REPUBLIC OF KENYA

IN THE SUPREME COURT OF KENYA

(Coram: Ibrahim, Wanjala, Njoki, Lenaola & Ouko, SCJJ)

PETITION NO. E019 OF 2023 AS CONSOLIDATED WITH PETITION NO. E021 of 2023)

–BETWEEN–

EXPORT PROCESSING ZONE AUTHORITY ..... 1ST APPELLANT

K.M (*minor suing through mother and*

next friend **SCHOLASTICA KHALAYI SHIKANGA) .....2ND APPELLANT**

IRENE AKINYI ODHIAMBO ..... 3RD APPELLANT

MILLICENT ACHIENG AWAKA ..... 4TH APPELLANT

ELIZABETH FRANSISCA MWAILU ..... 5TH APPELLANT

ELIAS OCHIENG ..... 6TH APPELLANT

JACKSON OSEYA ..... 7TH APPELLANT

HAMISI MWAMERO ..... 8TH APPELLANT

DANIEL OCHIENG OGOLA ..... 9TH APPELLANT

MARGARET AKINYI ..... 10TH APPELLANT

CENTRE FOR JUSTICE GOVERNANCE

& ENVIRONMENTAL ACTION (*suing on their own*

behalf and on behalf of all residents of Owino-Uhuru

*Village in Mikindani, Changamwe Area, Mombasa***) .....11TH APPELLANT**

-AND-

NATIONAL ENVIRONMENT

MANAGEMENT AUTHORITY ..... 1ST RESPONDENT

THE HON. ATTORNEY GENERAL ..... 2ND RESPONDENT

THE CABINET SECRETARY, MINISTRY OF ENVIRONMENT,

WATER & NATURAL RESOURCES ..... 3RD RESPONDENT

THE CABINET SECRETARY,

MINISTRY OF HEALTH ..... 4TH RESPONDENT

THE COUNTY GOVERNMENT OF MOMBASA ..... 5TH RESPONDENT
METAL REFINERY (EPZ) LIMITED ..... 6TH RESPONDENT
PENGUIN PAPER & BOOK COMPANY LIMITED ..... 7TH RESPONDENT

(*Being an appeal from the Judgment of the Court of Appeal at Mombasa (Gatembu, Nyamweya & Lesiit, JJ. A) of 23rd June 2023 in Civil Appeal No. E004 of 2020 as consolidated with Civil Appeal No. E032 of 2021)*

Representation:

Mr. Cyprian Wesonga, Edmond Wesonga & Eric Masafu for the 1st Appellant
(*Wekesa & Simiyu Advocates*)
Mr. Charles Onyango, Odongo Awino & Gideon Ondongo for the 2nd to 11th Appellants
(*Olel, Onyango, Ingutiah & Company Advocates*)
Mr. Victor Liech & David Gatheru for the 1st Respondent
(*Murugu, Rigoro & Co. Advocates*)
Mr. Motari for the 2nd, 3rd and 4th Respondents
(*Office of the Attorney General*)
Ms. Naomi Kinyua for the 5th Respondent
(*Muturi Gakuo & Kibara Advocates*)

JUDGMENT OF THE COURT

A. INTRODUCTION

[1] Two appeals are before us for determination: ***Petition No. E019 of 2023*** filed by the 1st Appellant dated 1st August 2023 and filed on 24th August 2023, and ***Petition No. E021 of 2023*** by the 2nd – 11th appellants dated 5th August 2023 and filed on 7th August 2023 both pursuant to the provisions of Article 163 (4) (a) of the Constitution. The appeals arise out from the Judgment of the Court of Appeal at Mombasa *(Gatembu, Nyamweya & Lesiit, JJ.A*) in ***Civil Appeal No. E004 of 2020*** as consolidated with ***Civil Appeal No. E032 of 2021*** delivered on 23rd June 2023.

[2] The appeals concern the alleged violation of the right of the 2nd – 11th appellants to a clean and healthy environment, the highest attainable standard of health care and sanitation as guaranteed by Articles 42 and 43 of the Constitution and by dint of Article 70 of the Constitution. The appeal also interrogates the applicability of *the polluter pays principle*, *the precautionary principle*, *the doctrine of presumption of regularity*, apportionment of liability and, the interpretation of the constitutional remedy of compensation provided under Article 23(3) of the Constitution in instances where a court has made a pronouncement on violation of rights and fundamental freedoms with a specific focus on environmental protection.

B. FACTUAL BACKGROUND

[3] The 2nd to 11th appellants are residents of Owino-Uhuru Village within Changamwe Division, Mikindani Area of Mombasa County. They claim that they have been living in the densely populated village situate on Plot No. 148/V/MN in Mikindani which measures about 13.5 acres of land and that in the year 2006 Penguin Paper and Book Company Limited leased a neighbouring plot to Metal Refinery (EPZ) Limited (hereinafter Metal Refinery) which set up a lead acid battery recycling factory. The lead acid recycling activity produced toxic waste which seeped into the village causing the area residents various illness and ailments as a direct consequence of lead poising with more than 20 deaths attributed to it.

[4] Upon seeing the adverse effects of the existence of the factory, the 2nd – 11th appellants campaigned for its permanent closure and urged the concerned authorities to investigate the environmental degradation caused as well as the negative impacts suffered. This led to several intermittent closures and re-openings of the factory until it permanently closed in 2014. Even so, they posited that the responsible State agencies licensed and sanctioned the activities of Metal Refinery contrary to their mandate, thus violating their constitutional rights.

C. LITIGATION HISTORY

i. Proceedings before the Environment and Land Court (ELC)

[5] The 2nd – 11th appellants, suing on behalf of themselves and the residents of Owino -Uhuru Village, moved the ELC by way of ***Constitutional Petition No. 1 of 2016*** seeking declarations that their right to life, rights to a clean and healthy environment, clean and safe water and the highest attainable standard of health have been violated by the actions, inactions and omissions of the 1st appellant and respondents herein. They also sought a declaration that there was a systematic denial of their right to information by the 1st appellant and respondents, specifically the right to access to information about how exposure to lead would affect them and precautionary measures to be taken.

[6] Arising from the said alleged violations, they sought an order of compensation for loss of life and damage to their health and environment. They also sought an order of *mandamus* against the 1st appellant and respondents urging the court to direct them to; within 60 days from the date of the court's judgment, carry out a comprehensive participatory scientific study to ascertain the levels of lead in water, soil, animals as well as in the human bodies of the residents; within 90 days from the date of the judgment, implement recommendations in a report prepared by the Lead Poisoning Investigation Team of the 4th Respondent dated May 2015 and another by the Senate Standing Committee on Health dated 17th March 2015 including adequately cleaning up and remediating contaminated water and soil in Owino – Uhuru village and offering adequate health services to the residents and animals affected by the exposure to lead from the Metal Refinery's manufacturing plant; develop and implement regulations adopted from best practices with regard to lead and lead alloys manufacturing plants; and, to take steps towards ensuring that regulations dealing with licensing, setting up, operation, supervision of the activities as well as independent scientific monitoring of all entities dealing in hazardous materials are designed, enacted and implemented to provide effective deterrence against the threats to protected rights under the Constitution.

[7] In a Judgment delivered on 16th July 2020, the court (*A. Omollo J*) allowed the petition. The court in doing so, held that the 2nd – 11th appellants had not only demonstrated that their rights under the Constitution were likely to, or were threatened with violation, but had proved actual violation to their personal life, environment (soil and dust), abodes and the water which they consumed.

[8] On proof of the alleged violations, the court noted that seven (7) witnesses who testified in support of the petition were residents of Owino-Uhuru Village and that the learned trial court judge had the opportunity to observe their injuries. The Deputy Government Chemist, who testified as PW8, provided a report detailing results from samples taken from 50 residents of Owino-Uhuru which indicated elevated blood lead levels and that the soil, dust and water samples tested showed high levels of lead; a report by the Senate Standing Committee on Health contained the committee's recommendations which included the immediate cleaning of the environment including detoxifying and restoring the soil, replanting destroyed trees, immediate testing of all the residents of Owino-Uhuru village for lead exposure, and the removal of hazardous waste sludge the factory had disposed of over the years and continued to dispose of at Mwakirunge Dumpsite; and the evidence of Dr. Ajoni Adede, who testified as PW9, engaged by the 11th appellant to carry out tests on the 2nd – 10th appellants and which evidence determined that their impairments were due to lead absorption. None of the respondents gave any evidence to contradict the scientific reports produced.

[9] Concerning who among the respondents was guilty of the alleged violations, the court acknowledged that the evidence tendered pointed the source of the pollution as being the Metal Refinery factory, which evidence the 6th and 7th respondents did not contradict or challenge. The court also found that there was no evidence of public participation before the commencement of the operations of Metal Refinery; the National Environment Management Authority (hereinafter NEMA) failed to provide evidence that the Village had been gazetted as an Export Processing Zone (hereinafter EPZ) region or that the 2nd – 11th appellants had alternative accommodation to move to in order to avoid contamination; and for them to leave the suit land, the State was under obligation to compensate them, no

evidence was led of any compulsory acquisition process that was on going. In any event, availability of alternative accommodation does not grant permission for pollution of the environment, which includes both human and natural environment.

[10] The court proceeded to determine whether each party was guilty of any violation(s) and in that regard it noted that the 3rd respondent (*Cabinet Secretary, Ministry of Environment, Water, & Natural Resources*), contravened the law by failing to encourage public participation in the licensing processes and activities likely to endanger the environment when it issued Metal Refinery Limited's license No. 78 of 2006 prior to NEMA issuing the same company with the requisite Environmental Impact Assessment (hereinafter EIA) license. The court further determined that, considering that the 3rd respondent had just begun working on an environmental policy in 2006 when they issued Metal Refinery with a license, and that the policy came to fruition in 2013, it was questionable what policy document gave it confidence in issuing a license as well as advising Export Processing Zone Authority (hereinafter EPZA) to authorize the operations of Metal Refinery.

[11] In relation to the 4th respondent (*the Cabinet Secretary, Ministry of Health*), the court found that, from the evidence adduced, the 4th respondent, upon inspection of Metal Refinery's premises, found workers working without protective equipment such as masks; there was dust, a heap of uncrushed and crushed batteries, and smelting emitting toxic fumes; and tones of sludge on the river bed. As a result, the court held that despite all these observations, the 4th respondent did not invoke the provisions of Sections 115 – 120 of the Public Health Act to have the polluter remove the nuisance.

[12] What is more, although children in the area were given iron and calcium supplements by the County government, this was only for a period of three (3) months. There was thereafter no follow up or plan of action put in place by the 4th respondent to ensure that the 2nd – 11th appellants received the necessary treatment until the lead levels in their blood were reduced to allowable levels. Accordingly, on account of not taking steps to have Metal Refinery remove the

nuisance, and for failure to provide the required treatment to the 2nd – 11th appellants, the court found the 4th respondent liable for breaching the rights to life and to a clean and healthy environment of the 2nd - 11th appellants.

[13] In relation to the 1st respondent (NEMA), the court recognized that the 1st respondent issued Metal Refinery with an EIA License on 5th February 2008 pursuant to an EIA Project Report submitted on 13th March 2007. According to the trajectory of correspondences, the 1st respondent, in its letter dated 26th September 2006, approved Metal Refinery's project to be undertaken on L.R. No. MN/II/3697 Kilifi District. In a letter dated 1st June 2006, Metal Refinery requested for a change of address on the license and EIA approval to the 7th respondent's premises. However, NEMA by a letter dated 6th December 2006 addressed to Metal Refinery, acknowledging its letter of 26th September 2006, advised the latter to continue manufacturing lead alloys using scrap metal batteries from the region as raw material, indicating that the EIA license would be granted in due course. NEMA in effect allowed Metal Refinery to proceed with its operations without an EIA license and on premises that were not the subject of operations in Metal Refinery's application to NEMA.

[14] The court further noted that, while NEMA was considering the EIA Project Report dated 13th March 2007, of which there was no evidence of its findings which ought to have been shared with other lead agencies, proceeded to issue a letter dated 23rd April 2007 referenced *"Cessation and Restoration Order for the Scrap Battery processing plant, Birikani area off New Holland/CMC Yard Nairobi Road Mombasa"* directing Metal Refinery to *inter alia* cease operations, and initiate an EIA Study to facilitate in depth evaluation of the potential impacts associated with the project and to materialize harmony with the affected and interested stakeholders. Within three (3) weeks of the said order, NEMA then proceeded to approve Metal Refinery's project and the trial court viewed this action as assisting Metal Refinery in breaching the law instead of holding them accountable. Furthermore, the court added that, NEMA showed contradiction in its mandate when it issued another letter dated 11th June 2007 stating: *"This is to inform you that the authority has reviewed your request and hereby grant*

permission to carry out trial runs". This act, according to the trial court raised the question whether the law allowed for trial runs before an EIA license was given.

[15] Likewise, the court stated that, although NEMA issued improvement orders to Metal Refinery, there was no evidence to ascertain that the latter complied with the requirements; and if it did comply, what steps NEMA took to ensure full compliance with its directions. Despite this, NEMA in its defense alluded to the fact that Metal Refinery had ceased operations in 2012 and went ahead and issued a certificate of transfer of EIA License No. 001375 which was then transferred to Max Industries Limited on 26th April 2013. And on 29th November 2013, it issued a closure order under section 117 of the EMCA to Max Industries Limited for operating a lead recycling plant without a Waste Recycling License contrary to Waste Management Regulations, 2006.

[16] In consequence, the court determined that NEMA did not demonstrate that it invoked *the polluter pays principle* as envisaged by the Environmental Management and Coordination Act (hereinafter EMCA) since no prosecution had been undertaken nor payment from the polluter ordered for the restoration of the environment. That all that NEMA had done was write letters to demand for improvement until the residents of Owino-Uhuru Village petitioned Parliament which then constituted a committee whose recommendations resulted in tests being done both on humans and the environment. The court therefore found that NEMA had failed to fulfill its mandate as set out in Section 58 of EMCA.

[17] Concerning the 5th Respondent (*The County Government of Mombasa*), the court found that it had no role or liability in enforcing compliance with environmental laws.

[18] Relating to the 1st appellant (EPZA), the court recognized that for EPZA to issue Metal Refinery with an EPZ License it requested the latter to submit proof of space in a valid gazetted EPZ, and a copy of EIA License from NEMA for the project. That EPZA proceeded to issue the EPZ license to Metal Refinery valid from 13th December 2006 to 18th December 2007, based on the strength of the NEMA's letters dated 26th September 2006 and 6th December 2006, rather than a certified

copy of the EIA license. The two letters were merely letters, not an EIA License. Secondly, that the letters referred to Plot No. MN/II/3697 Kilifi District while the license EPZA issued was for operations on land in Mombasa. Subsequently, the court held that EPZA was in violation of the law when it issued Metal Refinery with a license without prior submission of an EIA license and premised on letters that were in respect of distinct parcels of land, thus did not comply with the EPZ Act.

