Kimeu & 3074 others v Kenya Pipeline Company Ltd & another (Environment and Land Petition 9 of 2019 & Petition 8 & 12 of 2019 (Consolidated)) [2025] KEELC 5239 (KLR) (11 July 2025) (Judgment)

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REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MAKUENI

ENVIRONMENT AND LAND PETITION 9 OF 2019
& PETITION 8 & 12 OF 2019 (CONSOLIDATED)

CA OCHIENG, TW MURIGI & A NYUKURI, JJ

JULY 11, 2025

BETWEEN

MUINDI KIMEU & 3074 OTHERS ..... PETITIONER

AND

KENYA PIPELINE COMPANY LTD ..... 1ST RESPONDENT

NATIONAL ENVIRONMENT MANAGEMENT AUTHORITY (NEMA) .... 2ND RESPONDENT

JUDGMENT

Introduction

1. The obligation of business enterprises to respect human rights in the course of their operations and the duty of the State to protect human rights including the duty to ensure that businesses do not violate human rights, must be complied with for the actualization of rights protected in the bill of rights enshrined in our Constitution, including the right to a clean, healthy and sustainable environment for individuals and communities.

2. Ostensibly, on the premise of being residents of the Thange River Basin in Makueni County, the petitioners sued Kenya Pipeline Company Limited (Hereinafter referred to as 'KPC') which is a state owed corporation mandated with providing means of transporting petroleum products in the Country, and the National Environment Management Authority (Hereinafter referred to as 'NEMA') which is the principal instrument of Government charged with the responsibility of general supervision including co-ordination of overall matters relating to the environment and implementation of all environment related policies.

3. The petitioners filed a further amended consolidated Petition dated the 17th May, 2023 brought pursuant to Articles, 1(1) (3), 2(1) (4) (5) (6), 3, 10, 20 (1) (2) (3b) (4), 21, 22, 26, 28, 29, 35, 40, 42, 43(1), 47(1), 61, 69, 70, 159(1) & 258 (1) and 259 of the *Constitution* of Kenya 2010, as read with Rule 4 of the *Constitution of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules* as well as Section 3 of the *Water Act*, 2002, where they sought the following Orders:

   a. A declaration against the Respondents that the Petitioners constitutional rights guaranteed and protected under Articles 26, 29(d), 35, 40, 42, 43(1) (a) (c) and (d) and 47 of the *Constitution* have been and continue to be contravened and violated.

   b. A declaration that the Respondents have breached obligations imposed upon them in respect of the environment by Articles 43 and 69 of the *Constitution*.

   c. An environmental restoration order requiring the Respondents to restore the Petitioners' damaged land, soil, surface and underground water, the environment (biota & fauna) to its original status and/or to the satisfaction of this Honourable court.

   d. Provision of borehole with distribution network as pleaded in this Petition.

   e. Rehabilitation of Thange Basin Riparian habitat to the satisfaction of this Honorable court.

   f. Establishment of free fully specialized medical clinic to deal with unique diseases associated with effects of hydrocarbon.

   g. A declaration that the discharge vouchers signed by the Petitioners for crops and livestock be set aside as the same are unconstitutional, null and void.

   h. The 1st Respondent do pay the Petitioners general, exemplary/punitive damages, special and full compensation as pleaded in the Petition taking into account prior compensation made thereto.

   i. Costs of this Petition be borne by the Respondents or as the court may order.

   j. Any other order or relief as this Honourable court may deem just and expedient to grant for the interest of justice as provided under Articles 70 and 159 (1) of the *Constitution*.

4. The Petition is supported by the affidavits of Muindi Kimeu dated 22nd September 2020 and 17th May 2023 respectively and filed on behalf of all the Petitioners.

5. The gist of the Petition is that there was a leakage that occurred on 12th of May 2015 in the 1st respondent's old pipeline, while transporting Petroleum products fifty (50) metres from the source of Thange River (hereinafter referred to as "the river"). The petitioners allege that they are residents, owners and/or beneficiaries of Thange River Basin. Further, that the leakage was immediately reported to the 1st respondent who repaired the damaged part of the pipeline. It was the Petitioners' contention that a considerable amount of petroleum products had escaped for unknown period of time, percolating into unknown depths of pervious soil and the aquifers, thereby spreading vertically and horizontally for unknown distance and affecting their livelihoods.

6. On 17th December 2015, NEMA issued an Environmental Restoration Order under Section 108 of the *Environmental Management and Coordination Act*, Cap 387 Laws of Kenya (hereinafter referred to as 'EMCA'). The petitioners' claim that in January 2016 following public outcry, a multi sectoral team was formed comprising of NEMA, Energy Regulatory Commission (hereinafter referred to as 'ERC'), Kenya Petroleum Refinery Authority (hereinafter referred to as 'KPRA') and Water Resources Management Authority (hereinafter referred to as 'WRMA') to establish the root cause of the spill

and identify corrective action. That the team relied on earlier scientific reports as they did not have technical personnel to carry out scientific and water testing as well as analysis.

7. The petitioners contended that according to the incident report, the spillage of the petroleum hydrocarbons was caused by acts of negligence and/or breach of duty of care as well as duty to protect the environment particularized as;

   i. Failing to diligently maintain and keep the pipeline transporting petroleum in good working condition.

   ii. Due to lack of diligence and constant supervision, failed to detect the damaged pipeline in good time as to avoid the said damage.

   iii. Failed to install proper and/or working early leak detection and safeguard system.

   iv Failed to provide enough personnel and financial resources for monitoring the safety of the leaked pipeline.

   v Generally failing to provide/ maintain safe system for transporting petroleum products.

   vi. Failing the legitimate constitutional expectation of the Petition to observe, conserve, respect, protect the right to a clean and healthy environment guaranteed and protected under Articles 42, 69 (2) and 70 of the *Constitution*.

8. The petitioners explained that upon investigation, WRMA and NEMA convicted the 1st respondent for polluting the environment and issued sanctions that the 1st respondent should be held liable for adverse effects of the oil spillage.

9. That on 27th October 2015, WRMA issued a Restoration Order against the 1st respondent requiring immediate action to prevent pollution to water and to take remediation and restoration actions. Further, on 17th December 2015, NEMA issued a Restoration Order to the 1st respondent requiring it, to put in place measures to prevent any further pollution and remediation of the affected area.

10. That the 1st respondent breached its statutory obligation imposed under Section 97 of the *Petroleum Act* and by virtue of that breach the 1st Respondent is strictly liable for any loss or damage thereby caused under Section 97 (4) for failure by the 1st Respondent to comply with safety measures.

11. That the 1st respondent has admitted liability through their conduct of partial payment of claims for the crops and livestock as well as their willingness to settle the claim for loss of health and treatment upon medical evidence by the Petitioners.

12. The petitioners aver that they suffered socio-economic losses as a result of the pollution on the soil, water and air. Further, that they have been exposed to danger and have suffered losses including;

   a. Loss of water for domestic, irrigation and livestock.

   b. Loss of indigenous resources, biodiversity, heritage, marine life, recreational, physical and psychological torture, inconvenience, annoyance etc.

   c. Loss of present and future income, land use for food production and livelihood.

   d. Loss of treatment and entire loss to livestock.

   e. Loss of health, illness for present and future treatment.

   f. Loss of crops and fruits and loss of future income and livelihood.

g. Loss of livestock treatment and future income associated thereto.

h. Loss of Medical and Human health.

i. Claim for specialized medical damages.

j. Claim for special damages.

k. Claim for rehabilitation of Thange River.

l. Claim for declaration invalidating vouchers.

m. Claim for punitive /exemplary damage.

n. Claim for remediation and restoration of Thange River Basin.

o. Claim for long-term water solution.

p. Claim for establishment of special clinics.

q. Costs and any other relief.

13. The Petitioners state that the 1st respondent has violated their Constitutional Rights as enshrined in Articles 26, 28, 29, 40, 42, 43(1) (a) (c) (e), 29 (d), 69 (1) (g) of the *Constitution*, 2010, as well as Rule 4(1) of the *EMCA (Water Quality Regulations*, 2006), Section 96 (1) of the *Water Act*, 2002, Section 97 of the *Petroleum Act*, Section 84 of the *Occupational Safety and Health Act*, 2007 and Principle 10 of the *Rio Declaration* (1992).

14. The petitioners stated that the exposure to polluted environment violated and continues to violate their right to life due to the injuries, incurable diseases and fatalities caused by the pollution. They further allege that they were confused and embarrassed and their dignity was violated. Further, that they have been displaced from their land and water, which they relied on, for their livelihoods hence subjected to psychological torture including cruel and degrading treatment.

15. They asserted that the oil spill polluted their soil and water, making it worthless, hence violating their right to own and occupy their parcels of land. They insisted that their health is at risk due to contaminated water and having lost their livestock and livelihoods, they are unable to access adequate food of acceptable quality as well as clean and safe water in sufficient quantities.

16. The petitioners claim that although they were paid as per the discharge vouchers, the payment was through fraud, misrepresentation, coercion and unorthodox means, which was used to force them to sign the said discharge vouchers. They claimed that the 1st respondent concealed and misrepresented material information to them and failed to give them the basis including criteria for their computation. They claimed that contrary to the rules of natural justice and their right to fair administrative action, they were not granted an opportunity and/or right to have legal representation at the time of negotiation and therefore the discharge vouchers were imposed on them without their input.

17. The petitioners insist that the 2nd respondent failed to discharge its obligations under the *Constitution* of Kenya, 2010 and *EMCA* by allowing the decommissioning and vacating of the environment, having full knowledge that the process of remediation had not been completed. Further, that the 2nd respondent failed to provide information on the remediation and decommissioning process to them. They reiterated that the 2nd respondent failed in its mandate to supervise and monitor various agencies involved in the remediation and restoration exercise of the Thange River Basin.

18. The petitioners have enumerated the losses they incurred as follows;

a. loss of domestic water at Kshs 28,059,375/=.

b. general damages for violation of various articles of the *Constitution* at Kshs 615,000,000/=.

c. loss of income for land use, crops and fruits at Kshs 23,576,948/=.

d. claim for livestock at Kshs 280,701,324/=.

e. cost of medical treatment at Kshs 339,240,000/=.

f. damages for pain and suffering and loss of amenities at Kshs 989,100,000/=.

g. loss of expectation of life at Kshs 2,550,000/=.

h. special damages for veterinary and professional fees at Kshs 7,830,100/=.

i. human health professional fees at Kshs 22,100,000/=.

j. expenses incurred for laboratory tests at Kshs 11,053,100/=.

k. loss of long-term water solution (borehole) at Kshs 6,000,000/=.

l. exemplary/ punitive/ aggravated damages at Kshs 307,500,000/=.

m. invalidating discharge vouchers.

19. The Petition was opposed. Both respondents filed replying affidavits.

20. Beatrice Orgut, the former Safety Health Environment and Quality Manager of the 1st respondent swore a replying affidavit dated the 29th June 2021. She stated that the Environmental Restoration Order can only be issued by the 2nd respondent that has the mandate of issuing such an order. She contended that the issues raised by the petitioners do not qualify as proper constitutional questions as some are personal injury claims, which ought to be proven specifically.

21. She argued that Muindi Kimeucannot in his own capacity prove the claims for the petitioners, which include loss of crops, fruits, economic loss and claim for special damages. She asserted that only some of the petitioners were entitled to the reliefs sought as some of them were fictitious. Further, that the 1st respondent insists that not all Petitioners were residents nor were they owners of land around KM 256, where the oil spillage occurred.

22. She explained that their initial investigations identified 328 persons being the affected victims that were compensated by executing discharge vouchers after explanation with the help of the community leaders. The 1st respondent denied coercing the 328 persons and stated that they executed the discharge vouchers voluntarily.

23. She contended that the 1st respondent provided bursaries for the residents' children. Further that it constructed and fenced schools. That it also provided food and water through Kenya Red Cross as part of their community service obligations.

24. She insisted that after the oil spillage, the 1st respondent repaired the leaking pipeline and informed the 2nd respondent as well as other relevant government agencies. She averred that there were no injuries or fatal accidents affecting humans or livestock. Further, that the 1st respondent explained that in every step of bioremediation, the petitioners' representatives were present and were appraised of the events on the ground. She claimed that as at 20th November 2015, the 1st and 2nd Respondents continued to be in communication, wherein the 1st Respondent informed the 2nd respondent that the leak had been fixed and transportation of oil had commenced as they had received a Compliance Notice.

25. She explained that the environmental impact assessment of the area was done by SGS Kenya on behalf of the 1st Respondent and in their report, benzene and xylene chemicals were detected in the soil. Further, that the report indicated that TPH, toluene, ethylbenzene, xylene and lead had not exceeded the respective Dutch Intervention Values (hereinafter referred to as "DIV") standards that could be harmful for human habitation or environmental regeneration.

26. She contended that sampling of surface water was done by SGS on various dates and that ultimately it was noted that the amount of pollutants were below WHO and *EMCA* guidelines. She stated that the 1st Respondent informed the 2nd Respondent that bioremediation was done on the soils around the pipeline prior to covering the repaired pipeline with the same soils. Further, that environmental remediation is a factor of time and environmental monitoring is required to track the pace of degradation of the hydrocarbons so as to confirm complete restoration.

27. On access to information, she contended that the Petitioners were aware of every action, the 1st respondent undertook about the oil spillage through their representative and have not exhibited how they requested for information. She denied that the 1st respondent infringed on the rights of the petitioners, as particularized in the Petition.

28. She maintained that the oil spillage was accidental and the 1st Respondent undertook efforts to restore the affected area to its original position including supplying the victims with clean water and food for both human and cattle consumption. Further, that Article 43 of the *Constitution* only applies to sitting governments and not government agencies or parastatals.

29. She deposed that bioremediation measures cannot be 100% as the same relies on the concept of natural attenuation. Further, that the demand for boreholes was unjustified as that would mean they would be affected more by the water.

30. On the petitioners claim for specialized medical clinics, she stated that according to Dr. Mubisi Swaro's report, there was no indication that there lacked hospitals in Kenya that can deal with the ailments contracted by the Petitioners, from the oil spill. She reaffirmed that the Petitioners were not entitled to income for land, crops and food because the 1st respondent had spent Kshs 11,168,842.82 on provision of foodstuffs to them. Further, that no books of account were produced to confirm the Petitioners earnings from their land or livestock. She blamed the petitioners for violating the prohibitory order restraining them from consuming farm produce and water from Thange River Basin and reiterated that they were liable for contributory negligence. She denied that the 1st respondent had decommissioned the remediation exercise but insisted that it had merely scaled it down.

31. In opposing the Petition, the 2nd respondent filed a replying affidavit dated 6th October 2020, sworn by Zephania O. Ouma, its acting Director Compliance & Enforcement. He averred that the 2nd respondent learnt of the oil spill at Thange River vide the 1st Respondent's letter dated 30th June, 2015. He confirmed that the 2nd respondent's staff visited the site on the same date, to assess the status and extent of the oil spill.

32. He stated that the 2nd respondent issued an Environmental Improvement Order requiring the 1st respondent to undertake the following actions: -

    a. Speed up identification of the leakage point and fix the same to prevent further discharge of petroleum to the environment;

    b. Come up with a contingency plan of managing the oil spill issue;

c. Undertake comprehensive environmental, social, medical and economic assessment to determine the extent of the magnitude and the extent of impacts.

33. The deponent contended that vide their letter dated 14th August, 2015, the 1st Respondent wrote to NEMA to update them on the progress in addressing the oil spill incident. He asserted that on 5th October, 2015, WARMA wrote to the 1st respondent and copied the letter to the 2nd Respondent.

34. He explained that the 2nd respondent undertook a site inspection on 17th November, 2015 and being dissatisfied with the progress on compliance with the orders issued on 14th August 2015, issued an Improvement Notice of even date. Further, that in response to NEMA's Improvement Notice, the 1st respondent wrote back on 20th November, 2015 confirming that they would comply with the said notice. He reaffirmed that on 17th December, 2015, the 2nd respondent wrote another letter to the 1st respondent seeking for a report on the leak detection system and directed it, to undertake restorative measures aimed at alleviating further damage to the environment and to the livelihoods of the locals.

35. Further, that vide a letter dated 15th January, 2016, the 1st respondent forwarded a report on their leak detection system and further confirmed that they were providing the affected locals with clean drinking water as per NEMA's directive. He contended that in furtherance of the 2nd Respondent's mandate, it constituted a multi-sectoral team comprising ERC, WARMA, National Land Commission (hereinafter referred to as 'NLC'), 1st respondent and itself. Further, on 29th February, 2016, the multi-sectoral team issued a report detailing its findings and recommendations on the incident, which were communicated to the 1st respondent for implementation. That the 2nd Respondent together with its lead agencies have constantly monitored the clean-up exercise and implementation of the recommendations of the multi sectoral team.

36. That in response, the 1st Respondent on 18th April, 2017 wrote to NEMA requesting to scale down on the clean-up exercise. In response, the 2nd Respondent wrote a letter dated 30th May, 2017 advising the 1st Respondent to undertake further remediation measures and to forward a water quality analysis report to NEMA in order to enable an informed decision on the 1st respondent's request.

37. The deponent averred that the 1st respondent forwarded to NEMA the reports, which had been requested vide the letter dated 19th December, 2017. Further that in January 2018, the 1st respondent also forwarded another TPH Trend Analysis report for the period March 2016 to November 2017.

38. He reiterated that the clean-up exercise was bearing fruits and resultantly NEMA advised continuous monitoring of the water quality. The clean-up exercise was ongoing and being a continuous activity, NEMA is constantly monitoring the same to ensure the petitioners' right to a clean and healthy environment is protected.

39. He termed the petitioners' accusations against the 2nd respondent as baseless and aimed at tainting the image of NEMA in view of the steps undertaken.

40. He denied violating the petitioners' constitutional rights and insisted that the 2nd respondent had constantly monitored the clean-up exercise and maintained all the records. Further that NEMA had ensured that the locals were involved in the processes through stakeholder meetings.

41. He argued that the petitioners have only made constitutional reference without any nexus to the breach occasioned to the said Articles of the *Constitution* by the 2nd respondent and that no Constitutional breach was demonstrated against the 2nd Respondent.

42. The deponent contended that NEMA has endeavored to undertake its mandate as envisaged under the *EMCA* and that it continues to do so. He held the view that the Petitioners' case was unwarranted, mala fides, speculative and an abuse of court process.

43. The deponent contended that the petitioners' prayer for a fresh environmental impact assessment study report to be undertaken was unattainable since the same can only be undertaken at the commencement of a project and not after. The 2nd respondent further contended that the prayer for punitive and aggravated damages is untenable and contrary to the polluter pays principle. He urged the Court to dismiss the Petition herein with costs.

44. In a rejoinder, Muindi Kimeu swore a supplementary affidavit dated the 12th July 2021 wherein he denied the averments in the replying affidavits and reiterated their claim. He argued that the petitioners' claim is not a land dispute but seeks compensation for loss of land use, crops and fruits. He maintained that the verification of the crops was done by physical count by the 1st respondent's agents in the presence of the Petitioners who stood against their respective plots. He denied that there was sufficient remediation.

Petitioners' Evidence.

PW1: David Shokut

45. He said that he is the Principal Hydrologist at Water Resources Authority, hereinafter referred to as 'WRA', in Nairobi. He testified that following the report of oil spillage, together with another hydrologist from WRA, they were directed to undertake a geophysical survey in October, 2019. He explained that the exercise was initially done on the ground. It was his testimony that he was to probe the depth of the ground by measuring electrical parameters of the ground. Further, that they measured the resistivity of the rocks by passing current through the rocks and found out that there were traces of oil up to the depth of 30 metres in the ground indicating high resistivity.

46. He stated that since June, 2019 they had not done another study. Further, that he expected that when it rains the oil would flow with water. He confirmed that they did not do a survey because there was no rain. He adopted his report dated October, 2019 which is contained in his affidavit dated the 25th October, 2021.

47. Upon Cross-examination, he stated that he was not aware that on 5th October, 2015, WRA issued a restoration order but later saw it. It was his testimony that the letter dated the 27th October, 2015 did not amount to a restoration order and that WRA was supposed to issue one. He stated that Kiboko is a different area from River Thange and there was also an oil spill at Kiboko. He claimed that sampling was done in 2019 and the reading was 0.016. He explained that it is their water quality expert who could tell if those levels were toxic. Further, that at the time they went to undertake the survey, there were other government agencies including NEMA following up on the matter.

PW2 – Kenneth Koreje.

48. His testimony was that he was the Principal Water Quality and Pollution Control Officer at WRA. He confirmed that the mandate of WRA includes protection of water resources from adverse effects of pollution. Further, that in regard to the Thange oil spill, he explained that WRA collected water samples from four sampling points of the area of the oil spill for testing. Further that, since 2015 WRA had been carrying out water samples and analysis from the site of the spill.

49. He highlighted the methodology used in sampling, testing and analysis of the water from targeted sites. He explained that when it came to analysis WRA uses the American standard method for analysis of standard water and waste water. That once they have the results, they compare them with national standards which are different for drinking water and effluent.

50. He indicated that their report showed that in certain areas there were high concentrations of oil and grease, particularly in areas where the spill occurred while in areas far from the spill site, concentration was either low or not present. He pointed out that the acceptable parameter for oil and grease in the water should be nil. Further, that the latest results were in regard to samples collected on 18th May, 2023 and upon analysis, some traces of oil and grease ranging between 0.01 milligrams per litre to 0.21 milligrams per litre (mg/l) were noted. He produced the reports in his affidavits dated 20th September, 2021 and 19th May, 2023 respectively.

