated that in 2009 she was employed by the 7<sup>th</sup> Respondent, Metal Refinery EPZ Ltd as an administration manager in charge of daily administrative work and handling all administrative issues. After working for four months or so her son started to become critically ill and after several tests, he was found to be suffering from lead poisoning due

to secondary exposure from her. She did immediately resign from work and thereafter started her long fight to speak up for the larger family of Owino Uhuru residents who had been severely affected by lead poisoning .

- b. She stated that in 2010 she started to write letters to different Government agencies and the Mombasa Municipal Council seeking their intervention seeking to stop the operations of the 7<sup>th</sup> respondent to no avail. **{see pages 58-72 of the petition}**. In the same year 2010 workers of the 7<sup>th</sup> Respondent started to die. One Karissa was the first to die due to lead poisoning while others became critically ill. She started to organize public demonstration to force the state into action. Due to her agitation in seeking justice for the residence of Owino Uhuru, she was arrested in 2012 together with 16 other residents of Owino Uhuru village for organizing the protests and was charged in court with the offences of unlawful assembly and incitement to violence.
- c. She stated that after the arrest they decided to register the 10<sup>th</sup> petitioner {center for justice Governance and Environmental Action} to run the TUNA SAUTI CAMPAIGN. In 2015 she petitioned the SENATE to intervene and this led to other government agencies being co-opted into the parliamentary task force to look into the lead poisoning. This committee did look into the indisputable scientific evidence presented, soil sample results, blood tests results gathered by experts, personal interviews conducted with the affected residence of Owino Uhuru and conclusively found as a fact that indeed the 7<sup>th</sup> respondent had poisoned the petitioners and recommended that restorative action by both the National and county Government be undertaken. **{see report on page 109 to 125 of the petition}**.
- d. She further narrated that in their attempt to secure help for the affected victims of the poisoning, the respondent government agencies continuously closed their doors on them by refusing to offer essential services like medication to the affected persons, failing to shut down the factory, or when they did, the factory would only close at day time but continued to operate at night, they refused to give them laboratory tests results of the victims who were tested, allowed the factory to operate while flouting all basic legal, environmental and health requirements amongst others and thus impeded the petitioners' right to information, right not to be discriminated against, social rights, rights to fair administrative action and right to clean and healthy environment .
- e. It was her further evidence that, the 7<sup>th</sup> respondent was allowed to operate without first securing an Environmental impact Assessment

(EIA) license which was a mandatory pre requisite requirement to be met before starting to operate. No prior public participation was carried out to take the respondents view's about putting up this factory in their vicinity , and even when the issue of lead poisoning was brought up, they continued to let the 7<sup>th</sup> respondent to operate to the loss and detriment of the petitioners. As proof of the serious nature of the lead poisoning that occurred, the witness directed court to the evidence showing the lead levels of various villages as captured by the government analyst and lancet laboratory results. These included the results of the late LINET NABWIRE which showed that she had over 238ug/dl of lead in her blood, which was way above the recommended level of 5ug/dl.

- f. The effects of the pollution were grave and far reaching as the entire Owino Uhuru village soil has been affected by the affluent discharge which was flowing through the village directly from the 7<sup>th</sup> respondent factory, and remediation of the entire village has to be carried out at great cost, affected persons must be put through a treatment regime, several houses had their roofs damaged and have to be repaired and most fundamentally, the social and health fabric of the entire villagers of Owino Uhuru has been irreversibly affected and cannot be remedied even if monetary compensation were to be awarded.
- g. This witness finally stated that the 7<sup>th</sup> respondent did finally stop production of the lead product when they influence legislation in the national assemble and in all other East Africa assemblies which took a stand under East African Union to ban all lead exports. It is only after this was done that the 7<sup>th</sup> respondent finally stopped production in the year 2015. She prayed that based on the undisputed and uncontroverted evidence placed before this honourable court the prayers sought in the petition be granted.

## **Respondent's evidence**

### **DW 1- JOHN NDUNG'U**

75. DW 1 relied on his replying affidavit dated 5<sup>th</sup> July 2018, and the witness statement dated 16<sup>th</sup> May 2018. He was the public health officer in charge of Kilindini District {Changamwe and Likoni divisions} as the District public health officer. In 2007 he did see a news item on television, where residents of Owino Uhuru village were demonstrating over pollution by a company based at Changamwe. The following day he found the chief public health officer {Mr Maithya } and medical officer of health Mombasa municipality {Dr Chindagaye } waiting for him at his office where they were also joined by a team from inspectorate department before heading to Owino Uhuru village. He stated that

he found that the factory had been closed down but a few months later more demonstrations were held against it being reopened.

76. He did visit the factory and carried an inspection on 26/02/2009, and thereafter issued an order to have the said factory closed down; and it so remained until NEMA reissued a letter recommending that it be re-opened { see Annexure JKN-7}. He further confirmed that in June 2010 he did participate and supervised the removal of waste {sludge} by the 7<sup>th</sup> respondent assisted by trucks of the 4<sup>th</sup> respondent from the said factory after which he allowed the factory to be reopened with stringent conditions to be complied with. In June 2011 he stated that he did order that the factory be closed again for failing to comply with stringent checks that they had placed.
77. Despite his efforts, the respondents re-opened the factory and continued to operate forcing him to again issue closure orders in September 2011. In 2014 he did participate in a joint investigative committee to shed light into the details/operation of the 7<sup>th</sup> respondent, which committee carried out extensive studies and made recommendations to be acted upon. According to him, the Ministry was not negligent and did their best to mitigate any damage to the environment and public health as was required of them and thus the 1<sup>st</sup> to 3<sup>rd</sup> respondents did not bear any liability.
78. On cross examination he stated that he came to Mombasa in the year 2004 and confirmed the incidences he mentioned in his replying affidavit as being factual and confirmed that indeed the petitioner were affected by lead poisoning which was a direct result of the activities of the 7<sup>th</sup> respondent. He confirmed through various documents/exhibits that there were several incidents and instances where they let the 7<sup>th</sup> respondent operate in total disregard to the directives issued and continued with the smelting process even at night to avoid detection.
79. He also confirmed that he supervised the dumping of sludge at Mwakirunge Dump site { 180 tonnes}, using the 4<sup>th</sup> respondent's lorries and pursuant to their direct approval. He also confirmed in cross examination that the 7<sup>th</sup> respondent also dumped sludge by the river bed next to the factory which lead to pollution of the environment. Further he confirmed that he was not aware if the petitioner's were ever put on a treatment regime to remove lead from their body by the government nor did he have any documentation to prove this. Finally he confirmed that only 200 persons were tested but the entire Owino Uhuru village had approximately 3000 persons who were exposed to lead poisoning. He stated that it maybe necessary that they too be tested to confirm if they had lead poisoning and remedial action be taken.

**DW2- NANCY ETYANG**

80. My Lady, DW2 a representative of the 3<sup>rd</sup> Respondent confirmed that the issues and concerns of the residents of Owino Uhuru relating to lead exposure and poisoning were brought to their attention in 2014. As a Ministry and in conjunction with the 5<sup>th</sup> Respondent, they did meet community leaders and

later conducted their investigations. It was further her evidence that blood samples of residents of Owino Uhuru and Bangladesh Areas were taken to ascertain the extent of lead poisoning and thereafter followed a report which clearly showed elevated levels of lead especially in children.

81. My Lady, it was further her evidence that having noted that there was contamination and exposure of the residents of Owino Uhuru to lead, a raft of measures were to be undertaken and they included:

- a) The 5<sup>th</sup> Respondent to set up a system to monitor the children;
- b) There was need to map out the area for purposes of a clean-up;
- c) A recommendation that certain drugs were to be made available to the children and residents to prevent further exposure
- d) A medical camp to be set up for monitoring etc

(see the conclusions at page 147 of the petition)

82. My Lady, on cross examination from Counsel, she did confirm that the 7<sup>th</sup> Respondent factory was closed following numerous complaints from the community.

On cross examination by Counsel for the Petitioners, it was her evidence that the 4<sup>th</sup> Respondent had a responsibility together with other agencies to prevent the kind of lead exposure that was witnessed at Owino Uhuru. She indeed confirmed that lead levels in Owino Uhuru were beyond the safe level and made various recommendations. (See page 172 of the petition).

### **DW3- ZEPHANIA OUMA**

83. My Lady, DW3 at the time of giving his evidence on behalf of the 4<sup>th</sup> Respondent, was the acting Director for Compliance and Enforcement of the 4<sup>th</sup> Respondent herein. He did confirm that the 7<sup>th</sup> Respondent did present an EIA Project report on the 13<sup>th</sup> March 2007 which was duly circulated to other agencies for purposes of receiving their comments.

84. It was further his evidence that on the 23<sup>rd</sup> April 2007, they did issue a cessation and restoration order to the 7<sup>th</sup> Respondent after having conducted a ground inspection and noting that the 7<sup>th</sup> Respondent had been operating without an Environmental Impact Assessment licence.

85. On the 16<sup>th</sup> May 2007, the 4<sup>th</sup> Respondent did permit the 7<sup>th</sup> Respondent to commence its operations subject to certain conditionalities imposed upon them.

86. On 11<sup>th</sup> June 2007, the 4<sup>th</sup> Respondent did grant permission to the 7<sup>th</sup> Respondent to carry out "trial runs". However, on the 14<sup>th</sup> August 2007, the 4<sup>th</sup> Respondent did lift the cessation and restoration order thus permitting the operations of the 7<sup>th</sup> Respondent to resume.

87. My Lady, this is rather interesting in view of the fact that they did issue the 7<sup>th</sup> Respondent with an EIA licence on the 5<sup>th</sup> February 2008. This therefore means that the 4<sup>th</sup> Respondent did authorise and permit the 7<sup>th</sup> Respondent to undertake its operation without first obtaining an EIA licence!
88. My Lady, the assertion by the 4<sup>th</sup> Respondent that it did everything within its mandate to protect the Petitioners as per the provisions of the EMCA is thus untrue.
89. On 30<sup>th</sup> March 2015, following numerous complaints by the villagers of the Owino Uhuru, the Senate Standing Committee on Health and at the request of NEMA, submitted the epidemiological results of the lead effects on the environment. From the Report, it did emerge that the residents had been exposed to lead. The soil and dust in non – play and play areas had high lead levels and the recommendations of the Task Force were inter alia:-
- a) The 7<sup>th</sup> Respondent had heavily contaminated Owino Uhuru with lead and the area ought to be gazetted as a contaminated site;
  - b) All residents of Owino Uhuru settlement were to be tested to determine blood lead levels;
  - c) Decommissioning of the 7<sup>th</sup> Respondent plant;
  - d) Ensure restorative justice for the affected population.

**DW4- MARTIN SHIMBA**

90. My Lady, DW4 was an Environmental Inspector with the 4<sup>th</sup> Respondent. He did confirm having knowledge of complaints of air and water pollution which led to lead poisoning in Owino Uhuru village by the 7<sup>th</sup> Respondent. It was further his evidence that the 4<sup>th</sup> Respondent works as a supervisory and coordinating agency on matters touching on environment.
91. It was his evidence that in 2011, one Mwai Muitungu, a NEMA expert teamed up with him and conducted an inspection of the 7<sup>th</sup> Respondent factory and made a finding inter alia that:-
- i) The factory's production capacity of lead was sixty (60) tonnes per month;
  - ii) The battery breaking area was not ventilated;
  - iii) Mixture of ashes and water were emitting a pungent smell
  - iv) Oil spillages from the IDO holding tanks were discharged into a drainage channel.
- A raft of recommendation were thereafter made to remedy the situation.
92. My Lady, the witness testified that in 2013 a further inspection was done on the 7<sup>th</sup> Respondent factory and the recommendations were that:
- i) The Company should stop further recycling until a waste recycling licence is obtained from the Authority;
  - ii) The Company needs to carry out air and water quality survey quarterly and submit the same to the Authority;

iii) The Company is required to carry out more detailed environmental audit.