[19] Following the above findings, *liability* was apportioned in the following ratio: EPZA, Cabinet Secretary (CS), Ministry of Environment Water and Natural Resources and CS, Ministry of Health - 10% each; NEMA - 40%; the Metal Refinery (EPZ) Limited -25%; and Penguin Paper and Book Company Ltd - 5%.

[20] Lastly on *compensation*, the court, while considering Principle 13 of the ***Rio Declaration***, the concept of strict liability and Section 108 of the Environment Management and Coordination Act as well as Article 70 (c) of the Constitution, and following the decisions in ***David M. Ndetei v Orbit Chemical Industries Limited*** HCCC No. 147 of 2008 [2014] KEHC 4354 (KLR) and ***Mohamed Ali Baadi and others v Attorney General, Cabinet Secretary, Ministry of Environment, Water and Natural Resources,Cabinet Secretary, Ministry of Land, Housing and Urban Development, Cabinet Secretary, Ministry of Information and Communication and Technology, Cabinet Secretary, Ministry of Transport and Infrastructure, Cabinet Secretary, Ministry of Energy and Petroleum, Kenya Ports Authority, National Environment and Management Authority, National Land Commission, County Government of Lamu & Lapsset Corridor Development Authority*** High Court Petition No. 22 of 2012 [2018] KEHC 5397 (KLR) found that the 2nd - 11th appellants were entitled to compensation in monetary and non -monetary terms.

[21] The trial court accordingly issued a declaration that the 2nd - 11th appellants' rights to a clean and healthy environment; rights to the highest attainable standard of health and right to clean and safe water; and rights to life were violated by the actions and omissions of the 1st appellant and the respondents. An award of Kshs. 1.3 Billion to the 2nd – 11th appellants was thus made for personal injury and loss of

life payable within ninety (90) days from the date of judgment by the 1st appellant and the respondents in accordance with the apportionment of liability set out above. The court also directed the 1st appellant and the respondents to clean up the soil, water and to remove any waste deposited within Owino-Uhuru village by the 6th respondent within four (4) months of the judgment, in default the sum of Kshs. 700 Million would be due and payable by them to the 11th appellant to coordinate the soil and environmental clean-up exercise. An order of *mandamus* was in addition issued against the 2nd, 3rd, and 4th respondents directing them to develop and implement regulations adopted from best practices with regard to lead and lead alloys manufacturing plants; costs of the petition was equally granted to the 2nd – 11th appellants.

ii. Proceedings before the Court of Appeal

[22] Dissatisfied by this outcome, EPZA and NEMA moved the Court of Appeal by filing two separate appeals that were subsequently consolidated.

[23] NEMA in its appeal, ***Civil Appeal No. E004 of 2020***, raised nine (9) grounds of appeal summarized by the court as follows; that the trial court- erred on the issue of liability as it misconstrued the interpretation of the principles of strict liability, '*polluter pays*', and causation in apportioning liability; failed to appreciate the EIA process, the importance of trial runs and the *'precautionary principle'* in environmental governance; erred in awarding the quantum of compensation of Kshs. 1.3 Billion and Kshs. 700 Million and basing the quantum on proposals given by the 2nd -11th appellants only; erred in finding that the 11th appellant should be paid to conduct soil contamination clean up in favour of the public and without any expert input.

[24] EPZA on its part filed ***Civil Appeal No. E032 of 2021***, raising twenty – three (23) grounds of appeal which the Court of Appeal summarized into five (5) broad areas as follows: the trial court's jurisdiction to hear and determine the constitutional petition; the violations of the law found to have been committed by the 1st appellant and apportioning liability to the latter; the application of the *polluter pays principle* and, the award of excessive damages of Kshs. 1.3 Billion to

the 2nd – 11th appellants and persons claiming through them for personal injury and loss of life, and of Kshs. 700 Million payable to the 11th appellant without justification, evidence and ascertainment of affected persons in the representative suit.

[25] In a Judgment delivered on 23rd June 2023 (*Gatembu, Nyamweya & Lesiit JJ.A*), the court first addressed the preliminary issue raised by the 1st appellant regarding the trial court's jurisdiction to hear and determine the petition before it. Relying on this Court's decisions in ***Samuel Kamau Macharia and another vs. Kenya Commercial Bank and 2 others*** SC Appl No. 2 of 2011 [2012] eklr ***Albert Chaurembo Mumba & 7 others (sued on their own behalf and on behalf of predecessors and or successors in title in their capacities as the Registered Trustees of Kenya Ports Authority Pensions Scheme) v Maurice Munyao & 148 others (suing on their own behalf and on behalf of the Plaintiffs and other Members/Beneficiaries of the Kenya Ports Authority Pensions Scheme)*** SC Pet. 3 of 2016 [2019] eKLR, and ***Kibos Distillers Limited & 4 others vs. Benson Ambuti Amdega & 3 others*** [2020] eKLR as well as Section 129 of EMCA, the appellate court held that Section 129 (3) of EMCA cannot be used to arrogate the National Environment Tribunal (NET) specific powers given to the courts under the Constitution, particularly under Article 23 (3) which provides for reliefs that can be granted in a claim for violation of constitutional rights. That Section 13 (3) of the ELC Act in this respect specifically grants the ELC jurisdiction to hear and determine applications for redress of a denial, violation, or infringement of, or threat of violation of the fundamental freedom relating to a clean and healthy environment under Articles 42, 69, and 70 of the Constitution. And that therefore, the trial court had jurisdiction to determine the petition.

[26] Turning to the substantive issues arising from the consolidated appeal, the court found that the same largely turned on the legality and propriety of the trial court's findings on the liability of EPZA, NEMA and other State agencies for the adverse effects from the operations of the factory run by Metal Refinery, and the basis for the quantum of the award of damages and compensation.

[27] On whether there was a legal basis to find EPZA and NEMA liable for the adverse effects of the operations of Metal Refinery, the Court of Appeal determined that under Section 2 of EMCA, conviction on pollution implies the application of criminal law and sanctions to private operators as opposed to State agencies, since primary liability appears to be assigned to private actors as the primary polluters. However, the State and State agencies are not exempt from the application of the *polluter pays principle*, the reason being that, the State's liability occurs when it violates its statutory or constitutional obligation or duty, (the wrongful act), and a linkage is established between the wrongful act and the damage or injury caused by the environment (the causal link).

[28] Aside from that, the Constitution places positive obligations upon the State and State agencies to promote and protect the right to a healthy environment by taking *"all necessary measures"*. Therefore, a violation of the right to a healthy environment may be invoked not only where the pollution or nuisance originates from the actions of the State or its organs, but also if it results from a lack of effective regulation of private activities. Based on the foregoing, and in applying Article 260 of the Constitution, the court determined that EPZA and NEMA as statutory bodies, are thus bound by the foregoing.

[29] On account of the above finding, and in answering the question of legal implication and environmental effect if any, of the actions and conduct or omissions of EPZA and NEMA during the processes of licensing of Metal Refinery, and the adequacy of the monitoring and enforcement of its activities and operations, the court determined that, based on the sequence of events that led to the issuance of licenses by the EPZA and NEMA to Metal Refinery , the findings of the trial court that the two were both in direct violation of Article 69 of the Constitution, and Section 23 of the EPZ Act as well as Sections 59 to 62 of EMCA, respectively, were correct. The court therefore upheld the trial court's holding on all these issues.

[30] It was also the appellate court's view that the allocation and apportionment of liability to EPZA and NEMA for approving the project and its commencement before fully considering and evaluating the impact of the project was near equal in

measure to that of the actual perpetrators of the pollution. By the same token, it was agreed that NEMA would bear greater responsibility because once evidence of the adverse and hazardous effects on the operations of the project became apparent, given the nature of the wide-ranging effects on the ecosystem, human health, water, and air quality, it ought to have applied a wide range of enforcement measures at its disposal, including the cancellation of the EIA License, restoration orders, and prosecution of the perpetrators of the pollution.

[31] In the end, having analyzed the evidence afresh, the appellate court proceeded to revise and review the trial court's allocation and apportionment of liability and determined the same as follows: NEMA at 30%; EPZA at 10%; the CS Ministry of Environment Water and Natural Resources and CS Ministry of Health at 5% each; Metal Refinery (EPZ) Limited at 40%; and Penguin Paper and Book Company Limited at 10%. Further, no liability was apportioned to the County Government of Mombasa since there was no cross - appeal on the trial court's findings on that issue.

[32] Regarding *the precautionary principle*, the court stated that, based on the definition of the principle under Section 2 of EMCA, its proper application requires caution to be taken even when there is no evidence of harm or risk of harm from the project, and that proof of harm should not be the only basis of acting. Scientific analysis of risks should instead form the core of environmental rules and decisions, notwithstanding the fact that such analysis may be uncertain. In the alternative, the principle is also used when there are limits to the extent that science can inform actions, and ultimately rules and decisions have to be made having regard to other considerations such as the public perception of the risk and the potential for harm.

[33] Secondly, on the argument by EPZA to justify the operations of Metal Refinery in terms of the contribution to economic development, the court held that there will always be competing values that need to be balanced in environmental regulation, as well as the costs and benefits of compliance; and it is notable in this respect that this should be one of the main objectives of an EIA and that Article 69 of the Constitution also specifically emphasizes on ecologically sustainable development.

[34] On the issue of quantum of damages, the appellate court found that the trial Court failed to consider various relevant factors and principles of law in the award of damages. The learned judges in that regard held that the guiding principle in an award of general damages in constitutional petitions is discretionary and will depend on the circumstances of each case. They also recognized that the decisions relied on by the trial court were not relatable to the case at hand; and that the award of Kshs. 1.3 Billion as compensation for the 2nd – 11th appellants and persons claiming through them was erroneous as the specific persons to benefit save the said appellants were not identified.

[35] As far as the award of restoration was concerned, the appellate judges found that the award of Kshs. 700 Million to the 11th Appellant had not been specifically pleaded or proved; given that restoration of contaminated land is a very technical exercise, the 2nd - 11th appellants had not demonstrated scientific methodologies and techniques to be applied to justify the order and award; and that the legal and institutional framework for restoration of contaminated land resides in NEMA under EMCA. In those circumstances, the appellate court concluded that this was a proper case for it to interfere with the exercise of the learned trial judge's discretion. The appellate court for this reason decided to set aside the award of compensation and referred the matter for rehearing before a Judge at the ELC at Mombasa other than *A. Omollo J,* including the taking of additional evidence limited to the said issue and assessment of damages payable to the 2nd - 11th appellants. The court further directed NEMA, within 12 months from the date of the judgment, and in consultation with all the relevant agencies and private actors and in the appropriate exercise of its functions and powers to:

(a) identify the extent of contamination and pollution caused by the operations of the Metal Refinery at the Owino- Uhuru Settlement;

(b) remove any contamination and pollution in the affected areas of Owin-Uhuru Settlement;

(c) restore the environment of Owino-Uhuru Settlement and its eco-system;

(d) *periodically report every 3 months to the ELC at Mombasa on the progress made in this regard, and for any consequent directions, until the satisfactory completion of the restoration.*

D. PROCEEDINGS BEFORE THE SUPREME COURT

[36] Aggrieved by the aforementioned judgment, two appeals have been preferred before us: ***Petition No. E019 of 2023*** and ***Petition No. 021 of 2023.*** By a consent order issued on 20th February 2024, the two appeals were consolidated.

[37] EPZA's appeal in *Petition E019* is premised on 11 grounds summarized in its submissions to the following issues:

a. Under the current and Pre-2010 Constitution and the law, which statutory State Agencies have the primary responsibility of environmental impact assessment and monitoring for sustainable protection and conservation and the coercive powers to obviate any allegations of the 2nd to 11th appellants rights?

b. Whether EPZA is liable for any breaches, failures, improper exercise of statutory duties and mandate of the National Environmental Authority (NEMA), the Ministry of Environment and Natural Resources and/or Ministry of Health in the matters that underpinned the 2nd - 11th Appellants' claims at the trial court.

c. Whether EPZA was entitled to rely on the doctrine of presumption of regularity of the acts of other specialized statutory lead agencies and thus discharged its statutory mandate before granting the EPZ Manufacturing License to Metal Refinery (EPZ) Limited.

d. Whether EPZA mitigated the risk of environmental pollution and injury to human life in declining to renew the EPZ license to Metal Refinery (EPZ) Limited.

e. Whether remitting the petition to the ELC for rehearing on the issue of damages payable with a primer of taking additional evidence violates its right to fair hearing;

f. Who shall bear the costs in this Court, in the Court of Appeal and in the trial court?

[38] Consequently, EPZA seeks the setting aside of the Orders finding it 10% liable and substituting the same with an order dismissing the petition; the setting aside of the Court of Appeal's orders remitting the petition for rehearing and taking of additional evidence and the setting aside of the orders of costs against it.

[39] The 2nd -11th appellants similarly aggrieved, filed ***Petition No. E021 of 2023*** pursuant to Article 163 (4) (a) of the Constitution and Section 15A of the Supreme Court Act seeks redress before this Court on the grounds that there was:

(a) Breach of Articles 22, 23, 42 and 70 (2) (c) of the Constitution with respect to their entitlement to an award on compensation for breach of their rights to a clean and healthy environment and for injury to health as a result of proven environmental pollution by setting aside an award by the ELC and

i) Ordering a retrial of the petition to prove injury on the part of the affected persons;

ii) Failure to award compensation to the 2nd -11th appellants herein as well as other victims identified through the documents forming part of the record;

iii) Directing that all victims of the pollution be identified as a basis for compensation

(b) Breach of Articles 21, 48 and 50 (1) of the Constitution by denying the 2nd - 11th appellants their right to access justice by ordering a retrial at which the 2nd -11th appellants, who are members of an economically disadvantaged community, will shoulder the onerous burden of calling over 4,000 people to testify in court;

(c) Breach of Article 10 (2) of the Constitution by:

i) Interfering with the exercise of discretion on the part of the trial judge in so far as apportionment of liability is concerned, without strict adherence to the principles underpinning such interference.

ii) Apportioning a larger share of liability upon a company which has been allowed to flee the jurisdiction of the court and another is

moribund, and hence making a large part of any award that may be made to the 2nd -11th Appellant non- realizable in actual terms.

[40] The 2nd - 11th appellants for the above reasons seek that the entire judgement of the Court of Appeal be set aside and in its place an order be issued affirming the judgement of the ELC and/or in its place this Court enhances the award of compensation for breach of their rights to a healthy environment as well as the amount issued as cost of remediation of the soil and general clean-up of the environment at Owino-Uhuru settlement.