51. Upon cross examination, he stated that oil and grease refers to hydrocarbon and petroleum in a hydrocarbon product and that the elements of hydrocarbon are toluene and benzene. He stated that he had done regular monitoring of water at Thange River basin and in 2015, the concentration was very high. He concluded by stating that there was a lot of oil and grease at the four points where samples were collected as the same was visible and floating on the water and was not fit for human and livestock consumption. He was emphatic that the results show the level of oil and grease is relatively high. He conceded that the documents attributed to WRMA were from their office. Further, that the standards depend on the usage of the water.

52. He indicated that all the results seen herein were in respect to water analysis and not soil analysis as soil is not their mandate. He contended that, he was not able to give an opinion on whether boreholes ought to be sank as a geological study has to be done to confirm if oil is still available in the soil. He reiterated that they did water quality test regularly and technically it is possible to have 0.00 concentration depending on methodology used, which include trace and analytical methods.

53. It was his further testimony that the recommended standard for measuring oil and grease in water can include analytical standard. Further, for drinking water, they look for one specific component of oil and grease which include Toluene, Benzene and Xylene. He conceded that there is a report from KIRDI dated 16th October, 2015 that indicates that there was discharge to the environment.

54. He confirmed that he was involved in this matter since the oil spill and was aware that the 1st respondent was directed to undertake a clean-up exercise in respect to the oil spill. He stated that WRA are supposed to do regular water quality monitoring whether or not there is a clean-up. He stated that both Respondents were involved in the clean-up.

55. He noted that there is a change in the results of 2015 and 2023 as there is a positive change in concentration parameters of oil and grease.

PW3: Dr. Jefferson Kaloki Nthanga.

56. He confirmed to be a Veterinary Surgeon residing in Kibwezi but working in Nairobi with the Ministry of Agriculture and Livestock. He produced a report contained in his affidavit dated 24th of June 2021, including invoices and receipts. He confirmed that in 2016, Thange Farmers Association commissioned him to undertake a livestock exposure assessment in Thange River Basin. Further, this assessment was undertaken after the residents became dissatisfied with the criteria of compensation that was suggested by the experts in Environmental and Social- Economic Impact Assessment (ESEIA) Report that recommended compensation for loss of recovery of treatment only at 20% of the value of the livestock cost. It was his testimony that he carried the livestock exposure impact assessment test,

complied and signed a report which he gave to his clients. He claimed that he is stilled owed Kshs 3,728,850/=.

57. Upon cross examination, he stated that they were working as a team but he was the lead expert. Further, that he signed the report on behalf of the team. He explained that when conducting the assessment, they relied on observation, examination of the animals, observing the environment and considering SGS reports. It was his testimony that they did a trans-sectional walk through the villages. Further, that they conducted post-mortems on the dead animals. From the post mortem findings in the lungs and respiratory systems, there was an indication that animals were affected by irritants.

58. Further, that in a post-mortem that he did personally, the ruminal contents of the sheep were smelling of oil. He explained that he did not take the samples to the laboratory as that was unnecessary. He pointed out that they examined different types of livestock including chicken, goats, sheep and cattle but he could not recall the number. He further explained that in his report, he took into account other factors but the team ruled out disease, as in one of the watering points they could see a layer of oil floating. He conceded that it would have been important to do a toxicology test but insisted that they did a post-mortem, which was paid by the villagers. He knew the total amount paid but had not given a tabulation. He confirmed that he had not gone to the site in the last two years.

59. He testified that he dealt with 22-23 villages but could not recall each homestead. He clarified that Titus Mutua had five cattle that were in poor body condition and he took photographs of the same. It was his testimony that the provincial administration were present at the point of examination. He reaffirmed that they had divided themselves into several groups and he was leading one of the teams to do the assessment. He reiterated that they had questionnaires that the group were issuing to the villages to indicate the number of animals on their farms, which reports are part of his report.

PW4: Dr. Anthony Mubisi Swaro.

60. This witness who is a medical practitioner having qualified from the University of Nairobi with a Bachelor of Medicine and Bachelor of Surgery, stated that he was an Occupational Health Specialist who has worked as such, from 1978 to date. He adopted the contents of his supporting affidavit dated 22nd June, 2021 as his evidence in chief and produced the annexures thereto as exhibits. He indicated that his attendance fees was Kshs. 25,000/= based on time spent in court.

61. It was his testimony that upon instructions, he scouted for laboratories that could conduct requisite tests for complete blood count, liver function and kidney function from several laboratories. He explained that he settled on SharoMed Laboratories to carry out tests. Further that having considered that Dr. Kowino had randomly sampled only fourty five (45) individuals, he opined that it would be necessary to increase the representative sample to one thousand three hundred and five (1305), out of the population of three thousand and eighty-five (3285) Petitioners. According to him, the sample was representative both in age and gender and covered all the twenty-eight (28) villages from Thange River Basin.

62. He explained that between December 2019 and January 2020, he set up medical camp clinics at Machinery Township as well as at St. Peters Primary school at Kibwezi for purposes of carrying out medical examination and collecting samples for laboratory tests. He stated that together with other doctors they took history and conducted physical examination as well as physiological tests, lung tests, laboratory tests and made diagnosis for each individual. According to him, the degree of injury was calculated using the level of malfunction of the organ tested. He confirmed that the disability rating was arrived at, by clinical manifestation and degree of malfunction of the organ.

63. The witness explained that he clustered the victims into four groups namely; severely affected, moderately severely affected, moderately affected and mild affected. He stated that all this information is contained in a report marked as 'ASM – 5', which he produced. He reaffirmed that his fee note was Kshs 20,227,600/= and that he was paid Kshs 14,300,900/= leaving a balance of Kshs 5,926,700/=. He recommended that the affected Petitioners should be compensated.

64. Upon Cross examination, he clarified that the persons he examined had the same deficiencies of different degrees. Further, that a few had severe deficiencies, while others had moderately severe deficiencies and others were slightly affected. He explained that when he indicated that someone has liver and renal toxicity, it meant that the liver is functioning but is slightly affected and therefore not functioning at 100%. He pointed out that he checked the production of enzymes in the liver so that if the production is about 70%, it is mild.

65. It was his further explanation that the cause of liver dysfunction in this case was hydrocarbon, which affected organs in the body like liver, kidney and blood and that chemicals like benzene, damage the cells of liver, kidney and bone marrow, whose function is to manufacture red and white blood cells including platelets. He confirmed that in this instance, there was chronic poisoning as there was an accumulated effect. Further, that the problem was noticed in June 2015, although exposure could have started earlier.

66. He conceded that he examined the victims after four (4) years and they had a continuous exposure to hydrocarbon, which were inhaled or ingested through water, since it could be found in food grain in the area and in animal products, which is milk and meat. Further, it could pass through the skin, if the said water is used for bathing.

67. It was his testimony that he did not go to the site of the spillage and that his conclusion that the victims were affected by the spillage was based on the history provided, written documents from ESEIA Report, his own examination and documents from Dr. Kowino.

68. On whether he could quantify compensation for the affected persons, he declined to comment on the same but conceded that the persons with mild infections would not require the same treatment as those with severe infection, that needed long term treatment. He clarified that, on account of normal distribution, he expected that there were people who suffered, but had not been examined.

69. PW4 confirmed that he did not examine animals. He contended that although there are many diseases that can cause liver dysfunction which include hepatitis 'B' virus, but the physical examination and history caused him to rule out the issue of disease. He explained that he took into account relevant issues like alcohol consumption, history of hepatitis 'B' and excessive smoking. He stated that his fees was paid in bits by Counsel for the Petitioners because of the work he was doing.

70. Upon further cross examination, he indicated that he had a laboratory specialist who tested hydrocarbon effects. He contended that the tests did not require a toxicologist. He stated that he did not conduct MRI tests. In regard to Dr. Kowino's report, he explained that he did not talk to him. Further, he did not include costing for future medical expenses. According to him, the most severe form of hydrocarbon in the world is benzene, because it is toxic and is associated with cancer of liver, blood and brain. He reaffirmed that at the point of examination, no one had cancer but that cancer can develop after 7-10 years. He insisted that what occurred was a chronic poison, which takes time and at the time of examination, it was too early to detect cancer.

71. He recommended a clinic for the Petitioners for follow up. He clarified that hypertension does not cause liver failure but heart failure and it can also affect the kidney but not liver.

72. In re-examination, he clarified that he purchased equipment and they set up clinics as there were none in the area. Further, they had to hire rooms, buy stationery and masks. It was his testimony that he had five nurses to pay and had printed both the reports and forms for use in examination.

PW5 – Samuel Kariuki Ngatia.

73. This witness is a Chief Labarotory Technologist and director Sharomed Diagnostic Centre. He stated that he is graduate from Kenyatta University with a Degree in Bachelor of Science in Medical Laboratory Services with an experience of five (5) years. He adopted his affidavit dated 22nd June, 2021 and produced annexures thereto as exhibits.

74. His testimony was that he carried out several tests including kidney function test, liver function test, urinalysis and total blood count. He particularized the machines he used for the tests. He indicated that he prepared a register for the entire population who underwent a test and explained the methodology used in the tests.

75. He specified that all the tests carried out and results thereof were in Vol. 6-21 attached to his Supporting Affidavit and marked as exhibit 30. He confirmed that he charges kshs. 25,000/= per day for court attendance and that he sought for transport in the sum of kshs. 20,000.

76. Upon Cross-examination he stated that he carried out the tests in two phases. He clarified that in November, 2019 he carried out tests for 1051 clients and in February, 2020 he carried out tests for 254 clients all totalling to 1305 clients. It was his evidence that in 2019 September, he was appointed by Dr. Swaro of Workhealth Consultants, who briefed him on the tests to be done on his 1305 clients, which were total blood count, kidney function test, liver function test and urinalysis.

77. He explained that he collected the samples from the client but he did not test the presence of Benzene and Toulene. He confirmed that Francis Mwangi Kiai is his co-director at SharoMed diagnostics and that the testing exercise was done in fourteen (14) days.

78. He averred that he had hired workers to assist him, who were paid on daily basis but there was a balance amount owed to him. He alleged that they were printing and photocopying the results and registers for the clients, which was done by a separate entity.

PW6: Simon Waweru Chege

79. He stated that he is a freelance journalist with 6 years' experience with NAGEW Company Limited. He adopted his supporting affidavit dated the 17th September, 2020 as his evidence in chief and produced the attached photographs and a Certificate of Authenticity dated 22nd June, 2021 as his exhibits.

80. It was his testimony that he carried out several tasks including photography, video shooting, exclusive interviews and compiling information. He particularized the equipment and machines used in executing his tasks. He stated that on 23rd November 2015 at 2pm, he took photographs, small clips, interviewed locals at Thange epi centre where trenches had been dug to drain petroleum products to a nearby tanker as stated in the witness statement on 17th September 2020.

81. Upon Cross examination he confirmed that he was a freelance journalist working with Githima TV and Kihooto FM. He stated that he used his phone to take photographs and that his phone was not automated to take a photographic date.

PW7: Margaret Waithera Kinyua.

82. The witness stated that she is a resident of Thange and a teacher at Thange Primary School since 2009. She adopted the supporting Affidavit sworn on 17th September, 2020 as her evidence in chief. It was her testimony that Thange Primary School is 800 metres from the point of Thange oil spillage and that the source of water for domestic use for the school community and the immediate neighbourhood including St Peters Thange Boys Secondary is a borehole drilled in the school compound. According to her, around May 2015, the school community noticed that the water from the borehole had a strange smell and taste, which led to banning of the use of the borehole water in July 2015. Further, this forced the community to start using the water from Thange River. She further stated that in October 2015, the 1st Respondent began supplying water to the school community but that the supply was erratic and unreliable, constraining the community to revert to using water from Thange River until that was banned towards the end of January 2016.

83. She stated that due to the exposure to contaminated water, the community was apprehensive on the adverse health effects of the same. That subsequently, Dr Swaro conducted medical examination on the following six teachers namely; Ruth Mutuku, Lucy Nthenya Kilei, Caroline Kaloo Muia, Agnetta Kavindu Wambui, Beth Nthenya Muendo and Simon Warui Mwangi. She maintained that the school community was adversely affected by the oil spill.

PW8: Christine Mueni Musa.

84. The witness adopted the contents of her supporting affidavit sworn on 17th September, 2020 as her evidence in chief and produced the attached documents. She stated that together with her family, they are residents of Thange Village. She confirmed that she was the widow of Duncan Matheri Muchoki(deceased) and the legal representative of his estate having been granted Letters of Administration. She explained that she was married to the deceased in 1990 and that by the time he died, they had six children. Further, that before his demise, her late husband had been a petitioner in this suit and had been examined by Dr. Swaro as per the medical report which she annexed to her affidavit. She alleged that from 2018, her husband had suffered from cancer and eventually died. She claimed to be sickly as were some of her family members. She believed that the ailments affecting her family members were as a result of the pollution of the Thange River.

PW9: Paul Kimanthi Kalai.

85. PW9 stated that he was the proprietor of plot number 7479 measuring about 1.8 HA. He claims to be a horticultural farmer and an owner of livestock. He adopted the contents of his supporting affidavit dated the 7th September, 2020 as his evidence in chief.

86. He contended that together with his family, they live at Moki Village within Thange River Basin and according to him, the oil spill seriously affected his family's livelihood. He insisted that the oil spill disrupted his family's normal way of life causing them anxiety and fear as the same had adversely affected their health, crops and livestock. He explained that the water from Thange River was used for domestic purposes, livestock, irrigation, recreation, fishing, picnic, sight-seeing, cultural and other associated activities.

87. He averred that in May 2015, they noticed the presence of oil floating and flowing along river Thange, which created a public outcry drawing attention of the national and county government, parliament, senate and other state agencies like NEMA, WARMA and KPC. He alleged that upon several stakeholder meetings, the County government of Makueni imposed a total ban on the use of the

water from the Thange River, while the community was supplied with water by the 1st respondent. He complained that the water supply was erratic and, in some instances, it would take a week for resupply causing some residents to secretly use water from the Thange River for domestic and livestock use. He insisted that the 1st Respondent took six months from the date of the spillage before supplying water to the residents.

88. He reiterated that the total ban on using the water from Thange river for irrigation has severely affected his farming activities. He explained that in February 2016 as the County Government officials and the Kibwezi County Commissioner enforced the ban on the use of the water from the Thange River, they also visited his farm and ordered that the crops growing thereon to be uprooted, which was done. He pointed out that this enforcement of the total ban was done until the end of 2018. According to him, that ban has never been lifted to date. He maintained that his claim was for loss of crops, livestock and other claims as per the Petition.

PW10: David Mulili Maingi.

89. The witness adopted the contents of his affidavit sworn on 17th September, 2020 as his evidence in chief. His testimony was that he was a permanent resident of Mwanza / Mbulutini village within Thange River Basin where he has lived with his family for more than 30 years. He stated that he owns plot number 2527 measuring about four (4) acres, which he uses for both subsistence and livestock farming. He claimed that his family relies on the water from Thange River for both domestic and livestock use.

90. He confirmed that in March 2016, he was one of the residents of Thange River who were examined by Dr. Kowino and found to be adversely affected as a result of exposure to hydrocarbons. He explained that in December 2019, he was also examined by Dr. Mubisi Swaro who confirmed that he was adversely affected by exposure to hydrocarbons. He produced two medical reports prepared by the aforementioned doctors.

PW11: Ben Mutuku Muthiani.

91. The witness adopted the contents of his affidavit sworn on 17th September, 2020 as his evidence in chief. He stated that he is a permanent resident of Moki/ Kavunie village of Kinyambu Sub location having lived there with his family for the last thirty - five (35) years. He confirmed that he is a subsistence farmer in plot number 2530, which is 1.5 kilometres from Thange River measuring approximately one acre where he grows subsistence crops while keeping livestock.

92. He stated that in August 2016, the 1st respondent installed a water tank on his plot for purposes of ensuring supply of water for domestic use after the ban on the use of water from River Thange. He lamented that the 1st Respondent's supply of water was erratic and inadequate and in instances when supply had not been done for several weeks, he had no alternative but to fetch water from Thange River as he could not afford to buy it. He alleged that the 1st Respondent stopped supplying water in February 2020. He complained that all his livestock died in 2018 due to consumption of water and licking of salt near river Thange

PW12: Thomas Musau Kivivo.

93. PW12 adopted the contents of his supporting affidavit dated 17th September, 2020 as his evidence in chief. He confirmed that he was a resident of Ndivuni Village in Kibwezi and was aged 53 years old. His testimony was that he owned plot number 82 measuring three (3) hectares and abutting Thange River. He claimed that since the oil spillage, he was chosen to champion the interest of residents of twelve (12) villages being Ndivuni, Kithaayoni, Katilamuni, Mwanyani, Mikuyuni, Miumoni, Kathiani, Masaani,

Sayngulu, Bondeni, Mambo and Nguuni. He further confirmed that the petitioners from the twelve (12) villages, together with their families are known to him.

PW13: Stephen Malonza Kimondu.

94. He adopted his supporting affidavit sworn on 17th September, 2020 as his evidence in chief. He alleged to be a resident of Kyaoni village in Kibwezi. He stated that he owns plot number 950 and 303 both measuring about four (4) acres, which parcels abut Thange river. He claimed to have been chosen by the residents of the Thange River Basin and champion the interest of Kyoani 'B' and Thange 'B'. He stated that the Petitioners from the two villages are well known to him. He verified the contents of the Petition and stated that there were no similar proceedings over the same subject matter in any other court.

PW14: Jared Kasuni.

95. He adopted evidence contained in his affidavit sworn on 17th September, 2020 as his evidence in chief. It was his testimony that he was a resident of Makongeni village in Kibwezi and was aged 43 years. He claimed to own plot numbers 2120 and 2740 both measuring about five (5) acres and abutting river Thange. He confirmed that he retired as a secondary school teacher in 2004, and embarked on cash crop farming in Thange as well as rearing livestock, whereof he used water from the river for domestic use, livestock and irrigation. He alleged that following the oil spill, he was selected as a member of the task force formed to look at the consequences of the spillage and the necessary remediation for purposes of representing the interest of farmers. He explained that Kibwezi sub county is generally dry in most parts of the year as the rains are unreliable and therefore crop and livestock farming is generally dependent on the water from river Thange. He alleged that when the community noticed oil floating and flowing along River Thange in May 2015, there was public outcry and demonstrations along Nairobi - Mombasa Highway decrying lack of Government response on the situation, which culminated in stakeholder engagement between the Respondents herein, WARMA, National and County Government including the community. He claimed that the oil spill interrupted the people's socio economic, political and cultural activities.

96. He contended that there was a strong petroleum odour along River Thange between 2015 and 2017 with the odour being strongest during the day and mild at night. He claimed that the odour affected their breathing and that residents complained that inhaling the same caused wheezing and irritation on their respiratory system. He confirmed that the residents also complained of other side effects including fatigue, nausea, palpitations, eye and skin irritation including usual headaches.

97. He complained that during this period, nobody visited the community to explain the side effects of inhaling hydrocarbons and the effect of consuming crops and livestock. He alleged that this caused allot of anxiety, apprehension and uncertainty about their lives. He averred that people were psychologically traumatized because to date, no one explained to them, the effect of coming in contact with petroleum products. He complained that there was no public participation and sensitization of the resident. He further alleged that the oil spillage affected their use of Thange River for recreation purposes, site seeing, fishing, tourist attraction, picnic, cultural purposes, washing, bathing and swimming. He alleged that the effects of the oil spillage had reduced them to beggars.

PW15: Muindi Kimeu.

98. PW15 who is the 1st petitioner stated that he resides in Thange, Kibwezi, Kinyambu location and is a farmer cultivating vegetables, growing fruits and keeping livestock. He further confirmed that his level of education is up to primary school, standard 8 and thereafter he was trained as a farmer at

Machakos Training Centre. He explained that he represents farmers within Thange Basin. He adopted the contents of his affidavits dated 22nd September 2020, 24th June 2021, 12th July, 2021 and 17th May, 2023 respectively as his evidence in chief and produced annexures thereto as exhibits 'MRI-MK33'. He stated that his prayers were as per the further amended consolidated Petition dated the 17th May, 2023.

99. He confirmed that the Thange River basin has twenty-seven (27) villages namely; Thange, Mbulutini, Ngomano, Moki, Mwanza, Nzavoni, Mukuyuni, Mwanyani, Mambo, Kithaayoni, Kathiani, Mbondeni, Syangu, Ndauni, Isunguluni, Katilamuni, Kithaayoni, Kalimakoi, Kilungu, Kyumani, Kyambusya, Kinyambu, Mutusye, Muusini, Masaani, Makongeni and Syanguli.

100. He contended that on 12th May 2015, a pipeline leak occurred at 256.9 Kilometres from Mombasa in Thange, Kibwezi, Makueni County and the same was repaired by the emergency response team of the 1st Respondent. He stated that in June 2015, the 1st respondent was informed by the local residents that they had noticed traces of petroleum products near River Thange, 100 metres from the pipeline and after investigation it was established that the products were as a result of the spillage that occurred in May 2015, which seeped the porous rocks underground and, on the surface, up to the Thange River.

101. The witness stated that the ESEIA Report of 2016 which was conducted at the instance of the Respondents identified the Plume area being the area of interest as covering 104m long and 240m wide. He however pointed out that the affected area is larger given that traces of hydrocarbons were traced 42 kms from the point of the leakage to the confluence of Athi River.

102. The 1st petitioner contended that the 1st and 2nd respondents in conjunction with WARMA sent a team of experts to carry out preliminary investigations five (5) months after public outcry. Further, that on 30th September 2015, WARMA carried out investigations and found that the surface water of the river and ground water was contaminated with hydrocarbons and the contaminants had extended to a considerable distance downstream. He insisted that the presence of oil and grease made the water unsuitable for domestic use.