93. My Lady, on cross examination, it did emerge that the 7<sup>th</sup> Respondent had been carrying out its operations without an EIA licence! The EIA licence was issued on the on the 5<sup>th</sup> February 2008, whilst the 7<sup>th</sup> Respondent did commence its operations way back in 2006 with the knowledge and blessings of the 4<sup>th</sup> Respondent.

**DW 5- JIMMY WALIULA**

94. DW5 testified on behalf of the 5<sup>th</sup> Respondent. He stated that he was the county attorney of the 5<sup>th</sup> respondent and it was within his knowledge that the 8<sup>th</sup> respondent did let their property to the 7<sup>th</sup> respondent in 2006. This property being Plot No 1707/V/MN, where the 7<sup>th</sup> respondent set up a factory dealing with recycling of lead acid batteries which mainly involved collecting and smelting of lead electrodes extracted from the batteries. This factory was set up after the owners obtained all relevant approvals from all relevant ministries and departments at the national level the same having been set up prior to coming of the devolved system governments.
95. According to this witness, the 5<sup>th</sup> respondent played a very limited role in the whole process by only issuing a single license permit to the plant after its officers were satisfied that it complied with the physical health requirements which included things like whether the plant was well ventilated and had fire fighting equipment for use in case of fire etc. He reiterated that they had nothing to do with the measuring toxicity of the 7<sup>th</sup> respondents operations nor were they involved in the process of issue Environmental Impact Assessment licence. Thus he stated that they were not to blame for the misfortune that befell the petitioners.
96. In cross examination he confirmed that the county government of Mombasa is the successor in title to Municipal Council of Mombasa. He confirmed that the municipality had a public health department but insisted that it was not their work to deal with issues of closure of the factory. He was shown a letter dated 12/6/2008 from Municipal Council of Mombasa directing the factory to close down and a second letter dated 4/7/2008 re opening the said factory without ensuring compliance. He also confirmed that it was the council's duty to approve physical planning and it was not right to have the factory next to a residential area.
97. He confirmed that the Municipal Council of Mombasa did issue to the 7<sup>th</sup> respondent a certificate {under the municipality drainage by laws} dated 14<sup>th</sup> August 2009. This confirmed that indeed drainage from the factory had been dug, yet he could not confirm if indeed such a drainage existed { see page 97 of the petition}.

98. He was also shown letters on pages 98 to 106 of the petition, which letters showed that the municipality had allowed and gave permission to the 7<sup>th</sup> respondent to dump the sludge at an open dumping site at Mwakirunge. The witness did acknowledge that indeed that could have been the correct position but he was not aware of the protocol used in lead waste disposal.

Further the witness was shown a letter dated 12<sup>th</sup> June 2008 from the office of the medical officer of health –Municipal Council of Mombasa {This letter is annexure in the replying affidavit of Fanuel Kidenda – Annexure II} , where the municipality wrote to the 7<sup>th</sup> respondent giving them notice to improve their environment failure to which stern action would be taken against them. The witness indeed confirmed that the letter originated from their office and showed that they had more obligations towards the petitioners than what he was alleging.

#### **DW 6 -FRANCIS WAKAHU ITEGI**

99. DW 6 was the 1<sup>st</sup> witness called by the 6<sup>th</sup> Respondent. He is the liason officer based at their Mombasa office and stated that he is fully aware of the content of the affidavit of Mr Fanuel Kidenda dated 2<sup>nd</sup> March 2018 and fully identified with its contents. He stated that before they issue an EPZ license, they write to the applicant, which In this case was the 7<sup>th</sup> respondent and issue them an **approval in principle** on condition that they meet certain pre licensing conditions namely; to have and EIA license and to also comply with the provisions of Export permit and minerals dealers license. It was his case that upon fulfilment of these conditions, the 7<sup>th</sup> respondent was duly granted an EPZ license dated 13<sup>th</sup> December 2006 {see **Annexure FK-4 on page 45 of the replying affidavit of Fanuel Kidenda**}
100. On cross examination he stated that the mandate of EPZ Authority was to promote a government programme established in 1990 to promote export from Kenya to other developed nations/countries. He reiterated that their mandate is simple and that is license an entity so long as they have complied with all relevant prerequisite requirements. To this end he was shown the EPZ license dated 13<sup>rd</sup> December 2006 and the EIA license issued on 5<sup>th</sup> February 2008 {**annexure 5 on page 46 of the affidavit of Fanuel Kidenda**}. **This clearly showed that they did proceed to award the license irregularly and without compliance with the law because the licence was issued way before the EIA was issued which act, omission or/or commission was highly irregular.**
101. Further he confirmed that the provisional EIA approval given by NEMA was for a parcel land in **Kilifi County** being **L.R. NO MN/11/3697 KILIFI DISTRICT**.
102. Finally he also confirmed that EPZ did receive letters of complaint in 2008 complaining about the activities of the 7<sup>th</sup> respondent. Specifically they addressed the 7<sup>th</sup> respondent on this issues vide their letter dated 23<sup>rd</sup> September 2008 {**Exhibit -8**} where they told them unless they dealt with the

said issues the corporation will not renew their yearly license. But unfortunately continued to grant them yearly license without ascertaining or ensuring that they complied with license conditions, all to the detriment of the petitioner's .

**DW 8- MATHEW WERE OLIECH**

103. The 2nd 6th Respondent's witness DW8 testified that he worked at EPZ as the assistant manager –Environment and was the author of the report / notes of the inspection dated 29<sup>th</sup> April 2009, which recommended for re -opening of the 7<sup>th</sup> respondent operations because they had complied with 90% of the conditions set for them. He also stated that he relied on the affidavit sworn by Fanuel Kidenda on behalf of the 6<sup>th</sup> respondent. He further referred the Honourable Court to a second report which he authored being Exhibit 11 to the said affidavit where minutes of a joint meeting of all concerned stake holders were held and deliberations captured. He stated that their work is to facilitate the operations of prospective investors, while Ministry of Health is responsible for closure and compliance under public health Act.
104. On cross examination he confirmed that under section 23 of the EPZ Act they are empowered to deal with environmental issues that arise. The said section 23{2}{b} states that an enterprise shall not engage in a business that has “ A deleterious impact on the environment , or engage in unlawful activities , impinging on national security or may prove to be a health hazard “ Further he confirmed that by 2008 they had received numerous correspondences regarding the activities of the 7<sup>th</sup> respondent which were deleterious to the environment and confirmed that he did recommend that the factory be reopened despite the fact that they had not fully complied with all recommendations made by the health and environmental department.
105. He was evasive and put the blame on ensuring compliance on the other government agencies including the Ministry of Health and also Ministry of Environment/NEMA who according to him were the lead Agencies . Further he confirmed that a EPZ license can only be issued after the EIA license has been issued.

**F. Issues for determination**

106. Your Ladyship, from the totality of the pleadings and the evidence adduced by all parties to this petition, together with the testimony of the witnesses who testified herein, we humbly opine that the following questions now fall for the determination of the court;

***a. Whether the Petitioners right to clean and healthy 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 the African Charter on Humans and People's Rights (ACHPR) were violated and if so the culpability of the Respondents.***

- b. Whether the Petitioners' right to highest attainable standard of health and right to clean and safe water in adequate quantities as guaranteed by Article 43 (1) (a) and (d) of the Constitution, Article 12 (1) and (2) (a) and (c) of the International Covenant of Economic, Social and Cultural Rights (ICESCR), Article 24 of the Convention on the Rights of the Child (CRC) and Article 16 of the African Charter on Humans and People's Rights (ACHPR) has been violated by the actions and omissions of the Respondents.**
- c. Whether the Petitioners' right to life as guaranteed by the provisions of Article 26 of the Constitution has been violated by the actions, inactions and omissions by the Respondents.**
- d. Whether 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 for under Article 35 (1) (a), (b) and 3.**
- e. Whether the Petitioners are entitled to compensation in general damages against the Respondents for the damage to the Petitioners' health and environment, and to the loss of life.**
- f. Whether an order of mandamus ought now to be issued against the 2<sup>nd</sup>, 3<sup>rd</sup>, 4<sup>th</sup>, 5<sup>th</sup>, 6<sup>th</sup>, 7<sup>th</sup> and 8<sup>th</sup> Respondents directing them to carry out a comprehensive participatory scientific study within 60 days from the date of the judgment at Owino Uhuru village to ascertain the levels of lead in water, soil, animals and human bodies of the residents, including the Petitioners, and further directing the said Respondents to clean up the contaminated environment of Owino Uhuru Village by remediating the soil, air, dust and water and to offer adequate comprehensive health services to the residents and petitioners herein affected by the lead acid recycling factory.**
- g. Whether in view of the matters raised and disclosed in the process of the hearing of this petition and upon a consideration of the evidence adduced, it is now desirable that the orders sought by prayers h, i and j of the petition be granted.**
- h. Whether the Respondents ought to be now compelled to pay the costs of this petition.**

We now propose to deal with these issues sequentially as follows;

- I. Whether Petitioners right to clean and healthy 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 the African Charter on Humans and People's Rights (ACHPR) were violated and if so the culpability of the Respondents.**

**a) Whether there was violations on right to healthy environment**

107. Several witnesses who testified in support of the petition informed the court as to how they came to learn of the incidence of pollution in Owino Uhuru Village. PW1, 2, 3, 4, 5 and 6 are persons who live in Owino Uluru village and were also residents therein during the time when the 7<sup>th</sup> Respondent factory was in operation. PW7 on his part is a former employee of the 7<sup>th</sup> Respondent and explained in material detail the goings on within the said factory.
108. PW1 to 6 told the court that the first sign they saw with respect to the activities of the 7<sup>th</sup> Respondent was the huge plumes of smoke that would emanate from the factory and rest upon the Village. The smoke caused several members of the village to develop breathing and other respiratory problems. The smoke, as described, would be accompanied by particles which fell on the village like rain. Soon they would see that the roofs of their iron sheet houses began to experience accelerated rates of corrosion.
109. In addition to the smoke, waste water discharged from the factory was allowed to escape through a hole in the 7<sup>th</sup> Respondent's wall leading directly in to Owino Uhuru Village. This worsened the already bad situation. Children who came in to contact with this water during their play time developed various skin ailments including loss of pigmentation. The case of Kelvin Musyoka whose discoloured skin was exhibited to the court by PW1 is illustrative of this point.
110. As a former employee of the 7<sup>th</sup> Respondent, PW7 confirmed that indeed the process of extracting lead from Used Lead Acid Batteries (ULABs) produced the said smoke and the waste water which the villagers testified to. PW8, Wandera Bideru told the court that the waste water and the smoke produced in the course of the lead smelting process is highly concentrated with lead particulates. The smoke released in to the environment by the 7<sup>th</sup> Respondent clearly contaminated the water and soil in the village and caused the increased incidence of disease complained about.
111. Various studies, investigations and inspections carried out in Owino Uhuru Village and in the factory, and whose reports are available, have also demonstrated that the activities of the 7<sup>th</sup> Respondent was the cause of the pollution. The Public Complaints Committee (PCC) established under the provisions of sections 31 to 36 of the Environmental management and Coordination (EMCA) Act, upon receipt of complaints carried out investigations in Owino Uhuru Village (the village).
112. In its report, which appears at pages 46 to 57 of the record of the petition herein, the PCC noted, at page 51 of the record, that smoke from the factory is responsible for the corrosion of corrugated iron sheets on the roofs of the residents of the village. The report also noted that the smoke and effluent

discharged from the factory had significantly lowered the air quality around the village and caused adverse health impacts on the residents of the village, including respiratory diseases. The report noted that the effluent so discharged was contaminated with lead. The dust produced in the factory was also noted to impact negatively on the health of factory workers.