[41] In response to ***Petition No. E021 of 2023***, the 1st respondent, NEMA, filed a cross – appeal based on the following grounds-that the learned judges erred in law;

1. *In finding that the 1st respondent had not discharged its statutory roles;*
2. *In finding that the polluter pays principle only applies to private entities, and not public entities like the 1st respondent, but went ahead and apportioned heavy liability on the 1st respondent based on unclear constitutional criteria;*
3. *In failing to appreciate that the alleged violation of constitutional rights in the matter before the ELC stemmed from the tort of negligence, hence the principle of strict liability would have strictly applied in apportioning liability;*
4. *In finding the 1st respondent 30% liable for violation of the 2nd -11th appellants' constitutional rights;*
5. *In failing to attach requisite weight to the 1st respondent's submissions on the concept of trial runs in novel environmental issues;*
6. *In remitting the matter to the ELC, for hearing on the issue of quantum of damages.*

[42] Accordingly, NEMA seeks that this Court varies and/or sets aside the Judgment of the Court of Appeal apportioning to it liability at 30% for violation of

the 2nd -11th appellants' constitutional rights and to the extent that it remits for rehearing the issue of quantum of damages to the ELC.

E. PARTIES SUBMISSIONS

i. 1ST Appellant's (EPZA) Case

[43] The 1st appellant's submissions in support of its appeal are dated 22nd January 2024 and filed on 19th February 2024. In opposition to ***Petition E021 of 2023*** EPZA also filed an affidavit sworn by Winnie Sang, Assistant Manager, Legal and Corporate Services of the 1st Appellant.

[44] EPZA first submits that the activities complained of, are subject to legislation since they took place in 2007 before the enactment of the Constitution, 2010. Under both the former and current constitutional architecture and statutory frameworks therefore, it is the 1st and 3rd respondents who are obligated to ensure sustainable management and conservation of the environment. Once they fail to discharge their mandate, liability attaches to them and not EPZA as the EMCA leaves no doubt that NEMA is the statutory body for the implementation of all environmental policies and for EIA licensing, auditing, monitoring and elimination of environmental injurious activities. Moreover, that the Public Health Act existing pre- the 2010 Constitution gave coercive powers to the CS, Ministry of Health and the predecessor to the County Government of Mombasa to arrest and halt offensive activities. With that in mind, EPZA posited that the 1st, 3rd and 4th respondents had and still have the primary duties, responsibilities in the contested claims herein.

[45] EPZA further argues that, its responsibilities under the EPZ Act, include examining and processing applications for licenses by export processing zone developers, operators and enterprises. And that, in issuing the EPZ Manufacturing license to Metal Refinery, it relied on NEMA's permission and the minerals dealers license issued by the Commissioner of Mines and Geology. As a result, it submits that it cannot be held liable for the alleged violations of Articles 42, 69 and 70 of the Constitution or any other law for the omissions or commissions of NEMA, neither the Ministry of Environment nor the Ministry of Health, who are the

specialized agencies on matters relating to the environment and health considering that the material statute does not put any responsibility on it of carrying out EIA and environmental monitoring post the EIA process.

[46] It further argues that the case before the trial court was not about the fact that Metal Refinery should not have been licensed in the first place but rather that it operated in a manner hazardous to both the environment and human health. On that basis it claims that it cannot be vicariously or by association be held liable for any malfeasance by NEMA and other State agencies. It faults the Court of Appeal for supposing that Section 23 (2) (c) of the EPZ Act required it to carry out an EIA and monitoring over the proposed activities to ascertain that they are environmental and health friendly. To this end, it asserts that it could not have withheld the EPZ Manufacturing license in view of compliance by Metal Refinery with the conditions set, as it would have been an unreasonable exercise of statutory powers, and a usurpation of the statutory powers of the 1st respondent relating to the environment.

[47] Placing reliance on Rule 26 (3) (b) of the Supreme Court Rules, 2022 and this Court's decision in ***Speaker of the Senate & Another vs. Attorney General & 4 Others*** [2013] eKLR, EPZA urges the Court to re-appraise the available evidence, draw inference of fact, and provide interpretative guidance on whose mandate under the Constitution and the law it is for EIA monitoring as well as the question of coercive powers to intervene if there are threatened or actual constitutional violations as is alleged.

[48] Relying further on the decision in ***Kibos Distillers Limited & 4 others vs. Benson Ambuti Adega & 3 others*** [2020] eKLR, EPZA submits that it is legally entitled to rely on the doctrine of presumption of regularity of the acts of the other State agencies to grant the EPZ manufacturing license without investigating whether there were procedural lapses on the part of the 1st and 3rd respondents or that the proposed activities were harmful to the environment and human health, as the latter are the experts in matters related to the environment.

[49] EPZA furthermore asserts that it mitigated the damage caused by not renewing Metal Refinery's license when it expired on 13th December 2007, one year after issuance. It alleged that this measure was overlooked by the superior courts when they imposed 10% liability on it for activities and operations of Metal Refinery that took place without a renewed EPZ Manufacturing License, contrary to the principle of mitigation of loss stated by the Court of Appeal in ***African Highland Produce Ltd vs. John Kisoro*** [2001] eKLR.

[50] EPZA urges that the damages for treating the persons affected by the pollution and restoring contaminated soil are special damages which were not proved. Further that the Court of Appeal erred in the interpretation and application of its jurisdiction under Articles 163(4) as read with Articles 25 (c), 27 (1) (2) and 50 of the Constitution as well as Rule 22 (b) of the Court of Appeal Rules, 2022, by remitting the claim back to the trial court for rehearing on the issue of compensation payable, with an egregious primer of taking additional evidence. That order, it urged, violates its right to a fair hearing and equal protection and benefit of the law under Articles 25 (c), 27 (1) (2) and 50 of the Constitution as it amounts to; an opening to all and sundry including those who are not residents of the village to join the case; and a ticket to fill the gaps exposed in the pleadings and evidence by taking additional evidence. And that since parties are bound by their pleadings, the 2nd -11th appellants' claim on damages ought to have failed and not be remitted back to the trial court.

[51] EPZA, in addition, submits that the Court of Appeal was correct to interfere with the discretion of the trial court on the issue of quantum. That from the onset, the suit filed by the 2nd – 11th appellants, pretended to be baptized as a suit on behalf of all (unnamed) residents of Owino-Uhuru village, failed to meet the requirements of a representative suit; therefore, it had no legal standing for damages to be awarded. Alternatively, the claim for general damages to the 2nd – 11th appellants for their health, loss of life, and cleaning up environment was intrinsically in the nature of damages that needed to be specifically pleaded and proved by them. By failing to do this, the claim ought to have been dismissed by the Court of Appeal as opposed to giving a second chance to the 2nd – 11th appellants

to strengthen their case, as this violates the 1st appellant's right to a fair trial under the Constitution.

[52] Likewise, it states that it is untenable for the 2nd – 11th appellants to seek the reinstatement of the trial court's award, as it was based on incorrect principles and both a misapprehension and lack of evidence. That the ELC did not apply the correct legal principles regarding the award of damages, as there were no reasons or principles underpinning the award it issued; and that an award of general damages for damage to health and loss of life cannot be communal or group based to an indeterminate amorphous assemblage in the manner ELC made its determination. EPZA opined that in tandem with the polluter pays principle under Section 2 of EMCA, Metal Refinery ought to bear the greatest responsibility for any violation of rights as well as a resultant greatest liability.

[53] Lastly, regarding costs of the appeal in this Court and the superior courts, EPZA states that, having partially succeeded in the Court of Appeal, the court ought to have set aside the order of costs of the trial court against it, and instead awarded those costs to it, as guided by the principle in Section 27 (1) of the Civil Procedure Act, 2010 and this Court's decision in ***Jasbir Singh Rai & 3 others vs. Tarlochan Singh Rai & 4 others*** [2014] eKLR.

ii. The 2nd – 11th Appellants' Case

[54] The 2nd – 11th appellants, in opposition to ***Petition E019 of 2023*** filed a replying affidavit by Phyllis Issa Indiatsi Omido, the Executive Director of the 11th appellant, deponed on 7th September 2023; and submissions dated 16th February 2024. In support to their appeal they filed written submissions dated 24th November 2023 highlighting various grounds therein.

[55] They submit that in spite of the Court of Appeal recognizing that the 2nd – 11th appellants' right to a clean and healthy environment had been violated, the appellate court proceeded to overturn the compensation awarded by the trial court and directed NEMA to carry out certain processes and make periodic reports to court, irrespective of NEMA's unwillingness demonstrated in carrying out the remediation exercise both before, during and even after hearing of the original

petition. For this reason, they seek the reinstatement of the payment of the sum of Kshs. 700 Million, or such other figure as the Court may deem appropriate to the 11th appellant to hire experts to carry out the remediation work.

[56] They further contend that the right to a clean and healthy environment is a substantive right that supports other rights that are enshrined in the Constitution; and as provided in the ***UN Framework Principles on Human Rights and the Environment***. Therefore, the moment a finding is made that there was violation and infringement of rights, the court has a duty to validate those rights by making an appropriate order; as sought by them in terms of compensation and as rightly awarded by the trial court.

[57] In connection with the finding by the Court of Appeal that the persons that the 2nd – 11th appellants purport to represent are not ascertainable and identifiable, the 2nd – 11th appellants assert that: firstly, the 2nd -10th appellants were clearly identified and all presented their evidence sufficient to prove that they suffered harm and nothing barred the court from awarding them appropriate compensation; secondly, the original petition was a representative suit on behalf of the residents of Owino-Uhuru Village and as identified in the Senate Report, Taskforce Report and the Government Chemist report all of which noted that the village is inhabited by at least 4,000 persons; and thirdly, the County Government of Mombasa had an opportunity to test some of the appellants who are therefore well identified. Inevitably, they submit that it was a misdirection on the part of the appellate court to order that the matter be remitted back to the ELC for ascertaining who the 2nd – 11th appellants represent.

[58] They further opine that by the Court of Appeal directing that the matter be reheard at the ELC on the issue of compensation and additional evidence taken to assist the court in assessment of damages, it impedes their right of access to justice as repeat litigation process is not only costly but will take years to complete; that any remedy given at a later date cannot be effective; that the same is also an affront to the right to a fair hearing as envisaged in Article 50 of the Constitution given that the claimants have already been identified as a community with an estimated

4,000 people, vide the reports adduced and accepted by the court; hence, there is no need for a retrial to identify the exact number and identity of the claimants.

[59] Furthermore, that the testing and treatment for lead poisoning is expensive which is evidently demonstrable by the fact that the government itself was only able to test 50 members of the community; and the community is itself economically disadvantaged and cannot afford to pay for the necessary tests for lead poisoning. Evidently, that this was therefore a case in which the appellate court could apply the principle of *the science of attribution* to infer that the rest of the members of the community who live in very close proximity were similarly affected. They thus contend that the Court of Appeal ought to have maintained the monetary compensation the trial court had awarded the 2nd – 11th appellants.

[60] The 2nd -11th appellants also submit that the Court of Appeal was not right in interfering with the discretion of the trial court in the apportionment and allocation of liability as there was absence of an identifiable error. The appellate court ought to have been satisfied that the apportionment made by the trial court was not one which was reasonably open to interference by it.

[61] In response to EPZA's appeal, the 2nd – 11th appellants submit that the Constitution, pre- and post-2010 both guaranteed the fundamental rights of individuals and although the pre - 2010 Constitution did not capture aspects of environmental protection and management, this does not mean that there was no regard to it. And that in the landmark decision of ***Peter K. Waweru vs. Republic, Nairobi,*** HC Misc. Application No. 118 of 2004, the High Court interpreted the right to life in Section 71 of the retired Constitution to include a right to a clean and healthy environment. Subsequently, it is the law that, where there is a right there is a remedy. Those rights are clearly defined in Articles 42 and 70 of the Constitution, and EPZA along with NEMA are therefore culpable for corporate pollution as aptly established by the two courts below. Likewise, in terms of Article 259 of the Constitution, the Constitution is not static and must be allowed to grow through a purposive interpretation and application.

[62] They further argue that Section 23 (2) (c) of the EPZ Act provides that an EPZ License shall not be issued to a business enterprise where there is the likelihood of a deleterious effect on the environment. As a direct result, the legislation regulating the issuance of license in 2007 aimed to ensure that there was no harm to the environment from the activities of companies operating within the EPZ. Apart from that assertion, they also urge that, for the court to draw an inference to the doctrine of presumption of regularity sought to be invoked by EPZA, the latter ought to have provided evidence showing that it took steps to ensure that NEMA had issued an EIA license before it issued theirs. Having not done so, it is presumptuous on EPZA's part to allege that they had assumed that NEMA had issued the EIA license before issuing theirs. In any event, given that parties are bound by their own pleadings, EPZA cannot rely on this argument since it is being raised for the first time in this Court.

[63] They also submit that, while EPZA issued its license to Metal Refinery based on NEMA's prior approval, the said letter did not relate to the site for which EPZA issued its license. Accordingly, the doctrine of presumption of regularity, which is founded on assumption that all acts are presumed to be rightly done until the contrary is proved is unavailable to EPZA. For this reason, EPZA abdicated its responsibility by failing to comply with the provisions of Section 23 of the EPZ Act.

[64] It was the 2nd – 11th appellants' further submission that although EPZA did not renew the license it had issued to Metal Refinery for one year between 2006 – 2007, it admits that Metal Refinery continued operations until 2014, when it officially ceased operations and therefore EPZA allowed Metal Refinery to operate in the zone for at least seven (7) years without a license keeping in mind that there is no record that EPZA ever tried to close down the business due to the lack of a license.

[65] The 2nd – 11th appellants also reiterate that EPZA aided Metal Refinery in its activities by allowing it to begin operations without an EIA license; and no demonstrable action on EPZA's part can be deemed to have been geared towards mitigating the polluting activities of Metal Refineries. EPZA having been found culpable of environmental damage and harm to the residents of Owino-Uhuru

settlement therefore, and based on the nature of the petition, it would only be prudent to condemn it to pay costs.

[66] Responding to NEMA's cross appeal, they submit that, within the parameters of EMCA there exists no provision in law to support the conduct of trial or test runs. In any case, the very act of NEMA to permit such *test runs* within an environment that is occupied by residents of Owino-Uhuru village was reckless and negligent given that it was within its knowledge that Metal Refinery was dealing with a commodity that was likely to emit a toxic substance to the environment. They posit that even though one could concede to the assertion that it was permissible to conduct trial runs, how then did NEMA allow Metal Refinery to undertake its activities for close to one year at the expense of the residents of Owino-Uhuru village? Accordingly, the 2nd – 11th appellants affirm that NEMA failed to shut down the factory, and failed to discharge its statutory mandate and ought to be found culpable for all that happened to the claimants.