103. It was his contention that on 27th October 2015 WARMA issued a restriction order and directed the 1st Respondent to take the following actions:

    a. Undertake comprehensive ESEIA study to determine the magnitude and extent of impact mitigation/ remediation action plans and compensating for any loss or damage arising thereof.

    b. Source for and provide alternative source of good quality water for domestic use for the community in the short term.

    c. Engage WARMA in undertaking hydrogeological studies polluted aquifer as part of remediation and come up with an elaborate water quality monitoring borehole.

    d. As a key stakeholder in water resources management, WARMA to pursue a legal action against KPC for the abnormally long period taken to repair the leaks and the pollution of both surface and ground water.

104. Pw15 stated that in November 2015, the matter was raised before the Senate Standing Committee on energy which committee made the following recommendations:

    a. NEMA to issue Environmental order within one week of the visit to the environment to its original hydrological characteristic

    b. Ministry of health to carry free and accessible medical screening and health care and undertake comprehensive testing for all residents and students for possible lead poisoning.

c. The Senate engages an independent expert besides those engaged by the 1st respondent to evaluate the extent of the pollution and carry out an environmental social and economic impact assessment of the oil spill.

d. The 1st respondent to compensate residents for the loss of this livelihood and their environment and to further ensure reliable supply of water to residents and the affected schools.

105. PW15 explained that this led to a formation of a County Task force made up of representatives from Makueni County, National Government, NEMA WARMA, local community and the 1st Respondent with the mandate of identifying the cause of the spillage and the necessary corrective action. Further that the 1st respondent procured the services of SGS to undertake Environment Site Assessment, whose report was presented to the Taskforce. After review of the SGS & WARMA Reports of 2015 and February 2016, the Taskforce prepared a detailed incident investigation report dated 29th February 2016, which confirmed contamination of soil and river water and outlined the social-economic impacts.

106. He averred that on 16th January 2016, the Task Force issued a restriction order to the residents of the river Thange basin not to use farm produce including water in the affected areas and to stop further irrigation, crop farming as well as livestock grazing pending clean up and environmental restoration. He also alleged that thereafter officials from the County Government of Makueni and Kibwezi Sub County administration officers were dispatched to enforce the order as a result of which, crops dried up and some farmers were ordered to uproot their crops.

107. According to the 1st Petitioner, NEMA issued a restoration order requiring the 1st Respondent to:

a. To take such actions as will prevent the continuation or cause of the pollution or environmental hazard.

b. To remove or alleviate any injury to land or to the environmental hazard.

c. To prevent and alleviate further or any damage to the land or environment, aquifer beneath the land, flora, fauna or under or about the land under reference.

d. To provide alternative portable water to the affected local resident up to the period NEMA & WARMA have established the water is no longer contaminated.

108. The 1st petitioner stated that towards the end of the year 2018 due to lack of surveillance, starvation and desperation and after Makueni County Enforcement officers withdrew from the restricted area, subsistence farming resumed.

109. It was his testimony that in the year 2016 following recommendations in the detailed Incident Investigation report, the 1st respondent was required to carry out a detailed ESIA to cater for soil, water, livestock, biota and human health and compute loss of income. That the 1st respondent commissioned three firms to conduct the said assessment:

a. SGS to carry out an environmental site assessment of impacted area which included hydrogeological study, sampling of the soil, surface river water, shallow underground water and borehole water on or about October or November 2015.

b. Enviroserve Limited to carry out soil and water remediation and restoration of the contaminated soil and ground water in the affected area in February 2016

c. Panafcon Limited to determine the environmental, social & economic impact of the spilled oil on the soil water (surface and ground water) crops & other plants. Livestock and community and quantify economic losses to the affected population particularly loss of livelihood.

110. Further, that when the reports were released in April 2016, the farmers noted discrepancies therein and sought that the same be reviewed before reparation. He claimed to have written to the 1st Respondent about the same, on 9th May 2016 and was advised by the latter to support the said complaint, with veterinary and human health reports. The issues of concern were:

a. Loss of livestock in the report only covered the upper Thange basin leaving out completely affected livestock loss in the lower Thange basin, that shared the same Thange River as a source of livestock water.

b. The population of livestock covered in the ESEIA report did not reflect the actual loss of farmers. Further, that farmers with few animals were added while others with more were reduced.

c. The ESEIA report only considered loss of livestock, treatment cost and left actual loss of dead and sickly animals.

d. The ESEIA Report addressed loss of medical treatment and left general damages for human health unaddressed.

111. It was his testimony that the affected farmers engaged the services of Dr. Jefferson Nthanga to carry out livestock assessment loss. That this was done in June 2016 and communicated to the 1st Respondent but it failed to elicit any response from them. He also alleged that the County Government of Makueni faulted the ESEIA report, outlining the reasons for its shortcomings to include among others, failure to indicate impact on plants, animals and marine life and include long term water solution.

112. It was his further contention that on 11th August 2016, the 2nd Respondent gave an update report on the remediation clean up monitoring exercise, noting that there was minimum reduction of oil in all the monitoring wells and recovery trenches. Further, that St. Peters school's borehole which is 40 metres deep and located 150 metres away from the leak point had contaminated oil.

113. The 1st petitioner contended that on 3rd January 2017, a stakeholders' meeting was held to check the extent of the cleanup and an agreement on the plan for decommissioning recommended that ENVIROSERVE ensure cleanup activities runs until the decommissioning time and SGS to carry out two samples in November 2017.

114. He also stated that another stakeholder meeting was held on 26th January, 2018, which recommended sampling along river Thange in the second week of February 2018 and samples were to be shared with the local community so as to enable them undertake their own independent testing. In addition, the 2nd Respondent was to consider the requests by the 1st Respondent to scale down the cleanup process.

115. He complained that due to prolonged period of restoration and remediation of the environment, the Petitioners complained to the 1st Respondent prompting the latter to respond vide their report of October 2018. They faulted the report on the following grounds:

a. The scaling down of operations by the 2nd respondent was done without the community's approval contrary to the recommendation of the Report dated 26th January, 2018.

b. The 1st respondent rejected the petitioners' claims and failed to carry out further medical examination of the remaining affected families, contrary to recommendations by their own Dr. Kowino.

c. That 636 claims were rejected yet all the information had been supplied by the ESEIA study.

d. Despite a budget to drill a borehole with network distribution, the same has not been done.

e. That the claims for loss of land use and livelihoods were rejected on the ground that crop growing ban was restricted only within the epicenter yet the same document noted that the County government had not communicated the lifting of the ban to the community.

f. Further, that the rejection for claims on land use was without basis as there was evidence that the County Government issued a total crop ban and ordered the uprooting of crops throughout Thange Basin, which was done by the community.

116. He reaffirmed that after decommissioning and handing over of the polluted environment to the 1st Respondent, the 2nd Respondent made a site visit and made observations that the site was still polluted as there was petrol smell and trail seen in several wells, causing them to question the information and parameters used to vacate the site of the pollution.

117. The 1st and 2nd respondents despite express recommendation from WARMA Report of 28th April 2018, went ahead to decommission the remediation process and vacated the polluted environment. He further complained that the information around the cleanup exercise and decommissioning of the site was not shared with the Petitioners. Further, that the only information they had was from Nairobi HCCC Judicial Review No 106 of 2016 in which ENVIRONSERV were awarded a contract for Kshs 136,000,000/=.

118. He pointed out that the fact that decommissioning was done before the environment was restored as it emerged during the heavy rains in November and December 2019, which caused the product to start oozing from the trenches as was captured in the daily Star Newspaper.

119. He contended that the final ESEIA Reports made recommendations and categories of compensation to the Petitioners but instead of implementing them, the 1st respondent resorted to undertaking activities and engaging in schemes aimed at manipulating and sabotaging the implementation to defeat the petitioners' claims.

120. He stated that the 3075 petitioners were genuine claimants and residents of the Thange River basin whom he had verified in his capacity as their representative. He also stated that the verification exercise was done in October 2017 by the 1st respondent in corroboration with himself and village elders of the twenty (27) villages. He maintained that their claim is not a land dispute but for compensation for loss of land use, crops and fruits.

121. He averred that the poor, weak, vulnerable and minors suffered immeasurable damages caused by the 1st Respondent's actions. He accused the 1st respondent of deliberately concealing sampling results done by SGS. He reiterated that Dr. Nthanga Jefferson and Dr. Mubisi Swaro conducted livestock assessment and medical examinations on the Petitioners respectively.

122. The witness produced several documents and reports including;

a. Minutes appointing the 1st Petitioner

b. WRMA Sampling reports

c. WRMA Restoration order

d. WRMA Letter dated 22nd February 2016

e. Laboratory Report dated 16th October 2015

f. WRMA Letter dated 12th February 2016

g. Water analysis results of 2nd December 2015 &9th February 2016

h. Restoration order of 17th December 2015

i. Senate Report of November 2015

j. Incident investigation report dated 29th February 2016

k. Restriction order dated 16th January 2016

l. Social Economic Impact Assesment study

m. Laboratory analysis results

n. Protest letters dated 9th May 2016

o. Letter dated 27th June 2016

p. ESEIA Review and comment report dated 3rd August 2016

q. Update report on Thange remediation clean up monitoring exercise dated 11th August 2016

r. Minutes of stakeholder meeting dated 3rd November 2017

s. Decommissioning plan

t. Minutes dated 26th January 2018

u. Report of October 2016

v Letter dated 24th October 2018

w. WRMA Sample report dated 2oth February 2018

x. Report dated 28th February 2018

y. SGS report of November 2017

z. Daily star newspaper online edition dated 28th November 2019

aa. Dr. Thange Jefferson's Livestock exposure assessment Report of June 2016

ab. Dr. Mubisi Swaro executive summary

ac. Work plan/ program for livestock assessment

ad. Invoice for Kshs 7,478,850/=

ae. Fee note of Kshs 20,277,600/=

af. Payment receipts of Kshs 14,300,900/=

ag. Medical reports and assorted expenses

ah. Budget for clinical lab tests

ai. Invoice for Kshs 11,531,100/=

aj. Payment receipts of Kshs 6,916,500/=

ak. Petition to Kenya National Human Rights Commission

al. Petition to the Senate Standing Committee on Energy

am. Dr. Kowino medical report

an. Laboratory medical results by Dr. Swaro

123. Upon Cross examination, he clarified that his home was about fifty (50) metres from the spillage site. He stated that he went to the spillage site after about twenty (20) minutes of being informed of the event and noted that oil was emanating from an underground pipe. On representation, he confirmed that he represented three thousand and seventy-five (3075) other Petitioners having received authority to represent them. He insisted that he knew the people he was representing as well as their homes as they are mostly farmers.

124. It was his testimony that he knew Mercy Makau who stays 150 metres from his homestead. He confirmed that he knew Baraka Munyoki who lived 25 metres from his home. Further, that Mary Kivuva is from Kathiani village while Hellen Kalekye is from Nguuni village, which about 35 km away far from the oil spillage site. He claimed that the spillage drifted about 35 km away from the spillage site.

125. He confirmed knowing one Anna Munika who lives in Muoki village, which is 200 metres from his homestead. It was his testimony that she was a farmer and although she was an adult at the time of the spillage, he did not know her age. It was his confirmation that Anna Munika is now deceased and there was a representative of her estate. He confirmed having known Tonia Mutua is from Kyoani village and stated that she was alive during the oil spillage. He stated that her identity card number had been indicated in the authority but she did not sign against her name.

126. He denied being the one who wrote the names of the petitioners and stated that representatives from every village were in charge of writing the names. He pointed out that the petitioners were enumerated in the Further Amended Petition whereof the Petitioners family, village and identity card numbers and signatures were included.

127. PW15 contended that the spillage first occurred on 12th May, 2015, which prompted the 1st Respondent to come to the site and repair the leaking pipe. He alleged that the spillage reached the river, sipped through the soil and flowed to his land. He explained that not all parcels of land including his land had title deeds as their lands were ancestral.

128. He explained that during ESIA, when the respondents visited their lands, everyone including the purchasers stood on their respective parcels. He stated that petitioners with titles did not file them in court.

129. He further explained that a Company called Panafcon Kenya Limited was contracted by the 1st respondent to administer questionnaires to the petitioners. He denied working with the said company and said that he was selected to be the Chairperson of the petitioners. It was his explanation that the team from Panafcon did not visit all the petitioners' homesteads' but only went to one hundred and fourty eight (148) homes. He clarified that the number 3074 did not represent homes but residents. He alleged that the affected persons are in more than the mentioned one hundred and fourty eight

(148) homesteads. He said that besides Panafcon, other institutions visited the homesteads. Further, that there was little difference between the time of the spillage and when he was testifying.

130. PW15 informed court that in June, 2015 after the 1st respondent had repaired their pipes and left, some of the petitioners discovered oil in a shallow well around the spillage site forcing some of the employees of the 1st respondent to return. He further alleged that there was presence of oil in November, 2015, when it rained. He further claimed that when the 1st respondent found oil in the shallow well, they chased them away and never informed them of any dangers posed, which was the reason why they continued using the water therefrom. He was categorical that the 1st respondent dug trenches to collect the oil 1km in length and 240 metres in width on both sides of Thange River. He insisted that his parcel of land was situated within the epicentre of the oil spillage, which spillage reached a distance of 42 km from the epicentre up to Athi River.

131. He alleged that between October and November, 2015 the 1st respondent supplied the petitioners with one lorry of 10,000 litres of fresh water per week. He conceded that there was a Taskforce in Kibwezi in November, 2015 which met at the County Commissioner's office. Further, that it is in those meetings where they were informed of the dangers of the oil spillage.

132. He reiterated that they stopped growing crops on their land until a Restoration Order was issued. Further, that there was also an Improvement Order issued. He conceded that that some of the petitioners were paid some monies but he claimed which they received involuntarily. Further, that he was paid 20% of the loss of his livestock which he understood to cover the cost of treatment of the said livestock.

133. It was his further testimony that the farmers from Thange River Basin met with the Insurance Company with a view to discussing their compensation at the County Commissioner's office. Further, that in the said meeting, they were not given an opportunity to render their views but were issued with Discharge Vouchers to sign. He further claimed that he was asked to sign the Discharge Voucher before reading it.

134. He further explained that although they treated their livestock, they died and that not all petitioners were farmers, nor reared livestock and bees. He did not know the number of farmers who cultivates mangoes and maize and how much they harvested. He was emphatic that they moved around villages and learnt that five hundred and twenty six (526) people had livestock as tabulated on his exhibit marked as 'annexure 'E'.

135. He was insistent that there were people who were affected by the contaminated water. Further, that a doctor Anthony Mubisi Swaro examined the affected persons who were one thousand three hundred and five (1305) in number. PW1 claimed that they were first examined at Machinery while the second examination was at Thange Primary School.

136. He claimed that they had paid Dr. Swaro more than kshs. 14 million, which monies were contributed by the petitioners. Further, that some of the petitioners failed to see Dr. Swaro because they could not afford it but he did not know their health status.

137. PW15 explained that the death certificates at page 180 of his documents marked as 'Annexure 'f' showed the cause of death as anaemia and that he had not produced a post-mortem report. He confirmed that for the two parcels of land he owned, he was compensated a sum of kshs.393, 000/=, which according to him, was little.

138. He clarified that they were only compensated for one and a half years in regard to their land instead of three years. He told the court that he knew Alice Maingi who was at the epicentre of the spillage but

is not one of the petitioners' herein and he did not know what happened to her case or if she received compensation. He also alleged that one Rufus and Daniel Kitonga Maanzo had another case but he was not sure if they were compensated. He further confirmed that NEMA gave a Restoration Order after about seven months of the oil spillage. He explained that a Taskforce was formed pursuant to instructions from the Governor of Makueni and comprised of representatives from NEMA, WRA, KPC and himself to seek compensation for the oil spillage and restore the environment.

139. PW15 confirmed that the 1st Respondent hired a company called SGS to conduct the clean-up exercise which took three years. Further, that Enviroservee went to do the clean up on 1st March, 2016 and there was follow up meeting on the clean-up exercise by stakeholders on 3rd November, 2017.

140. In Re-examination he clarified that the claim for livestock loss was assessed by Dr. Jefferson Nthanga. He contended that there was no need of annexing title deeds as Panafcon never sought for them. He insisted that he did not understand what a Discharge Voucher entailed and that they were not compensated for their health.

1st respondent's case.

141. The 1st respondent called one witness in support of its case. DW2, Ibrahim Aden, a Senior Environment Officer adopted the replying affidavit sworn by Beatrice Orgut as his evidence in chief. He also produced the documents annexed to the replying affidavit in support of the 1st respondent's evidence. It was his testimony that after the oil spill which occurred on 12th May, 2015, a team was dispatched to the site where they excavated trenches but that they did not observe any significant oil spill and as such they did not inform the community to stop using the water. He confirmed that a second team was dispatched to the site on 16th May, 2015 which extended the area of excavation and noted that there was oil in the water. He stated that they reported the incident to various agencies and a multi-agency was established to address the problem.

142. He was emphatic that as part of the clean-up intervention, they contracted the services of SGS to undertake water quality, soil and biota tests. Further, that they undertook a hydrological survey where it was established that there was oil underground necessitating a clean-up. He insisted that they adopted the DIV and CCME standards to test the quality of the water and soil standards. He went on to state that the spillage occurred from an underground pipeline which was close to the river causing the oil to leak into the soil.

143. He explained that the remediation process involves treating the water to the satisfaction of the acceptable levels. Further, that the 1st respondent undertook measures in treating the water and maintained that they were monitoring the site annually. He asserted that based on their last sampling report, both the water and soil are clean as per the Kenyan and International Standards. He argued that the spillage comprised of Super petrol which evaporates faster in the sun. It was his testimony that according to the 2021 report, samples collected from the wells and river water showed that the water is safe.

144. He testified that the 1st respondent provided water to the residents for two years through KIMAWASCO and Kibwezi Water Company. Further, that it offered to drill a borehole but the same was not achieved due to conflict in the community. He further testified that upon assessing the impact on the community, panafacon came up with the number of people who were to be compensated.

145. In cross-examination, he stated that he was aware of the Restoration Order of December 2015 which stated that they were to provide water to the community. He reiterated that the 1st respondent provided water for two years up to 2018. He asserted that they were not granted permission by NEMA and WRA

to stop supplying water to the community. He further testified that the 1st respondent approved and provided funds for drilling the borehole but the same was not done due to conflict in the community as regards to the location. According to him, remediation has been achieved even though NEMA had not lifted the restoration order.

146. He insisted that he was not aware that there had been oil flowing into the river or that the 1st respondent was removing oil from the site in 2019. He stated that the 1st respondent contracted several laboratories to carry out the sampling whose results showed that the parameters were below the Dutch Level interventions.

147. As regards the discharge vouchers reflected on page 1048 of the petitioners' Volume 7, he testified that there were logistical issues and that is why the Discharge Vouchers were signed before payment. He was insistent that three hundred and fifty (350) people were compensated. He asserted that the 1st respondent did not coerce the claimants to sign the Discharge Vouchers. He explained that the report by Panafcon was from the time of the incident to when the said report was done while the report by the Insurance Company was up to 2018.

148. It was his testimony that ESIA Report capped compensation at one animal out of a herd of five which is 20%. He denied being aware of any mass losses and stated that if there were any, then the same were not reported. He further stated that on the Impact Assessment, the community affected was narrowed down to Thange.

149. In further cross-examination by Mr. Muthanwa, he stated that the spillage report was made on 15th June, 2015 and that they went to the site on 16th June, 2015. He noted that the multi-agency team was formed around November 2015, which came up with a report of the 29th of February 2016 with several recommendations amongst them to assess the extent of losses, which had been incurred. He stated that the ESIA Report done in May 2016 laid out the basis for compensation. He reiterated that he was not aware that the Petitioners were coerced in the payment of compensation. Further, that the they were paid on a without prejudice basis.

150. He asserted that the 1st Respondent complied with the recommendations issued by NEMA and that they gave regular progress reports.

2nd respondent's case.

151. The 2nd respondent called one witness in support of its case. DW2 Zephania Owuor Ouma, adopted his affidavit dated the 6th October, 2020 as his evidence in chief. He produced the documents attached to his affidavit as exhibits in support of his evidence. It was his testimony that based on the Improvement Orders issued from 2015 together with the Environment Restoration Order, NEMA had confirmed that substantive compliance has been achieved based on the prescribed remediation standards. He further testified that the 2nd respondent still ensures that the 1st respondent submits continuous analysis reports to NEMA to ensure the stability of the remediation process.

152. According to the witness it took long for NEMA to issue the Environmental Restoration Order after the incident was reported in June 2015 because there were certain gaps that could not have facilitated for NEMA to issue the Restoration Order. Further, that there was need for the 1st respondent to carry an economic and environmental assessment to determine the extent of the pollution and social impact that might have occurred and the awaited the report from WRAon the adequacy and completeness of the Restoration Order. He was emphatic that notwithstanding the delayed Restoration Order, appropriate intervention measures were already ongoing to ensure that pollution was stopped. He

explained that a multi-agency team under the Chairmanship of the County Commissioner was constituted to supervise the interventions.

153. In cross-examination, he testified that the 1st respondent complied with the Restoration Order though he could not comment on the quality of the water and air. He testified that compliance is a continuous process and that the remediation process was done in accordance with the international best practices and the local legislation. He testified that Enviroserve Kenya Limited undertook the remediation process while Panafcon undertook the sampling and analysis. He further stated that the remediation report showed that substantive compliance had been achieved.

154. It was his testimony that he could not link disease occurrences to the oil spill. He further stated that NEMA issued a cautionary notice through the multi-agency team informing the residents not to use the water. He claimed that there was a compensatory arrangement by the 1st respondent to deliver clean water to the community. He further testified that NEMA issued a letter appreciating the 1st respondent for having achieved compliance to the prescribed remediation standards.