113. Several inspections whose reports appear at pages 72 to 89 of the record of the petition also found that the 7th Respondent's practises led to release of harmful material in to the environment in addition to causing harm to the 7th Respondent's employees health and the health of those living next to the smelter.
114. Upon receipt of a petition by the residents of the village, the Senate Standing Committee on Health also carried out investigations in to complaints of pollution against the activities of the 7th Respondent herein. The report appears at page 108 to 125 of the record of the petition. Through this report, the Senate also noted the incidence of pollution in the village caused by the activities of the 7th Respondent.
115. We also wish to draw the court's attention to the report by Eco-Ethics International - Kenya Chapter appearing at pages 127 to 144 of the record of the petition. At page 141 the researchers conclude that "there is consistently more lead concentration in the environment, i.e. soil, water and wall dust within the areas proximal to the lead acid recycling factory as compared to far flung areas".
116. Reference is also made to the report of the Government Chemist - pages 182 to 196 of the record of the petition where a sampling of blood from 50 residents revealed chronic levels of lead poisoning in some of the residents. Additionally, the report also detailed severely elevated levels of lead in the soil, dust and water in the village. The conclusion of the report at page 194 made the observation that "Owino Uhuru settlement is exposed to lead, a highly toxic chemical substance. The elevated exposure presents a serious threat to her residents and livestock"
117. The attention of the court is also drawn to the SGS reports appearing at pages 197 to 204 of the record of the petition which detail soil, air and water pollution within the village by lead particulates released from the 7<sup>th</sup> Respondent's factory.
118. Finally, we wish to draw the court's attention to the report appearing at page 157 to 208 of the record of the 4th Respondent's Replying Affidavit. This is the report of the Taskforce on Lead Exposure at Metal Refinery EPZ Ltd. While acknowledging that there had been pollution of the environment in the village caused by the 7th Respondent's activities, and this had led to very high blood lead levels among the residents of the village from as high as 420 ug/dl to 1 ug/dl, the task force also observed that the soil in the village was contaminated with lead. It recommended the decommissioning of the factory and remediation of the soils around the village.

119. From the above chronology, it is indeed apparent that there was, and still remains massive pollution of the environment where Owino Uhuru Village sits. That pollution is directly attributable to the activities of the 7th Respondent herein. However, the 7th Respondent was aided in causing the pollution by the actions and inactions of the other Respondents herein. Simply put, had the rest of the Respondents herein carried out the duties statutorily and constitutionally expected of them, such a massive scale environmental disaster could not have taken place.

## **II. Culpability of the Respondents**

### **The 1st Respondent**

120. The 1st Respondent, the Hon. Attorney General, is sued in his capacity as the chief legal advisor to the government of the Republic of Kenya. Under the provisions of the Government Proceedings Act, especially section 13 thereof, the 1st Respondent herein is enjoined to represent the Government in all civil proceedings in which the government is a party.

### **The 2nd and 3rd Respondents**

121. The 2nd and 3rd Respondents are respectively the Cabinet Secretaries of the Ministries of Environment, Water and Natural Resources and that of Health. These two are the ministries directly charged with the responsibility of ensuring that policies are put in place to ensure that the constitutional guarantee of a clean and healthy environment under article 42 of the Constitution of Kenya 2010 is realised with respect to every Kenyan. The 2nd Respondent, in particular is charged with the responsibility of ensuring the attainment by all Kenya of the highest attainable standard of health as guaranteed in article 42 of the Constitution of Kenya. In so undertaking their responsibilities, the 2nd and 3rd Respondents are inter alia, expected to;

- Develop policies to ensure the progressive realisation of the economic and social rights under articles 42 and 43 of the constitution.
- Enforce existing legislation that ensure activities harmful to the environment do not take place or those that negatively impact on public health are avoided.
- Where violations to the rights under articles 42 and 43 of the constitution occur, to ensure prompt assistance to the victims and, in conjunction with other government departments and ministries, to ensure punishment for the perpetrators as well as restoration of the victims to their condition prior to the violation.
- The 2nd and 3rd Respondents, who are state officers, must at all times be guided by the provisions of article 10 of the Constitution of Kenya, which provides thus:

10. (1) **The national values and principles of governance in this Article bind all State organs, State officers, public officers and all persons whenever any of them—**
- (a) applies or interprets this Constitution;**
  - (b) enacts, applies or interprets any law; or**
  - (c) makes or implements public policy decisions.**
- (2) **The national values and principles of governance include**
- (a) patriotism, national unity, sharing and devolution of power, the rule of law, democracy and participation of the people;**
  - (b) human dignity, equity, social justice, inclusiveness, equality, human rights, non-discrimination and protection of the marginalised;**
  - (c) good governance, integrity, transparency and accountability; and**
  - (d) sustainable development. The 2nd and 3rd Respondents failed to uphold the national values, particularly those of good governance, transparency, accountability and sustainable development when they allowed the Petitioners to be poisoned by noxious substances emanating from the 7th Respondent’s factory.**

122. The 4th Respondent herein, which is a state agency under the 2nd Respondent’s ministry allowed the 7th Respondent to set up and operate a lead acid battery recycling factory without the 7th Respondent having been issued with an Environmental Impact Assessment License. This was in direct contravention of the provisions of section 58 of EMCA. It is acknowledged even by the Respondents herein that the 7th Respondent commenced operations at Mikindani in the year 2007. The 4th Respondent however, only issued it with an Environmental Impact Assessment License (EIA) on the 5<sup>th</sup> day of February 2008 (refer to annexure 5 at page 46 in the record of the Replying Affidavit of Fanuel Kidenda on behalf of the 6th Respondent)

123. The 7<sup>th</sup> Respondent was thus enabled to operate without any EIA license for a period of roughly one year during which period it’s activities caused massive environmental degradation, contamination, pollution and harm to peoples’ health.

124. The issue of the 7th Respondent’s harmful activities was brought to the attention of the 2nd Respondent by letter dated 29<sup>th</sup> May 2009 (page 58 in the record of the petition). The 2nd Respondent ignored the letter and did not take any action in exercise of powers conferred under EMCA or even to uphold the constitution. Even when through its own task force report (page 157 to 203 in

the Replying Affidavit of the 4th Respondent) it became clear that the soil, air and water in Owino Uhuru village is polluted, the 2<sup>nd</sup> Respondent has not taken any action to remedy the situation.

125. Several of the Petitioners' witnesses testified as to their interaction with the officers of the 3rd Respondent with respect to their complaints over pollution emanating from the 7th Respondent's factory as well as their demand that the same be shut down. By and large, the pleas by the Petitioners for assistance was largely ignored by the officers working under the 3rd Respondent.
126. The 3rd Respondent has jurisdiction under section 115 of the Public Health Act to order the removal or destruction of any matter which constitutes a nuisance and which is deemed injurious to health. Section 118(e) of the Public Health Act then proceeds to define a nuisance as follows;

**118. The following shall be nuisances liable to be dealt with in the manner provided in this part-**

**(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;**

127. The lead contaminated effluent discharged from the 7th Respondent's factory in to the neighbouring community thus counts as noxious matter. The officers of the 3rd Respondent thus had power and authority to order the removal of the same from the 7th Respondent's premises. They did not.
128. Instead, as ably demonstrated by the several letters appearing at pages 58 to 66 of the record of the petition, which letters were either written to or copied to offices of the 3rd Respondent, the said 3rd Respondent dithered in its response to the crisis. This becomes clear when one considers the several inspection reports appearing at pages 72 to 89 of the record of the petition.
129. What is made abundantly clear is that the 3rd Respondent, through its officers, found evidence of pollution and contamination from lead particulates due to failure by the 7th Respondent to abide by safety regulations, and variously ordered the 7th Respondent's factory to be closed from time to time. However, even before the mistakes could be corrected, the factory would be allowed to re-open and to continue with the contamination.
130. Vide her letter dated the 15th day of August 2012, PW10 Phyllis Omido wrote to the Government Chemist, a department under the 3rd Respondent's ministry asking the 3rd Respondent to carry out its mandate by undertaking tests to determine the blood lead levels of the residents of Owino Uhuru Village. The Government Chemist responded in the negative alleging that it did not have the equipment necessary to undertake the work (see letter dated 22nd August 2012

at page 126 of the record of the petition). Here too the 3rd Respondent failed in its statutory and constitutional duty to safeguard the health of the Petitioners.

131. Eventually the 3rd Respondent through the Government Chemist did get around to deal with the problem at Owino Uhuru Village in the year 2015. The studies reported through three reports appearing at pages 145 to 196 of the record of the petition shows that there was contamination of soil, water and dust in Owino Uhuru from lead toxins released from the 7th Respondent's factory. Additionally, the reports indicated that there was chronically high blood lead levels in the residents sampled for the report. (see summary of blood lead levels for 50 residents of Owino Uhuru village appearing at page 209 to 210 of the record of the petition).
132. Even after availing itself of this evidence of contamination, the 3rd Respondent has not taken any steps towards availing treatment for the Petitioners or even to test those who have not been tested to determine their blood lead levels.

#### The 4th Respondent

133. 4th Respondent is established under section 7 of EMCA. Under section 9(1) of EMCA, the main object and purpose for which the 4th Respondent is established is to exercise general supervision and coordination 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.
134. Among the 4th Respondent's principal duties is to ensure that projects that legally require EIA licenses are commenced only after consideration of an EIA report and issue of an EIA license. It is in this way that the 4th Respondent majorly executes its mandate of protecting the environment and to protect citizens from harmful projects.
135. Section 58 of EMCA provides as follows;

**58- (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.**

136. The 4th Respondent issued the 7th Respondent with and EIA license on the 5th day of February 2008. (see annexure 5 in the Replying Affidavit of Fanuel Kidenda on behalf of the 6th Respondent). The EIA report was itself submitted

to the 4th Respondent on behalf of the 7th Respondent on the 13th day of March 2007. (see annexure “ZO1” at page 9 in the Replying Affidavit of Zephaniah Ouma on behalf of the 4th Respondent).