[67] The 2nd -11th appellants also argue that it is misleading for NEMA to assert that the Metal Refinery factory and its activities was a novel project, thus unaware of its deleterious effects. They urge that by virtue of Article 2 of the Constitution, Kenya is a party to the ***Basel Convention*** and there is a presumption that it was privy to the *Technical Guidelines for Environmentally Sound Management of the Waste Lead – Acid Batteries*. Since it is known that lead is a heavy metal that would have negative effects on the environment and upon flora and fauna if not handled and or disposed of properly caution should have been applied before any activity was commenced by the Metal factory. For this reason, the 2nd- 11th appellants state that the undertaking of an EIA is mandatory and not optional and NEMA cannot run away from its responsibility of overseeing the EIA process, and should have observed the contents of *Rio Principles 15 and 16* on precautionary and polluter pays principles when making its decisions.

[68] They lastly submit that constitutional damages as reliefs are separate and distinct from remedies available under private law. As such, there was no obligation to prove actual loss, as per Article 70 of the Constitution as well as

Section 3 of EMCA and since the general approach by courts in awarding compensation is governed by comparative awards in cases of a similar nature, the trial court was appropriately guided by the case law presented to it, with no objection from the 1st appellant and respondents, and it also considered their wrongful acts and the substantial injury occasioned to the residents of Owino-Uhuru Village.

iii. 1st Respondent (NEMA's) Case

[69] NEMA filed a replying affidavit by Erastus K. Gitonga, the Acting Director of the 1st respondent, deponed on 26th January 2024; written submissions dated 20th February 2024 and filed on 22nd February 2024; supplementary submissions in support of the cross-appeal dated 22nd April 2024 and filed on 24th April 2024, respectively, and submissions in response to ***Petition E021 of 2023*** dated 14th February 2024 and filed on 19th February 2024.

[70] As to whether EPZA can abdicate its legal mandate and instead blame NEMA for the alleged violations, highlighting specifically Section 23 (2) (c) of the EPZ Act, NEMA submits the section does not state that EPZA shall solely and fully rely on information from other State agencies including NEMA to determine whether a proposed business enterprise 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. Accordingly, it is its case that the law mandatorily requires EPZA to take positive and deliberate steps, and put in place measures to ensure that the proposed business meets the conditions set out in the EPZ Act.

[71] NEMA further submits that Section 9 (2) of the EPZ Act grants EPZA extensive powers regarding the licensing and supervision of export processing zones. For this reason, nothing prevents it from outsourcing expert or independent opinions when it lacks the requisite expertise to discharge its mandate. NEMA posits that based on the provisions of the EPZ Act, EPZA is therefore an independent body and not a department within NEMA and if the law had intended that EPZA should solely rely on information from NEMA for it to act one way or

another, nothing would have been easier than having the same expressly provided for.

[72] NEMA argues that, in any event, the conditional authorization for Metal Refinery to commence the project pending the issuance of the EIA License was never directed to EPZA, but to the former. To this end, it is preposterous for EPZA to claim that it solely relied on the said approval to issue its license to Metal Refinery and had EPZA sought further information from NEMA, it would have been apparent that the latter's conditional authorization to Metal Refinery did not violate the law. NEMA adds that it was not inherently illegal for a project to commence without an EIA License as the law, though not expressly stated under Section 58 (8) and (9) of EMCA, contemplates scenarios where a project can actually commence and proceed without the issuance of an EIA License. Consequently, had the EPZA sought information from NEMA, it would have been informed that smelting of scrap lead acid batteries was a relatively novel industry in Kenya; which NEMA, in a bid to exercise due caution and in line with the precautionary principle, deemed it fit to monitor the project for a while before issuing the EIA License.

[73] As to whether EPZA was entitled to rely on the doctrine of presumption of regularity, citing the decision of ***Kibos Distillers Limited & 4 others vs. Benson Ambuti Adega & 3 others*** [2020] eKLR, it claimed that the doctrine of presumption of regularity is not available to EPZA since the law does not allow EPZA to delegate its duty to any other entity, and it was therefore a complete dereliction of EPZA to argue that it has no expertise in matters relating to the environment, and is therefore justified to rely on the communication from NEMA. Secondly, among the conditions EPZA communicated to NEMA as requirements was a certified copy of the EIA License.

[74] To the argument that EPZA mitigated the harm caused by not renewing Metal Refineries' Manufacturing License when it expired on 13th December 2007, NEMA submits that the same cannot stand since EPZA's claim that when it became aware that Metal Refinery failed to comply with environment and health requirements wrote to the latter, depicts that EPZA allowed Metal Refineries to operate without

an EPZ manufacturing license for seven years thereafter before it ceased operations. Subsequently, based on factual causation, otherwise known as *'but for test'* as applied in ***Francis Muchai Karera vs. Jane Wahu & Another*** [2009] eKLR NEMA submitted that, had EPZA not allowed Metal Refinery to operate for a year with the EIA license, when it had initially insisted on the same, Metal Refinery would not have caused the pollution complained of. But if EPZA had not allowed Metal Refinery to operate without the EPZ manufacturing license for seven years, the 2nd – 11th Appellants would not have suffered further serious injuries. Inevitably, EPZA, being the ultimate licensing authority, cannot rely on the doctrine of presumption of regularity, as the same was not available to it.

[75] In support of its cross appeal, NEMA affirms that it not only complied with the law but also did everything within its mandate to protect the 2nd – 11th appellants by taking all necessary steps to ensure that the now offending project was legally compliant. In compliance with Section 58 (8) and (9) of the EMCA, trial runs are allowed, which it contended are necessary to evaluate the effect of any novel industry, such as lead recycling. In the same vein, that this does not insinuate that the law relieved NEMA of its responsibilities to ensure that every project is implemented in compliance with the law. It reiterates its submission that the learned judges erred in not appreciating that a project may commence without an EIA license.

[76] NEMA further contends that it did not violate the 2nd – 11th appellants' constitutional rights to a clean and healthy environment and thus is not 30% liable. NEMA alleged that the learned Judges of Appeal misconstrued the principles of strict liability, polluter pays, and causation by finding that there exists a direct causal link between its act of approving Metal Refinery Limited's activities and the injuries suffered by the 2nd – 11th appellants. It urges that the superior court failed to appreciate that other players were involved in the whole process leading to the Metal Refineries' activities as a result of which the chain of causation was broken and that it follows that, NEMA's actions could not have been said to be the direct or proximate cause of injuries suffered by the 2nd – 11th appellants.

[77] On whether the court erred in remitting the issue of compensation for rehearing, NEMA submits that such an order would amount to violation of its rights to fair hearing, since the 2nd – 11th appellants pleaded and claimed general damages for health, loss of life and cleaning up, compensation in the nature of special damages needed to be specifically pleaded and proved. Further, that an award of damages for violation of constitutional rights, albeit a constitutional law remedy is based on common law (tort) principles, and since parties are bound by its pleadings, the 2nd -11th appellants claim ought to have been dismissed in its entirety instead of remitting the matter to the ELC. Taking note that the alleged victims are also unknown, it argues that in the unlikely event that this Court allows the instant Petition it would be impossible to identify the alleged victims and such an action would only serve to open doors for opportunists.

[78] NEMA finally affirms that it did not just comply with the law but did everything within its mandate to protect the 2nd – 11th appellants by taking all the necessary steps to ensure that the lead battery project was legally compliant.

(i) 2nd, 3rd and 4th Respondents' Case

[79] The Attorney General, CS, Ministry of Environment Water and Natural Resources and the CS, Ministry of Health filed joint submissions and reflected on two issues; whether the Court of Appeal erred in referring the matter for retrial on assessment of damages including additional evidence limited to that issue only and whether EPZA's liability should be borne by NEMA.

[80] On the first issue, they submit that by the Court of Appeal ordering the taking of additional evidence and a retrial, the order would serve to open a pandora's box and a litany of claims that were not placed before the court during the trial process and on the second issue, they restate that the germane issue in the consolidated appeals is who is responsible for the alleged lead poisoning for the residents of Uhuru-Owino. They also rehash the facts to point out that NEMA issued a license for the conduct of activities by Metal Refinery, which activity was authorized by EPZA. The license did not permit Metal Refinery to conduct illegal and environmental disastrous activities and therefore portend that the negligence and

inactions of Metal Refinery should not be blamed on NEMA, EPZA, the Ministry of Health and the Ministry of Environment, Water and Natural Resources.

(i) 5th Respondent's (County Government of Mombasa) Case

[81] The 5th Respondent responded to the consolidated appeal, by way of submissions dated 21st February 20204 and filed on 27th February 2024. It submitted on two issues: on whether the matter should be remitted for retrial on an award of damages, the 5th respondent argues that given that the 2nd – 11th appellants did not demonstrate or provide a database to indicate how the award of damages claimed if granted would be apportioned amongst the residents of Owino-Uhuru village who were affected, it is their position that an award of damages would amount to personal gain for the 2nd -11th appellants which would be unfair on other affected persons.

[82] On that account, it is their submission that an award of damages would only succeed if the 2nd -11th appellants had proved their claim by presenting the number of residents alleged to have been affected and to what extent, which they did not do. Additionally, that the affected persons would have to strictly prove that they were residents of Owino-Uhuru Village during the period which the metal refinery was operational and it is their view that the compensation award of Kshs. 1.3 Billion was not justified. The 5th respondent equally urges that remitting the matter for retrial and introducing new evidence goes against the principles of *de novo* trials as it would allow the 2nd – 11th appellants to introduce new evidence and to fill in the gaps. Over and above that, the ELC Court being *functus officio,* lacks the requisite jurisdiction to rehear the matter and or change its decision.

[83] As to whether the 1st appellant was liable for issuing a license to the 6th Respondent, the 5th respondent claims that the 1st appellant acted in violation of Article 69 of the Constitution as well as Section 23 of the EPZ Act when it proceeded to issue a license to the 6th respondent without the required EIA License. Consequently, it urges that the 1st appellant should be held liable for the injuries suffered by residents of Owino-Uhuru Village.

F. ANALYSIS AND DETERMINATION

[84] It is imperative for this Court to first point out that the undisputed facts in the appeal before us is that the factory in question was operated by Metal Refinery on land owned by Penguin Paper and Book Company Limited. Secondly, the parties concede that there was proof of violation of the 2nd to 11th appellants' right to clean and healthy environment. The issues raised in the consolidated appeals before us therefore largely turn on the legality and propriety of the findings of the Court of Appeal on the liability to be borne by NEMA, EPZA and other state agencies for the adverse effects from the operations of the said factory and the basis for the quantum of the award of damages and compensation.

[85] None of the parties have disputed that this Court lacks jurisdiction to entertain the consolidated appeal. The appeal is brought under Article 163 (4) (a) of the Constitution. We have reflected on our jurisdiction and found that the suit here originated from the ELC court and proceeded to the Court of Appeal as a constitutional issue raising issues of constitutional interpretation and application. In line with our decision ***Lawrence Nduttu & 6000 Others vs. Kenya Breweries Ltd & Anor*** S. C. Petition No.3 of 2012 [2012] eKLR, we find that this Court has jurisdiction to entertain the appeal before us. Having considered the respective parties' pleadings and submissions in the consolidated petition, this Court is of the considered view that the issues arising for determination are;

a. *Whether the Court of Appeal misinterpreted and misapplied the provisions of Article 69 of the Constitution as read with Article 70 (2) of the Constitution.*
b. *Whether the Court of Appeal erred in its assessment of liability.*
c. *Whether the Court of Appeal erred in its interpretation of Article 23 of the Constitution specifically the available remedies once a Court has determined that there were violations of rights.*
d. *Whether the Court of Appeal erred in reversing the ELC Court's award on damages.*
e. *Whether the Court of Appeal erred in remitting the matter back to the ELC for re-assessment of the award of damages.*

f. Whether the appellants are entitled to the reliefs sought.

g. Who shall bear the costs of the Appeal?

a. Whether the Court of Appeal misinterpreted and misapplied the provisions of Article 42, 69 and 70(2) of the Constitution

[86] EPZA's submission in this respect is that the superior courts erroneously and retrospectively applied the provisions of the Constitution for actions which took place prior to promulgation of the Constitution. That the actions complained of are also the subject of legislation since they took place in 2007 before enactment of the Constitution 2010 and that, under both the former and current constitutional architecture, it is the 1st, 2nd and 3rd respondents who are obligated to ensure sustainable management and conservation of the environment.

[87] The 2nd- 11th appellants in a rejoinder submitted that although the Pre-2010 Constitution does not capture aspects of environmental protections and management this does not mean there was no regard to it and in ***Peter K. Waweru vs. Republic, Nairobi,*** HC Misc. Application No. 118 of 2004 the court interpreted the right to life in Section 71 of the retired Constitution to include a right to a clean and healthy environment. Subsequently, where there is a right, there must be a remedy for any violation, which rights are now clearly defined in Articles 42 and 70 of the Constitution. We understand EPZA's argument to be that the issues in dispute ought to be anchored in the previous Constitution and the legislation in existence at that time since the alleged violations took place in the year 2007.

[88] We have considered the history pertinent to the environmental degradation in Owino-Uhuru Village and note that the same did not commence and end in the year 2007 because the discharge of the affluent which posed a significant risk to those who came into contact with it continued until the eventual close down of the factory in the year 2014. This fact is well captured in the report of *The Task Force on Decommissioning Strategy for Metal Refinery EPZ Ltd* which was conducted in the year 2015 and at that time the tests still showed evidence of lead exposure at the factory and amongst residents of Owino- Uhuru village. The suit before the

ELC was commenced by way of constitutional petition dated 20th February 2016 under the current Constitution as the violations had continued beyond 2010.

[89] In **Clerk & Lindsel on Torts 16th Edition, paragraph 23 - 01,** it is stated that '*every continuance of a trespass is a fresh trespass of which a new cause of action arises from day to day as long as the trespass continues"*. The infringement in this case was not static but a continuing violation. Being a continuous act the same cannot be the subject of mathematical computation of time. The provisions of the current Constitution were therefore applicable to the circumstance of this case as the said principle in tort finds favour in allegations of constitutional violations.

[90] As regards whether in the constitutional architecture it is only the 1st, 2nd and 3rd respondents who are obligated to ensure sustainable management and conservation of the environment, the preamble of the Constitution 2010 acknowledges the need to be respectful to the environment which is the people's heritage, and also expresses the determination to sustain it for the benefit of future generations. Article 42 of the Constitution further provides that every person has the right to clean and healthy environment. This includes the right to have the environment protected for the benefit of future generations. It is noteworthy that this right has both individual and collective dimensions. The individual dimension is the right of any victim or potential victim of any environmentally damaging activity to obtain reparation for harm suffered, while the collective dimension imposes a duty on individuals and states to cooperate to resolve environmental problems.