155. In cross-examination by Mr. Ndolo, he testified that he issued the Cautionary Notice after the County Director NEMA issued an improvement notice in 2015 informing the public not to use the water until such a time that NEMA was convinced that appropriate clean-up had been carried out. He went on to state that the Cautionary Notice was issued orally in the meetings by the multi-agency team which targeted the community in Thange.

156. It was his testimony that the Restoration Order was issued on 17th December, 2015, six months after the occurrence of the incident. He explained the delay by stating that they were awaiting reports from WRA. In addition, he stated that the delay in getting scientific and technical advice eventually informed Enviroserve of the extent of pollution.

157. He confirmed that they decommissioned the company that was undertaking underground remediation in 2018 and was not aware if they were still on the site. According to him, remediation is a process which involves continuous monitoring. He conceded that there was pollution and added that remediation of underground water takes time for stability to be fully achieved. He further confirmed that NEMA had not lifted the directive issued to KPC to provide clean water for the community and insisted that it should be complied with.

158. On cross-examination by Mr. Muthanwa, he testified that NEMA did not engage KPC in coming up with the company that compiled the ESEIA Report. He clarified that they were satisfied with the work done by Panafcon, the designated laboratory. He added that under Section 108 of *EMCA*, compensation would include water, health and livestock while the issue of food would be debatable. He argued that a study would be required to be done in order to link the occurrence of pollution to the health of the residents.

159. In re-examination, he stated that it was not possible to have a total remediation and that the clean-up would be completed with time naturally.

Submissions.

Petitioners' submissions.

160. The petitioners in their submissions provided a background of the dispute herein and reiterated the evidence they presented and relied on the exhibits produced. They challenged the evidence presented by the respondents. They highlighted the following issues for determination:

    a. Whether the parties are suited, that is the issue of petitioners' locus.

b. Whether the petitioners are genuine residents of the polluted environment

c. Whether the petitioners' constitutional rights as pleaded in the Petition have been violated, the manner in which the rights have been violated the cause/ effect link and the consequences of such violation.

d. Whether the petitioners have proved their case and the issue of liability.

e. The cause – effect link of violation and losses.

f. Whether the petitioners are entitled to relief sought.

g. Issues as to costs.

161. As to whether the petitioners' had locus standi to institute the Petition, they submitted that the issue of Locus Standi which had been a hindrance to public interest litigation and particularly environmental issues was removed in the year 2000 under Section 3 (3) & (4) of *EMCA*, which grants every person in Kenya the capacity to bring an action notwithstanding that such a person cannot show that the defendant's act or omission has caused or is likely to cause him any personal loss or injury. They further relied on Section 111 (2) of *EMCA* which removes any doubt on the issue of locus and states that it shall not be necessary for a claimant who applies for a Restoration Order to the court to show that he has a right or interest in the property, environment or the land alleged to have likely to be harmed.

162. Further, that Articles 22 (2) and Article 70 (3) of the *Constitution* also removed the issue of locus in Constitutional matters. They argued that Rule 4(2) of the *Constitution of Kenya (Protection of rights and fundamental freedoms) Practice and Procedure Rules*, 2013, reinforces the issue of capacity that apart from persons in their own interest, Court proceedings may be instituted by a person acting in the public interest or an association acting in the interest of one or more of its members to institute a petition alleging denial, violation, infringement or threat to a right.

163. It was their submission that they are persons acting on their own interest as persons who were affected and suffered personal losses including injuries. Further, that they have substantial vested interest in the outcome of this petition and locus to pursue restoration of the degraded environment. They aver that they seek compensation for themselves and in solidarity with the larger Thange community and generally the people of Kenya for the present and future generations for violation of their right to a clean and healthy environment.

164. They insisted that they are properly pleaded and joined in this petition, which gives rise to the same questions of law, facts, documents, reports, expert witnesses and reliefs against common respondents. To buttress their averments, they relied on the decision in Nairobi Constitutional & Human Rights Division – Petition No. 201 Of 2020. The *Association of Kenya Insurers (AKI) v The Kenya Revenue Authority & 2 others*.

165. Regarding the question as to whether the Petitioners are genuine residents of the polluted environment, they submitted that they are all residents of the oil spillage affected environment. They argued that they had tendered evidence to demonstrate that they are all residents and beneficiaries from twenty-seven (27) villages forming part of the greater Thange river basin of Kibwezi Sub County. They referred to the affidavit of Muindi Kimeu at paragraph *2*, where he deposed that on 6th November, 2015 he was nominated as the community representative to represent farmers' interest within the affected environment and as such, fully participated in almost all activities of oil disaster victims from May, 2015.

166. They further submitted that Muindi Kimeu at paragraph 3 of his supplementary affidavit had stated that with the assistance of Thomas Musau Kivivo and Stephen Kimondiu, who are petitioners herein and witnesses in this petition, carried fresh verification exercise of all the petitioners, re-arranged the petitioners in accordance with the villages of their residence and that identification was carried using identity cards for adults or birth certificates for the minors. Further, that the evidence of Muindi Kimeu on the integrity of the petitioners is corroborated by the affidavit evidence of Thomas Musau Kivivo's dated 19th September, 2020 and Stephen Kimondiu dated 17th September, 2020, who both participated in the verification exercise. They reiterated that the 1st respondent failed to prove that any of the three thousand and seventy-five (3075) petitioners in this Petition, is fictious.

167. On the issue as to whether the Petitioners' constitutional rights as pleaded in the Petition have been violated, the manner in which the rights have been violated, the cause/ effect link and the consequences of such violation, they submitted that the incident of the oil spillage is pleaded in paragraphs 43, 45, 51-57 of the Petition and paragraphs 6,7,8,9,10,11,20,21,31 and 36 of the supporting affidavit of Muindi Kimeu. They explained that the 2nd respondent inspected the 1st respondent's oil pipeline at River Thange and the surrounding environment and issued an Improvement Notice under Section 117(3)(g) of *EMCA* on the 17th November,2015. Further, that it is this Improvement Notice that identified the 1st respondent as a polluter of the Thange River and its environment.

168. They contended that on the 17th December, 2015, the 2nd respondent having found the 1st respondent as the polluter of the Thange River Basin, issued a Restoration Order under Section 108 of *EMCA*, which required it to restore the environment as near as it may be, to the original status and award compensation to other persons whose environment or livelihoods had been harmed by the pollution. Further, that in its letter dated the 27th October, 2015, WRA observed that both surface water and the underground water resources were contaminated with oil.

169. They referred to the Multi-Sectoral Team's report dated the 29th February, 2016 which established that the pollution of the Thange River Basin was caused by oil spillage. Further, that the Senate Standing Committee on Energy also identified oil spill incident to have caused the pollution. They submitted that the incident of the oil spill of 12th May, 2015, which caused the pollution to Thange River and its environment culminated in the violations of their rights. To support their arguments, they relied on Dr. Kariuki Muigua's Article titled "*Safeguarding Environment Rights in Kenya* at page 6, bullet 2.3 - Economic & Social Rights as well as the following decisions: *Adrian Kamotho Njenga v Council of Governors & 3 others* (2020) eKLR; *Cortec Mining Kenya Ltd v Cabinet Secretary Ministry of Mining & 9 Others* (2017) eKLR and *Friends of Lake Turkana Trust v Attorney General & 2 Others* (2014) eKLR.

170. It was the petitioners' further submission that the standard of proof in the instant Petition, like other matters of civil nature, is on a balance of probability and they ought to demonstrate with some degree of precision the rights they allege have been violated, the manner they have been violated, and the relief they seek for the violations.

171. On violation of their rights to a clean and healthy environment, the petitioners relied on the Water Resources Authority's reports and affidavits sworn by Dr. Kenneth Koreje. They argued that the 1st respondent had been identified as the polluter and investigations contained in the Water Analysed Test Results report for 2017 to 2018 indicated as well as concluded that there was presence of oil and grease in the water. Further, that the water was still polluted by hydrocarbon compounds.

172. They further submitted that WRA-Hydrogeological/Geophysical Assessment Report for Thange Oil Spill report of October, 2019 established and concluded that the shallow aquifer in the study area had been infiltrated and contaminated and made various recommendations.

173. It was their further submission that NEMA issued an Improvement Notice dated the 17th November, 2015 and Restoration Order for Environment dated the 17th December, 2015, pursuant to Section 108 of *EMCA*. Further, that the NEMA reports corroborate that pollution was caused by oil spillage, identified the 1st respondent as the polluter, ordered immediate action to be undertaken for remediation as well as restoration of the environment, and a report was to be given after thirty (30) days.

174. It averred that the Senate Standing Committee Report of February, 2016 established that there were huge quantities of petroleum oil products spilled into Thange River, which were soaked in the ground leading to accumulation in the underground soil. Further, that the community complained of pneumonia, skin irritation and stomach pain associated with polluted water.

175. They also referred to the Multi-Sectoral Detailed Incident Investigation Report dated the 29th February, 2016 where it established that the oil leak impacted the river water, ground water and soil and the extent of the contaminated plume was assessed to be 2.5km long (dilute plume), 1km (dense plume) and 10m deep. Further, that the pollution affected ground water, farms, wells and boreholes which the local community depend on for their livelihoods. That the said Multi-Sectoral Team report also established that the oil leakage was caused by acts of omission and/or commission, negligence and/or breach of duty by the 1st respondent's failure to diligently maintain and keep the pipeline transporting petroleum products in good working condition.

176. On the final ESEIA Study Report of the Thange River Basin by Panafcon Ltd of April 2016, they submitted that the said report also established and confirmed that the spilled petroleum products largely seeped into the ground reaching the shallow ground water. Further, that some of the products entered the Thange river and the released oil products migrated with the ground water and the Thange River Water, in the north-east direction. They challenged the 1st and 2nd respondents' defence regarding violation of Article 42 of the *Constitution* where the latter alleged that the oil spillage was not intentional but accidental. The petitioners insisted that the said oil spillage caused environmental pollution of monumental proportions. Further, that any acts of remediation amounted to a mitigating factor against losses of the oil spill. To buttress their arguments, they relied on the case of *MC Mehta & Another v Union of India*.

177. On the violation of Article 26 of the *Constitution*, they submitted that as pleaded at paragraphs 18 and 62(a) of the Petition, it is the respondents that violated and continue to violate the petitioners' constitutional right to life guaranteed and protected under Article 26, as the 1st respondent failed to remediate and restore the degraded and polluted environment as far as practicable to its immediate former condition, before the pollution. Further, that this has been manifested through human health injuries, unique incurable diseases and fatalities among the residents of Thange river basin arising from their exposure to effects of hydrocarbon.

178. It was their further submission that the threats to life could be inferred from the adverse effects of various chemicals on the human body and made reference to the various medical reports including Dr. Kowino's and Dr. Swaro's that had been produced as exhibits. Further, that on the effect of hydrocarbons, one of the reports noted the main hazards included toluene, benzene, lead and that the side effects of toluene include asthma, cardiac, arrhythmias, (abnormal heart rhythms), while long term exposure could lead to liver and kidney damage.

179. On the effect of benzene, they explained that this results in anaemia, which can lead to heart failure and cause cancer as well as liver damage and dermatitis. They insisted that the doctors' findings were shocking and confirmed a threat to their right to life and a threat to future generations. It was their further submission that as a result of effects of hydrocarbons, after filing the instant Petition, seventeen (17) petitioners have since died and their death certificates clearly indicate the cause of their death closely linked and/or associated with the effect of benzene/toluene. They highlighted the names of the deceased petitioners, date of death as well as cause of death. To support this argument, they relied on the case of *Peter K. Waweru v Republic*, Civil Appl No. 118 of 2004 [2006] eKLR.

180. On violation of Articles 43 (a) and 29 (d) & (f) of the *Constitution*, they submitted that the 1st respondent failed to implement recommendations issued to it in the following reports: the Senate Committee on Energy Report of February, 2016; Multi-Sectoral Team Report of February, 2016; Stakeholders Meeting of 1st November, 2018; and ESEIA Report Volume 3. They urged the Court to declare that their right to health services and not to be exposed to psychological torture as recommended in the aforementioned reports had been denied and violated and continue to be violated by the 1st respondent.

181. On violation of the right to clean and safe water in adequate quantities guaranteed and protected under Article 43 (1) of the *Constitution*, they submitted that this was violated as Thange River, which is their only source of natural water has been and continue to be polluted. Further, that the portable water supplied by the 1st respondent was irregular and inadequate; and in February, 2020, the 1st respondent withdrew provision of portable water without authority of WRMA and NEMA, thus exposing them to health vagaries of using polluted water.

182. They also submitted that for the first six months after the spillage, provision of portable water was lacking and the community continued to use the polluted Thange river as water for domestic, irrigation and livestock. Further, that to date there is very high probability that the underground water is still contaminated as per the latest WRMA Hydrogeological Assessment Report of October 2019, which revealed that the shallow aquifer about 5 metres (about 15 feet) is still contaminated by the oil plume. They insisted that the withdrawal of provision of portable water by the 1st respondent went against NEMA's Environmental Restoration Order of 17th December, 2015.

183. They contended that as the time 1st respondent withdrew the provision of portable water, they did not seek the approval of NEMA or WRMA or allow public participation on the said issue and this posed a great danger to their lives. They sought the Court to issue an order that fresh hydrogeological/ Geophysical Assessment Report for Thange oil spill and Laboratory Water Quality analysis of the surface water be carried out by WRMA, the County Government of Makueni and to allow them, to engage their own independent experts to be paid by the 1st respondent under the Polluter-Pays-Principle to determine the current status of the environment.

184. On the claim of violation of their right to property and violation to right to be free from hunger and to have adequate food of acceptable quality, they submitted that the same was corroborated by documentary evidence which was produced as exhibits. They made reference to the Multi Sectoral Team Report of February, 2016; the Makueni County Restriction (Ban) Order of 16th February, 2016; the ESEIA Reports of April, 2016 and revised by the ESEIA report by 1st Respondent and KPC Report of October, 2018. Further, they argued that the 1st respondent did supply relief food for a period of eighteen (18) months, which fell short of the Constitutional threshold as the food supplied was inadequate and of poor and unacceptable quality.

185. They further contended that the provision as well as withdrawal of relief food was done without the Authority of WRMA, NEMA and without public participation thus further violating their constitutional right to public participation in matters affecting food security. Further, that as a result of withdrawal of relief food, hunger and desperation, the petitioners gradually resumed subsistence farming towards the end of 2018, to alleviate severe food shortage.

186. On the alleged violation of their right to have their inherent right to human dignity, they relied on the case of *ANN v the AG* (2013) eKLR and argued that the said right had been violated since they were living under threat of their health and life, which depicted a picture of degradation of their dignity. They further relied on the case of *Kiluwa Ltd & Another v Commissioner of Lands & 3 Others* (2015) eKLR to buttress their averments.

187. They also submitted that their rights under Articles 35 and 47 of the *Constitution* had been violated since during the six months after the spillage, they suffered panic, trauma, psychological torture, anguish and bitterness occasioned by lack of information as regards the adverse effects of hydrocarbon exposure. To support this averment, they relied on Principle 10 of the *Rio Declaration on Environment & Development* (1992). They claimed that contrary to the spirit of the above principle, the 1st respondent failed to display material safety data sheets on petroleum hydrocarbons at public places, administrative centers, petitioners' homes or public baraza's information regarding the chemical classification of the hazards they were exposed to and the safety precautions to be undertaken, to avoid the inhalation and/or ingestion of the hazardous substances.

188. Further, that the violation of Article 35 is corroborated by the evidence of Jared Kasuni who confirmed that nobody visited the residents to explain the health effects of the hydrocarbons and this caused anxiety. They also contended that many ailments by the community were associated with the effects of hydrocarbons. They insisted that there was no public participation and sensitization of the community, nor was guidance and counselling offered to the affected community. Further, that contrary to Articles 35 & 47 of the *Constitution*, the 1st Respondent did not give the petitioners information leading to proposed settlement contained in the Discharge Vouchers of loss of crops, livestock, as well as the criteria and basis of the assessment. Further, that at the venue of signing the Discharge Vouchers, they were denied the chance to read the contents of the said Discharge Vouchers and/or to retain a copy of the same.

189. They reiterated that the 1st respondent violated their rights as guaranteed and protected under Article 47 as read together with the enabling statute at Section 4 (3) (b) & 4 (4) (b) of the *Fair Administration Actions Act,* including the Rules of Natural Justice. They argued that because they were laymen, who were not granted an opportunity or notified of their right to have legal representation during the opportune time of negotiating/making decisions and that the Discharge Vouchers were imposed upon them. On alleged violation of Article 69 (1) (d) of the *Constitution*, they submitted that they were not involved in the scaling down and handing over of the site by the 1st respondent as this was done in a clandestine manner contrary to recommendations from WRMA's report of 26th January, 2018.

190. Regarding the issue of liability and who should bear the legal responsibility to pay damages and incidental costs, they addressed it from a restrictive perspective on oil spillage as defined under section 2 of *EMCA* on Polluter Pay Principle. They submitted that the reliefs sought in the Petition except Prayer No. C, should be borne by the 1st respondent as provided under section 111 of *EMCA*. They reaffirmed that the 2nd respondent failed in its Constitutional and Statutory obligation to monitor and implement the remediation, restoration and clean up exercise. Further, that it also failed to ensure its own environmental Restoration Order of 17th December, 2015 was fully complied with. They directed the court on how to categorize their claims. To buttress their averments, they relied on the following

decisions: *M C Mehta & Another v Union of India & Others* 1987 AIR 1086, 1987 SCR (1) 819 and *Michael Kibui & 2 Others (suing on their own behalf as well as on behalf of the inhabitants of Mwamba Village of Uasin Gishu County) v Impressa Constrozione Giusseppe Mantauro SPA & 2 Others* (2019) eKLR,

191. They further argued that there was a cause effect link between the Constitutional Environmental liability and the social including economic losses they suffered and proceeded to highlight findings in the various aforementioned reports. To support this averment, they relied on the case of Machakos ELC Petition No. 19 of 2020 *Halai Concrete Quarries & 5 Others v County Government of Machakos* (2020) eKLR. They proceeded to enumerate the nature of the claims sought and insisted that the clean-up exercise both of the underground and surface water had not been remediated and they sought a multiplicand of five (5) years from May 2015 to May 2020 on loss of domestic water.

192. They further insisted that they were entitled to claim for general damages for violation of their rights to a clean and healthy environment since their social cohesion and way of life was interrupted, which they proceeded to quantify. To support these arguments, they relied on the following decisions: *Miguna Miguna v Fred O. Matiangi, Ministry of Interior & Coordination of National Government & 6 Others; Kenya National Commission on Human Rights* (2018) eKLR *; Lucy Wanjiku (Suing as the Legal Representative of Mukaru Nganga - Deceased) v Attorney General* (2018) eKLR; *Jamlick Muchangi Miano V Attorney General* (2017) eKLR; and Mombasa Civil Mombasa Civil Appeal No. E004 of 2020 *National Environment Management Authority v Kelvin Musyoka & 17 Others* as Consolidated with Civil Appeal No. E032 of 2021.

193. They further submitted that they are entitled to be compensated for loss of income from land for crops and fruits. They contended that the 1st respondent only paid partial compensation for a limited period of one and half years on the false assumption that within that period, the environment would have been restored and farmers would have returned to farming, but this did not happen. They quantified the amounts they sought to be paid and explained that the legal basis for their claim emanated from the Polluter Pay Principle as well as section 3(3) (e) of *EMCA*.

194. On their claim for loss of livestock and health, they relied on various reports including the medical reports and justified that they are entitled to an award for general damages for personal injury, pain, suffering and loss of amenities as well as the cost of medical treatment. They further submitted that 1,305 petitioners claim damages for personal injury, pain and suffering and loss of amenities while the claim for the other 1,770 petitioners who did not undergo the laboratory tests and have no medical reports is withdrawn. They further sought for a claim for loss of expectation of life for the 17 deceased persons who died after the filing of the Petition and their cause of death was directly related to the adverse exposure to hydrocarbon environmental pollution. They enumerated their claims for special damages and sought for medical treatment, livestock, medical examination, and laboratory tests.

195. They further submitted that they were entitled to compensation for their claim for exemplary/ punitive/ aggravated damages as well as a declaration to invalidate the discharge vouchers. To support this argument, they relied on the following decisions: *Beebna Khambatia v Talvinde Sago & 3 Others* (2015) eKLR; Uhuru Owino Petition Civil Appeal No. E 004 of 2020; Nakuru HCCC No. 98 of 2002 *Simon Kinyua v Eveready Batteries (K) Ltd*; Kakamega Civil Appeal No. 7 of 2017 – *West Kenya Sugar Co. Ltd v Sumba Julaya (Suing as the Administrator & Personal Representative of the estate of James Julaya Sumba)* (2019) eKLR and Nairobi Civil Appeal No. 98 of 2014 – *Hon. Gitobu Imanyara & 3 Others v Attorney General* (2016) eKLR; Machakos ELC Petition No. 601 of 2013 *David Gitau Thairu v County Government of Machakos & 2 Others* (2020) eKLR; *National Insurance Co. Ltd v Boghara PolyFab Pvt Ltd* – Civil Appeal No. 5733 of 2008 and *Katiba Institute v President's Delivery Unit & 3 Others* (2017) eKLR.

196. They further submitted that they were entitled to a borehole as a long-term solution, establishment of a special clinic and rehabilitation of Thange River Riparian Habitat and Restoration of aqua including marine life. They argued that it is the obligation of the polluter to restore damaged environment that include replacement of soil, replanting of trees and other flora. They insisted that as per the findings in the ESEIA Report, the stored product would continuously be released downstream of Thange River when the ground water dynamic change.