137. As at the time of submission of the EIA report and way before the EIA license was issued, the 7th Respondent had already commenced operations. This was blatantly in violation of the provisions of section 58 of EMCA set out above. Even when the 4th Respondent got to learn of the action by the 7th Respondent to operate illegally without an EIA license, the 4th Respondent did not apply the punishment set out at section 138 of EMCA. Instead, it rewarded the 7th Respondent’s wrong doing by issuing it with an EIA license the following year.
138. It is apparent from the testimony of the Petitioners’ witnesses that the 7th Respondent commenced operations in the year 2007. This fact is further corroborated by the testimony of a director of the 7th Respondent during the PCC investigation at page 51 of the record of the petition. As testimony has established, environmentally harmful activities by the 7th Respondent commenced in earnest during this early period of illegal operation by the 7th Respondent.
139. The 4th Respondent proceeded to issue an EIA license to the 7th Respondent when the EIA report presented for its consideration did not contain any comments from the immediate neighbours of the premises where the 7th Respondent was already carrying out its activities. The report of the Taskforce on Lead Exposure at Metal Refinery EPZ Ltd which appears at page 170 of the record of the Replying Affidavit of Zephaniah Ouma on behalf of the 4th Respondent indicates that the Taskforce found for a fact that Owino Uhuru Settlement shares a common boundary with the 7th Respondent factory. This is in tandem with testimony from other witnesses.
140. It is thus unfathomable that the 4<sup>th</sup> Respondent could consider and approve an EIA report without the input of anybody from the large settlement bordering the factory. This was either occasioned by recklessness or worse, a cover up. Either way, the 7th Respondent’s EIA license was issued without the knowledge of the residents of Owino Uhuru Village who ended up bearing the brunt of the polluting activities of the 7th Respondent.
141. As further proof of the cavalier manner in which the 4th Respondent has handled the matter of issue of EIA licenses, we urge the court to consider a letter dated 6th December 2006 which is part of exhibit number 2 in the Replying Affidavit of Fanuel Kidenda sworn on behalf of the 6th Respondent herein. Vide the said letter, the 4th Respondent herein purported to allow the 7th Respondent to commence operations of a lead acid battery recycling factory in Kilifi County, a factory similar to the one that caused the pollution in Owino Uhuru Village, without first obtaining an EIA license contrary to the very clear provisions of section 58 of EMCA. Instead of championing respect for rules that ensure that the environment is protected from harm, the 4th Respondent herein appear to fight on the side of impunity and anarchy.

142. The 4th Respondent was part of, and fully participated in the PCC investigation, The Senate Standing Committee on Health Investigation and report and finally set up their own Taskforce on Lead Exposure at Metal Refinery EPZ Ltd. In all these investigations, the outcomes were consistent to the effect that the 7th Respondent had caused heavy pollution at Owino Uhuru Village and that humans and wildlife had suffered as a result of the same. Yet to date, the 4th Respondent has not taken any action towards holding those responsible to account, or cleaning the environment or even seeking help for the victims.

The 5th Respondent

143. The 5th Respondent is the successor in title to the now defunct Municipal Council of Mombasa (MCM) as provided by clause 33 of the Sixth Schedule to the Constitution of Kenya 2010. As a local authority established under the Local Government Act, MCM had within its mandate the power to regulate the physical planning within the local territory of Mombasa City.

144. Section 29 of the Physical Planning Act provides, where pertinent, as follows;

**29- Subject to the provisions of this Act, each local authority shall have the power—**

- (a) to prohibit or control the use and development of land and buildings in the interests of proper and orderly development of its area;**
- (b) to control or prohibit the subdivision of land or existing plots into smaller areas;**
- (c) to consider and approve all development applications and grant all development permissions;**
- (d) to ensure the proper execution and implementation of approved physical development plans;**
- (e) to formulate by-laws to regulate zoning in respect of use and density of development; and**
- (f) to reserve and maintain all the land planned for open spaces, parks, urban forests and green belts in accordance with the approved physical development plan.**

145. In essence this means that a local authority such as MCM had power to prepare physical development plans, consider and deny or approve applications for developments, determine issues of zoning and to ensure that the execution of the development is as per the approved plans. It was thus within the mandate of MCM to delineate residential zones and to ensure that the same were kept separate from industrial zones.

146. Section 30 of the Physical Planning Act then proceeded criminalise the carrying out of any development project without permission from the local authority and further donated power to the local authorities to penalise such infringements through fine or imprisonment. Under section 33 of the said Act, the local

authority had exclusive power to issue approvals for development, no doubt after satisfying itself that the same is in consonance with the approved physical development plans and zoning schemes already put in place.

147. Section 36 of the Physical Planning Act then provides thus;

**36- If in connection with a development application a local authority is of the opinion that proposals for industrial location, dumping sites, sewerage treatment, quarries or any other development activity will have injurious impact on the environment, the applicant shall be required to submit together with the application an environmental impact assessment report.**

148. MCM therefore had the power to approve or reject the 7th Respondent's application for approval to set up a lead acid battery recycling plant next to the Owino Uhuru Settlement. Additionally, MCM had the power to require the 7th Respondent to submit an EIA report prior to approving its application for a license to set up a lead acid battery recycling factory where it did, right next door to a large human settlement.

149. Instead of so carrying out its responsibilities under the law, MCM proceeded to issue an operation license to the 7th Respondent herein without due regard to the effect that its activities would have on the physical environment and those living next to the factory. As already demonstrated above, the 7th Respondent commenced operations in the 2007 but only obtained an EIA license from the 4th Respondent on the 5th day of February 2008.

150. MCM thus issued an operating license to the 7th Respondent herein knowing full well the nature of its intended business, but failing in its duty to insist upon the obtaining of an EIA report prior to issue of the license. This is clearly in breach of both the letter and spirit of the law governing the issue of licenses.

151. It is then little wonder that within a year of its operation, MCM issued an order for the closure of the 7th Respondent's factory citing the fact that the factory had failed to take adequate measures to prevent fumes and particles and other wastes from its premises from affecting the neighbours, communities and employees (please refer to the letter dated 12th June 2008 - annexure number 6 in the Replying Affidavit of Fanuel Kidenda on behalf of the 6th Respondent). It is worthy of note that the infringements complained about by the MCM in its letter of closure aforesaid were the very issues which ought to have been considered when dealing with the 7th Respondent's application for approval of development plans.

152. MCM then proceeded to reopen the factory less than a month after its closure. This was done through letter dated the 4th day of July 2008 - annexure number 7 in the Replying Affidavit of Manuel Kidenda sworn on behalf of the 6th Respondent herein. Quite alarming is the fact that this letter lifting closure

did not indicate that the 7<sup>th</sup> Respondent had complied in any way with the requirements that necessitated its closure. It was simply reopened to continue polluting. Here too, the 5<sup>th</sup> Respondent abdicated its responsibility to protect the public and the environment as it was mandated by the law.

153. After this initial closure and reopening, the factory continued to pollute. Complaints and petitions for assistance by the residents of Owino Uhuru Settlement, which were either addressed to, or copied to MCM or its officers did not yield any response from MCM. One of the most glaring shortcoming with the operations of the factory was that it did not have a proper disposal system for its slag, which is a lead concentrated by-product of its smelting process.
154. With a view to convincing the other lead agencies which had at the time closed down the 7<sup>th</sup> Respondent's factory that all was well, MCM issued to the 7<sup>th</sup> Respondent a certificate dated 14<sup>th</sup> August 2009 certifying that the 7<sup>th</sup> Respondent had completed construction of a soak pit and septic tank (refer to page 97 in the record of the petition). As it turned out, no such soak pit or septic tank had been constructed as can be attested to by the fact that MCM later allowed the 7<sup>th</sup> Respondent to dump its waste at Mwakirunge dumping site. This is the same waste that should have been disposed of through the septic tank had one been built. (please refer to letters appearing at pages 98, 103, 104, 105 and 106 of the record of the petition).
155. MCM participated in several inspections and investigations where the extent of the damage to the environment and the health of people around the 7<sup>th</sup> Respondent's factory was laid bare. Still MCM did not take steps to close the factory or otherwise demand compliance. By so failing to act, when it had power to do so under the law, MCM is culpable jointly with the other Respondents on the fate that befell the Petitioners.
156. As the successor in title to MCM, the 5<sup>th</sup> Respondent herein is obligated to settle any award for which MCM may be found liable.

#### The 6th Respondent

157. The 6<sup>th</sup> Respondent, hereinafter referred to as EPZA, is established under the provisions of section 3 of the Export Processing Zones Act. Under section 9 of the Act, one of the objectives of the EPZA is the regulation and administration of approved activities within the Export Processing Zones through, inter alia, the examination and processing of applications for licences by the export processing zone developers, export processing zone operators, and export processing zone enterprises and issue the relevant licences.
158. Where pertinent, Section 23 of the Export Processing Zones Act provides as follows;

**23 - (1) No export processing zone enterprise shall be established, and the benefits described in Part VIII shall not accrue to any enterprise, unless the export**

**processing zone enterprise holds a valid licence issued by the Authority.**

**(2) The licence shall be granted by the Authority if the application is found to meet the objectives of this Act and if the proposed business enterprise—**

**(a) -**

**(b) -**

**(c) shall not have a deleterious impact on the environment, or engage in unlawful activities, impinging on national security or may prove to be a health hazard;**

159. In essence therefore, the EPZA is clothed with the power to license enterprises seeking to operate within their zones. The license ought not be granted unless the authority satisfies itself that the activity sought to be undertaken by the enterprise applying for the license is not deleterious to the environment or is not a health hazard. The license to operate within an EPZ is hence not issued just for the asking, but only upon satisfaction of certain conditions.

160. With a view to carrying out its responsibilities under the provisions of the law above cited, the EPZA, in response to the 7<sup>th</sup> Respondent's application to be issued with an EPZ enterprise license, responded by its own letter dated 27<sup>th</sup> June 2006 setting out conditions upon which the 7<sup>th</sup> Respondent could reasonably be issued with a license. See annexure number 1 in the Replying Affidavit of Fanuel Kidenda sworn in response to this petition.

161. Condition (c) required the 7<sup>th</sup> Respondent to submit a copy of EIA license from the NEMA, the 4<sup>th</sup> Respondent herein. EPZA then proceeded to issue the 7<sup>th</sup> Respondent with a license on the 13<sup>th</sup> day of December 2006 thereby enabling the 7<sup>th</sup> respondent to begin operations as an EPZ enterprise. The license is attached as exhibit 4 in the Replying Affidavit of Fanuel Kidenda aforesaid. The 7<sup>th</sup> Respondent did not obtain an EIA license until the 5<sup>th</sup> day of February 2008.

162. The EPZA therefore did not follow its own conditions set for issuing an operating license to the 7<sup>th</sup> Respondent. In so doing, the EPZA issued a license to the 7<sup>th</sup> Respondent to operate its factory without knowing or caring to find out about the effects that the activities of the factory would have on the environment or on the health of the community living around the factory. As the authority ultimately responsible for administering the Export Processing Zones, EPZA admitted in to its zone a company, the 7<sup>th</sup> Respondent herein, whose activities have had a deleterious effect on the environment and also negatively impacted the health of those working for and living around the factory. This is a complete abdication of its responsibility as set out in Section 23 supra.

163. Your Ladyship evidence abounds that beginning the year 2008, it had become clear that the activities of the 7<sup>th</sup> Respondent were harmful to the environment and also a danger to the life and health of the community. Witnesses have testified to demonstrations being held by the members of Owino Uhuru

Community to press the authorities to close down the activities of the 7th Respondent's factory.