[91] *The Final report of the Constitution of Kenya Review Commission (CKRC)* at pages 267 and 268 made various recommendations in relation to the environment citing that it is the duty of the State to prevent pollution and its effects. The report also called for the application of the precautionary principle, environmental impact assessment and environmental audits. The CKRC recommendations have been adopted in Article 69 of the Constitution and when implementing the right to clean and healthy environment, the primary responsibility lies with the Government to adopt measures that will ensure

effective environmental conservation and management. Article 69 of the Constitution imposes on the state the obligation to;

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

(b) work to achieve and maintain a tree cover of at least ten per cent of the land area of Kenya;

(c) protect and enhance intellectual property in, and indigenous knowledge of, biodiversity and the genetic resources of the communities;

(d) encourage public participation in the management, protection and conservation of the environment;

(e) protect genetic resources and biological diversity;

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

(g) eliminate processes and activities that are likely to endanger the environment; and

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

[92] On the other hand, Article 69 (2) provides that every person has a duty to cooperate with state organs and other persons to protect and conserve the environment and ensure ecologically sustainable development and use of natural resources. Article 70 (1) provides mechanism to redress any violation of the right to clean and healthy environment in the following terms:

> ***"(1) If a person alleges that a right to a clean and healthy environment recognised and protected under Article 42 has been, is being or is likely to be, denied, violated, infringed or threatened, the person may apply to a court for redress in addition to any other legal remedies that are available in respect to the same matter".***

[93] The provisions of Article 69 places the obligation in respect of the environment to "the State" defined in Article 260 of the Constitution to mean *the collectivity of offices, organs and other entities comprising the Government of the Republic under the Constitution*. Article 69 (2) further elaborates this point by mandating every person to cooperate with "all state organs". The obligation to ensure respect of the environment is therefore not a preserve of the 1st, 2nd and 3rd respondent as submitted but an obligation to all State organs.

[94] In that context, EPZA is a State Corporation under the Ministry of Investments, Trade and Industry, established in 1990 by the EPZ Act Cap. 517, Laws of Kenya. EPZA's mandate is to promote and facilitate export-oriented investments and to develop an enabling environment for such investments. Section 19 of the EPZ Act grants EPZA the mandate to issue a licence to any person to carry on business as an export processing zone developer, or an export processing zone operator or an export processing zone enterprise.

[95] Section 23 (c) of the EPZ Act further provides that a license for the establishment of export processing zone enterprise shall be granted if the application is found to meet the objectives of the Act and if the proposed business enterprise -

> ***"(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."***

[96] The Constitution and the law therefore directly imposes an obligation on all State organs to ensure the protection of the environment. Section 23 (c) of the EPZ Act imposes a specific and clear obligation to EPZA in ensuring there is protection to the environment. We must for these reasons dismiss EPZA's argument that it is only the 1st, 2nd and 3rd Respondents who are obligated to ensure sustainable management and conservation of the environment.

b. Whether the Court of Appeal erred in its assessment of liability

[97] The 1st appellant and the respondent's submission on liability is a vicious blame game, each seeking not to attach liability to itself either by omission and

commission and be culpable to the environmental degradation and the violations suffered by the 2nd to 11th appellants. This back-and-forth between parties is common in complex environmental or liability cases where multiple parties may be involved in the causation or exacerbation of harm. The court in such cases needs to assess the roles each party played, whether through direct actions (commission) or through failing to act when required (omission), and ultimately determine who is responsible for the degradation and the injuries caused.

[98] The arguments by the 1st appellant and the respondents revolve around the various principles of sustainable development some of which are embodied in Section 3 (5) of EMCA. They also urge the Court to consider their respective mitigation of loss.

[99] Principle 1 of the 1992 ***Rio Declaration on the Environment and Development*** states that human beings are at the centre of concerns for sustainable development. They are entitled to a healthy and productive life in harmony with nature and one of the national values and principles of governance as provided under Article 10 of the Constitution is sustainable development. The principles of sustainable development are also captured in Section 69 (2) of EMCA to include: the principle of sustainable development of policies, plans and processes for the management of the environment; the principle of international cooperation in the management of the environmental resources shared by two or more states; the polluter pays principle; and the pre-cautionary principle.

[100] Further, the Constitutional provision on the enforcement of the right to clean and healthy environment is largely based on *the polluter pays principle* where the provisions give extensive power to the court to compel the government or any public agency to take restorative measures and to provide compensation for any victim of pollution and to compensate the costs borne by the victims for the lost use of natural resources as a result of an act of pollution. In addition to the *polluter pays principle* there is also *the precautionary principle* which directly impacts on environmental liability. *The precautionary principle* marks a shift from post-damage control (civil liability as a curative tool) to the level of pre-

damage control (anticipatory measures of risks). Principle 15 of the ***Rio Declaration on Environment and Development*** states in that context;

> "***[i] In order to protect the environment, the precautionary approach shall be widely applied by States according to their capabilities. Where there are threats of serious or irreversible damage, lack of full scientific certainty shall not be used as a reason for postponing cost-effective measures to prevent environmental degradation*".**

(See also **Kariuki Muigua,** ***Attaining Environmental Justice for Posterity*** **Vol 2 Glen Wood Publishers Limited** Pg. 26-47).

[101] Section 3 (5) of the EMCA embodies these principles to guide the courts at arriving at a determination in an application for redress for a contravention to a clean and healthy environment. The same have been described under Section 2 of the Act as follows;

> ***"polluter-pays principle" means that the cost of cleaning up any element of the environment damaged by pollution, compensating victims of pollution, cost of beneficial uses lost as a result of an act of pollution and other costs that are connected with or incidental to the foregoing, is to be paid or borne by the person convicted of pollution under this Act or any other applicable law;***
>
> ***"precautionary principle" is the principle that where there are threats of damage to the environment, whether serious or irreversible, lack of full scientific certainty shall not be used as a reason for postponing cost-effective measures to prevent environmental degradation;***

[102] The *polluter pays* principle therefore inclines that the person who will be targeted to carry out clean-up of contaminated land is the polluter, regardless of whether the contamination was foreseeable when the pollution event occurred or whether the polluter was at fault. The test of *'causing'* involves some active

operation or chain of operations to which the presence or continued presence of the pollutants is attributable. Such involvement may take the form of a failure or omission to act in certain circumstances. The test of *'knowingly permitting'* would also require both knowledge that the substances in question were in, on or under the land and the possession of the power to prevent such substances being there. There is also the presumption that if a person has caused or knowingly permitted the presence of a contaminated substance on one piece of land, he will also be regarded as having caused or knowingly permitted that substance to be present on any land to which it appears to have migrated.

(See also **Freshfields, *Tolley Environmental Law,* Tolley Publishing Ltd Issue 3 April 1998**)

[103] Courts also rely on common law principles when determining the issue of strict liability in environmental matters. The old and often quoted case of ***Ryland vs Fletcher*** (1868) LR 3 HL 330 imposes strict liability on the owner of land for damage caused by the escape of substances to his or her neighbours land. From this case the pre-requisites of strict liability are that the defendant must have made a non- natural or special use of his land; that the defendant brought onto his land something that was likely to do mischief if it escaped; the substance in question escaped; and the plaintiff's property was damaged because of the escape.

[104] Furthermore, in ***David M. Ndetei vs. Orbit Chemical Industries Limited*** [2014] KEHC 4354 (KLR), the court in its analysis of ***Ryland vs. Fletcher*** took the view that a non-natural use of land relates to the nature of the activity carried out by the defendant on his land and it must be one that is special, exceptional or out of the ordinary, hazardous or inherently dangerous. It should also be one that carries high risk of great harm which risk cannot be ameliorated by the defendant despite exercise of reasonable care. The time and place where the activity is carried out is, in addition, a factor to consider so that a factory set up in an otherwise industrial area would not be deemed as non-natural use of land. In the case of ***M. C. Mehta vs. Union of India*** [1987] 1 SCC 395, the court stated that the test upon which such liability is to be imposed is based on the nature of the activity. Consequently, where an activity is inherently dangerous or hazardous,

then absolute liability for the resulting damage attaches on the person engaged in the activity.

[105] As relates to state obligations the findings and recommendations of the African Commission on Social and Economic Rights in its decision in ***Action Centre (SERAC) & Another vs. Nigeria*** Communication 155/96 (*Otherwise known as the Ogoni Case or Serac case*) brought out pertinent issues on Article 21 (disposal of natural resources) and Article 24 (right to environment) of the African Charter. The African Commission on Human and Peoples Rights found that, when a state allows private persons or groups to act freely and with impunity to the detriment of the rights recognized in the Charter, it would be in violation of its obligation to protect the human rights of its citizens. In relation to Article 21 of the Charter the Commission stated;

> "***Governments have a duty to protect their citizens, not only through appropriate legislation and effective enforcement, but also by protecting them from damaging acts that may be perpetrated by private parties. This duty calls for positive action on the part of governments in fulfilling their obligations under human rights instruments…"***

[106] In the present appeal, EPZA relies on *the doctrine of presumption of regularity*, and urges this Court to find that it was not for it to investigate whether there were procedural lapses on the part of the 1st and 3rd respondents or that the proposed activities were harmful to the environment and human health, as the latter are the experts in matters relating to the environment. The ELC and the Court of Appeal on their part faulted EPZA for issuance of a license to Metal Refinery without prior submission of an EIA license, the superior courts also found that the letters were in respect to distinct parcels of land. The ELC Court also noted that in accordance with Principle 2 of the *Stockholm declaration 1973,* export processing zones have neighbourhoods which ought to be protected for intra-inter-generational equity.

[107] In general, *the presumption of regularity* presupposes that no official or person acting under an oath of office will do anything contrary to their official duty, or omit anything which their official duty requires to be done. The doctrine provides a degree of deference to the actions or decisions made by government officials or institutions. It is grounded in the assumption that these officials act within the bounds of the law, follow established procedures, and operate in good faith when performing their duties. This presumption also relieves courts or reviewing bodies from conducting a deep, thorough review of every action or decision unless there is specific evidence to suggest wrongdoing, procedural lapses, or irrational behavior. (See ***The Presumption of Regularity In Judicial Review Of The Executive Branch*** **Harvard Law Review pg. 2432**). The idea is that, in the absence of clear evidence to the contrary, administrative actions should be presumed to be regular, lawful, and reasonable.

[108] However, this concept must be balanced with other important values like accountability, due process, and the rule of law. Such a balance ensures that decisions and actions can still be challenged if there are indications of arbitrariness, unlawfulness, or significant procedural flaws, helping protect individuals and entities from potential abuse of power or wrongful outcomes. In practice, *the presumption of regularity* requires a showing of some evidence or claim to overcome, after which a more probing review can take place.

[109] In the above context, the Court of Appeal in ***Chief Land Registrar and 4 others vs Nathan Tirop Koech & 4 others*** (2018) eKLR, stated that there is a presumption that all acts done by government officers are done in official capacity and that all procedures have been duly followed. And in ***Kibos Distillers Limited & 4 others v Benson Ambuti Adega & 3 others*** [2020] eKLR the Court of Appeal also held that the evidence required to rebut the presumption of regularity must be cogent, clear and uncontroverted and that the presumption of regularity cannot be rebutted through conflicting interpretation of a statutory or regulatory provision. The Court further held that liability for any action cannot be founded on conflicting interpretation of statute.

[110] In this case, EPZA under Section 23 of the EPZ Act was under a duty to ensure that the business entities it licensed under the Act *"shall not have a deleterious impact on the environment"*. The decision in ***Kibos*** (supra) is therefore distinguishable from this case as in ***Kibos*** the court held that the starting point is that NEMA acted lawfully and procedurally in issuing the EIA Licenses. That is not the case in this appeal because prior to issuing Metal Refinery with a license and by a letter dated 27th June 2006 responding to Metal Refinery, EPZA required it to submit a certified copy of an EIA license from NEMA. It is clear to us therefore that EPZA was aware that an EIA license was necessary prior to its issuance of a license to Metal Refinery and it subsequently relied on a letter from NEMA to issue Metal Refinery a license yet the letter referred to L.R. No. MN/III/3697 Kilifi District/County, a totally different parcel of land because Metal Refinery was stationed in Changamwe, Mombasa District/County.

[111] In any event the presumption of regularity does not oust a State organ's responsibility to probe the administrative duties of another institution where in its opinion it finds that such institution has not complied with due process. We are therefore in agreement with the Court of Appeal's finding that EPZA was not only in direct violation of Article 69 of the Constitution and Section 23 of the EPZ Act, but also assumed the legal risk and responsibility for any shortcoming by NEMA in its process of issuance of the EIA license to Metal Refineries.

[112] Further to the above finding, we note that NEMA's submissions on liability are largely to the effect that Section 58 of the EMCA contemplates scenarios where a project can actually commence and proceed without issuance of an EIA License. That in a bid to exercise due caution and in line with *the precautionary principle* it deemed it fit to monitor the project for a while before issuing an EIA licence. They also submit that the learned judges of the superior courts below erred in finding that there was a direct link between NEMA's act of approving Metal Refinery's activities and the injuries suffered by the 2nd -11th appellants.

[113] The Court of Appeal in enhancing NEMA's apportionment of liability held that NEMA bears greater responsibility because once evidence of the adverse and hazardous effects on the operations of the project became apparent, given the

nature of the wide ranging effects on the ecosystem, human health, water, and air quality, it ought to have applied a wide range of enforcement measures at its disposal, including the cancellation of the EIA License, restoration orders, and prosecution of the perpetrators of the pollution.

[114] Section 7 of the EMCA establishes NEMA while Section 9 provides for the objects and functions of NEMA to include amongst others;

> ***"(k) initiate and evolve procedures and safeguards for the prevention of accidents which may cause environmental degradation and evolve remedial measures where accidents occur;***
>
> ***(l) monitor and assess activities, including activities being carried out by relevant lead agencies, in order to ensure that the environment is not degraded by such activities, environmental management objectives are adhered to and adequate early warning on impending environmental emergencies is given."***

[115] Section 19 on the other hand provides the liability of the Authority for damages and states;

> ***"The provisions of section 18 shall not relieve the Authority of the liability to pay compensation or damages to any person for any injury to him, his property or any of his interests caused by the exercise of the powers conferred on the Authority by this Act or by any other written law or by the failure, whether wholly or partially, or any works"***.

[116] Section 25 also establishes the National Environment Restoration Fund whose objects under Section 25 (4) include the fact that it shall be a supplementary insurance for the mitigation of environmental degradation where the perpetrator is not identifiable or where exceptional circumstances require NEMA to intervene towards the control or mitigation of environmental degradation.