197. The petitioners' Counsel in their submissions sought to withdraw 1,770 petitioners' claim for loss of general damages, for personal injury, pain and suffering and loss of amenities.

1st respondent's submissions.

198. The 1st Respondent filed its submissions dated 18th September, 2023. It was Counsel's submission that for any person to commence proceedings in court on behalf of any other person, they need authority which needs to be executed and filed in court. Counsel asserted that the 1st Petitioner was unable to give a convincing answer as to the reason why some petitioners did not sign the authority. Counsel urged the court to strike out the names of all the petitioners who had not signed the authority to sue. Relying on the decision of *Stephen Lolo Tathi & Others v Maham Musa Kioko* Civil Suit No. 132 of 2019, Counsel submitted that the authority to act must be signed by the person giving such authority.

199. At paragraph 24 of the 1st Respondent's submissions, Counsel conceded that an oil spill had occurred around Thange River during the month of May 2015 but argued that the amount of blame levelled against the 1st respondent was exaggerated. Counsel submitted that the reliefs sought by the petitioners are not real and that they ought to be disallowed.

200. Submitting on whether the petitioners' right to life under Article 26 of the *Constitution* had been violated, Counsel contended that the spillage along Thange River was not intentional and that the 1st respondent moved in to remedy the situation as soon as they were informed about the incident. Counsel further contended that the petitioners had not demonstrated how the 1st respondent had deprived their right to life. Pointing out the evidence of Dr. Kowino J.O, Counsel asserted that the witness had stated that he could not fully ascertain that it was the petrochemicals alone which had caused the abnormalities. Counsel therefore submitted that Article 26 had not been violated.

201. The 1st respondent further submitted that the petitioners did not prove that they were physically and or psychologically tortured by the 1st respondent in violation of their constitutional rights under Article 29 (d) of the *Constitution*. Counsel made reference to the 1st respondent's evidence stating that KPC had provided the Petitioners with water on various occasions and that it had even sunk shallow wells. Counsel submitted that the petitioners ought to have been examined by a doctor to ascertain whether they exhibited symptoms of torture.

202. Submitting on Article 35 of the *Constitution*, Counsel stated that the Petitioners did not disclose to the court about the type of information that was withheld from them by the 1st respondent. Counsel further submitted that the petitioners did not adduce evidence indicating that they had called for certain information and that the 1st respondent had declined to provide the same. Counsel submitted that the 1st petitioner confirmed in his evidence that he had been appointed as the leader of the petitioners and that he had always been in attendance during the meetings called by the Respondents.

203. Further submitting on Article 40 of the *Constitution*, Counsel stated that the petitioners did not demonstrate that the 1st respondent had impeded their right to acquire and own property. Counsel contended that the 1st respondent moved into the etitioners' land for purposes of taking remedial

measures on the oil spill. Counsel contended that it is the 1st respondent's duty to was to supervise the remedial measures as the petitioners have no technical knowhow on the same.

204. Counsel went on to submit that that in compliance with Article 42 of the *Constitution*, the 1st respondent moved in immediately to the site and repaired the damaged part of the pipeline. Counsel asserted that it was the continued monitoring of the spillage and the remedial works done by the 1st respondent that saw the reduced levels of hydrocarbons in the affected areas. Counsel insisted that the 1st respondent did not walk away from the problem and that it indeed solved the problem.

205. Submitting on Article 43 (1) (a), (c) and (d) of the *Constitution*, Counsel reiterated that the 1st respondent is still on the ground trying to ensure that life goes back to normal before decommissioning the remedial process.

206. On Article 47 of the *Constitution*, Counsel submitted that the petitioners had not demonstrated how the 1st respondent had trampled on their constitutional rights. It was further contended that the petitioners did not prove how the 1st respondent curtailed the petitioners' constitutional rights under Article 69 of the *Constitution*. Counsel maintained that it is not the responsibility of the 1st respondent to ensure compliance with the provisions of Article 43 of the *Constitution*. Counsel further contended that the 1st respondent was not bound by Article 69 of the *Constitution* which he argued were obligations directed to the State.

207. It was the submission by Counsel for the 1st respondent that the petitioners are not entitled to prayer "C" of the further amended petition because the conclusions made by the Report of SGS which was produced as Exhibit BO11 confirmed that the health risks to the occupants of most of the areas monitored was considered to be very low or negligible. Counsel made reference to Exhibit BO14 which is also a Report by SGS asserting that the concentrations of petroleum hydrocarbons detected in soil samples were below the DIV guidelines.

208. Counsel further contended that on the issue of water, the Report by SGS confirmed that the TPH results for all the surface water and ground water were within the limits and guidelines of the Dutch Intervention Values and the World Health Organization guidelines for drinking water.

209. Counsel contended that the 1st respondent had not been decommissioned by the 2nd respondent and that the remedial process is still ongoing. It was his submission that Prayer "C" of the further amended Petition was therefore unnecessary.

210. On Prayer "D" of the Petition, Counsel submitted that the petitioners have never communicated to the 1st respondent on the exact location where boreholes are to be sunk. Counsel also contended that it is unnecessary for boreholes to be sunk now within an area where the oil spilled and that the court should therefore disallow that prayer.

211. On Prayer "E" of the Petition, Counsel contended that it was unnecessary to issue orders compelling the 1st respondent to restore the damaged land, soil, surface and underground water because the 1st respondent is still on the ground trying to do the same thing.

212. Similarly, as regards Prayer "F" of the Petition, Counsel submitted that it is unnecessary for the 1st respondent to be directed to establish specialized hospitals to offer medical treatment to the victims when the Country has enough hospitals to cater for the same.

213. On Prayer "G" of the Petition, Counsel submitted that the 1st petitioner did not adduce evidence to prove that undue influence and or coercion were used against the people who signed the discharge

vouchers. That once they appended their signatures, they were bound by the terms in the vouchers. Counsel stated that the discharge vouchers ought not to be declared unconstitutional.

214. Counsel went on to submit that the petitioners had not proved that they were entitled to Prayer "H" of the Petition because special damages ought to be specifically pleaded and proven which they had failed to do. Counsel urged the court to deal with the cases of only the petitioners who had been examined by Dr. Swaro and not to make the presumption that the persons who were not examined are also sick. Counsel further submitted that if the court is inclined to award compensation to the petitioners who were examined, then it should bear in mind the amount of money that was paid to each individual in the discharge vouchers that were presented in court.

215. On the claim for general damages, Counsel suggested payment of Kshs. 10,000/= each for the 1305 Petitioners that were examined by Dr. Swaro. On the claim for loss of expectation of life, Counsel submitted that the petitioners had failed to discharge their burden of proof and therefore, the award ought to be dismissed.

216. On the claim for special damages for veterinary and professional fees and expenses, Counsel submitted that Dr. Jefferson Kaloki Nthanga did not specifically prove his claim of Kshs. 7,830,100/= at the hearing of the case. Further, Counsel submitted that the Petitioners had not proved their claim for exemplary damages as they had not shown that the 1st respondent arbitrarily acted against the petitioners.

217. Concluding his submissions, Counsel maintained that if any damage was suffered by the petitioners, then the same was personal and therefore every person who suffered such damage ought to prove the damage suffered and such damage cannot be awarded in a representative capacity. Counsel further submitted that the 1st respondent had taken remedial measures and that the site of the oil spill was secure and that the waters of River Thange were safe for human and livestock consumption. Counsel urged the court not to award costs on this Petition considering that it is the practice in constitutional litigation and also considering the fact that the 1st respondent has incurred huge costs on the remediation process and compensation of the petitioners.

218. To buttress his submissions, Counsel relied on the authorities filed with the submissions in the list of authorities dated 18th September, 2023.

2nd Respondent's submissions.

219. The 2nd respondent in its submissions provided the background of the Petition herein and confirmed that the genesis of the Petitioners' case against it, is an oil spill that occurred on/or about June 2015 around river Thange from the 1st respondents pipeline. In its submissions, the 2nd respondent framed the following issues for determination:

    i. Should a Restoration Order be issued against the 2nd respondent

    ii. Whether the Petitioners have proved the purported violation of their Constitutional rights by the 2nd respondent.

    iii. Who should bear costs

220. As to whether Restoration Orders should be issued against the 2nd respondent, it submitted that under Section 108 of *EMCA*, it provides for an Environmental Restoration Order being issued by the Authority to a polluter of the environment. It argued that, a salient feature of an Environmental Restoration Order is stopping continuation of pollution and restoring the environment as near as it may be to the state it was in. Further, that in relation to the instant Petition, it already issued the same

to the 1st respondent vide its letter dated 17th December 2015. It supported the averments at paragraph 116 of the Petitioners' Submissions where they had stated that apart from prayer for "Environmental Restoration Order against the 2nd Respondents, all other claims in the Petition are payable by the "polluter", that is the 1st respondent under the polluter Pays Principle".

221. It further submitted that it is not likely to harm the environment and the prayer against it should not issue. It took the view that the 2nd respondent has neither harmed nor is likely to harm the environment and that this prayer should not issue against the 2nd Respondent. Further, that it is not in dispute by the 1st respondent that indeed the pollution was caused by their activities. That this fact is not denied or disputed by them or the other parties herein. They reiterated that the law provides where pollution occurs and the polluter is known, it is the polluter who is responsible for compensation. To buttress its arguments, it relied on the following decisions: *National Environment Management Authority & 3 others v Maraba Lwatingu Residents Association & 505 others* [2020] eKLR and *Indian Council for Enviro-Legal Action v Union of India*.

222. It further relied on the strict liability rule as espoused in the case of Rylands v Fletcher. It also submitted that the said principle has widely been used in various cases both domestically and internationally to show liability for persons who keep dangerous substances which escape and cause harm on the surrounding environment. To expound on the rule on strict liability, it also relied on the decisions of *Shell PDC Ltd v Chief G.B.A. Tiebo & Others* and *KM & 9 others v Attorney General & 7 others* [2020] eKLR, Petition 1 of 2016.

223. It argued that the Restoration Order sought against it can only be issued against the 1st Respondent being the polluter. Further, that the Polluter Pays principle should apply. It insisted that the 2nd respondent is only a regulator on environmental issues and funded by members of public including the petitioners herein, and should not utilize public funds for clean-up activities where the polluter is well known and capable of undertaking such an exercise.

224. As to whether the Petitioners proved the purported violation of their Constitutional rights by the 2nd respondent, it submitted that its core mandate is to exercise general supervision and co-ordination over all matters relating to the environment wherein it is required to supervise and co-ordinate the different Lead Agencies involved in the control and management of the various components of the environment. It argued that the environmental sphere is so vast and technical that one entity cannot strictly speaking deal with each and every element encompassing it. Further, that it is for this purpose that the 2nd respondent is required to supervise and co-ordinate the various government agencies.

225. It further submitted that its role was to first determine the source of the pollution, the pollutant, action required to stop such pollution, key Lead Agencies to address various pollution issues and co-ordinate and supervise the remediation exercise. It reiterated that it fulfilled its mandate as provided by the law and made reference to the evidence adduced by both the petitioners and respondents.

226. It submitted that the delay in the issuance of a Restoration Order as alleged by the petitioners was because the same could not be issued immediately after the spill as the extent of the damage was not known. Further, that there was need for the 1st respondent to undertake a comprehensive Environmental, Medical, Economic and Social Impact Assessment, which was to guide the nature of the Restoration Orders to be issued by NEMA. It explained that the petitioners herein are beneficiaries of the said directives as the Restoration Orders issued by NEMA and guided by Reports submitted to it, directed the Petitioners' to be provided with clean water and food.

227. It further submitted that various actions were taking place during the period running from 30th June 2015 when NEMA visited the site to 17th December 2015 when the Restoration Order was issued.

Further, that there was evidence that various Improvement Notices were issued to the 1st Respondent by both NEMA and Water Resources Authority during that period.

228. On the petitioners' claim that it failed to discharge its role to co-ordinate, supervise and monitor, it reiterated that its officers evaluated the situation and determined that the pollution was emanating from the 1st respondent's pipeline. Further, that a site visit incident report was thereafter prepared, wherein the 1st respondent was directed to take various remedial measures including but not limited to, immediately stopping the oil spill. It insisted that in undertaking its supervisory role, it engaged the Water Resources Authority as the Lead Agency in charge of water, taking into account the fact that the pollution affected water aquifers and River Thange and requested for water sampling of the area. It further insisted that it undertook its supervisory role as per its mandate. It also argued that letters addressed to the County Commissioner of Makueni and the Water Resources Authority, which were produced as evidence clearly confirm that it undertook its co-ordination and supervisory role in the clean-up exercise.

229. It concluded that the Court should find that it did not breach any constitutional rights accruing to the petitioners and that it is the 1st respondent who should be made to pay the costs of the Petition.

Analysis and determination.

230. Upon consideration of the Petition, Answers to Petition, testimonies of the witnesses, exhibits and respective submissions, the following issues arise for determination:

    a. Whether the Petition has met the Constitutional threshold for a Constitutional Petition;

    b. Whether the Petitioners were residents of Thange River Basin;

    c. Whether the Respondents violated rights under Articles 42 and 69 of the *Constitution* within Thange River Basin, and if so, whether the Court should exercise its powers under Article 70 thereof;

    d. Whether the Respondents and the State breached their obligations under Article 21 of the *Constitution*;

    e. Whether the Petitioners' rights under Articles 26, 28, 29 40 and 43 of the *Constitution* were violated;

    f. Whether the Petitioners' rights to access to information and fair administrative action under Articles 35 and 47 of the *Constitution*, respectively were violated.

    g. Whether the Petitioners proved liability as against the Respondents and if so, whether they are entitled to an award of damages;

    h. Whether the Petitioners are entitled to the orders sought.

231. Although the question as to whether the petitioners had locus standi to file the instant Petition was raised as an issue within the Petition, the said question was also presented by the 1st respondent in their Notice of Motion dated the 15th October, 2021 and this Court vide its Ruling delivered on 22nd February, 2023, made a finding that the petitioners indeed had the relevant locus standi to institute these proceedings.

A. Whether the Petition has met the Constitutional threshold for a Constitutional Petition.

232. The Respondents contended that the Petition does not meet the threshold of a Constitutional Petition, which argument was opposed by the petitioners. On meeting the Constitutional threshold, Rule 10 of the *Constitution of Kenya (Protection of rights and fundamental freedoms) Practice and Procedure Rules* (Hereinafter referred to as the 'Mutunga Rules') provides for the form and substance of a Constitutional Petition as follows:

> 10.
>
> (1) An application under rule 4 shall be made by way of a petition as set out in Form A in the Schedule with such alterations as may be necessary. (2) The petition shall disclose the following—
>
> (a) the petitioner's name and address;
>
> (b) the facts relied upon;
>
> (c) the constitutional provision violated;
>
> (d) the nature of injury caused or likely to be caused to the petitioner or the person in whose name the petitioner has instituted the suit; or in a public interest case to the public, class of persons or community; (e) details regarding any civil or criminal case, involving the petitioner or any of the petitioners, which is related to the matters in issue in the petition; (f) the petition shall be signed by the petitioner or the advocate of the petitioner; and (g) the relief sought by the petitioner.
>
> (3) Subject to rules 9 and 10, the Court may accept an oral application, a letter or any other informal documentation which discloses denial, violation, infringement or threat to a right or fundamental freedom.
>
> (4) An oral application entertained under sub rule (3) shall be reduced into writing by the Court.'

233. Therefore, the law on the legal threshold of a Constitutional Petition is well settled. A Constitutional Petition must raise a Constitutional question requiring Constitutional interpretation as opposed to statutory interpretation. This in essence requires that a petitioner should clearly set out the respondents' acts complained about, with a reasonable degree of precision; the constitutional provisions infringed upon by the respondents and the manner in which they are alleged to have been violated.

234. This position was well articulated in the case of *Mumo Matemo v Trusted Society of Human Rights Alliance* [2014] eKLR, where the Supreme Court stated that:

> " ...the principle in *Anarita Karimi Njeru* (supra) underscores the importance of defining the dispute to be decided by the court... Procedure is also a handmaiden of just determination of cases. Cases cannot be dealt with justly unless the parties and the court know the issues in

> controversy. Pleadings assist in that regard and are a tenet of substantive justice, as they give fair notice to the other party. The principle in *Anarita Karimi Njeru* (supra) that established the rule that requires reasonable precision in framing of issues in constitutional petitions is an extension of this principle" In the case of *Christian Juma Wabwire v Attorney General* [2019] eKLR, the Judge relied on the decision in *Lt Col Peter Ngari Kagume and 7 others v AG*, Constitutional Application No 128 of 2006 where it was held that:-It is incumbent upon the petitioners to avail tangible evidence of violation of their rights and freedoms. The allegations of violations could be true but the court is enjoined by law to go by the evidence on record. The petitioners' allegations ought to have been supported by further tangible evidence such as medical records, witnesses..... the court is deal to speculation and imaginations and must be guided by evidence of probative value. When the court is faced by a scenario where one side alleges and the rival side disputes and denies, the one alleging assumes the burden to prove the allegation... However, mere allegation of incarceration without providing evidence of the same does not at all assist the court. It was incumbent upon the Petitioners to provide evidence of long incarceration beyond the allowed period and not to be presumptuous that the court knows what happened....."

235. Again, the Supreme Court of Kenya has articulated this position in the case of *Communications Commission of Kenya & 5 Others v Royal Media Services Limited & 5 Others* [2014] eKLR, as follows:

> 'Although Article 22 (1) of the *Constitution* gives every person the right to initiate proceedings claiming that a fundamental right or freedom has been denied, violated or infringed or threatened, a party invoking this Article has to show the rights said to be infringed, as well as the basis of his or her grievance. This principle emerges clearly from the High Court decision in *Anarita Karimi Njeru v Republic* [1979] KLR 154; the necessity of a link between the aggrieved party, the provisions of the *Constitution* alleged to have been contravened, and the manifestation of contravention or infringement. Such a principle plays a positive role, as a foundation of conviction and good faith, in engaging the Constitutional process of dispute settlement.....'

236. In the instant case, the petitioners have alleged that their rights as enshrined in Articles 26, 28, 29 (d), 35, 40, 42, 43, 47 and 69 of the *Constitution* have been violated on account of the acts and or omissions of the respondents for allowing the oil spill to occur at the Thange River Basin, which culminated in environmental damage as well as negative impact on human health, loss of lives, livestock and damage to crops. They insisted that the respondents failed to put in place remedial measures to correct the effects of the oil spill. In the circumstances, while associating ourselves with the decisions cited above, we find and hold that the Petition has met the Constitutional threshold for a Constitutional petition since it has precisely set out the acts complained of; the Constitutional provisions allegedly violated by the respondents and the manner in which they are alleged to have been infringed.

B. Whether the Petitioners were residents of Thange River Basin.

237. The respondents disputed the petitioners' allegations of being residents of the Thange River basin. Section 107 of the *Evidence Act* places the burden of proof on a claimant and stipulates thus:

> '(1) Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist. (2) When a person is bound to prove the existence of any fact it is said that the burden of proof lies on that person.'

238. Section 109 of the *Evidence Act* places the burden of proof of any fact to the person alleging the existence of such fact and stipulates as follows:

> 'The burden of proof as to any particular fact lies on the person who wishes the court to believe in its existence, unless it is provided by any law that the proof of that fact shall lie on any particular person.'

239. In this instance, the petitioners explained that they were residents, owners of land and/or employees within twenty-seven (27) villages of the Thange River Basin where the oil spillage occurred. We have considered the discharge vouchers produced by the 1st respondent at pages 1044 to 1315 annexed to the replying affidavit of Beatrice Orgut dated the 29th June, 2021 and it confirms that the persons who signed the said discharge vouchers were described by the 1st respondent as residents of Thange River Basin. This was further corroborated by the oral evidence of the petitioners' witnesses being Stephen Kimondiu and Thomas Musau Kivivo, who confirmed that the petitioners were residents of Thange River Basin. Further, in the evidence tendered, it emerged that the 1st respondent was even supplying food and water to the petitioners and even sunk shallow wells for their livestock. From the evidence tendered, it is clear that while the respondents were undertaking the assessment of the impact of the oil spillage in the Thange River Basin, where they even prepared the Environmental and Social – Economic Impact Assessment (ESEIA) Report, the petitioners were actually made to stand on their respective parcels of land and identify their livestock. Dr. Kowino, who presented a report dated the 5th May, 2016 on behalf of the 1st respondent, confirmed conducting medical examination on a sample of fourty six (46) residents comprised of men, women and children, picked at random from different villages within the affected area. On behalf of the petitioners, Dr. Mubisi Swaro confirmed in evidence having examined a sample of about one thousand three hundred and five (1305) persons from the affected area. Further, Dr. Jefferson Nthanga confirmed carrying out livestock assessment loss suffered by the petitioners. It is therefore clear that the persons who were attended to, by the three doctors mentioned above, were indeed residents within the Thange River Basin. From the foregoing, we find and hold that the petitioners have proved that they are indeed residents of the Thange River Basin.

C. Whether the Respondents violated rights under Articles 42 and 69 of the Constitution within Thange River Basin, and if so, whether the Court should exercise its powers under Article 70 thereof.

240. Article 42 of the *Constitution* of Kenya provides for the right to a clean and healthy environment as follows:

> " Every person has the right to a clean and healthy environment, which includes the right — (a) to have the environment protected for the benefit of present and future generations through legislative and other measures, particularly those contemplated in Article 69; and (b) to have obligations relating to the environment fulfilled under Article 70."