164. It is however, intriguing that there is no documented response to the community's outcry from the EPZA. There is no action that they took to mitigate or stop the pollution that was taking place by a factory licensed by them. At no time did they order the closure, or even temporary cessation of the activities of the 7th Respondent in response to the community's outcry. There is no letter or other document authored by EPZA to the 7th Respondent seeking compliance with set environmental safety standards, or even seeking an explanation from the 7th Respondent as to why complaints were being raised against them.
165. Instead of seeking to enforce compliance by the 7th Respondent to safety standards that would have prevented the pollution, available documents show that at every opportunity, EPZA differed with the decisions of other government agencies which closed the factory intermittently by arguing that the factory ought to be opened forthwith to continue with its business.
166. Case in point is the notes of the inspection meeting held on 27th April 2009 (**see page 76 to 78 of the record of the petition**). Despite protests by other agencies, EPZA recommended at page 78 that the factory be reopened even though it had not fully complied with the conditions sets for such reopening. Indeed, EPZA itself notes in the said minutes that only 90% of the expected compliance had been met by the 7th Respondent.
167. This attitude of the EPZA is further demonstrated through the notes on meetings held on the 9th March 2009 and 10th March 2009 (**see annexure 11 in the Replying Affidavit of Fanuel Kidenda**). In the said notes, EPZA makes observations to the effect that the failure by the 7th Respondent to comply with safety standards "**is caused by the bureaucratic nature of safety compliance agents**". The documents prepared by DW7 herein on behalf of EPZA further state that the 7<sup>th</sup> Respondent is a victim of lack of collaborative interaction of NEMA lead agencies such as the Ministry of Public Health, Municipal Council of Mombasa and EPZA itself.
168. In other words, instead of seeking compliance from the 7<sup>th</sup> Respondent and demanding respect for the law from those running the factory, EPZA found it useful to make excuses for them at every turn. Indeed, the evidence of DW6 and DW7 who testified on behalf of EPZA was also to the effect that EPZA's main function is to encourage business. Public health and environmental conservation take a back seat.
169. EPZA thus encouraged and acquiesced in the activities of the 7<sup>th</sup> Respondent and must thus be held responsible for the damage to the environment and harm caused to people by the activities of the factory.
170. Your Ladyship the 2<sup>nd</sup> and 3<sup>rd</sup> Respondents as well as the officers holding positions in the 4<sup>th</sup>, 5<sup>th</sup> and 6<sup>th</sup> Respondents are public servants and must at all times uphold the values and principles of the public service as set out in **article**

**232 of the Constitution**, which provides for among others, accountability and responsiveness of public servants in the discharge of their duties. These respondents failed the community in Owino Uhuru in this case.

### **The 7th Respondent**

- 171.** The 7<sup>th</sup> Respondent is a limited liability company incorporated in Kenya under the provisions of the Companies Act, Cap 486 of the Laws of Kenya. **(see its certificate of incorporation at page 279 of the record of the petition).** It is also licensed as an EPZ company by the 6th Respondent herein. **The license issued on 13th December 2006 appears as annexure number 4 in the Replying Affidavit of the 6th Respondent.**
172. It is the 7th Respondent that set up a lead acid battery recycling company next to Owino Uhuru Village. In the process of so setting up the factory, the 7th Respondent by-passed or altogether ignored mandatory statutory provisions that would have ensured safe operation of the smelter. The 7<sup>th</sup> Respondent acted with impunity and reckless disregard for the health and safety of the public.
173. To begin with, the 7<sup>th</sup> Respondent set up a lead smelting factory right next door to a densely populated slum. Despite this, the 7<sup>th</sup> Respondent (MRL) deliberately allowed lead laden smoke, dust, waste water and other solid waste to be discharged directly in to Owino Uhuru village.
174. The uncontroverted evidence is that MRL did not put in place any equipment to mitigate the release of waste in the Owino Uhuru Community or in to the environment generally. In fact, available evidence suggests that such waste was deliberately channeled by MRL in to the village.
175. Evidence abounds that MRL did not provide adequate safety gear to its employees leading to sickness and death of some of them. MRL did not instal scrubbers to prevent the escape of lead dust and smoke from its premises. It did not build a septic tank for disposal of lead slag and it did not build a drainage system to safely dispose of waste water.
176. MRL commenced its activities without first obtaining an EIA license. When eventually it got round to preparing an EIA report, it made sure that the community neighbouring its factory were not consulted to make comments on the proposed project.
177. When the smelting process began, MRL did not inform the victim community of the effects of lead poisoning. Even when complaints began to emerge, MRL was not forthcoming with information to the community about the true nature of its activities and especially the effect of exposure to lead on human life and health, as well as the health of the environment.
178. Instead of taking genuine steps to stop pollution when protests emerged, MRL engaged in smokescreen exercises meant merely to hoodwink the authorities to

allow it to reopen its factory. The letters appearing at **pages 90 to 107 of the record of the petition** are testament to this fact. The prevailing theme in those letters is a counter complaint by MRL protesting that closure of its factory was making it lose business, instead of addressing the root cause of the complaint.

179. To make a bad situation even worse, MRL began disposing some of its waste at Mwakirunge dumpsite, a public dumping place in violation of the Basel Convention Technical Guidelines on Safe Disposal of Lead Waste, a convention to which Kenya is a signatory.
180. Despite clear evidence of harm to the environment and poisoning of the public as a result of its activities, MRL has never made any recompense, leaving the victims to fend entirely for themselves.

### **The 8th Respondent**

181. The 8<sup>th</sup> Respondent, Penguin Paper and Book Company Ltd, were the landlords of MRL at the site where the factory was located on plot number 1707 section V/M.N in Mikindani Mombasa. The agreement at **page 284 of the record of the petition** is proof of this. Further proof is in the **Mineral Dealers Licence at page 286 of the record of the petition** where the location of MRL's business is indicated as being in godowns owned by the 8th Respondent.
182. The Export Processing Zone Enterprise Licence (**exhibit 4 in the 6th Respondent's Replying Affidavit**) also list the 8<sup>th</sup> Respondent as the Landlord to MRL. Ultimately vide their letter dated 1st December 2006 requesting for change of address on NEMA EIA, MRL indicated that their new address would be at Godowns owned by the 8<sup>th</sup> Respondent herein. **This letter appears at page 69 of the 4th Respondent's Replying Affidavit.**
183. My Lady when one considers the EIA report submitted by MRL to NEMA, specifically neighbour's comments which begin at **page 87 of the 4th Respondents Replying Affidavit**, it immediately becomes clear that the only signed comments are by the 8th Respondent and Awand CFS Mikindani. There is testimony to the effect that Awand CFS and the 8th Respondent herein are sister companies.
184. The 8th Respondent made comments on the EIA report while pretending to be a neighbour but being aware that it was actually the landlord. Then they got a sister company, located some distance away to also sign as a neighbour. The real neighbours, the residents of Owino Uhuru village were never asked for comments on the proposed project.
185. It is thus clear without peradventure that from the outset, the 8th respondent engaged in a scheme to mask the true business of MRL and also what effect that business would have on the health of the environment and the people around it.

186. Being the owners of the premises from which the lead poison emerged, and having willingly invited MRL to use its premises, the 8th Respondent ought now to be held liable for the consequences of the actions of its tenant.
187. In **Rylands vs Fletcher** it was held :- that "the person who for his own purposes brings on his lands and collects and keeps there anything likely to do mischief if it escapes, must keep it in at his peril, and, if he does not do so, is prima facie answerable for all the damage which is the natural consequence of its escape".
188. In this case, the 8th Respondent willingly brought in to his premises a tenant dealing in harmful substances and it did not alert its neighbours as to the presence of such substances and the possibility that it could do harm. The substance, in this case lead poison, escaped and harmed the neighbours and the neighbourhood. The 8 Respondent cannot now escape liability.
189. Whereas Principle 16 of Rio Declaration promotes the taking into account the polluter should, in principle, bear the cost of pollution (in this case the 7th Respondent), with due regard to the public interest; this principle does not take away, the ultimate responsibility of a state as a duty bearer under international human rights laws and standards to ensure human rights for all are respected, protected and fulfilled. The obligation to respect means that States must refrain from interfering with or curtailing the enjoyment of human rights. The obligation to protect requires States to protect individuals and groups against human rights abuses. The obligation to fulfil means that States must take positive action to facilitate the enjoyment of basic human rights.
190. The 1st to 6<sup>th</sup> Respondents are state organs while their witnesses are state agents. Under Article 21 of the Constitution, state organs and agents required to observe, respect, promote and fulfil the fundamental freedoms and Bill of Rights including implementing laws to fulfil state's international obligation in respect of human rights and fundamental freedoms.
191. On environmental rights, the 1st to 6th Respondents have an obligation under Article 69 (1) d), f) and g) to take necessary steps to promote environmental rights. This Article 69 of the Constitution in line with Principle 15 of the 1992 Rio Declaration on application of the precautionary approach in environmental protection where in case 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 environmental degradation.
192. Whereas the actual pollution was committed by the 7th Respondent, the inaction and omission of the 1st- 6th Respondents as duty bearers makes them responsible for violations suffered by the Petitioners. In the case of **Muhammad Kaya -vs- Turkey 22535/93** the European Court of Justiceruled that;

“For positive obligation to arise it must be established that the authorities knew or ought to have known at the time of the existence

of a real and immediate risk of life.....from criminal acts of a 3rd party and that they (authorities ) failed to take measures within their scope of their powers which, judged reasonably, might have been expected to avoid a risk”

The African Commission on Human and People’s Rights made similar pronouncements in the **Ogoni decision** (supra) where it ruled that state parties shall not only protect rights through appropriate legislation and effective enforcement but by also protecting the citizens from damaging acts that may be perpetrated by private parties. This was further confirmed in the Commission's decision in **Association of Victims of PEV and Interights -vs- Cameroon 272/03** that stated in part;

“..State parties have a positive obligation of preventing and punishing the violations of private individuals.....thus any illegal act carried out by an individual against the rights guaranteed by Charter and not directly attributed to the state constitutes a cause of international responsibility of the state not because it has itself committed an act in question but because it has failed to exercise the conscientiousness required to prevent it from happening..”

In **Charles Murigu Murithii & 2 others -vs- the Attorney General (2015) e-KLR** , Justice Lenaola in making a determination on duty of state in violations of human rights by non-state actors ruled that;

'..the state will in appropriate cases be held liable in case 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..'

193. My Lady in 2011, the UN Human Rights Council endorsed the United Nations Guiding Principles on Business and Human Rights (UNGPs) in its resolution 17/4 of 16 June. The UNGPs provides for three principles namely;

- States’ existing obligations to respect, protect and full human rights and fundamental freedoms. This principle requires States to protect against human rights abuse within their territory and/or jurisdiction by third parties, including business enterprises. This requires taking appropriate steps to prevent, investigate, punish and redress such abuse through effective policies, legislation, regulations and adjudication;
- The role of business enterprises to comply with all applicable laws and to respect human rights. Business enterprises should respect human rights. Businesses should avoid infringing on the human rights of others and should address adverse human rights impacts with which they are involved.
- The need for rights and obligations to be matched to appropriate and effective remedies when breached. This requires States to take

appropriate steps to ensure, through judicial, administrative, legislative or other appropriate means, that when such abuses occur within their territory and/or jurisdiction those affected have access to effective remedy

194. The State is committed to implanting the UNGPs and the 1st Respondent is spearheading a process of coming up with a National Action Plan on its implementation. Whereas the UNGPs are soft laws, the court should be guided by its spirit and make a determination that both the state (1st to 6th Respondents) and businesses (7th and 8th Respondent) have a duty to ensure rights are protected and where there is a violation appropriate remedy is offered.

**II. Whether the Petitioners' right to a clean and healthy environment and the right to the highest attainable standard of health and right to clean and safe water in adequate quantities as guaranteed by Article 42, 43 (1) (a) and (d), Article 12 (1) and (2) (a) of the International Covenant of Economic, Social and Cultural Rights (ICESCR), Article 24 of the Convention on the Rights of the Child (CRC) and Article 16 of the African Charter on Human and People's Rights (ACHPR) have been violated by the actions and omissions of the Respondents.**

195. *My Lady*, our Constitution, by including environmental rights as a fundamental, justiciable human right, by necessary implication requires that environmental considerations be accorded appropriate recognition. These rights are thus clearly spelt out in **Article 42 of the Constitution**.