[117] Part V of the Act provides for the protection and conservation of the environment while Part VI provides for an integrated Environmental Impact Assessment. Section 58 (2) specifically provides;

> ***"The proponent of any project specified in the Second Schedule shall undertake a full environmental impact assessment study and submit an environmental impact assessment study report to the Authority prior to being issued with any licence by the Authority:***
>
> ***Provided that the Authority may direct that the proponent forego the submission of the environmental impact assessment study report in certain cases".***

[118] The process that follows after the conduct of an Environmental Impact Assessment is the publication of the EIA in at least two newspapers of nationwide circulation; receipt of comments on the EIA report by lead agencies; if necessary receipt of further advise from comments received through a technical committee set up by the Authority and the conduct of further evaluation of environmental impact assessment study. It is after these processes are done and the Authority is satisfied as to the adequacy of an Environmental Impact Assessment study, evaluation or review report, that it may issue an EIA license on such terms and conditions as may be appropriate and necessary to facilitate sustainable development and sound environmental management.

[119] Section 64 provides that the Authority may conduct a further Environmental Impact Assessment even after issuance of the license while Section 69 mandates the Authority to conduct environmental monitoring with a view to assessing any possible changes in the environment and their possible impacts; or the operation of any industry, project or activity with a view of determining its immediate and long-term effects on the environment.

[120] NEMA equally has other roles including the issuance of licenses for effluent and emissions discharge and the issuance of environmental restoration and conservation orders in any matters relating to the management of the

environment. Rule 14 of the **Environmental Management and Co-Ordination (Waste Management) Regulations** provides the general obligation to mitigate pollution and mandates every trade or industrial undertaking to install anti- pollution equipment for treatment of industrial waste. The anti-pollution equipment installed is determined by the best practicable means, environmentally sound practice or other guidelines NEMA may determine. In relation to treatment of Industrial waste, Rule 15 & 19 prohibit discharge of waste unless the waste has been treated.

[121] The Court of Appeal in apportioning liability to NEMA held that it approved the project at its commencement before the full impact of the project was considered and evaluated. It specifically found and held in paragraph 84 that;

> ***"NEMA did not provide evidence that the EIA Study undertaken by Metal Refinery (EPZ) Limited dated 13th March 2007 that was produced in evidence was subjected to technical evaluation in light of the parameters that require to be satisfied in terms of impact as set out in the Second schedule to the Environmental (Impact Assessment and Audit) Regulations, 2003 and confirmation of the relevant standards that required to be met by Metal Refinery EPZ Ltd, including on hazardous waste. The casual link between the approval of the operations of Metal Refinery EPZ Limited before completion of the EIA Process and the damage suffered as a result of effects of the projects is therefore evident, since appropriate controls could have been put in place by NEMA ex ante were the hazardous impact of the project properly identified, including an absolute prohibition on the project. Put differently, the project would never have seen the light of day and hence no damage would have been resulted...(sic)"***

[122] Section 1 of the Second Schedule of EMCA sets out general projects that require EIA to include any activity out of character with its surrounding, any structure of a scale not in keeping with its surrounding and major changes in land

use. The Schedule provides a more specific and comprehensive list of projects such as urban development, transportation, dams and rivers, mining, forestry and agriculture. The provisions of Section 58 do not therefore provide the Authority the power to conduct *'test runs'* as suggested by NEMA in its submissions. It is also clear to us that due procedure was not conducted by NEMA prior to issuance of the license to Metal Refinery. There are inconsistencies as to where the actual location of the factory was to be located, despite there being clear provisions in Section 59 of the Act that the publication of the Environmental Impact Assessment should contain the place where the project is to be carried out and where the environmental impact assessment study, evaluation or review report may be inspected. There is also no indication that the EIA was gazetted prior to its approval or comments were received concerning the same. NEMA issued a cessation Order on 23rd April 2007 only to later approve and issue the EIA license on 16th May 2007 without confirming that the terms set out in the cessation order had been complied with. It thereafter reverted and urged Metal Refinery to conduct *'test runs'* and even after issuance of the license and noting that Metal Refinery was discharging effluents harmful to the environment, it only issued improvement orders and this continued until the eventual closed down of Metal Refinery in 2012. Again, NEMA proceeded to transfer the EIA License to Max Industries Limited on 23rd April 2013 without addressing the environmental concerns already apparent.

[123] We have already outlined the responsibility that state organs have under Article 69 of the Constitution in relation to protection of the environment. NEMA in this regard has a myriad of duties under EMCA to safeguard the environment. In its enforcement capabilities under Section 117 of that Act, NEMA could order the immediate closure of any manufacturing plant or other establishment or undertaking which pollutes or is likely to pollute the environment contrary to the provisions of the Act and require the owner or operator of such establishment or undertaking to implement any remedial measures that an environmental inspector may direct; under Sections 108 -116, NEMA can order restoration and conservation of the environment. Part XIII of EMCA also outlines environmental

offences, Section 141 and 142 makes it an offence for failing to manage any hazardous waste and materials and polluting the environment. Despite this huge mandate, it is discernable that NEMA was negligent in the conduct of its duties in the present case or as the ELC held, NEMA's actions assisted Metal Refinery in breaching the law instead of holding them to account.

[124] As to whether there was a causal link between the actions of NEMA and the damage suffered by the 2nd -11th appellants, there is no doubt that NEMA's actions and inactions provided the casual link between Metal Refinery's negligence and the injury occasioned to the 2nd – 11th appellants. NEMA had on numerous occasions the opportunity to avert the discharges from the factory but it clearly failed on its mandate and this led to the unwarranted suffering occasioned to the residents of Owino-Uhuru Village. We therefore find that the Court of Appeal was right in holding that NEMA bore a greater responsibility and that NEMA and EPZA were the main actors in so far as the cause of deleterious activities were concerned with the liability of the other actors being either passive or reactive in relation to the pollution.

[125] We further note that the 2nd, 3rd and 4th respondents have advanced the argument that the negligence and inactions of Metal Refinery should not be placed on NEMA, EPZA, the Ministry of Health and the Ministry of Environment, Water and Natural Resources. We have in that regard already highlighted that the State and its organs and agencies can be responsible even to actions of private persons, and that the provisions of Articles 42, 69 and 70 of the Constitution bears both an individual and collective dimension. We also note that the superior courts imposed individual responsibility on each of the respondents and specifically on the 3rd respondent because it issued a mining license to Metal Refinery on 31st December 2006 whereas Metal Refinery had not obtained an EIA license. Under Section 103 of the Mining Act, the Cabinet Secretary is to issue a mining license where *inter alia*;

> "***the applicant has obtained an approved environmental impact assessment and environmental management plan in respect of the applicant's proposed mining operations"***.

To the 4th respondent, the superior Courts held that it had an obligation under Sections 115 – 120 of the Public Health Act to have Metal Refinery remove any nuisance but it failed to do the same.

[126] As relates to mitigation of loss, mitigation measures are means to prevent, reduce or control adverse environmental effects of a project, and include restitution for any damage to the environment caused by those effects through replacement, restoration, compensation or any other means. **Freshfields, *Tolleys Environmental Law* Tolley Publishing Company Ltd Issue 3 April 1998** states that the exercise of reasonable care, or even the highest standard of care to try to avoid the damage is not necessarily a defence. For example, the employment of diligent, well- qualified management and the installation of expensive state- of- the art effluent treatment systems will avail a company little if its routine discharges cause foreseeable discharges to a neighbouring property.

[127] EPZA on the above issue now submits that the appellate court failed to consider its actions in mitigation of the adverse effects on the environment by it failing to renew the license of Metal Refinery. EPZA did not however renew the license for one year i.e. 2006 – 2007 while Metal Refinery continued to operate within the EPZ zone for seven (7) years; and there is no evidence on record that EPZA tried to close down Metal Refinery due to lack of a license. We note that during the deliberations of the Public Complaints Committee under EMCA in ***PCC vs Metal Refinery Ltd*** PCC Complaint No. 22 of 2009, a Mr. Itegi from EPZA stated that Metal Refinery has a valid license expiring December 2009; this inconsistency from EPZA does not aid its defence on mitigation. EPZA clearly did not thus exercise reasonable care and its action of failing to renew a license for one year did not mitigate the loss occasioned. The temporary closures by NEMA and the actions of the 2nd, 3rd and 4th respondents in treating the residents of Owino-Uhuru Village did not equally avail much in mitigation. We have to restate that the state's obligation is first precautionary before relying on the *polluter pays principle* which is not the case here.

[128] Upon arriving at the above findings we find no reason to disturb the Court of Appeal's finding on liability.

c. Whether the Court of Appeal erred in its interpretation of Article 23 of the Constitution specifically the available remedies once a Court has determined that there was a violation of rights

[129] Article 23 of the Constitution provides the authority of courts to uphold and enforce the Bill of Rights. Article 23 (3) provides that in any proceedings brought under Article 22, a court may grant appropriate relief, including-

(a) Declaration of rights;
(b) An injunction;
(c) A conservatory order;
(d) A declaration of invalidity of any law that denies, violates, infringes, or threatens a right or fundamental freedom in the Bill of Rights and is not justified under Article 24.
(e) An order of compensation; and
(f) An order of judicial review.

[130] The 2nd – 11th appellants submitted that constitutional damages are separate and distinct from remedies available under private law. As such there is no obligation to prove actual loss and that the courts' approach is ordinarily governed by comparative awards in cases of a similar nature. EPZA, NEMA and the 2nd, 3rd and 4th respondents on the other hand take the view that since the 2nd to 11th appellants pleaded and claimed general damages for heath, loss of life and cleaning up, those are in the nature of special damages which need to be specifically pleaded and proved; that an award of damages for violation of Constitutional rights, albeit a Constitutional remedy is based on common law (tort) principles which the 2-11th appellants have not adhered to.

[131] The enforcement of environmental rights is anchored under Article 70 of the Constitution. Article 70 (1) grants any person the right to seek redress under Article 42 in case of an infringement of his/her right to a clean and healthy environment

as recognized and protected under Article 42. Article 70 (2) provides that the court may make any order, or give any directions, it considers appropriate:

(a) To prevent, stop or discontinue any act or omission that is harmful to the environment;

(b) To compel any public officer to take measures to prevent or discontinue any act or omission that is harmful to the environment; or

(c) To provide compensation for any victim of a violation of the right to a clean and healthy environment.

[132] In exercising its mandate under Article 70 (2), Article 70 (3) guides the court when it provides as follows;

> ***"(3) For the purpose of this Article, an applicant <u>does not have to demonstrate that any person has incurred loss or suffered injury</u>". [Emphasis Added]***

[133] This Court has in various cases addressed itself to the apportionment of compensation as a remedy to constitutional violation. In ***Wamwere & 2 others v Attorney General*** S.C. Petition No. 34 & 35 of 2019 [2024] KECA 487 (KLR) , this court held that the crafting of remedies in human rights adjudication goes beyond the realm of compensation for loss as it is principally for vindicating rights. In that case, the Court further held that though the appellants did not lead any evidence of the loss they may have suffered due to the violation of their right and freedom from inhuman treatment, it was important for the court to vindicate and affirm the importance of the violated rights. In ***CMM (Suing as the next friend and on behalf of CWM) & 6 Others vs. The Standard Media Group & 4 Others,*** [2023] KESC 68 (KLR) this Court equally addressed itself to what a trial Court should do in its assessment of an award of compensation in constitutional rights violation claims when it held;

> *"...**All the trial court was expected to do in considering this prayer was to assess what, in the circumstances of the case would be the appropriate compensation, or what other relief***

would vindicate the appellants' contravened rights. Examples of factors the court would have taken account of include the fact that the violations related to children; that some of the children had to transfer from the school; some were ridiculed, and being minors they were bound to suffer distress, trauma, anguish, fear and lowered self-confidence. On the other hand, exculpatory factors to consider would be the fact that some of the respondents, upon learning of the complaints about their publications immediately pulled down the offending story.

[100] In the result, it was erroneous for the two courts below to ignore settled principles for the award of compensation in constitutional rights violation claims; namely, that once the burden of proving a violation was discharged, it was not necessary for the appellants to prove any damage or loss so as to be entitled to any of the reliefs contemplated in Article 23(3) …"

[134] In ***Musembi & 13 others vs. Moi Educational Centre Co. Ltd & 3 others*** S.C. Petition No. 2 of 2018 [2021] KESC 50 (KLR), this Court in overturning the decision of the Court of Appeal held that the questions and issues that a court has to consider in order to make an award of damages with regards to constitutional violation is manifestly different to what the Court would consider in say, tortious or civil liability claim. The Court distinguished the same as follows;

"…In the latter, the issues are clear cut and quantification of the appropriate award is in most instances, straight forward. The same, however, is not true of constitutional violation matters, such as the instant one. Quantification of damages in such matters does not present an explicit consideration of the issues; other issues such as public policy considerations also come into play. A Court obligated and mandated in evaluating the appropriate awards for compensation in constitutional violations does not have an easy task; there is no adequate

damage standard that has been developed in our jurisprudence that recognizes that an award for damages in constitutional violations is quite separate and distinct from other injuries. In this regard, the Court of Appeal was unclear of what other material that the Petitioners needed to present before the trial Court to establish that there was a violation of their constitutional rights by the Respondents, and that the Court therefore abused its discretionary powers in issuing the award of damages. In the event and following our reasoning in Martin Wanderi & 106 Others v Engineers Registration Board & 10 others, SC Petition No.19 of 2015 [2018] eKLR we must overturn the appellate Court's decision on this issue….."

[135] In ***The Matter of African Commission on Human And Peoples' Rights vs. Republic of Kenya*** Application No. 006/2012 Judgment (Reparations) 23 June 2022 (*the Ogiek case*) the African Court of Human and People's Rights in paragraphs 88 and 90 held;

"The Court confirms, therefore, that international law requires that the determination of compensation for moral damage should be done equitably taking into account the specific circumstances of each case. The nature of the violations and the suffering endured by the victims, the impact of the violations on the victim's way of life and length of time that the victims have had to endure the violations are among the factors that the Court considers in determining moral prejudice…….

While it is not possible to allocate a precise monetary value equivalent to the moral damage suffered by the Ogiek, nevertheless, the Court can award compensation that provides adequate reparation to the Ogiek. In determining reparations for moral prejudice, as earlier pointed out, the Court takes into consideration the reasonable exercise of judicial discretion and

bases its decision on the principles of equity taking into account the specific circumstances of each case....”