241. It is therefore explicit that Article 42 of the *Constitution* provides for the right of every person to a clean and healthy environment, as an omnibus right, which encompasses the right to have the environment protected. Essentially, this Article recognizes that the environment being an asset in itself deserves protection, which is independent of its impacts on humans. Further, it takes cognizance of a human rights-based approach in environmental protection.

242. Therefore, the right to a healthy and safe environment encompasses the right to protection of the environment, which therefore means that the inherent and intrinsic value of living entities both human and non-human are recognized under our law. Thus, our law provides for a sustainable ecosystem.

As stipulated in Article 42(b) of the *Constitution*, duty bearers have obligations in regards to the environment as an independent entity.

243. It therefore follows that the rights of nature are part of the right to a clean and healthy environment. Jeremy Gilbert in his article the Nexus between ''Human Rights'' and the ''Rights of Nature''. Debates, Tensions and Complementarities, October, 2024, 328 argues that the right to a healthy environment demonstrates a link between the wellbeing of human beings and the rest of the natural world, underlining the intrinsic reciprocity between those two elements. It is our view that Courts need to simultaneously uphold these different categories of rights, without creating human/ nature dichotomies, so as to foster a new model of development, that is truly sustainable for both humans and non-humans.

244. Where there is environmental degradation or pollution as in this instance, and both the environment as well as human lives are detrimentally impacted, the Court is empowered to grant remedies to protect the environment as an independent entity and also grant orders to protect human life. In the Nigerian case of *Centre for Oil Pollution Watch v Nigerian National Petroleum Corporation*. Supreme Court of Nigeria SC. 319/2013, the Supreme Court of Nigeria upheld the position that where government agencies mandated to enforce compliance of environmental laws and policies fail to do so in circumstances where there is environmental degradation, the issue of ownership of land does not arise, but the Court should not hesitate to grant appropriate orders to protect the environment. They held as follows:

> " It cannot be denied that there are legislations and agencies specifically put in place to address issues of environmental degradation such, as the *National Environmental Standards and Regulation Enforcement Agency (Establishment) Act*, 2007 (NESREA Act), which provides, inter alia, for the enforcement of compliance with laws, guidelines, policies and standards on environmental matters, the *National Oil Spill Detection and Response Act* and the National Oil Spill Detection and Response Agency (NOSDRA) created to detect and respond to oil spillage within the National Territory. There are also State environmental laws and agencies. The issue that arises is what is the remedy of persons affected or likely to be affected by the effect of the environmental degradation where the statutory agencies fail to carry out their responsibilities or where the land belongs to no one in particular, as in this case, but the effect of he pollution extends far beyond the immediate environment? As observed in the case of *R v Inspectorate of Pollution & Anor., exparte Greenpeace Ltd. (No.2)* (supra), where a government agency fails to carry out its statutory function in circumstances such as this, it is highly unlikely that the government, Federal or State, would institute an action against its own agency. The public would be left without a remedy''

245. Article 12(2)(b) of the *International Covenant on Economic, Social and Cultural Rights* (ICESCR) provides steps for the realization of the right to the highest attainable standard of health by stating thus:

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

246. In 2021, the United Nations Human Rights Council in its Resolution A/ HRC/ RES/48/13 of 8 October 2021, reaffirmed that the right to a clean, healthy and sustainable environment is an internationally recognized human right.

247. The United Nations General Assembly in its Resolution dated 26th July, 2022 (A/76/L.75) at the 76th Session on the issue of human right to a clean, healthy and sustainable environment, recognized that the impact of climate change, the unsustainable management and use of natural resources, the pollution of air, land and water, the unsound management of chemicals and waste, the resulting loss of biodiversity and the decline in services provided by ecosystems, interfere with the enjoyment of a clean, healthy and sustainable environment. Further, that environmental damage has negative implications, both direct and indirect, for the effective enjoyment of all human rights.

248. On 29th September, 2022, the United Nations General Assembly recognized with a unanimous vote and affirmed that a right to a clean, healthy and sustainable environment is linked to other rights and is part of existing international human rights law.

249. The UN Special Rapporteur on the issue of human rights obligations related to the enjoyment of a safe, clean, healthy and sustainable environment vide his report published on 30th December, 2019, (A/HRC/43/53) stipulated good practises, which ought to be adhered to by the State in recognizing the right to live in a safe, clean, healthy and sustainable environment, categorizing them into procedural and substantive elements of the right. The procedural elements being access to information, public participation and access to justice and effective remedies. On the other hand, the substantive elements are clean air; a safe climate; access to safe water and adequate sanitation; healthy and sustainably produced food; non-toxic environments in which to live; work; study and play; and healthy biodiversity and ecosystem.

250. The *African Charter on Human and Peoples' Rights* (Banjul Charter) at Article 24 provides that all people have the right to a general satisfactory environment favourable to their development. On the other hand, the African Human Rights Law Journal provides that every citizen shall have a right to a satisfactory and sustainable healthy environment and shall have the duty to defend it. Further, that the State shall supervise the protection and conservation of the environment.

251. In Kenya, the *Environment Management and Coordination Act* (EMCA) at section 3 (1), (2), (2A), and (3) makes provision for entitlement to a clean and healthy environment and states inter alia:

> (1) Every person in Kenya is entitled to a clean and healthy environment in accordance with the *Constitution* and relevant laws and has the duty to safeguard and enhance the environment.
>
> (2) The entitlement to a clean and healthy environment under subsection (1) includes the access by any person in Kenya to the various public elements or segments of the environment for recreational, educational, health, spiritual and cultural purposes.
>
> (2A) Every person shall cooperate with state organs to protect and conserve the environment and to ensure the ecological sustainable development and use of natural resources.
>
> (3) If a person alleges that the right to a clean and healthy environment has been, is being or is likely to be denied, violated, infringed or threatened, in relation to him, then without prejudice to any other action with respect to the same matter which is lawfully available, that person may on his behalf or on behalf of a group or class of persons, members of an association or in the public interest may apply to the Environment and Land Court for redress and the

Environment and Land Court may make such orders, issue such writs or give such directions as it may deem appropriate to—

(a) prevent, stop or discontinue any act or omission deleterious to the environment;

(b) compel any public officer to take measures to prevent or discontinue any act or omission deleterious to the environment;

(c) require that any on-going activity be subjected to an environment audit in accordance with the provisions of this Act;

(d) compel the persons responsible for the environmental degradation to restore the degraded environment as far as practicable to its immediate condition prior to the damage; and

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

252. From the foregoing, it is crystal clear that a right to a clean and healthy environment is paramount for the enjoyment of other rights. It is inalienable, interdependent and indivisible from other human rights. Further, the said right as framed by our Constitution also described in international instruments as the right to a clean, healthy and sustainable environment, is a right upon which enjoyment of other human rights is anchored. For the realization of the right to a clean and healthy environment, the State, Corporations, communities and individuals have obligations under the law to satisfy both procedural and substantive elements of that right. Essentially, public participation, access to information and access to justice including effective remedies is as important as is clean air, safe water and a healthy ecosystem.

253. The nexus between the right to a clean and healthy environment with the right to life was aptly captured in the case of *Peter K. Waweru v Republic* [2006] eKLR where the Court expressed itself as follows:

> " The UN Conference on the Human Environment 1972, that is the Seminal Stockholm Declaration noted that the environment was "essential to ... the enjoyment of basic human rights – even the right to life itself."
>
> Principle 1 asserts that:
>
> > "Man has the fundamental right to freedom, equality and adequate conditions of life; in an environment of a quality that permits a life of dignity and well-being" Closer home – Article 24 of the *African Charter of Human and Peoples Rights* 1981 provided as under:
> >
> > > "All people shall have the right to a general satisfactory environment favourable to their development." Finally the UN Conference on Environment and Development in 1992 – ie. The Rio Declaration principle 1 has a declaration in these terms: "... human beings are at the centre of concerns for sustainable development. They are entitled to a healthy and productive life in harmony with nature." It is quite evident from perusing the most important international instruments on the environment that the word life and the environment are inseparable and the word life means much more than keeping body and soul

together. The orders we make in this case under s 84(1) are clearly intended to secure the right to life in the environmental context and the court is not limited in terms of the orders it can make under s 84(2)."

254. On the importance of a clean and safe environment, the African Commission on Human and People's Rights in Communication No.155/96: The *Social and Economic Rights Action Centre (SERAC) and the Centre for Economic and Social Rights v Nigeri*a, stated as follows:

> "These rights recognize the importance of a clean and safe environment that is closely linked to economic and social rights in so far as the environment affects the quality of life and safety of the individual. As has been rightly observed by Alexander Kiss, "an environment degraded by pollution and defaced by the destruction of all beauty and variety is as contrary to satisfactory living conditions and the development as the breakdown of the fundamental ecologic equilibria is harmful to physical and moral health." The right to general satisfactory environment, as guaranteed under article 24 of the African Charter or the right to healthy environment, as it is widely known therefore imposes clear obligations upon a government. It requires the State to take reasonable measures to prevent pollution and ecological degradation, to promote conservation, and to secure an ecologically sustainable development and use of natural resources."

255. Article 69 (1) of the *Constitution* provides for obligations of State and non-State actors in regard to the environment while Article 69(2) places obligations on every person and entity to cooperate with the State including other persons to protect the environment. Article 69 of the *Constitution* stipulates as follows:

> "(1) The State shall—
>
> (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; establish;
>
> (e) protect genetic resources and biological diversity;
>
> (f) 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.

(2) 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."

256. Therefore, under Article 69 of the *Constitution*, the 1st respondent has both State and non - State obligations while the 2nd respondent has State obligations in environmental and human rights protection.

257. Article 69(2) of the *Constitution* places obligations on every person and entity including business Corporations to collaborate with the State and other persons to protect the environment.

258. The 1st respondent is a state corporation under the Ministry of Energy tasked with the responsibility of transporting, storing and delivering petroleum products to consumers in Kenya through its pipeline system and oil depot networks amongst other functions. Being a State Corporation, the 1st respondent is not only an enterprise engaged in business, but is also a duty bearer obligated to respect, protect and remedy human rights including ensuring that its business of transporting petroleum products does not adversely affect the environment or violate human rights and more particularly the right to a clean, healthy and sustainable environment.

259. Section 97 of the *Petroleum Act* stipulates obligations of entities engaged in petroleum business as follows:

"

"(1) (1) A person engaged in petroleum business shall comply with the applicable environmental, health and safety laws;

(2) In the event of a fire, explosion, oil spill, injury or fatality occurring in the course of operating a petroleum logistics facility, transportation or sale of petroleum, either by accident or through negligence, the operator or person transporting or selling the petroleum shall forthwith clean up the polluted or damaged environment, at the operator's own expense, to the satisfaction of the licensing authority and any other relevant authority.

Provided that any person engaged in the storage, transportation or sale of petroleum and petroleum products shall have an oil clean-up plan in compliance with the National Oil Spill Policy, relevant environmental health and safety regulations or guidelines. If the operator or person transporting or selling petroleum fails, or unreasonably delays, to carry out the work referred to in subsection (2), the licensing authority may cause any work not carried out to be executed at the expense of the said operator or person transporting or selling the petroleum. Nothing contained in this section shall be construed as relieving the operator or person transporting petroleum from any liability in respect of any loss or damage caused by his failure to comply with safety measures as required in subsection (5). A person transporting petroleum by road, rail, coastal or inland waters, pipeline or any other mode shall institute measures to ensure that their mode of transportation is safe. The licensing authority may, at any time, require the operator of a facility or a transporter to show that he is in compliance with the provisions of this section."

260. In that regard, any entity engaged in petroleum business is obligated to comply with the relevant environmental, health and safety laws. Further, in the event of an oil spill, injury or fatality occurring in the course of such entity operating a petroleum logistics facility, or transportation of petroleum or sale thereof; either by accident or through negligence, such entity shall immediately clean up the polluted

environment to the satisfaction of the licensing authority, at the entity's own expense. In addition, the business entity is expected to institute mechanisms for prevention of accidents like oil spill and putting in place remedial action for the protection of the environment and control of accidental discharge. Thus, the clean-up exercise need not be prompted by the Licensing Authority but must be carried out immediately upon pollution.

261. In our view, the duty on the owners of an oil pipeline should be to maintain and repair its pipelines and ensure that petroleum being transported through the said pipelines, does not escape or cause risk to human lives and the environment. This duty of care is clearly articulated in the case of *Rylands v Fletcher* (1868) LR 3 HR 330, which is a common law duty of care.

262. The United Nations Human Rights Council, endorsed the *UN Guiding Principles on Businesses and Human Rights* in 2021, which provide guidelines for State and Companies to prevent and address human rights abuses that are committed within business operations. Although these Principles are not binding on States, they have nevertheless become soft law and underscore the duty of the State to protect against human rights abuses by businesses. This duty requires the State to prevent, investigate, punish and redress human rights abuses occasioned by businesses. Therefore, the State is obligated to create regulatory environment that enables businesses to respect human rights and provide guidance to businesses on their responsibilities.

263. In the case of *SERAC v Nigeria* (*supra*) the Commission emphasized that the State had the responsibility to protect the environmental and health rights of its citizens by taking measures including monitoring and protecting threatened environments.

264. In the Constitutional Court of Ecuador, Quito, B.M., June 27, 2015 Ruling No. Q230-1S-SEP-CC, Case No. ni05-14-EP Constitutional Court of Ecuador, (*Chevron Case* - July 2018), the Court addressed the questions of environmental harm and human health damages arising from extensive oil contamination in the Ecuadorian Amazon caused by Texaco (later Chevron) during decades of operation. In that case, the Court found that Texaco/Chevron had caused serious and widespread environmental contamination including soil degradation, water pollution, and health impacts for indigenous and rural populations, placing emphasis on the constitutional right to a healthy environment and the right to water, treating them as fundamental rights under Ecuador's 2008 *Constitution*. The Court underscored the need to apply international environmental standards and the precautionary principle and indicated that contamination must be assessed according to thresholds established by organizations like the World Health Organization (WHO) and United Nations Environment Programme (UNEP). Regarding the Precautionary and Preventive Principle in environmental governance, the Court reiterated that in cases of scientific uncertainty about environmental risks, measures must favour environmental protection as opposed to corporate interests and any uncertainty must be resolved in favour of nature and affected communities. The Court in reaffirming the principle that polluters are responsible for remediation costs held that Chevron had an obligation to compensate affected communities for environmental harm and human health damages.

265. It is not in dispute that there was an oil spillage within the Thange River Basin on 12th May 2015, wherein a pipeline leak occurred at 256.9 Kilometres from Mombasa in Thange, Kibwezi, Makueni County. It is also not disputed that the oil spillage contaminated the soil, air, river water, surface water, borehole water and negatively impacted animals, plants and human health. PW15 Muindi Kimeu in his testimony confirmed that on or about June 2015, the residents noticed traces of petroleum products near River Thange, 100 metres from the pipeline and after investigation it was established that there was an oil spillage that had occurred, which seeped the porous rocks underground and on the surface up to the said River.

266. The 1st Respondent in the replying affidavit sworn by Beatrice Orgut, conceded that there was indeed an oil spillage but argued that it was not intentional. The 2nd Respondent through its replying affidavit dated 6th October 2020, sworn by Zephania O. Ouma, its acting Director Compliance & Enforcement admitted that it learnt of the oil Spillage at Thange River vide the 1st Respondent's letter dated 30th June, 2015.

267. The letter dated the 5th October, 2015 from the Water Resources Management Authority addressed to the Sub Regional Manager, Middle Athi River Region, which was annexed to the 2nd Respondent's affidavit, indicated thus:

> " Following the visit done by a team from the Athi River Regional Office led by Noel Ndeti(SWQ & PCO) and officers from your office on 30th September, 2015, 4 No. sites along River Thange and 2 No. sites inland were visited to establish the actual situation on the ground and it was found out that both surface water and ground water resources were polluted with petroleum oil, with an abandoned shallow well approximately 25 metres from the river and 100 metres downstream of the leakage point holding a substantive volume of petroleum product. The officers later collected 4 No. samples for petroleum analysis to quantify levels of oil. In the meantime, you are advised to liaise with Kenya Pipeline Corporation and the affected communities to establish the extent of surface and ground water pollution."

268. The letter dated the 27th October, 2015 from the Water Resources Management Authority addressed to the Managing Director, Kenya Pipeline Company Limited, confirmed the occurrence of the oil spillage and stated thus:

> " Following an investigation exercise on Thange River Oil spill carried out on 30th September, 2015 by officers from WRMA Athi River Region Office and Middle Athi Sub Region, presented through a public complaint, it was observed and established that both surface water and ground water resources were contaminated with oil. The point source pollution was also identified to be Kenya Pipeline Company pipeline leakage at the position it crosses River Thange channel. Water samples collected and analysed for oil and grease, at KIRDI laboratories in Nairobi, the results confirmed both surface water and ground water resources collected were contaminated with oil.."

269. In the 1st respondent's replying affidavit to the Petition, sworn by Beatrice Orgut dated the 29th June, 2021, where she annexed a report dated November, 2015 by Kenya Pipeline Company to NEMA, it confirmed the oil spillage as follows:

> " On 12th May, 2015, a KPC staff reported a pipeline leak at Km 256.9 to the Nairobi Terminal Control Room at 1845 hours.....The spill was emanating from a corrosion assisted 2 – inch crack on the pipeline.....Due to the migration of the petroleum product away from the pipeline, KPC has contracted SGS Kenya to map out the extent of the product spread underground, and to recommend effective clean up measures. The assessment will also include soil, surface, river water and the borehole. KPC will use the SGS report to procure a NEMA approved contracted party to carry out the clean-up operation."

270. The deponent further confirmed that the 1st respondent contracted SGS Kenya Limited to conduct environmental monitoring on the site of the spillage and that the latter prepared a report, which confirmed that there was pollution of the soil, ground and surface water and air, at the said site.

271. The Environmental & Social – Economic Impact Assessment Study of Thange River Basin done by Panafcon Ltd Development Consultants at the instance of the 1st respondent, confirmed the presence of hydrocarbons in soil, water and biota (animal and plant life).

272. The report by multi sectoral team comprising NEMA, ERC, NLC, WRMA and Kenya Petroleum Refineries dated the 29th February, 2016, on detailed incident investigation, revealed the impact of the oil spillage as including detrimental effects on human health, livestock, water, soil, plants and livelihoods. An excerpt from the report is highlighted here below:

> " The above oil leak has impacted the river water, ground water and soil. Oil contamination has been observed in a well and excavations downstream the leak point. The ground water contaminated plume has been assessed to be 2.5km long(dilute plume), 1 km (dense plume) and 10 m deep. In the pathway of the contaminated ground water are farms, wells and boreholes on which the local Community depends for livelihood. As a result, a precautionary advisory has been given by the County Government to the Community not to use the water, plant or harvest crops in the impacted areas. There has been a public outcry with respect to spill including claims of impacts on human health, livestock, lack of safe water, forfeited income and lost livelihoods."

273. The findings in the initial report by the multi sectoral team was confirmed by subsequent reports done on the oil spill at the instance of the respondents.

274. In regard to the question of violation of human right to a healthy and safe environment, the expert evidence given by Dr. Mubisi Swaro and Dr. Kowino clearly demonstrated that the petitioners suffered a wide range of Liver and Renal toxicity due to the effects of the oil spillage. It is evident that there was petroleum in the river, surface and borehole water, which was being used for domestic purposes. In addition, there was evidence of hydrocarbons in the soils and crops, which affected the crops, health and livelihoods of the residents. Further, from the report of the multi sectoral committee comprising of NEMA, ERC, NLC, WRMA and Kenya Petroleum Refineries dated the 29th February, 2016, they indicated that as a result of the oil spillage, a precautionary advisory was given by the County Government of Makueni to the community not to use the water, plant or harvest crops in the impacted areas.

275. Besides, the post mortem done by Dr. Jefferson Kaloki Nthanga, on carcasses of the petitioners' livestock found that the livestock had ingested hydrocarbons. The livestock was not only a source of their livelihoods but also a source of food. In essence, the petitioners' food and water was poisoned by the oil spill.

276. From the Environmental & Social – Economic Impact Assessment Study of Thange River Basin by Panafcon Ltd Development Consultants, dated April 2016, it revealed that livestock and humans were negatively impacted by the oil spill.

277. The report of the Senate, Eleventh Parliament – Fourth Session, Standing Committee on Energy, fact finding visit to Kibwezi, Makueni County on the matter of Statement Sought on the Kenya Pipeline Company Oil Spillage into River Thange on 19th November, 2015, dated February, 2016, made the following findings:'

> " The Committee assessed the extent of the oil spillage along river Thange and further inspected school farms, boreholes, wells and the school water pump. It was established that: (1) Huge quantities of petroleum oil product spilled into river Thange following

oil leakage from Kenya Pipeline Company on 12th May, 2015; (2) Large amounts of petroleum products soaked into the ground leading to accumulation in the underground soil. Consequently, the waters of the river including community borehole had doses of oil indicated by shiny layers, choking fumes and pink colour of petrol; (3) There were complaints from residents of pneumonia, skin irritation and stomach pains which are associated with polluted water. The Ministry of Health, Makueni County was conducting tests on samples for ascertaining chances and possibility of lead poisoning; (4) The oil spillage was an environmental disaster which required attention of County and National Governments.....(4) Kenya Pipeline Company compensates residents for the loss of their livelihoods and their environment and to further ensure reliable supply of water to the residents and the affected schools."

278. From the evidence tendered by the parties herein, it is clear that there was pollution of the environment in Thange River Basin which included soil, surface and underground water, air and biota as a result of the oil spillage occasioned by the 1st respondent. Further, this affected human health and life. Regarding environmental damage, it is evident from the reports presented that since the soil, plants, animals, water and air were impacted negatively, it destabilized the ecological equilibrium of the Thange River Basin. In the circumstances, 1st respondent being a business operating petroleum transportation having failed to prevent the oil spill as well as having failed to mitigate the damage arising from the said oil spill, it is our finding that it violated the environment's right to be protected and or nature rights as well as the petitioners' right to a healthy and safe environment contrary to Article 42 of the *Constitution*.