196. *My Lady*, we do humbly submit that whilst the violation of the Petitioners' rights to a clean and healthy environment does not require proof of harm and to this end we wish to bring to your Ladyship's attention the provisions of Article 70(3) of the Constitution. We nonetheless do wish to submit that the Petitioners have presented before this court overwhelming and credible evidence of violation of the law which led to environmental damage and harm to the residents of Owino Uhuru village by the Respondents'.

197. *My Lady*, to demonstrate this, we do bring your attention to the following:

- i. The Petitioners' evidence when looked at in totality points to the fact that there was immense pollution of the environment and damage to their houses by the 7<sup>th</sup> Respondent with the corrosion of their roofs, emission of dark smoke with offensive and pungent odours to their village and its environs and discharge of acidic effluent through pipes directed into the village and heavy contamination of the soil with lead waste. The resultant effect was that the residents' eventually suffered respiratory diseases, skin diseases, loss of libido and lack of sexual desire, still born births and even death.
- ii. PW8 (Wandera Bideru), while working as Government Chemist, did visit the Owino Uhuru settlement with a team from various government agencies and

their recommendations were that the 7<sup>th</sup> Respondent factory be closed; a functioning diagnostic and treatment center be set up for screening and treatment of persons affected by lead exposure. These recommendations were based on the finding that there was high contamination of soil, dust and water with Lead within the settlement.

iii. DW2 (Nancy Etyang) further fortified the Petitioners' evidence as her team's Report showed that children in Owino Uhuru had blood lead levels of **45ug/dL** and above which is way above the World Health Organization acceptable level of less than or equal to 5ug/dL.

190. The 2<sup>nd</sup> Respondent is the Cabinet Secretary in charge of the Ministry of Environment, Water and Natural Resources at the National Government which is the ministry responsible for formulating standards, policies and programmes aimed at improving, maintaining and protecting the environment. Its responsibility is to ensure that policies are put in place to ensure that the environment is protected and to liaise with line agencies such as NEMA to ensure that the environment is protected.

191. On the 28<sup>th</sup> May 2008, the Petitioners wrote to the Minister for Environment & Mineral Resources informing him of the toxic lead pollution caused by the 7<sup>th</sup> Respondent (**See the letter in page 58 of the petition**). This letter did not elicit any response from the 2<sup>nd</sup> Respondent!

192. We do humbly submit that the 2<sup>nd</sup> Respondent had full knowledge of the contamination within Owino Uhuru settlement and did not take any steps through its officers and/or the line agencies to alleviate the menace.

193. In the case of **NBI CONST. PET NO. 22 OF 2012 - MOHAMMED ALI BAADI & OTHER VS. THE HON. ATTORNEY GENERAL & OTHERS (the Lapsset case)**, the Learned Judges while quoting the case of **T. Damodar Rao v. The Special Officer, Municipal Corporation of Hyderabad** stated as follows:

**"[I]t would be reasonable to hold that the enjoyment of life and its attainment and fulfilment guaranteed by Art. 21 of the Constitution embraces the protection and preservation of nature's gifts without [which] life cannot be enjoyed. 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] the polluted atmosphere caused by environmental pollution and spoilation should also be regarded as amounting to [a] violation of Art.21 of the Constitution."**

194. The 3<sup>rd</sup> Respondent is the Cabinet secretary in charge of the Ministry of Health of the National Government of Kenya and whose key mandate is to create an

enabling environment for a healthy citizenry, and to regulate and set standards and policy for health service delivery directives.

195. On the 24<sup>th</sup> February 2009, the 3<sup>rd</sup> Respondent through DW1 (JOHN NDUNGU) did prepare an Inspection Report on the status of 7<sup>th</sup> Respondent premises and made numerous recommendations to allow for its continued operations after having noted that there were serious health and environmental concerns. **(See Letter dated 24/2/2019 at page 72 of the petition)**. This was followed by numerous inspections which eventually led to recommendation for re- opening of the 7<sup>th</sup> factory notwithstanding that it had not complied with the health and safety measures that ought to have been implemented **(See Letter dated 14/6/2010 at page 86 of the petition)**. What thus clearly emerge from this evidence is that the 3<sup>rd</sup> Respondent did chose to ignore the plight of the Petitioners herein.
196. We do humbly submit the Respondent's has a legal duty and/or put in place safeguards to ensure that the Petitioners a clean and healthy environment. By their deliberate acts of omission and commission, the Respondents' failed in their duty.
197. My Lady, Article 69 of the Constitution imposes obligations on the State in respect of the environment and to this end, the State is required to eliminate processes and activities that are likely to endanger the environment. In the present case, we do humbly submit that the 2<sup>nd</sup>& 3<sup>rd</sup> Respondents did not take the appropriate and immediate steps to close down the 7<sup>th</sup> Respondent factory until such time that hue and cry arising from the plight of the Petitioners had become unbearable.
198. My Lady, as for the 4<sup>th</sup> Respondent, amongst its functions is to issue an EIA licence (See Section 63 EMCA). It also has the duty of conducting environmental audit and **monitoring** so as to ensure that activities carried out do not have significant adverse effects on the environment. The 4<sup>th</sup> Respondent did issue the 7<sup>th</sup> Respondent with an EIA licence on the **5<sup>th</sup> February 2008**. In permitting, licensing and sanctioning the operations of the 7<sup>th</sup> respondent, the 4<sup>th</sup> respondent violated the applicable law when it was quite apparent that the 7<sup>th</sup> Respondent has clearly not complied with the conditions set out by the 2<sup>nd</sup> respondent for opening of the factory.
199. The 6<sup>th</sup> Respondent on its part did grant to the 7<sup>th</sup> Respondent a license to operate as an EPZ company in clear violation of the provisions of section 23 of the Export Processing Zones Act which prohibits the licensing of any entity dealing in substances that can have a deleterious or adverse effect on the environment. The licence was granted notwithstanding the fact that the 7<sup>th</sup> Respondent had not obtained an EIA licence. For the 6<sup>th</sup> Respondent, their position was that "investors" must be encouraged to start business without unnecessary hurdles and profit thus comes before life.
200. Article 12 (2) (b) of the International Covenant on Economic, Social and Cultural Rights (ICESCR) provides that;

- 12 (1). The States Parties to the present Covenant recognize the right of everyone to the enjoyment of the highest attainable standard of physical and mental health.
- (2). The steps to be taken by the States Parties to the present Covenant to achieve the full realization of this right shall include those necessary for:
  - (a) .....
  - (b) The improvement of all aspects of environmental and industrial hygiene;

whilst Article 24 of the African Charter on Humans and People’s Rights (ACHPR) provides that;

**24. All peoples shall have the right to a general satisfactory environment favourable to their development.**

201. Kenya ratified the International Covenant on Economic, Social and Cultural Rights (ICESR) in 1972 and the African Charter on Human and Peoples’ Rights (ACHPR) in 1981. These Conventions are thus binding on Kenya by dint of Article 2 (6) of the Constitution of Kenya, 2010. Kenya having chosen to be bound by the international treaties it ratified, it has consciously and decidedly undertaken the obligations dictated by these Conventions. It is therefore its solemn duty to comply with the provisions of the Conventions. Consequently, it is thus time that the Respondents’ should be held to account for the numerous violations of the Constitution and the International Treaties to which it Kenya a signatory.

**IV. DID THE ACTIONS OF THE RESPONDENTS INFRINGE UPON THE PETITIONERS RIGHT TO LIFE AS GUARANTEED BY PROVISIONS OF ARTICLE 26 OF THE CONSTITUTION OF KENYA 2010 BY THEIR INACTIONS, OMISSION AND/OR COMMISSION**

202. The petitioners by this petition did plead that the activities, actions, inaction, acts of omission or commission of the all the respondent’s did infringe on their right to life which is guaranteed under **Article 26{1} of the constitution of Kenya 2010**. This has to be put into perspective with the background as provided for under Chapter four –The Bill of rights, Part -1 the General provisions as to the bill of rights, which provides that the **“Purpose of recognizing and protecting human rights and fundamental freedoms is to preserve the dignity of individuals and communities and to promote social justice and realization of the potential of all human beings”**

203. Article 2{6} of the constitution of Kenya 2010, provides that General rules of international law shall form part of the laws in Kenya. The right to life finds its most general recognition in **Article 3 of the Universal Declaration of Human Rights**. Article 6 of the International Convention on Civil and

Political Rights recognizes the inherent right of every person to life, adding that this right “shall be protected by law” and that “no one shall be Arbitrarily deprived of life”

204. Further in accordance with Article 2 of the Universal Declaration of Human Rights and Article 2 and 26 of the International Covenant on Civil and Political rights and pursuant to several other united nations declaration’s and conventions, **everyone is entitled to the protection of right to life without distinction or discrimination of any kind , and all persons shall be guaranteed equal and effective access to remedies for the violation of these rights.** These are further reinforced by Article 4 of the Charter of Human and People’s Rights and Article 5 of the Africa Charter on the Rights and Welfare of the Child.
205. The undisputed fact’s in this petition as clearly brought out by the evidence presented is that the activities of the 7<sup>th</sup> respondent from 2007 when they started to operate the smelting factory to when they finally shut down the factory in 2014 were all illegal and unconstitutional from the word go. , They were aided in no small part by the acts of omission or commission of the other respondents in this petition who abdicated their legal and statutory obligations/responsibility as explained in the submissions above {issue I }.This not only resulted in the death of several residents of Owino Uhuru Village, but also left several of them chronically unwell with high levels of lead poisoning and in need of specialized treatment which they lack to-date. The sad effect this is that the petitioners and their neighbours have been put in a position where they are dying in a slow and painful manner or had to bury their dependents like the case of PW6 Jackson Wanyama who had to bury his child Esther Anyango who died in 2012 , and later buried his wife Linnet Nabwire
206. YOUR LADYSHIP, the right to life does not only mean’s mere physical existence of the petitioners but more importantly it refers the quality of life, human dignity and a proper and healthy environment where they live and work.

In the celebrated case of **MUNN VRS ILLINOIS**

The court referred to the observation of Justice Field, wherein he stated that by the term “life” as used means more than mere existence. Thus, it embraces within itself not only physical existence but also the quality of life.

In the Supreme Court of India case of **Menaka Gandhi vrs Union of India** ruled that;

“The right to life embodied in Article 21 of the Indian constitution, is not merely a physical right but also includes within its ambit, the right to leave with human dignity and in a proper and healthy environment”.

Further the Supreme Court of India in the case of **Subhash Kumar vs State of Bihar and Ors (1991)** held that

'the right to life includes the enjoyment of pollution free water and air for full enjoyment of life. If anything endangers or impairs that quality of life in derogation of laws a citizen has a right to recourse'

At the African Commission on Human and People's Right, in the celebrated case of **The Social and Economic Rights Action Center and the Center for Economic and Social Rights -VS- Republic of Nigeria** (also known as Ogoni case), the Commission noted that;

'Pollution and environmental degradation to a level that is humanly unacceptable violates the right to life and integrity

in Kenya, the court in **Peter K. Waweru -vs- the Republic (2006) e-KLR** made the following observation;

'Right to life is not just a matter of keeping the body and soul together since in modern age the right could be threatened by other things including environment. The right to clean environment is prima-facie to all creatures'

The above decision was further emphasised in the **Friends of Lake Turkana trust -vs- the Attorney general and 2 Other (2014) e-KLR** where the court in referring to the human right principle of indivisibility stated that right to life, dignity and economic and social rights are all connected and it cannot be stated that one set of right is more important than the other.