[136] From the above authorities, it is clear that there is a distinct difference between damages in tort and damages for constitutional violations. The parameters to be examined in both are different. In a tortious claim, the fundamental principle guiding the court's quantification of damages is to restore the injured party to the position they would have been in had the tort not occurred. The damages awarded are compensatory, aimed at covering financial losses, personal injury, and sometimes pain and suffering caused by the tort. The goal is to address the harm by providing monetary compensation that reflects the actual damage suffered.

[137] On the other hand, in constitutional claims, where fundamental rights have been violated, the court takes a broader approach to the assessment of damages. It considers various factors including;

a. the nature of the violation.
b. the length of time the alleged violation has taken.
c. impact on the victim and whether there is a direct harm.
d. the broader implications of the case, including the need to deter future violations, uphold the rule of law, and ensure that public authorities or private parties respect constitutional rights.

[138] These differences in the approach between tortious claims and constitutional claims reflect the varying nature of the harm and the different objectives of each type of claim. While tortious claims are primarily about compensating specific losses, constitutional claims often aim to address broader issues of justice and the protection of fundamental rights.

[139] The Court of Appeal in this case took the same trajectory as it took in ***Musembi (supra)*** where it had cited that there was no evidence placed before the trial Court to enable it assess damages, and further, that in the circumstances of the case, it was incumbent upon the 2nd to 11th appellants to place material before

the court on the basis of which the court would undertake an enquiry to ascertain the extent of loss so as to arrive at a reasonable amount in compensation.

[140] We have already outlined above that under the provisions of Article 70 (3) of the Constitution, an applicant does not have to demonstrate that he/she has incurred loss or suffered injury. From the decisions cited it is clear that even in the absence of clear evidence to quantify the damage caused by the breach, courts may still award remedies based on the principle that the violation of constitutional rights itself warrants redress. These remedies can include a declaratory relief, nominal damages, or compensatory damages assessed on a more general basis, particularly in cases where the nature of the harm is difficult to quantify precisely. This ensures that the breach does not go unaddressed, upholding the integrity of the constitutional rights framework and providing some measure of justice to the aggrieved party.

[141] On our part, we also find that there was sufficient evidence for the trial court to make a finding on compensation. The trial court had the opportunity to observe seven witnesses presented by the 2nd to 11th Appellants and observe their injuries; the Deputy Government Chemist (PW8) provided a report detailing samples taken from fifty (50) residents of Owino-Uhuru Village which indicated elevated blood levels; soil, dust and water tested indicated high levels of lead which were hazardous especially for children in play areas and for persons who spend time in enclosed places. The *Report of The Standing Committee on Health on The Owino-Uhuru Public Petition* recommended the immediate cleaning of the environment including detoxifying and restoring the soil; the replanting of destroyed trees; the immediate testing of all residents of Owino-Uhuru Village for lead exposure and the removal of hazardous waste slug the plant had disposed of over the years and continued to dispose of at Mwakirunge dumpsite. The *Task Force on Decommissioning Strategy for Metal Refinery EPZ Limited* found sufficient evidence of lead exposure at the factory and amongst the residents of Owino-Uhuru Village. It is also notable that the scientific findings on infringements of the rights of the residents of Owino-Uhuru Village is not disputed by NEMA, EPZA, Ministry of Health and Environment and the County Government of Mombasa.

[142] We therefore return that the Court of Appeal erred in its finding that there was no credible evidence for the ELC Court to rely on to assess compensation to the 2nd -11th appellants; the Court of Appeal therefore erred in its interpretation of Article 23 of the Constitution specifically the available remedies once a court has determined that there were violations of rights.

d. Whether the Court of Appeal erred in reversing the ELC's Court award on damages

[143] The first issue in this respect is linked to the representative capacity of the 11th appellant, and whether compensation as a remedy can be issued in a class action suit. In the petition before the ELC, the 11th appellant (*Centre for Justice, Governance and Environmental Action*) stated that it was suing on their own behalf and on behalf of all residents of Owino Uhuru Village in Mikindani, Changamwe Area Mombasa. The 1st appellant and the respondents continuously urge that damages cannot be payable in a representative suit. The ELC on its part held that the injuries suffered by the 2nd-11th appellants were both personal and environmental and that it would amount to duplicity of suit if each of the petitioners filed their separate petitions seeking similar orders. As for the residents of Owino-Uhuru Village which was the area affected, the trial court found nothing wrong in the suit having been brought for singular and communal purposes/capacities.

[144] The Court of Appeal took a different approach as it held that the amount of Kshs. 1.3 billion was compensation for the 9 appellants and persons claiming through them who were not identified. The appellate court also noted that the object of compensation is to remedy a wrong that a person has suffered, and the victim must of necessity be identified for purposes of causation and enforcement of the remedy.

[145] Article 22 of the Constitution provides that in addition to a person acting in their own interest, court proceedings 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 public interest; or

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

[146] The above provision has been replicated and adopted in **The Constitution of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules, 2013** and in Section 3 of the EMCA.

[147] The 11th appellant is a registered non- profit registered community-based organisation primarily engaged in advocating for the respect and recognition of human rights especially in the area of environmental rights and the assurance of a clean and sustainable environment for the communities. The representative nature of the 11th appellant was first argued at the ELC on 19th March 2018 prior to the hearing. The bone of contention raised by 5th Respondent was that the residents of Owino- Uhuru Village were not aware of the suit. In response, the 11th appellant submitted that the petition was brought under Rule 22 of the Constitution of Kenya Practice and Procedure Rules as a class action, as opposed to a representative suit. Its executive director, Phyllis Omondi was one of the persons affected by the activities of Metal Refinery, she testified as PW10. The 1st appellant and respondents did not challenge this line of submission, or file an appeal against its capacity to represent members of Owino-Uhuru village. From the record, it is clear that 11th appellant's director, Phyllis Omondi, acted in a representative capacity prior to institution of the suit- including appearing before the various committees set up to investigate the issues concerning Metal Refinery and aptly presenting the views of the residents. We take judicial notice that the dispute, the resultant suit herein and its contents were widely shared through print and electronic media, and therefore all and sundry may have presented their individual claim or sought to be joined in the suit.

[148] We also find persuasive the determination in ***Albert Ruturi, J. K. Wanywela & Kenya Bankers Association vs The Minister of Finance & The Attorney-General and Central Bank of Kenya*** Nairobi High Court

Misc. Civil Application No. 908 of 2001 where it was asserted on behalf of the respondents, that for them to have a *locus standi* in the matter, the injury they complained of must be specific to them and that if the injury was suffered by everybody else, then it gave them no *locus standi* nor did it give anybody else such *locus standi* since none of them suffered over and above everybody else. The court however found that the Kenya Association of Bankers was a registered Society constituted of 48 individual banks, each of which was interested in the matter which nevertheless was effectively represented by the Association. By filing the suit through the association, they had made the matter easier to handle instead of each bank bringing its own separate suit. The court also established that no single member in the said association had a different view or acted against the view of others who wished to file the suit. That none of them could therefore be termed a busy-body and that there could therefore be expected no flood of cases to be filed in the court since that one single case would decide the common interest of them. While the said decision was made under the retired Constitution, it applies even more firmly in a case like the present one filed under the Constitution 2010.

(See also ***Babu Omar & Others vs Edward Mwirania & Another***, in Mombasa HCCC No.1 of 1996 ***Khelef Khalifa El-Busaidy v Commissioner of Lands & 2 others*** [2002] eKLR,)

[149] The difference between a representative suit and a class action suit is that a representative suit is opt-in in nature; parties instituting a representative suit are required to give notice of the suit to all persons with the same interest. A class action relates to proceedings in which an individual or a group of people with a common complaint lodge a legal challenge in court against an organisation or an individual on behalf of a larger group or class of people. If successful, all consumers aggrieved stand to get compensated. Examples of class action suits filed in Kenyan Courts include; ***African Centre for Corrective and Preventive Action & 6 others v Lolldaiga Hills Limited & 2 others; Kenya Wildlife Service & another (Interested Parties)*** [2022] eKLR a case challenging the right to a clean and healthy environment for the local community of Loldaiga area, Laikipia County, ***Consumer Federation of Kenya (COFEK) Suing through its***

officials namely Stephen Mutoro, Ephraim Kanake and Henry Ochieng v Commercial Bank of Africa & 2 others [2018] eKLR which sought a review of the interest charged by Commercial Bank of Kenya and refunds of all such higher interest levied on various customers of the bank as facilitation fees in respect to their M-Shwari accounts.

[150] We find that the 11th appellant's petition was in line with the provisions of Article 22 (2) (b) of the Constitution and that the 11th appellant was well within its right to bring the suit on behalf of the residents of Owino-Uhuru Village.

[151] As to whether compensation as a remedy can be issued in a class action suit, the 11th appellant in the trial court envisaged in its submissions that compensation would be advertised so that anyone affected may come forth and join it. In ***Centre for Human Rights and Democracy & Another v the Judges and Magistrates Vetting Board & 2 Others*** [2012] eKLR, the court stated that where a legal injury is caused to a person or class of persons through a violation of a constitutional or legal right or threat, the High Court had power to grant appropriate reliefs so that the aggrieved party was not rendered hapless or helpless in the eyes of the wrong visited upon them.

[152] The court's ability to grant a remedy, including compensation, is however limited by certain principles, including the enforceability and appropriateness of the remedy, and it cannot also be "at large". The key issue in that regard is that the identity of the persons represented in the suit ought to be reasonably ascertainable otherwise who would then be compensated? Courts cannot issue vague or unenforceable orders, and the identities of the represented individuals are crucial in determining the scope and amount of compensation. Without clarity on who is represented, it would be difficult for the court to fashion an enforceable order. Thus, compensation in class action and representative suits hinges on defining the class or group represented. Once the group is clearly identified, the court can tailor the remedy to ensure that it is appropriate, specific, effective and enforceable for the affected parties.

[153] In the ***Ogiek case*** (supra) the case concerned the eviction notice issued by the Kenya Forest Service in October 2009, which required the Ogiek Community and other settlers of the Mau Forest to leave the area within 30 days. The claim was commenced by the Centre for Minority Rights Development (CEMIRIDE) joined by Minority Rights Group International both acting on behalf of the Ogiek Community. In the court's determination for reparations, the African Court on Human and Peoples Rights held as follows:

> ***"Given the communal nature of the violations, the Court finds it inappropriate to order that each member of the Ogiek community be paid compensation individually or that compensation be pegged to a sum due to each member of the Ogiek Community. The Court is reinforced in its preceding finding given not only the communal nature of the violations but also due to the practical challenges of making individual awards for a group numbering approximately 40 000 (forty thousand). 77.Taking all factors into consideration, the Court decides, in the exercise of its equitable jurisdiction, that the Respondent State must compensate the Ogiek with the sum of KES 57, 850, 000. (Fifty-seven million, eight hundred and fifty thousand Kenya Shillings) for the material prejudice suffered".***

[154] In this case, PW2, Alfred Ogola Mulo, a clan elder testified that the Owino-Uhuru village measured 13.5 acres has 220 houses with approximately 3000 residents therein. *The Report on Lead Exposure in Owino-Uhuru Settlement* dated April 2015 also placed the residents of Owino-Uhuru to be **approximately 3000** people. A report of Assessment of blood lead levels among children in Owino-Uhuru dated May 2015 and conducted by the Ministry of Health stated that Owino-Uhuru comprises of 450 households with a population of 1700 persons. The Parliamentary Committee report stated that the number of residents comprised an **approximate 8000** people. The 2nd – 11th appellant placed the number at **about 4000** people in their petition.

[155] Whereas the number of residents is not static in the various reports, we note that the reports were conducted between 2009 to 2015 and it would be expected that the number of residents would change over time. That fact notwithstanding, during the proceedings at the trial court, the 2-11th appellants presented evidence and proved to the satisfaction of that court that the village of Owino-Uhuru consisted of a **class of 3000 people** clustered in 450 households. It is also not in dispute that the environmental damage affected the whole of Owino-Uhuru village. Like in the ***Ogiek* case** therefore, we find that there was reasonable consistency in the number of people the 11th Appellant represented and the trial court was therefore not in error in assessing compensation based on the evidence presented to it and we now turn to the specific issues of damages and restoration of the environment orders.

i. The award of damages.

[156] The ELC issued a global award of Kshs. 1.3 billion for loss of life and personal injury. The Court of Appeal in dismissing the award of damages adverted that there was no evidence to support the amount of compensation issued. In ***Kemro Africa Limited t/a "Meru Express Service (1976)" & Another vs Lubia & Another (No. 2)*** [1985] eKLR it was held an appellate court can justifiably interfere with the quantum of damages awarded by the trial court only if it is satisfied that the trial court applied the wrong principles (such as by taking into account some irrelevant factor or leaving out some relevant one) or misapprehended the evidence and so arrived at a figure so inordinately high or low as to represent an entirely erroneous estimate.

[157] We have considered the amount issued by the ELC and the comparative authorities cited by the learned judge. In ***Mohammed Ali Baadi* (supra)** the sum of Kshs. 1,760,424,000 was issued to 4,700 fishermen whose rights were violated by the construction of the Lamu Port-South Sudan-Ethiopia-Transport Corridor project. The petitioners in the case had pleaded that the project would have far reaching consequences on the marine ecosystem of the Lamu region in terms of the destruction of the mangrove forests, discharge of industrial effluents into the environment, and adverse effects on the fish species and marine

life. In determining the amount of compensation, the court was guided by valuation reports presented in court which opined that fishing is the economic mainstay of 80% of the population in Lamu; the cumulative effects of the above activities would lead to disruption of the fisherfolk livelihoods and create tension and conflicts because of the reduced fish in the breeding areas. A valuation report dubbed *Fisheries Resource Valuation and Compensation: A Report for Consideration by Lamu Port and Coal Plant Power Generation Company in Lamu*." placed the valuation at Kshs. 1,760,424,000 which sum was adopted by the court.

[158] In ***Orbit Chemicals Industries v Professor David M. Ndetei*** [2021] eKLR**,** the case related to the discharge of waste water or chemicals used to manufacture detergents on the respondent's land. The Court of Appeal reduced the amount of compensation awarded to the respondent noting that in regard to restoration of the soil the same was awarded as special damages which ought to have been specifically pleaded and proven. To the sum of cost of restoration awarded by the High Court at Kshs. 267, 439,464.15, the Court of Appeal reduced the same to Kshs. 12,000,000.00. The Court maintained the award of general damages for loss of use of land at Kshs. 1,500,000 and general damages for nuisance at Kshs 500,000. We note that the court in this case relied on the determination of the High Court in ***Ndetei*** as the comparative.

[159] The Court of Appeal however distinguished the above authorities and found that in ***Mohammed Ali Baadi*** (supra) there was a valuation report that supported the amount of damages issued, which was not there in this case and also noted that the fishermen were identifiable.