279. In relation to the 2nd respondent's alleged violations, section 9 *EMCA*, recognizes it as the principal instrument of Government in the implementation of all policies relating to the environment and also exercises general supervision and coordination of all matters touching on the environment on behalf of the State. Therefore, the obligations of the State under Article 69 of the *Constitution* are principally the obligations of NEMA, which include establishing systems of environmental audit and monitoring as well as eliminating processes and activities that may endanger the environment.

280. Section 9 of *EMCA*, provides for objects and functions of NEMA which stipulates thus:

> "(1) The object and purpose for which the Authority is established is to exercise general supervision and co-ordination over all matters relating to the environment and to be the principal instrument of Government in the implementation of all policies relating to the environment.
>
> (2) Without prejudice to the generality of the foregoing, the Authority shall—
>
> (a) co-ordinate the various environmental management activities being undertaken by the lead agencies and promote the integration of environmental considerations into development policies, plans, programmes and projects with a view to ensuring the proper management and rational utilization of environmental resources on a sustainable yield basis for the improvement of the quality of human life in Kenya;
>
> (b) take stock of the natural resources in Kenya and their utilisation and conservation;
>
> (c) establish and review in consultation with the relevant lead agencies, land use guidelines;

(d) examine land use patterns to determine their impact on the quality and quantity of natural resources;

(e) carry out surveys which will assist in the proper management and conservation of the environment; (f) advise the Government on legislative and other measures for the management of the environment or the implementation of relevant international conventions, treaties and agreements in the field of environment, as the case may be;

(f) advise the Government on regional and international environmental conventions, treaties and agreements to which Kenya should be a party and follow up the implementation of such agreements where Kenya is a party;

(g) undertake and co-ordinate research, investigation and surveys in the field of environment and collect, collate and disseminate information about the findings of such research, investigation or survey;

(h) mobilise and monitor the use of financial and human resources for environmental management; (j) identify projects and programmes or types of projects and programmes, plans and policies for which environmental audit or environmental monitoring must be conducted under this Act;

(i) 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; (m) undertake, in co-operation with relevant lead agencies, programmes intended to enhance environmental education and public awareness about the need for sound environmental management as well as for enlisting public support and encouraging the effort made by other entities in that regard; (n) publish and disseminate manuals, codes or guidelines relating to environmental management and prevention or abatement of environmental degradation; (o) render advice and technical support, where possible, to entities engaged in natural resources management and environmental protection so as to enable them to carry out their responsibilities satisfactorily; (p) prepare and issue an annual report on the state of the environment in Kenya and in this regard may direct any lead agency to prepare and submit to it a report on the state of the sector of the environment under the administration of that lead agency; (q) perform such other functions as the Government may assign to the Authority or as are incidental or conducive to the exercise by the Authority of any or all of the functions provided under this Act."

281. Therefore, the role of NEMA in its coordination and supervisory mandate includes among others; to conduct surveys which will assist in the proper management and conservation of the environment; advise the Government on legislative and other measures for the management of the environment; identify projects and programmes for which environmental audit or monitoring must be conducted;

initiate and evolve procedures and safeguards for the prevention of accidents which may cause environmental degradation and evolve remedial measures where accidents occur; and monitor and assess activities in order to ensure that the environment is not degraded by such activities. NEMA is also mandated to ensure environmental management objectives are adhered to, adequate early warning on impending environmental emergencies is issued, and render advice and technical support to entities engaged in natural resources management and environmental protection, so as to enable them to carry out their responsibilities satisfactorily.

282. The question that this court seeks to address is whether NEMA complied with its obligations under Article 69 of the *Constitution* as read with section 9 of *EMCA*, in the circumstances surrounding the oil spillage that occurred at the Thange River basin. In interrogating this question, this court will examine the conduct of NEMA before, during and after the oil spillage.

283. Considering the evidence tendered by the parties herein, there is no indication that NEMA audited or monitored the activities of the 1st respondent in respect to the pipeline at Thange River basin, prior to the oil spill that occurred in May, 2015. In addition, DW2 Zephaniah Ouma who testified on behalf of NEMA, did not adduce any evidence to demonstrate that NEMA initiated and or evolved procedures and safeguards addressing the 1st respondent, that would prevent accidents of oil spillage. We opine that NEMA was supposed to continuously audit and monitor the safety of the pipeline at Thange River basin and provide periodical reports to the 1st respondent and where there was need for repair, they ought to have timeously made the relevant directives to the 1st respondent, which they failed to do, yet there was a crack due to corrosion of the pipeline operated by the 1st respondent. NEMA should have demanded from the 1st respondent to provide verification of the safety of their systems and its ability to detect an impending leakage, before it occurred and the initiatives it had put in place in the event of a leakage.

284. In interrogating the actions of NEMA immediately after the oil spillage, the evidence on record indicates that NEMA issued the first Remediation Order to the 1st respondent on 17th December, 2015, which was six (6) months after the incident. NEMA admitted to the delay in issuance of the Restoration Order, but attributed it to the 1st respondent's delay in carrying out an Economic, Social and Environmental Impact Assessment on the extent of the oil spillage, before it was able to proceed. It is our considered view that this explanation is unsatisfactory as its delay was inordinate, in view of its role as the principal organ of government mandated to oversee environmental protection and conservation. This omission contravened the precautionary principle which requires 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.

285. The petitioners contended that NEMA failed to execute its mandate when it decommissioned the spillage site before complete remediation was undertaken by the 1st respondent, hence the basis for their prayer for an Order for Remediation. We have considered the evidence of PW2 Kenneth Koreje who conducted sampling, testing and analysing the river water samples, for the period between March, 2021 to June 2021 to ascertain the presence of oil in the water and we note that those results were positive. PW2 emphasized that the acceptable parameters for oil and grease in water, should be nil. Therefore, the fact that there was presence of oil and grease in the water five years after the spill, means that the remediation by the 1st Respondent was insufficient and there is need for further remediation.

286. The Inter-American Court of Human Rights in the case of the *Inhabitants of La Oroya v Peru*, Judgement of November 27, 2023, reaffirmed the duty of the State to adopt effective measures to guarantee that contaminant levels in the environment are compliant with applicable international

and national standards. Further, that failure to act constituted a violation of its obligations of prevention and protection of the right to health, life and personal integrity. The Court found that the environmental contamination in La Oroya reached levels that endangered the life and personal integrity of the inhabitants, particularly children. Further, that the State's failure to prevent, regulate, and supervise the sources of pollution, despite having knowledge of the serious risks, resulted in the violation of these fundamental rights. The Court reiterated that the environmental degradation is not an isolated phenomenon as it affects and compromises the effective enjoyment of human rights. Further, that States have the obligation to prevent significant environmental harm when such harm may impact the rights recognized in the American Convention.

287. In view of the 2nd respondent's actions of failing to: timeously issue Remediation Order; demonstrating having audited and or monitored the activities of the 1st Respondent regarding its pipeline at Thange river basin prior to the oil spill; initiating procedures and safeguards for the 1st respondent that would prevent accidents of oil spill; providing periodical reports made to the 1st respondent in regard to the state of its pipeline; making relevant directives to the 1st respondent and demanding from the 1st respondent a clear demonstration that their systems of petroleum transportation are safe and it has the ability to detect an impending leakage before it happens and the manner in which it would act in the event of a leakage, we find and hold that the 2nd respondent violated its obligations both to the environment and the petitioners under Article 69 of the *Constitution*.

288. Article 70 of the *Constitution* provides for enforcement of environmental rights and stipulates thus:

> "(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;
>
> (2) On application under clause (1), 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.
>
> (3) For the purposes of this Article, an applicant does not have to demonstrate that any person has incurred loss or suffered injury."

289. Therefore, where a right to a clean and healthy environment has been or is likely to be denied, violated, infringed or threatened, any person may seek remedy from Court. Where a party approaches Court for legal redress, the Court has inherent powers to grant orders that would protect and preserve the environment including to avert and stop acts that cause harm to the environment, to compel a public officer to prevent or discontinue acts that are harmful to the environment and provide compensation to victims of environmental rights violations.

D. Whether the Respondents and the State breached their obligations under Article 21 of the Constitution

290. Article 21 of the *Constitution* of Kenya requires the State to observe, respect, protect, promote and fulfil the rights and freedoms enshrined in the Bill of Rights including environmental rights. The same provides as follows:

> "21.
>
> (1) It is a fundamental duty of the State and every State organ to observe, respect, protect, promote and fulfil the rights and fundamental freedoms in the Bill of Rights.
>
> (2) The State shall take legislative, policy and other measures, including the setting of standards, to achieve the progressive realisation of the rights guaranteed under Article 43.
>
> (3) All State organs and all public officers have the duty to address the needs of vulnerable groups within society, including women, older members of society, persons with disabilities, children, youth, members of minority or marginalised communities, and members of particular ethnic, religious or cultural communities.
>
> (4) The State shall enact and implement legislation to fulfil its international obligations in respect of human rights and fundamental freedoms."

291. In the instant Petition, the State had the obligation to observe, respect, protect, promote and fulfil the petitioners' rights including the right to a healthy and safe environment for the residents of Thange River basin.

292. The duty to observe and respect means that the State should not engage in actions that affect human rights. In the context of this case, where the right to a clean and healthy environment is involved, the State must ensure it does not interfere with the enjoyment of that right. In addition, the duty to protect means that the State should ensure that no third parties including business corporations interfere with the enjoyment of human rights. Therefore, the State must take positive actions of protecting that right by investigating violations and prosecuting the violators. It ought to ensure that victims of human rights violations are compensated and remediations done including clean ups of polluted lands.

293. In the case of *SERAC v Nigeria*, (*supra*) the African Commission on Human and Peoples' Rights held that the obligation of the State to respect rights of the Ogoni People of Nigeria included the right to ensure no third party interfered with the enjoyment of their rights. The Commission took the position that protection involved the State undertaking effective and independent oversight for petroleum industry, providing information on environmental risks and meaningful access to regulatory and decision-making bodies to communities that may likely be affected by oil operations.

294. Regarding promoting and fulfilling environmental rights, the State is obligated to take proactive measures in ensuring that the right to a healthy and safe environment is enjoyed by citizens. In this instance, the State is obligated to undertake environmental audits and monitoring of projects to ascertain compliance with environmental laws and policies; initiate procedures and safeguards to prevent accidents that may result in environmental degradation; promote awareness and respect for environmental rights by business enterprises; avail the necessary support to business enterprises to assist

them to comply with environmental policies and aid them to identify, prevent and mitigate human rights related risks that accompany the activities.

295. The Petitioners complained that the State failed in its obligations under Article 21 of the *Constitution* but failed to join the Attorney General who is the Principal Legal Advisor to the Government, to this suit, as would have been expected. That notwithstanding, we hold that the 1st respondent being a State corporation and having dual obligations as both State and non - State actor as well as the 2nd respondent who is mandated to exercise general supervision and coordination of all matters touching on the environment on behalf of the State, both bear obligations under Article 21 of the *Constitution* and as held above, it is our finding that the two respondents indeed violated the said Article.

E. Whether the Petitioners' rights under Articles 26, 28, 29, 40 and 43 of the Constitution were violated.

296. Article 26 (1) of the *Constitution* provides for the right to life which is a fundamental human right that is guaranteed to every person. It stipulates thus:

> "(1) Every person has the right to life."

297. Article 4 of the *African Charter on Human and Peoples' Rights* (ACHPR) establishes the right to life as a fundamental right. Every human being is entitled to respect for their life and integrity of their person and no one can be deprived of this right. Article 3 of the *Universal Declaration of Human Rights* (UDHR) provides that everyone has a right to life, liberty and security of the person. The Human Rights Committee interprets the right to life enshrined in Article 6 of the *International Covenant on Civil and Political Rights* (ICCPR), not just as freedom from unlawful killing but also as entitlement to enjoy life with dignity. These includes access to essential goods and services like health care and a healthy environment. The Committee has recognized the link between environmental conditions and the right to life, advocating for measures to protect the environment and ensure a healthy living space.

298. The right to life encompasses the fundamental principles that every person has a right to exist and the State has a duty to protect it. The General Comment No. 36 on Article 6 of the *ICCPR* on the right to life, stated that the said right is of crucial importance and is a supreme right from which, no derogation is permitted even in situations of armed conflict or other public emergencies.

299. In the matter at hand, as a result of the oil spill within the Thange River basin, it emerged that persons were poisoned by the hydrocarbon which culminated in the deaths of some of them. Further, majority of Petitioners suffered ill health arising from the effects of the oil spill as evident from the medical reports which were prepared by Dr. Mubisi Swaro and Dr. Kowino respectively. It is our considered view that the Respondents through their actions and or omissions, deprived the petitioners of life and integrity of their person.

300. Article 28 of the *Constitution*recognizes the inherent dignity of every person and their right to have that dignity respected and protected. It emphasizes that the State should guarantee every person equal treatment and fairness. Further, that every person is entitled to respect, regardless of their background, status, or circumstances. This right should be respected and protected by both the State and non-State actors. This Article underscores the commitment of the State in upholding human rights and ensuring that all citizens are treated with respect and dignity. It stipulates thus:

> "Every person has inherent dignity and the right to have that dignity respected and protected."

301. The *UDHR* provides that every person has an inalienable right to live in a dignified life without discrimination. Article 1 of the *UDHR* provides that all humans are born free and equal in dignity and rights. Article 5 of the *ACHPR* explicitly recognizes human dignity and provides that every individual has a right to respect for their inherent dignity and the recognition of their legal status. The right to dignity and healthy environment are deeply intertwined. The right to dignity in relation to the environment means every one has a fundamental right to a healthy and sustainable environment necessary for a dignified life. This right encompasses clean air, water and a safe climate all of which are crucial for people to live, work and thrive.

302. In the current scenario, the petitioners argued that the contamination of their water, soil, air, crops and livestock as a result of the oil spillage affected the quality of their lives which resulted in the violation of their dignity. Further, the petitioners averred that after the oil spillage, the supply of fresh water by the 1st respondent was intermittent and this compelled some of them to resort to the use of contaminated water, as they had no alternative sources of water. It was the petitioners' evidence that the 1st respondent in cahoots with the local administration compelled them to sign discharge vouchers to allegedly compensate them for their losses as a result of the oil spillage, without their informed consent. In our view, the actions of the 1st respondent towards the petitioners deprived them of basic needs necessary for human life which was a violation of their right to dignity.

303. Article 29 (c), (d) and (f) of the *Constitution* provides that every person has a right to freedom and security of the person and should not be subjected to violence or any form of torture. It provides inter alia:

> " Every person has the right to freedom and security of the person, which includes the right not to be— (c) subjected to any form of violence from either public or private sources; (d) subjected to torture in any manner, whether physical or psychological; (f) treated or punished in a cruel, inhuman or degrading manner."

304. Freedom from torture and security of the person includes freedom from physical and mental injury. Both Articles 5 and 7 of the *UDHR* and *ICCPR* respectively, provides that no one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment. The aim of the two Articles is to protect both the dignity and the physical and mental integrity of the individual.

305. From the evidence of the petitioners, it is clear that the 1st respondent's action of failing to consistently supply them with water when all their water sources had been contaminated with hydrocarbons cost them physical and mental anguish, violating their rights under Article 29 of the *Constitution*.

306. Article 40 (1) (a) and (b) of the *Constitution* provides for protection of the rights to property as follows:

> "(1) Subject to Article 65, every person has the right, either individually or in association with others, to acquire and own property—
>
> (a) of any description; and
>
> (b) in any part of Kenya."

307. In this matter, the petitioners argued that the 1st respondent had violated their right to property due to the pollution arising from the oil spillage which degraded their land, affected their crops and poisoned their livestock, culminating in economic loss. We have considered the evidence on record including the reports from experts which clearly show that the land within Thange river basin was polluted to the extent that crops were not fit for human and livestock consumption. Further, the oil spillage

affected the soil, crops, water and livestock thereby curtailing their livelihoods. We hence find that the 1st respondent violated the petitioners' right to property.

308. Article 43 of the *Constitution*, outlines economic and social rights and guarantees every person the right to the highest attainable standard of health, including reproductive healthcare, adequate and accessible housing with reasonable sanitation, and adequate food of acceptable quality and freedom from hunger. It emphasizes the State's responsibility to take proactive measures to realize these rights. The State is obligated to implement policies and programs that will enable Kenyans to access these essential services. It provides as follows:

> "(1) Every person has the right—
>
> (a) to the highest attainable standard of health, which includes the right to health care services, including reproductive health care;
>
> (b) to accessible and adequate housing, and to reasonable standards of sanitation;
>
> (c) to be free from hunger, and to have adequate food of acceptable quality;
>
> (d) to clean and safe water in adequate quantities;
>
> (e) to social security; and
>
> (f) to education.
>
> (2) A person shall not be denied emergency medical treatment.
>
> (3) The State shall provide appropriate social security to persons who are unable to support themselves and their dependants."

309. The Committee on Economic, Social and Cultural Rights in General Comment No. 4 (1991), argues that the right to food is implicit in the *African Charter* in provisions such as the right to life in Article 4, the right to health in Article 16 and the right to economic, social and cultural development in Article 22. The Committee argues that the right to food is inseparably linked to the dignity of human beings and is therefore essential for enjoyment and fulfilment of other rights including health, education and work.

310. In the current scenario, it emerged that as a result of the oil spill, the petitioners did not have access to water and food as the same was contaminated with hydrocarbons. Further, after the 2nd respondent had directed the 1st respondent to provide water, it only did so briefly and stopped, yet it was aware that the water within the Thange River Basin was contaminated. None of the respondents availed adequate evidence to confirm that the petitioners were provided with adequate food and water in the intervening period and if their medical bills were catered for. In the circumstances, we find that the 1st respondent indeed violated the petitioners' rights to health, water and food as stipulated in Article 43 of the *Constitution*.

F. Whether the Petitioners' rights to access to information and Fair Administrative Action under Articles 35 and 47 of the Constitution, respectively were violated.

311. Article 35 of the *Constitution* provides that every person has the right to access to information held by the State and non-State actors, which is fundamental for exercising or protecting their rights. Further, this envisages information held by government agencies, departments, officials, individuals or private

entities, particularly when it is essential for the enjoyment or protection of fundamental rights. The right to access information encompasses open, responsive, and accountable governance, promoting transparency and enabling citizens to participate effectively in democratic processes. The said Article 35 stipulates thus:

> " 35 (1) Every citizen has the right of access to—
>
> (a) information held by the State; and
>
> (b) information held by another person and required for the exercise or protection of any right or fundamental freedom.
>
> (2) Every person has the right to the correction or deletion of untrue or misleading information that affects the person.
>
> (3) The State shall publish and publicise any important information affecting the nation."

312. Section 4 of the *Access to Information Act* provides for the procedure to access information as follows:

> "(1) Subject to this Act and any other written law, every citizen has the right of access to information held by —
>
> (a) the State; and
>
> (b) another person and where that information is required for the exercise or protection of any right or fundamental freedom.
>
> (2) Subject to this Act, every citizen's right to access information is not affected by —
>
> (a) any reason the person gives for seeking access; or
>
> (b) the public entity's belief as to what are the person's reasons for seeking access.
>
> (3) Access to information held by a public entity or a private body shall be provided expeditiously at a reasonable cost.
>
> (4) This Act shall be interpreted and applied on the basis of a duty to disclose and non-disclosure shall be permitted only in circumstances exempted under section 6.
>
> (5) Nothing in this Act shall limit the requirement imposed under this Act or any other written law on a public entity or a private body to disclose information."

313. Article 19 of the *UDHR* provides for the right to receive information as follows:

> Everyone has the right to freedom of opinion and expression; this right includes freedoms to hold opinions without interference and to seek, receive and impart information and ideas through any media and regardless of frontiers."

314. Article 19 of the *ICCPR* provides for the right to access information and states as follows:

> " Everyone shall have the right to freedom of expression; this right shall include freedom to seek, receive, and impart information and ideas of all kinds regardless of frontiers, either orally, in writing or in print in the form of Art or through any other media of his choice."

315. Article 9 of *ACHPR* states as follows:

> " Every individual shall have the right to receive information."

316. Article 47 of the *Constitution* of Kenya established a fundamental right to fair administrative action, meaning that actions taken by public officers must be efficient, timely, lawful, reasonable, and procedurally fair. It provides that where a person's fundamental rights are affected by an administrative action, they are entitled to be granted reasons for the said actions. Parliament has enacted the Fair Administrative Actions Act to operationalize the provisions of this Article. Further, there is a nexus between fair administrative action to the principles on procedural fairness, the opportunity to be heard, and the requirement for adequate reasons for decisions.

317. Article 47 stipulates that:

> 47.
>
> (1) Every person has the right to administrative action that is expeditious, efficient, lawful, reasonable and procedurally fair.
>
> (2) If a right or fundamental freedom of a person has been or is likely to be adversely affected by administrative action, the person has the right to be given written reasons for the action.
>
> (3) Parliament shall enact legislation to give effect to the rights in clause (1) and that legislation shall—
>
> (a) provide for the review of administrative action by a court or, if appropriate, an independent and impartial tribunal; and
>
> (b) promote efficient administration."