#### **In VELLORE CITIZENS WELFARE FORUM VRS UNION OF INDIA**

The supreme court did hold that though industries are vital for the country's development, having regards to the pollution caused by them, the "principal of sustainable development" has to be adopted as the balancing concept.

207. Based on the above invite your ladyship to review the evidence presented especially the death certificate of Linnet Nabwire, medical reports by DR AJONI ADEDE, the laboratory results by Pathcare on pages 211 to 213 of the petition, laboratory results from the Government Chemist on pages 209 and 210, the findings of the PCC report and finally the Senate Standing Committee on Health report on pages 109 to 125 of the record of the petition and make a finding that indeed the respondents infringed on the petitioner's right to life thereby causing them to suffer loss and damage for which they should be compensated.

#### **V. Whether 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 for under Article 35 (1) (a), (b) and 3.**

208. Article 35 of the Constitution of Kenya 2010 provides as follows;

**35 - 1) Every citizen has the right of access to—**

- (a) information held by the State; and**
- (b) information held by another person and required for the exercise or protection of any right or fundamental freedom.**
- (2) Every person has the right to the correction or deletion of untrue or misleading information that affects the person.**
- (3) The State shall publish and publicise any important information affecting the nation.**

209. The provisions of the above quoted article of the constitution have now been codified through the Access to Information Act. In essence the law requires and expect public and private entities to be proactive in giving out information to the public, especially where the information held may have a direct influence on the enjoyment by the public of their fundamental rights and freedoms.

210. PW1 to 6 testified before the court that prior to the establishment of a factory next to Owino Uluru Village, the members of the community were never consulted. They were thus not involved either at the conceptualisation stage of the project or during the implementation thereof. Indeed, the witnesses told the court that during the initial stages of the operation of the factory, there were conflicting reports as to what exactly the factory was dealing in. Some people even thought that it was a biscuit manufacturing factory.

211. Because of this lack of information both by government agencies and the project's promoters themselves, the community did not know that the factory set up in their midst was a waste lead acid battery recycling factory. They did not know what lead is or how it can be caused to enter the human body; or even the effect it would have once it enters the body.

212. The effect of this lack of information on the part of the community was multi-pronged. First, the community were not given an opportunity to make representations or otherwise provide their views with respect to the project. Secondly, the community members did not know the effect of lead and how to protect themselves from the harmful effect of the lead contamination. They even did not take measures to ensure they did not come in to contact with the lead particulates emanating from MRL's factory. Finally, the petitioners and other community members did not know how or where to seek treatment for lead contamination once they started becoming sick.

213. The information about the true nature of lead as well as its potential adverse effects on the environment was within the knowledge of the Respondents

herein. The 2nd, 3rd, 4th, 5th and 6th Respondents have technical teams who definitely know about the properties of lead. They had this information and deliberately withheld the same from the Petitioners and the community who would have benefited from it most. The 7th Respondent clearly knew about lead since this was the substance that it was dealing with as its core business.

214. Despite the Petitioners stating that information about the real dealings of the MRL factory was withheld from them, none of the Respondents attempted to demonstrate in which way that they shared information with the Petitioners about the lead acid battery recycling factory. In the end, the averment by the Petitioners that information was withheld from them remained totally uncontroverted.
215. It is even more alarming when one considers that the EIA report presented to the 4th Respondent herein also did not indicate any input from the community in the process of its preparation. The Respondents thus violated the Petitioners' right to information as provided for under article 35 of the constitution. That violation has resulted in the harm that has now been suffered by the Petitioners and the larger community to which they belong.
216. According to Principal 10 of the 1992 Rio Declaration on Environment and Development, environmental issues are best handled with participation of all concerned citizens, at the relevant level. At the national level, each individual should have appropriate access to information concerning the environment held by public authorities, including information on hazardous materials and activities in their communities, and the opportunity to participate in decision-making processes. Further, it obligates the States to facilitate and encourage public awareness and participation by making information widely available.
217. Access to information is a procedural right which if actualised will enhance the substantive right of clean and healthy environment.
218. In **NAIROBI HIGH COURT CONSTITUTIONAL PETITION NO. 22 OF 2012 - MOHAMED ALI BAADI & OTHERS VS THE ATTORNEY GENERAL & 6 OTHERS**, the court had the following to say about the right to information in environmental cases;-

***The importance of being informed of basic facts about the quality of their environment is, therefore, well established in different international conventions. Increasing access to environmental information also allows for competing interests to be balanced. Access to information permits all relevant factors to be taken into account as part of decision making process. Environmental information is a self standing regulatory instrument and serves to inform the public of environment risks. Citizens must not only have access to information but must also be entitled to participate in decision-making and have access to justice in environmental matters. Only this way will they be able to assert their right to***

*live in a safe environment, and fulfil their duty to protect, and improve the environment for the benefit of future generations. In addition to enhancing the quality and implementation of decisions, improved access to information and public participation contributes to public awareness of environmental issues and provides more opportunities for the public to express their concerns to relevant authorities.*

*The state is obliged to play a proactive and prominent role in ensuring that the public who are likely to be affected by a proposed project, plan or development are provided with all the relevant information relating to the project including the environmental impact assessment report, which must contain all information that is necessary for the competent authority to consider the application, and to reach a decision.*

219. The court in the above cited case further proceeded to find that the state has an active duty to provide information relevant for environmental protection to the public and does not necessarily have to wait for an application to be made for such information.
220. The petitioners herein had crucial information withheld from them. May the court find that this violated their article 35 rights. And may the court take in to account this deliberate withholding of information in determining the quantum of damages payable to the Petitioners for the harm caused to them.

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

221. My Lady, Act 22 (2) of the Constitution of Kenya 2010, has expanded rights of a citizen/person to approach the court whenever their fundamental rights or freedoms are infringed upon or threatened. It provides as follows:-
- (1) Every person has the right to institute court proceedings claiming that a right or fundamental freedom in the Bill of Rights has been denied, violated or infringed, or is threatened.
  - (2) In addition to a person acting in their own interest, court proceedings under clause (1) may be instituted by—
    - (a) a person acting on behalf of another person who cannot act in their own name;
    - (b) a person acting as a member of, or in the interest of, a group or class of persons;
    - (c) a person acting in the public interest; or

(d) an association acting in the interest of one or more of its members.

222. We further do humbly submit that the Constitution allows any person to approach a Court alleging that a right in the Bill of Rights has been infringed or threatened. Consequently, the present action is a class action petition brought by the Petitioners herein on their own behalf as well as on behalf of the roughly 4000 residents of Owino Uhuru Settlement. Therefore bearing in mind that Owino Uhuru settlement is basically a low income habitation, the residents lack the capacity to litigate individually on a fairly sophisticated case such as this one as they also continue to battle the harmful effects of the lead poison within their settlement. The only realistic option open to them was through a petition of this nature.
223. My Lady, under Article 23 (2) (c) of the Constitution of Kenya 2018, this Court has powers to make an order for compensation upon making a finding that there has been violation of the petitioners' rights.
224. My Lady, **at page 170 of the Replying Affidavit of the 4<sup>th</sup> Respondent**, there is annexed a report which affirms that Owino Uhuru Settlement Area is a pre-independence, multi-ethnic and low income settlement with about **500 households** and a resident population of estimate of **4000 persons** administered under Kenyans governance system.
225. The said Report further affirms that Owino Uhuru Settlement exist in real time and space and share a common border with Metal Refinery EPZ Ltd (the 7<sup>th</sup> Respondent herein). We are thus dealing with a determinate number which can be easily ascertained.
226. My Lady, we do have several categories of persons who were affected by the pollution in the Owino Uhuru Settlement. These are:-
- a) The children
  - b) The living adults; and
  - c) Survivors of deceased persons

As for the children we have an example of

**The 1<sup>st</sup> Petitioner Kelvin Musyoka.**

According to the Medical Report of Dr. Ajoni Adede (PW), he had a history of having suffered heavy metal (lead poisoning) with general ill health, abdominal pains, diarrhea, anaemia, coughs and skin eruptions. The laboratory results show that he had a lead level of **28 ug/dl(which is way above the 5 ug/dl level considered acceptable by the World Health Organization.**

The said minor would require chelation therapy to expedite excretion of lead metal from his body.

On the adults, we have a wide sample of persons whose medical reports were submitted as evidence before this court.

**(i) Hamisi Mwameri (PW )**

- He is an adult aged 38 years.
- He was exposed to heavy metal (lead poisoning) having worked for Metal Refinery EPZ Ltd and also by virtue of being a resident of Owino Uhuru Settlement.
- His blood lead levels were **33 ug/dl** (being 10ug/dl is the accepted level of lead acceptable in adults by World Health Organization).
- He had complains of severe chest pain, cough, joint pains, lower libido and poor memory.
- Therapy – he would require anti-chelation therapy on a regular basis.

**(ii) Daniel Ogola**

- He is an adult aged 24 years old.
- He was born and raised in Owino Uhuru Settlement
- He was exposed to lead poison through smoke, open drainage running within the settlement and having worked in the factory.
- He had complains of general ill health, cough, chest pains, skin eruptions, abdominal pains, blurred vision, low sexual drive and numbness in legs.
- Its blood lead levels were **28 ug/dl**.
- He requires anti-chelation therapy regularly to recover.

**(iii) Margaret Akinyi.**

- She is a female adult aged 48 years.
- She has been a resident of Owino Uhuru Settlement for 24 years.
- She has history of recurrent pneumonia, coughs, blurred vision and poor memory.
- Her blood lead levels were **50 ug/dl**.
- Therapy – he would require anti-chelation therapy to stop further exposure.

**(iv) Elias Ochieng.**

- He is a male adult aged 24 years.
- He has been a resident of Owino Uhuru Settlement for over 24 years.

- He has a history of chest pains, breathlessness and numbness in legs.
- His blood lead levels were **63.4 ug/dl**. This exposure has a high chance of causing irreversable damage if not promptly treated.
- Therapy – he would require anti-chelation treatment immediately.

**(v) Jackson Oseya.**

- He is a male adult aged fifty two (52) years.
- He is a resident of Owino Uhuru settlement for over forty (40) years.
- He is exposed to lead poisoning through smoke, effluent from the factory and open drainage seeping through the settlement.
- He had complaints of low blood pressure, high sugar levels, chest pains, joint pains, low libido, blurred vision.
- His blood lead levels show a staggering **124.3 ug/dl**.

Therapy - he will require immediate treatment as his respiratory, muscular- skeletal, central nervous system, cardio vascular and endocin system have been severely affected.

vii) **Elizabeth Franscisca Muraily**

- She is a female aged sixty eight (68) years.
- She is a resident of Owino Uhuru settlement and has a history of high fever, teeth pains, joints pains, poor eye sight and diminishing hearing.
- Her blood lead levels were **99.3 ug/dl**

Therapy – owing to having metal poisoning, which has affected her skin, muscukuskeletal and central nervous system, an intermediate and urgent intervention is required.

ix) **Millicent Achieng Awaka**

- She is aged thirty eight (38) years.
- She is also a resident of Owino Uhuru settlement for over twenty (20) years and has been exposed to lead poisoning through smoke, open damage
- Her blood lead levels are **234.4 ug/dl**.

Therapy – She stands the risk of irreversible damage to her vital organs. Most of her teeth have fallen off.

- She requires immediate and urgently anti- diction treatment.