[160] We are alive to the fact that at the trial court, the number of persons who were stated to have died as a result of lead exposure was captured at twenty (20). The *WHO Report; Exposure to lead A Major Public Health Concern* states that adverse effects of lead exposure may result in death, disability- adjusted life years, mild mental retardation and cardiovascular outcomes. Young children and pregnant mothers are also said to be the most susceptible to the adverse effects of lead. The most critical effect to young children is its subtle effects on intelligence

quotient (IQ); lead exposure has therefore been linked epidemiologically to attention deficit disorder and aggression. Exposure of pregnant women to high levels of lead can cause miscarriage, stillbirth, premature birth and low birth weight as well as malformations. Chronic lead exposure commonly causes haematological effects, such as anaemia or neurological disturbances, including headache, irritability, lethargy, convulsions, muscle weakness, ataxia, tremors and paralysis. The report also noted that long-term exposure to lead may contribute to development of cancer.

[161] In the present case, the Clinical officer in charge of Mikindani Health Centre in the Parliamentary Committee report stated that he had seen and treated about 300 patients from Owino-Uhuru and most of them presented complaints suggestive of upper respiratory tract infections, allergies and diarrhoea. The appellants also produced medical reports from Gama Hospital which presented complaints of heavy metal (lead) poisoning with chest, joint pains and poor libido, anaemia, goitre, recurrent pneumonia, chemical pneumonia, blurred vision, effects on dental, musculoskeletal and central nervous system, poor memory as well as low blood.

[162] With the above evidence in mind, we reiterate the provisions under Article 72 of the Constitution and the authorities cited earlier that a party seeking relief need not prove an injury and we also restate our finding above on constitutional reliefs. Nevertheless, we find that in this case the harm was in the soil, air, water and the same also affected the health of humans. There was a direct effect as shown from the medical reports. The effects to humans and the environment was therefore not a one-off event but as stated elsewhere in this judgment, a continuous violation that persisted for more than seven years when Metal Refinery was operating and subsequently thereafter. We have taken into consideration the responsibility of all the parties involved and the broader implications of the case, including the need to deter future violations.

[163] Upon consideration of the above, it is our finding that the ELC Court arrived at the correct amount in terms of compensation for personal injury and loss of life; the amount was neither excessive nor did the court consider an irrelevant factor.

The Court of Appeal on its part, however, arrived at the wrong conclusion in its finding that the persons were not identifiable. For avoidance of doubt we affirm the sum of Kshs. 1.3 billion issued by the trial court on account of general damages for loss of life and personal injury. The amount is not only for the benefit of the 2nd to 11th appellants but for the 450 households and residents of Owino Uhuru Village which encompasses an approximate 13.5 acres.

ii. Restoration of the environment orders

[164] In environmental protection, there are powers available to the various environmental agencies as part of their regulatory functions. These powers typically permit the regulators to clean-up pollution or to take unilateral preventive action to combat it, and then to recover their costs from the party responsible. Principle 16 of the ***Rio Declaration on Environment*** provides:

> ***"National authorities should endevour to promote the internalization of environmental costs and the use of economic instruments, taking into account the approach that the polluter should, in principle bear the cost of pollution, with due regard to the public interest and without distorting international trade and investment."***

[165] The principle is captured in Section 2 of EMCA in the following terms:

> ***"--- the cost of cleaning up any element of environment damaged by pollution, compensation victims of pollution, cost of beneficial uses lost as a result of an act of pollution and other costs connected with or incidental on the foregoing is to be borne by the person convicted of pollution under this Act or any other applicable law."***

[166] *The polluter pays principle,* we reiterate, means that the absolute liability for harm to the environment extends not only to compensate the victims of pollution but also the cost of restoring the environmental degradation. Remediation of the damaged environment is part of the process of "sustainable

Development" and as such the polluter is liable to pay the cost to the individual sufferers as well as the cost of reversing the damaged ecology.

[167] In reversing the order for restoration, the Court of Appeal held that the same was not specifically pleaded. The court added that restoration is a fairly technical exercise and that the eventual restoration and reclamation of the land and habitat restoration, which requires scientific methodologies and techniques were not demonstrated by the residents and the 11th appellant, to justify the order and award. Lastly, that the relevant legal and institutional framework for restoration of contaminated land resides with NEMA under EMCA and not any other body.

[168] In that context, we have captured the powers of NEMA under EMCA above and we wholly agree that the power (s) to restore contaminated land is first deposited to the polluter with NEMA as the regulator in line with Article 69 of the Constitution and Sections 92, 25 and 108 of EMCA. The ELC in its final orders had however directed the 1st appellant and the respondents to, within 4 months (120) days from the date of the judgement, to clean- up the soil, water and remove any waste deposited within the Owino-Uhuru Village by Metal Refinery and in default the sum of Kshs. 700,000,000/= becomes due and payable to the 11th appellant herein to coordinate the soil/environmental clean-up exercise.

[169] We have considered the petition of appeal filed by the 11th Appellant. The 2-11th appellants had clearly sought orders of mandamus for the implementation of the lead poisoning report by the 5th respondent and the Parliamentary Committee Report. The said reports set out step by step guidelines for restoration of the environment. We therefore find that the claim for restoration was specifically pleaded.

[170] The decision of the ELC also specifically refers to the application of Article 69 of the Constitution, the State's obligation, and what happens if the State ignores and/or fails to comply with the orders made by the court. It is upon the State to show compliance with the orders through filing of reports showing the steps they have undertaken to remedy the environmental degradation. In the instance that the same is not done within the timeline provided, consequential orders may issue.

[171] As to whether the 11th appellant is capable of undertaking the exercise, the actions of the 11th appellant cannot be overstated in this matter. They have been present from the beginning and have championed the rights of the residents of Owino-Uhuru village. In presenting the claims, some of the residents undertook medical examinations to determine their lead exposure. The various reports filed in court present a step to step measures as to what ought to be done to restore the contaminated land. *The Senate Committee Report* gave the following recommendations;

> *a. the immediate clearing of the environment, including detoxifying, and restoring the soil;*
> *b. the replanting of trees;*
> *c. the immediate testing of all residents of Owino-Uhuru for lead exposure;*
> *d. the detoxification of all infected persons and pets;*
> *e. the removal of hazardous waste slug the plant has disposed off over the years and continues to dispose of at the Mwakiunge Dumpsite;*
> *f. the testing of all street children and other persons who scavenge for a living at the dumpsite;*
> *g. the immediate and full compensation of all the victims.*

[172] The report by *Okeyo Benards, & Wangila Abraham: Eco- Ethics International- Kenya Chapter* called for education on lead exposure. The report by *Wandera Chrispus Bideru, the Government Chemist* proposed the setting up of a functional diagnostic treatment Centre at a convenient place in Mombasa for screening and treatment of persons affected by lead exposure; excavation of soil and dust areas with elevated lead level and relocation of affected residents to alternative safe areas.

[173] To our minds, the recommendations present clear restoration measures, which are not technical in nature. We are also minded that *Principle 15 of the Rio Declaration and Section 3 (5) of the EMCA* opine that lack of full scientific certainty should not be used as a reason for postponing cost-effective action to prevent environmental degradation. We have shown the wide range of remedies a

court can issue including the issuance of structural remedies. (See also ***Esther Wanjiru Mwangi & 3 others v Xinghui International (K) Limited*** [2016] eKLR, & ***Isaiah Luyara Odando & another v National Management Environmental Authority & 2 others; County Government of Nairobi & 5 others (Interested Parties)*** [2021] eKLR). We must reiterate that the duty to protect the environment is not the sole preserve of the State; if there is failure on their part, individuals and persons of good will shall embrace this initiative- as has been done by many non-governmental organizations.

[174] We therefore find that the Court of appeal erred in dismissing the restorative orders issued by the ELC and the award of Kshs. 700 million in default. We are however alive to the fact that considerable time has passed since the orders of the ELC were issued. Within that frame time the 1st appellant and the respondents may have taken restorative measures which ought to have been accounted for before the default clause comes into place. We therefore find it fit to direct the respondents to file at the ELC in Mombasa, their respective reports, if any, within three (3) months of this decision, on the various restorative measures they have undertaken in line with the judgement of the ELC and the directions issued by the Court of Appeal or on their own initiative. The default clause should thereafter take effect if no restorative measures have been undertaken by the 1st appellant and the respondents. The ELC court will ascertain whether there is need for further directions to restore the damage caused based on the reports filed.

e. *Whether the Court of Appeal erred in remitting the matter back to the ELC Court for rehearing and re-assessment of the award of damages*

[175] Having come to the above conclusion on both the award of damages and the restoration of the contaminated land we find that the Court of Appeal erred in remitting the matter back to the trial court for re-assessment of the award of damages. We however find that the parties' submissions on this matter also centered on the question whether the Court of Appeal can remit a matter back to the trial court for re- hearing post- judgement. The resounding argument was that

the same was a violation of their right under Article 50 of the Constitution since the Court of appeal ideally granted the parties "a second bite of the cherry". That once a matter has been determined, the Court on appeal can either set-aside and/or reverse the decision.

[176] Rule 33 of the Court of Appeal Rules provides the general powers of the Court. The same provides;

> ***"On any appeal from a decision of a superior court, the Court shall have power, so far as its jurisdiction permits—***
> ***(a) to confirm, reverse or vary the decision of the superior court;***
> ***(b) to remit the proceedings to the superior court with such directions as may be appropriate; or***
> ***(c) to order a new trial,***
> ***and to make any necessary incidental or consequential orders, including orders as to costs".***

[177] The Court of Appeal Rules, 2022 are clear on the powers the court has, which includes to order a new trial or remit the proceedings with directions that are appropriate. The Court of Appeal in issuing the orders remitting the matter back to the ELC was therefore acting within its discretion and we see no reason to interfere with that discretion.

[178] Having come to our conclusion above, we are constrained to make a finding as to whether the Court of Appeal went against the principle of *de novo* trial. Our short answer is that a *de novo* trial or retrial is not akin to a second trial; it is a continuation of the same trial and the guiding factor for any retrial must always be the demand of justice. In ***Hussein Khalid and 16 others v Attorney General & 2 others*** S.C. Application No. 32 of 2019 [2020] eKLR, we held as follows concerning introduction of new evidence at a *de novo* hearing:

> ***"...Introduction of new evidence after hearing is concluded is against the principles of de novo hearing whether it is ordered in review or in revision jurisdiction of a court. It mutes the trial continuation intention signaling a second trial. We are alive to***

the fact that in some instances additional evidence may be tendered but in very exceptional circumstances…"

This is all we have to say on that issue.

f. *Whether the appellants are entitled to the reliefs sought*

[179] From a summation of our findings, the 2nd -11th appellants are the successful parties in these proceedings. They had applied for the entire judgement of the Court of Appeal be set aside and in its place an order be issued affirming the judgement of the ELC. We find no difficulty in affirming the decision of the ELC, save for the directions issued in relation to the orders of restoration of the contaminated land.

[180] We also note that in its petition at the ELC Court, the 2nd – 11th appellants had prayed for the implementation of the Basel Convention. ***The Basel Convention on the Transboundary Movement of Hazardous Wastes and Their Disposal*** adopted in March 1989 regulates the movement of these wastes and obliges its member countries to ensure that such wastes are managed and disposed of in an environmentally sound manner. Governments are expected to minimize the quantities that are transported, to treat and dispose of wastes as close as possible to where they were generated, and to minimize the generation of hazardous waste at source. The guidelines give specifications for the storage chambers and transport facilities and describe how batteries delivered to the recycling plant should be drained of their electrolytes, identified and segregated, and stored. Finally, the recovered lead must be refined in order to remove unwanted contaminants. The guidelines also address medical issues and public awareness. Kenya is a party to the Basel Convention.

[181] The ***Bamako convention on the Ban of the Importation into Africa and the Control of Transboundary Movement and Management of Hazardous*** waste within Africa is also response to Article 11 of the Basel Convention. Being a party to the Basel Convention, Kenya has the obligation to apply the technical guidelines in the conventions including but not limited to ***The Basel Convention Technical Guidelines on the***

Environmentally Sound Management of Waste lead. We therefore direct the 1st, 2nd and 3rd respondents to implement the recommendations made in the convention and its guidelines.

g. *Who shall bear the costs of the Appeal?*

[182] Costs follow the event but are issued at the discretion of the Court. We take note that the appeal is of a public interest nature, and the order that commends itself to us is to direct parties to bear own costs of the appeal.

h. Summary of Our Findings

[183] The Summary of our findings is that we uphold the Court of Appeal's determination on Liability. We however set aside its determination on the award of damages for loss of life and personal injury, and in return reinstate the award issued by the ELC Court. We also set aside the Court of Appeal's determination on restorative damages and reinstate the sum of Kshs. 700 million issued by the ELC Court, being an award to be issued to 11th Appellant to restore the environment in the event the 1st appellant and the respondents herein fail to abide by the ELC Court's directions. We however remit the matter back to the ELC and direct it to take into account any restorative measures undertaken and issue further directions thereafter.

G. DISPOSITION

[184] Consequent upon our conclusions above, the petitions of appeals and cross petition are disposed of by making the following orders:

i. ***The 1st appellant's appeal dated 1st August 2023 and filed on 24th August 2023 is hereby dismissed.***
ii. ***The 1st respondent's cross-appeal dated 17th April 2024 and filed on 17th April 2023 is hereby dismissed.***
iii. ***The 2nd -11th appellants' Petition of Appeal dated 5th August 2023 and filed on 7th August 2023 is hereby allowed only to the extent of our finding that the Court of Appeal determination on the***

award of damages for loss of life and personal injury herein is reversed with an order affirming the ELC's findings.

iv. The matter is hereby remitted back to the ELC in Mombasa to deal with the question of compliance with the restoration orders by the 1st appellant and the Respondents herein and in line with our determination.

v. Parties shall bear their respective costs before the ELC, Court of Appeal and this Court.

vi. We hereby direct that the sum of Kshs. 6,000/- deposited as security for costs upon lodging of this appeal be refunded to the appellants.

Orders accordingly.

DATED and **DELIVERED** at **NAIROBI** this **6th** day of **December, 2024.**

.....

M.K. IBRAHIM
JUSTICE OF THE SUPREME COURT

....

S.C. WANJALA **NJOKI NDUNGU**
JUSTICE OF THE SUPREME COURT **JUSTICE OF THE SUPREME COURT**

....

I.LENAOLA **W. OUKO**
JUSTICE OF THE SUPREME COURT **JUSTICE OF THE SUPREME COURT**

I certify that this is a true copy of the original

REGISTRAR
SUPREME COURT OF KENYA

THE SUPREME COURT
JUDICIARY
REPUBLIC OF KENYA