227. My Lady, from the above random patients who are all residents of Owino Uhuru settlement coupled with the random sample of 50 residents whose blood samples were taken by the Government Chemist, the common denominator amongst them is that they were exposed to high lead levels beyond the acceptable limits set by the World Health Organisation. **(See Report at page 209 – 210 of the Petition).**
228. These persons/ residents of Owino Uhuru settlement require anti- chelation therapy. This therapy is not only very expensive but it is treatment that should be due over a period of time.
229. My Lady, the harm suffered by the few residents whose medical reports are summarized above is a pointer to the injuries and damage that the 4000 residents of this settlement have suffered, we do humbly submit that cumulatively an award of Kenya Shillings Two Billion (Kshs. 2,000,000,000/=) compensation to the residents for the loss and damage suffered on account of their failing health, breach of their rights to life, right to live in a clean and healthy environment and the right to information. This compensation will also go along way in assisting the residents to receive treatment, which by all accounts is expensive indeed.
230. My Lady, as regards to costs of restoration of the soil, walls, water and general clean up of the settlement to rid it off the lead element, we propose the sum of **Kshs 1,000,000,000=00**. Owino Uhuru settlement area is approximately **13.5 acres**. The soil for the entire area is contaminated. The Report of the Taskforce on Decommissioning and Remediation strategy for Metal Refinery Ltd **(See Petitioners’ Supplementary List of Documents)** did recommend that inter alia that:-
- a) There be excavation and removal of soil and dust from the affected areas for safe disposal; and
  - b) The restoration of Owino Uhuru settlement and its ecosystem.
231. It is our humble submission that for these recommendations to be effected, the proposed amount would adequately suffice for the exercise.
232. Consequently, in proposing the aforesaid amount, we have factored in the costs of inflation and judicial trend in environmental cases on restoration of soil and clean up. (See the case of **David M. Ndeti v Orbit Chemical Industries Limited, Eklr 2014**.)
233. In the Lapsset case (supra), the Constitutional Court did order the Respondents’ to pay to the petitioners the sum of **Kshs. 1,760,424,000.00** as cumulative compensation for the fishermen.

**VII. Whether an order of mandamus ought now to be issued against the 2<sup>nd</sup>, 3<sup>rd</sup>, 4<sup>th</sup> and 5<sup>th</sup> Respondents directing them to carry out a comprehensive participatory scientific study within 60 days from the date of the judgment at Owino Uhuru village to ascertain the**

**levels of lead in water, soil, animals and human bodies of the residents including the Petitioners.**

232. Your Ladyship, PW8, Chrispus Wandera Bideru and PW10, Phyllis Omido testified before the court that so far only 50 residents of Owino Uhuru Village have had their blood lead levels tested to determine if they have been affected by lead poisoning. The reason for this has been indicated variously to be due to the high cost incumbent in carrying out such tests and also a general unwillingness on the part of the duty bearers to investigate this environmental disaster properly to unearth how many people were affected by the pollution.
- 233.** Owino Uhuru Village sits on roughly 13.5 acres of land. Upon this relatively small parcel of land lives 500 households with an approximate population of 4000 residents (**see the NEMA task force report at page 170 of the record of the 4th Respondent's Replying Affidavit**). The task force report itself runs from **pages 157 to 203 in the record of the 4th Respondent's Replying Affidavit**.
234. PW8 was categorical in his testimony before the court that it is conceivable, indeed most likely, that many more residents of Owino Uhuru Settlement were contaminated by the lead poisoning given the widespread nature of the pollution and the quick and far- reaching dispersal nature of smoke and dust.
235. This is further made worse by the fact that the area is a low income settlement where houses are bandied together. What affects one resident is sure to affect his neighbours. In order to rule out the possibility of contamination of more people, mass testing ought to be conducted on all the residents of Owino Uhuru Village.
236. The results for blood lead level so far conducted on the 50 residents of Owino Uhuru Village (**see pages 209 and 210 of the record of the petition**) reveal that a majority of those tested have blood lead levels higher than the WHO recommended upper limit of 10ug/dl. Some of those results show blood lead levels that experts consider lethal. The highest level detected is 420ug/dl which is deemed chronic contamination.
237. Since the Petitioners and the other residents of Owino Uhuru Settlement live in largely the same environment, it is entirely conceivable, indeed expected, that the rest of the 4000 residents will be similarly contaminated, hence the need for mass testing.
238. Various studies and reports so far conducted to determine the level of lead concentration on the soil, water, air and dust at Owino Uhuru Village have consistently returned the same results, namely that the environment in the village is heavily contaminated with lead. We refer the court to the report appearing at **pages 127 to 144 of the record of the petition**. Specifically at page 141, the lead experts make the finding that there is more lead concentrations in the soil, water and wall dust in areas proximal to the lead acid battery recycling factory.

239. We also refer the court to the report of the Government Chemist appearing at pages 182 to 196 of the record of the petition where after an analysis of several soil, air, dust and water samples, the report concludes at page 194 with the finding that **“Owino Uhuru Settlement is exposed to lead, a highly toxic chemical substance. The elevated lead exposure presents a serious threat to her residents and livestock”**.
240. We finally draw the court’s attention to the NEMA Task Force report at **pages 157 to 203 of the 4th Respondent’s replying affidavit**. That report also analysed samples of dust, soil, water and vegetation taken from the village and around the factory and found that **“it is clear from the results the levels were high and beyond acceptable levels”**. The report also analysed blood test results from the Government Chemist and found that the blood lead levels were above the acceptable WHO levels.
241. It is thus safe to deduce from the sampled reports above that the residents of Owino Uhuru Settlement live in an environment that is highly contaminated with lead. Some of them have shown clinical signs of illness associated with lead poisoning. Some have even died. In the circumstances it is pertinent that all the residents be tested and the environment cleaned as recommended by the Senate Standing Committee on Health as well as the NEMA Task Force through its report referred to herein above.
242. In order to protect the Petitioners’ right to the highest attainable standard of health, right to life and the right to live in a clean and healthy environment, the 2nd, 3rd, 4th, 5th and 6th Respondents ought now to be ordered to conduct mass blood tests on all residents of Owino Uhuru Village in order to determine the level of lead contamination in their blood and thereafter to offer treatment to all affected persons. Additionally, the said Respondents ought to be ordered to carry out remediation measures to clean up the environment to make the same safe for human, animal and plant habitation.
- 243.** Granting of judicial review orders are among the orders this honourable court is allowed to grant under Articles 23 and 70 of the constitution.
244. In South Africa , the court in **Fose -vs- Minister of Safety and Security (1997)** ruled that;
- 245.** 'Appropriate relief will in essence be relief that is required to protect and enforce the Constitution. Depending on 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.

**VIII. Whether in view of the matters raised and disclosed in the process of the hearing of this petition and upon a consideration of the evidence adduced, it is now desirable that the orders sought by prayers h, i and j of the petition be granted.**

247. Your Ladyship the Basel Convention on the Control of Transboundary Movement of Hazardous Wastes and its Disposal (Hereinafter “**the Basel Convention**”) was adopted on 22nd March 1989 in Basel, Switzerland and came in to force on 5th May 1992. Kenya ratified the convention on 1st June 2000. The Basel Convention is an international treaty that was designed to reduce the movements of hazardous waste between nations, and specifically to prevent transfer of hazardous waste from developed to less developed countries (LDCs).
248. Article 2(6) of the Constitution of Kenya provides as follows;
- 2(6) Any treaty or convention ratified by Kenya shall form part of the law of Kenya under this Constitution.**
249. The above provision of the constitution therefore means that the Basel Convention, and indeed any other treaty to which Kenya is a signatory and has ratified becomes part of the laws of Kenya. The provisions of the Convention thus have equal force with the laws domestically passed by the Kenyan legislature.
250. Annex 1 of the Basel Convention list substances or their wastes which have been deemed to be hazardous and whose movements across international boundaries is now sought to be governed and regulated by the provisions of the Convention. Wastes having lead or lead compounds are listed in the said Annex 1 as belonging to the category of wastes to be controlled.
251. Lead has found application in several industrial processes such as use of leaded gasoline, production of lead acid batteries and paints, jewellery making, soldering, ceramics, leaded glass manufacture, electronic waste and use in water pipes and solder (**refer to the document at page 37 of the record of this petition**).
252. As the world has become more aware of the adverse effects of high blood lead levels in human beings, its application in several industrial processes has been phased out. Very few countries, for example, still use leaded petrol. This has resulted in the lowering substantially of the mean blood lead levels in humans.
253. The major cause of lead poisoning in the environment is now due to the process of recycling of used lead acid batteries (ULABs). The use of lead acid batteries are prevalent owing to their application as the main power source for motor vehicles. This is also means that there is a very high rate of introduction of waste lead acid batteries in to the environment, whose management must now be controlled in order to limit environmental contamination through the process of recycling ULABs.
254. As already demonstrated through the expert reports produced in this case and discussed above, lead is a highly toxic chemical, an element which does not breakdown once released in to the environment. It has the capacity to destroy the environment in a massive way. The Basel Convention does well to provide

guidelines for its transport across international boundaries, but as this petition has demonstrated, greater regulation must also focus on the recycling process in order to ensure that it is done in an environmentally sound manner.

255. To this end, The Basel Convention Technical Guidelines for the Environmentally Sound Management of Waste Lead-Acid Batteries (hereinafter “**the technical guidelines**”) have been developed principally to offer support and guidance to state parties to the convention to put in place technically sound measures to ensure safe recycling processes of ULABs.
256. The technical guidelines makes provisions with respect to the specifications for setting up recycling plants, safe management and disposal of waste generated from the recycling process and measures to ensure public health safety.
257. Looked at from the prism of this petition, one readily sees the need for such guidelines. The 7th Respondent (MRL) herein set up a lead acid battery recycling plant next to a big human settlement and also close to other industries. MRL did not put in place the necessary equipments and mechanisms to mitigate or totally prevent the escape of lead particulates in to the environment. Indeed, MRL itself released lead contaminated waste in to settled areas.
258. The result, as has been seen during the hearing of this case, has been environmental pollution on a massive scale coupled with the contamination of the public that has led to increased incidence of disease and death. At one point, evidence abounds that the 5th Respondent herein allowed MRL to dump lead waste in a public dumping site.
259. One of the glaring gaps that has become apparent during the hearing of this case has been the lack of domestically developed guidelines and regulations for dealing with lead waste management. This gap now needs to be filled by the adoption of international best practises like the technical guidelines above mentioned.
260. It is thus necessary 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.
261. It is for this reason that we pray that the court grants orders as prayed under prayers h, i and j of the petition.

#### **IX. Costs**

262. My Lady costs follow the event. Should you find merit in this petition, we pray that you grant costs to the Petitioners certified for 3 advocates who appeared for the Petitioners herein. This is because of the complexity of the petition and the extraordinary skill that has gone in to preparing and prosecuting this petition. The court will of course take notice of the fact that it called for great



NSSF BUILDING, 9TH FLOOR,  
P.O. BOX 82427 - 80100  
**MOMBASA.**

2. JUDITH N. KITHINJI ADVOCATE,  
NEMA HEADQUARTERS,  
POPO ROAD,  
P.O. BOX 67839 – 00200,  
**NAIROBI.**
  
3. MUTURI GAKUO & KIBARA ADVOCATES,  
NEW CANNON TOWERS, 3RD FLOOR,  
P.O. BOX 80228 - 80100,  
**MOMBASA.**
  
4. EPHANTUS MOGERE ADVOCATE,  
EXPORT PROCESSING ZONE AUTHORITY,  
ADMINISTRATION BUILDING,  
VIWANDA ROAD, OFF NAMANGA HIGHWAY,  
P.O. BOX 50563 - 00200,  
**NAIROBI.**