318. Section 4 of the *Fair Administrative Action Act* stipulates that:

> " (1) Every person has the right to administrative action which is expeditious, efficient, lawful, reasonable and procedurally fair.
>
> (2) Every person has the right to be given written reasons for any administrative action that is taken against him. (3) Where an administrative action is likely to adversely affect the rights or fundamental freedoms of any person, the administrator shall give the person affected by the decision-
>
> (a) prior and adequate notice of the nature and reasons for the proposed administrative action;
>
> (b) an opportunity to be heard and to make representations in that regard;

(c) notice of a right to a review or internal appeal against an administrative decision, where applicable;

(d) a statement of reasons pursuant to section 6;

(e) notice of the right to legal representation, where applicable;

(f) notice of the right to cross-examine or where applicable; or

(g) information, materials and evidence to be relied upon in making the decision or taking the administrative action.

(4) The administrator shall accord the person against whom administrative action is taken an opportunity to- (a) attend proceedings, in person or in the company of an expert of his choice;

(b) be heard; (c) cross-examine persons who give adverse evidence against him; and

(d) request for an adjournment of the proceedings, where necessary to ensure a fair hearing.

(5) Nothing in this section, shall have the effect of limiting the right of any person to appear or be represented by a legal representative in judicial or quasi-judicial proceedings.

(6) Where the administrator is empowered by any written law to follow a procedure which conforms to the principles set out in Article 47 of the *Constitution*, the administrator may act in accordance with that different procedure."

319. In the matter at hand, the petitioners referred to the Discharge Vouchers which purported to discharge the 1st respondent from liability and all actions, proceedings, claims, demands, costs and expenses. The petitioners while conceding to have signed the Discharge Vouchers, alleged that they signed the same under duress, that they were not availed necessary information, given reasons or opportunities to be heard and that the decision to pay them the stated amount was made without their input.

320. Having considered this case in its entirety, it is clear that at the point of signing the Discharge Vouchers, the petitioners did not have sufficient information regarding their rights and the 1st respondent did not provide any justification or basis for arriving at the figures paid. Therefore, to the extent that the Discharge Vouchers exonerated the 1st respondent from liability in contravention of Articles 35 and 47 of the *Constitution*, those Vouchers are null and void and with no legal effect but the amounts paid therein, will be taken into consideration in the final award so that there is no unjust enrichment on the part of the Petitioners.

G. Whether the Petitioners proved liability as against the Respondents and if so, whether they are entitled to an award of damages;

321. Under *EMCA* 1999, Oil and Oil mixed products are defined separately from hazardous waste or hazardous substances. Section 2 of the *Act* defines "hazardous substance" as;

"any chemical, waste, gas, medicine, drug, plant, animal or microorganism which is likely to be injurious to human health or the environment; "hazardous waste" means any waste

which has been determined by the Authority to be hazardous waste or to belong to any other category of waste provided for in section 91 which includes, toxic, carcinogenic, flammable, corrosive, explosive, radioactive and persistent waste among others."

322. The same section defines oil as;

> " crude oil, refined oil, diesel oil, fuel oil and lubricating oil while "mixture containing oil" means a mixture of substances or liquids with such oil content as may be specified under this Act or, if such oil content is not specified, a mixture with an oil content of one hundred parts or more in one million parts of the mixture."

323. Pollution is defined as:

> " any direct or indirect alteration of the physical, thermal, chemical, biological, or radio-active properties of any part of the environment by discharging, emitting, or depositing wastes so as to affect any beneficial use adversely, to cause a condition which is hazardous or potentially hazardous to public health, safety or welfare, or to animals, birds, wildlife, fish or aquatic life, or to plants or to cause contravention of any condition, limitation, or restriction which is subject to a licence under the act."

324. The principles of strict liability and absolute liability are both branches of no-fault liability in tort law. No-fault liability is easily explained as liability that is imposed upon the defendant regardless of evidence of negligence or exercise of due care on their part. The principle on strict liability was established in the case of *Rylands v Fletcher* (1868) LR 3 HL 330, where the court was of the view that where a person brings something onto their land which is likely to cause mischief if it escapes and it does escape resulting in damage, such person shall be held strictly liable whether or not they were negligent. On the other hand, absolute liability means that where an unlawful act causes harm, the defendant is liable without necessity for proof of intent or negligence. Therefore, while strict liability allows for defence, absolute liability on the other hand has no room for any form of defence whatsoever.

325. The petitioners have blamed the respondents for the oil spillage and impacts arising therefrom and argued that the latter should be held fully liable for the same. They contended that the 1st respondent caused the pollution while the 2nd respondent failed in its Constitutional and Statutory obligation to monitor and implement the remediation and clean up exercise.

326. The principle of absolute liability emerged from the judgement of the Supreme Court of India, in the case of *M. C. Mehta v Union of India* [1987] 1 SCC 395 where the court affirmed that parties engaging in dangerous or hazardous industrial activities are absolutely liable for all damages occasioned by such actions. The court stated inter alia:

> " 7.
>
> (i) An enterprise which is engaged in a hazardous or inherently dangerous industry which poses a potential threat to the health and safety of the persons working in the factory and residing in the surrounding areas owes an absolute non-delegable duty to the community to ensure that if any harm results to anyone, the enterprise must be held to be under an obligation to provide that the hazardous or inherently dangerous activity must be conducted with the highest standards of safety and if any harm results on account of such activity the enterprise must be

absolutely liable to compensate for such harm irrespective of the fact that the enterprise had taken all reasonable care and that the harm occurred without any negligence on its part.[843E-G]

7.

(ii) If the enterprise is permitted to carry on an hazardous or inherently dangerous activity for its profit,the law must presume that such permission is conditional on the enterprise absorbing the cost of any accident arising on account of such activity as an appropriate item of its overheads. The enterprise alone has the resource to discover and guard against hazards or dangers and to provide warning against potential hazards. [844A-B] 7.(iii) The measure of compensation in such kind of cases must be co-related to the magnitude and capacity of the enterprise because such compensation must have a deterrent effect. The larger and more prosperous the enterprise, the greater must be the amount of compensation payable by it for the harm caused on account of an accident in carrying on of the hazardous or inherently dangerous activity by the enterprise. [844E-F]"

327. In the above case, the Supreme Court discussed the question of whether the court would apply strict or absolute liability as follows:

> " which is engaged in an hazardous or inherently dangerous industry, if by reason of an accident occurring in such industry, persons die or the injured. Does the rule in *Rylands v c Fletcher* apply or is there any other principle on which the liability can be determined? The rule in *Rylands v Fletcher* was evolved in the year 1866 and it provides that a person who for his own purposes being on to his land and collects and keeps there anything likely to do mischief if it escapes must keep it at his peril and, if he fails to do so, is prima facie liable for the damage which is the natural consequence of its escape.
>
> The liability under this rule is strict and there is no defence that the thing escaped without that person's willful act, default or neglect or even that he had no knowledge of its existence. This rule laid down a principle of liability that if a person who brings on to his land and collects and keeps there anything likely to do harm and such thing escapes and does damage to another, he is liable to compensate for the damage caused. Of course, this rule applies only to non-natural user of the land and it F 0 does not apply to things naturally on the land or where the escape is due to an act of God and an act of a stranger or the default of the person injured or where the thing which escapes is present by the consent of the person injured or in certain cases where there is statutory authority.....
>
> We are of the view that an enterprise which is engaged in a hazardous or inherently dangerous industry which poses a potential threat to the health aid safety of the persons working in the factory A B C D E and residing in the surrounding areas owes an absolute and knowledgeable duty to the community to ensure that no harm results to anyone on account of hazardous or inherently dangerous nature of the activity which it has undertaken. The enterprise must be held to be under an obligation to provide that the hazardous or inherently dangerous activity in which it is engaged must be conducted with the highest standards of safety and if any harm results on account of such activity, the enterprise must be absolutely

liable to compensate for such harm and it should be no answer to the enterprise to say that it had taken all reasonable care and that the harm occurred without any negligence on its part.

Since the persons had on account of the hazardous or inherently dangerous activity carried on by the enterprise would not be in a position to isolate the process of operation from the hazardous preparation of substance or any other related element that caused the harm must be held strictly liable for causing such harm as a part of the social cost for carrying on the hazardous or inherently dangerous activity. If the enterprise is permitted to carry on a hazardous or inherently dangerous activity for its profit, the law must presume that such permission is conditional on the enterprise absorbing the cost of any accident arising on account of such hazardous or inherently dangerous activity as an appropriate item of its over-heads. Such hazardous or inherently dangerous activity for private profit can be tolerated only on condition that the enterprise engaged in such hazardous or inherently dangerous activity indemnifies all those who suffer on account of the carrying on of such hazardous or inherently dangerous activity regardless of whether it is carried on carefully or not. This principle is also sustainable on the ground that the enterprise alone has the resource to discover and guard against hazards or dangers and to provide warning against potential hazards. [emphasis ours]

We would therefore hold that where an enterprise is engaged in a hazardous or inherently dangerous activity and harm results to anyone on account of an accident in the operation of such hazardous or inherently dangerous activity resulting, for example, in escape of toxic gas the enterprise is strictly and absolutely liable to compensate all those who are affected by the accident and such liability is not subject to any of the exceptions which operate vis-a-vis the tortious principle of strict liability under the rule in *Rylands v Fletcher* (*supra*)."

328. The Supreme Court of Kenya in *Export Processing Zone Authority & 10 others (Suing on their own behalf and on behalf of all residents of Owino-Uhuru Village in Mikindani, Changamwe Area, Mombasa) v National Environment Management Authority & 3 others* [2024] KESC 75 (KLR) expressed itself as follows:

> " Furthermore, in *David M. Ndetei v Orbit Chemical Industries Limited* [2014] KEHC 4354 (KLR), the court in its analysis of *Ryland v 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 v 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"

329. In the Council of State of Colombia, Third Section, Case No. 25000-23-26-000-1998-02203-01 (23105), Judgment of 13 May 2004, the Court addressed the issue of environmental liability of an oil company for contamination caused by oil spills in rural territories in Colombia. The Court found that there was significant environmental damage caused by oil spills, affecting soil, water bodies, and local ecosystems. It reaffirmed the preventive duty companies have under Colombian law when dealing with activities that carry environmental risks, particularly in the oil sector. In addition, the Court applied

the objective responsibility principle for environmental damages in regard to liability, emphasizing that it was not necessary for victims to prove negligence as it was sufficient to show that the activity (oil exploitation) caused environmental harm. Further, the Court stated that any detectable presence of oil or chemical residues in water sources and soil used for agriculture or human consumption would already be considered harmful and a violation of environmental duties. It was emphatic that even minimal contamination in rural ecosystems could have long-term and cumulative impacts. It ordered comprehensive reparation, including environmental remediation actions and compensation to affected communities and reinforced the importance of applying the precautionary principle, meaning that in cases of scientific uncertainty about the extent of damage, authorities and courts should err on the side of protecting the environment.

330. The principle of absolute liability is reflected in environmental law in the polluter pays principle which is defined in section 2 of *EMCA* as follows:

> 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;"

331. Extended Polluter Responsibility (EPR), transfers the burden of dealing with pollutants from governments to the organizations that produce them. The principle is essentially grounded under Principle 16 of the *Rio Declaration* of 1992, which states that:

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

332. International law is applicable in Kenya by dint of section 2(5) and 2(6) of the *Constitution* as well as under section 3(5) of *EMCA* which provides that"

> (5) In exercising the jurisdiction conferred upon it under subsection (3), the High Court shall be guided by the following principles of sustainable development —
>
> (e) the polluter-pays principle;"

333. The Supreme Court in the *Owino-Uhuru case*, (supra) laid out the criteria and applicability of the doctrine as follows:

> " 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."

334. The court further found that it extends absolute liability for harm done to victims of pollution and also to the cost for restoration and remediation of the damage done to the environment. The court went on to state that:

> " 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."

335. According to the *Organization for Economic Cooperation and Development* (OECD), there are four aspects that must be considered in the enforcement of the polluter-pays principle, which were discussed below in the backdrop of the Owino-Uhuru case: '

a. First, is the issue of identifying the polluter

b. The extent of damage done to the environment and the extent of the polluter's liability so that precise monetary value can be attached to the degradation.

c. Pollution caused must be identifiable.

d. There must be a damage that must be compensated."

336. Under the first Principle, the 1st respondent failed to maintain its pipeline which culminated in the corrosion of the same. This was reflected in the 2nd respondent's investigation's report dated the 29th of February 2016 where the 2nd respondent made a finding that the leakage was as a result of a corrosion in the pipeline. This finding having not been controverted by the 1st respondent leads to the conclusion that the pipeline was poorly maintained. The report indicated that:

> " The observed corrosion damage is attributed to deterioration of coating, which was found to have numerous cracks which may have been occasioned by aging and type of coating technology used during the time of construction. The leak spot at river Thange was highlighted in the KPC inline inspection of 2010 that repairs had not been done by the time of detection of the leak in 2015."

337. In the case of *Michael Kibui & 2 others (suing on their own behalf as well as on behalf of the inhabitants of Mwamba Village of Uasin Gishu County) v Impressa Construzioni Giuseppe Maltauro SPA & 2 others* [2019] eKLR the court held as follows:

> " The principle of polluter pays entails that a person involved in any polluting activity should be responsible for the costs of preventing or dealing with any pollution caused by that activity instead of passing them to somebody else. The polluter should bear the expenses of carrying out pollution prevention and control measures to ensure that the environment is in an acceptable state. In international law, the principle is embedded in the *Rio Declaration on Environment and Development* (1992) which reads at principle 16 that national authorities should endeavor to promote the internalization of environmental costs and the use of economic instruments taking into account that the polluter should, in principle bear the costs of pollution with due regard to the public interests and without

distorting international trade and investment. In this case, the 1st respondent is held liable as he is the polluter."

338. In the instant case, the 1st respondent who operates a pipeline to transport petroleum products, is aware that they are engaged in a dangerous and hazardous product and therefore they are obligated to conduct their business with the highest standards of safety because they are the ones who have resources to identify and guard against the inherent dangers posed by their products, unlike the community within which the pipeline traverses. Further, any harm arising from their operations, places absolute liability on them, to compensate the victims of the harm even in circumstances where there is no negligence on their part and where they have taken reasonable care. The test of attribution of liability to be applied, depends on the nature of the activity they are engaged in. Petroleum transportation is an inherently dangerous and hazardous enterprise and the 1st respondent would be held absolutely liable in the event of any accident or calamity that would result from the escape of the petroleum product from the pipeline. In our view, the 1st respondent cannot attribute contributory negligence on the part of the Petitioners. For those reasons, it is our finding that the 1st respondent is absolutely liable to compensate the petitioners and also remediate the environment within Thange river basin.

339. With regards to the role of the 2nd respondent, section 9 (2) of *EMCA* provides as follows:

> "(a) co-ordinate the various environmental management activities being undertaken by the lead agencies and promote the integration of environmental considerations into development policies, plans, programmes and projects with a view to ensuring the proper management and rational utilization of environmental resources on a sustainable yield basis for the improvement of the quality of human life in Kenya;
>
> (b) ...;
>
> (bb) ;
>
> (c) make recommendations to the relevant authorities with respect to land use planning;
>
> (d) examine land use patterns to determine their impact on the quality and quantity of natural resources;
>
> (h) undertake research, investigation and surveys in the field of environment and collect, collate and disseminate information about the findings of such research, investigation or survey;
>
> (j) identify projects and programmes or types of projects and programmes, plans and policies for which environmental audit or environmental monitoring must be conducted under this Act;
>
> (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;

(m) undertake, in co-operation with relevant lead agencies, programmes intended to enhance environmental education, public awareness and public participation;

((o) render advice and technical support, where possible, to entities engaged in natural resources management and environmental protection;

(p) prepare and submit to the Cabinet Secretary every two years, and report on the state of the environment in Kenya and in this regard may direct any lead agency to prepare and submit to it a report on the state of the sector of the environment under the administration of that lead agency"

340. These roles were emphasized by the Supreme Court of Kenya in the case of *Kanyuira v Kenya Airports Authority* [2022] KESC 30 (KLR) where it rendered itself as follows:

> " NEMA is responsible for promoting the integration of environmental considerations into development policies, plans, programmes and projects with a view to ensuring the proper management and rational utilization of environmental resources on a sustainable basis. This in turn ensures the improvement of the quality of human life in Kenya."

341. The Supreme Court in the case of *Owino Uhuru* (*supra*) held that by not regulating the activities of the 1st respondent, NEMA was negligent and assisted the 1st respondent in violating the law.

342. As admitted at paragraph 4 of its replying affidavit, the 2nd respondent has a duty to exercise general supervision and coordination in all matters relating to the environment. In relation to this matter, we find that their duty began even before the oil spillage incident occurred as they had a duty to continuously supervise the activities of the 1st respondent in relation to the pipeline, to ensure that the pipeline was in good working condition and recommend to the 1st respondent any remedial measures if necessary.

343. In the replying affidavit, the 2nd respondent has not demonstrated any supervisory and monitoring efforts it made in respect to the pipeline before this incident occurred. It is clear that it only responded six months later and therefore it is our finding that it was strictly liable for the injuries occasioned upon the petitioners.

344. Therefore, it is our view that the 1st respondent being the principal polluter was aided by the 2nd respondent, who failed to continuously monitor and audit the 1st respondent's pipeline, besides failing to order immediate remediation after the oil spill, making the 2nd respondent a secondary polluter.

345. In our apportionment of liability to the 1st and 2nd respondents, the fact that the respondents are principal and secondary polluters respectively, with the 1st respondent being absolutely liable while the 2nd respondent is strictly liable, shall be taken into account in this case. In the foregoing, we are persuaded to apportion liability at the ratio of 80: 20 between the 1st and 2nd respondents respectively.

Quantum.

346. The petitioners in their submissions argued that as a result of the effects of hydrocarbons, they suffered life time health challenges including severe, moderately severe, moderate and mild kidney, liver and blood toxic infections. They also asserted that they suffered loss of crops and livestock and similarly lost the use of Thange River. The Petitioners proved the claim by producing in evidence medical reports

regarding the extent of injury to their health. In addition, the Petitioners produced an assessment report in respect of lost livestock that was not controverted.

347. As regards compensation, the court in *M. C. Mehta* (*supra*) went on to state as follows;

> "We would also like to point out that the measure of compensation in the kind of cases referred to in the preceding paragraph must be co-related to the magnitude and capacity of the enterprise because such compensation must have a deterrent effect. The larger and more prosperous the enterprise, the greater must be the amount of compensation payable by it for the harm caused on account of an accident in the carrying on of the hazardous or inherently dangerous activity by the enterprise."

General damages.

348. There is a clear distinction between damages in tort and damages for constitutional violations as the principles to considered are different. In a tortious claim, the core principle the Court ought to consider in assessing damages, is to restore the injured party to the former position before the tort took place and it is pertinent that the compensation reflects the actual damage suffered.

349. For constitutional claims, where fundamental rights have been infringed, the court takes a wider perspective in the assessment of damages. Various factors are considered, inter alia; the nature of the violation, the period of the alleged violation, the effect on the victim and whether there is a direct harm, the broader implications of the matter, including the necessity to prevent future violations, uphold the rule of law, and ensure that public bodies and private entities respect constitutional rights.

350. In *Musembi & 13 others v Moi Educational Centre Co Ltd & 3 others* SC Petition No 2 of 2018 [2021] KESC 50 (KLR), the Supreme Court distinguished damages for tort as against damages for Constitutional rights violations 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....."

351. Similarly in the Matter of *African Commission on Human And Peoples' Rights Application No. 006/2012 Judgment (Reparations) 23 June 2022 (the Ogiek case) v Republic of Kenya* the African Court of Human and People's Rights held that;

> "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...."

352. Further, in the case of *Kigaraari v Aya* (1982-88)1KAR 768 the court held that:

> " Damages must be within the limits set out by the decided cases and also within the limits the Kenyan economy can afford. Large awards are inevitably passed on to the members of the public, the vast majority of whom cannot afford the burden in the form of increases insurance and increased fees."

353. In the case of *Stroms Bruks Aktie Bolag v Hutchison* [1905] AC 515, Lord MacNaughten, the court while distinguishing damages held as follows:

> " General damages'... are such as the law will presume to be the direct natural and probable consequence of the action complained of. 'Special damages' on the other hand, are such as the law will not infer from the nature of the act. They do not follow in ordinary course. They are exceptional in their character and, therefore must be claimed specifically and proved strictly."

354. In *Orbit Chemicals Industries v Professor David M. Ndetei* [2021] KECA 741 (KLR), the Court of Appeal while dealing with a dispute revolving around unlawful disposal of contaminated and untreated sewage water to by a party to a neighbouring premises, the Court of Appeal awarded damages to the Respondent as follows:

(i) costs of restoration of soil Kshs. 12,000,000

(ii) General damages for loss of use of land Kshs.1,500,000.00

(iii) General damage for nuisance Kshs. 500,000.00

355. In *Ahmed & another v Kenya Electricity Generating Company Limited & another* (Environment & Land Case 10 of 2017) [2024] KEELC 5551 (KLR) (25 July 2024) (Judgment), the Plaintiffs were the registered owners of an extensive farmland located along the Tana River measuring about 110 acres. They sought general damages and an injunction against the Defendants to restrain the continued spillage of harmful substances from the Defendant's premises to their farmlands, the oil spillage occasioned by the Defendants negligent acts rendered their farm land unproductive. The court awarded them Kshs 10,000,000/. In addition, the court ordered mitigation and restorative measures including provision of a waste fuel disposal system to stop any oil spillage and/or waste fuel oil from being washed onto the neighbouring farms or into the Tana River.

356. In *Mohamed Ali Baadi and others v Attorney General & 11 others* [2018] KEHC 5397 (KLR), the Petitioners opposed the manner in which the LAPSSET Project was conceptualized and implemented in violation of the *Constitution* and Statutory law. They also opposed its design, contending that it was done without putting in place adequate measures to mitigate the adverse effects of a project of such a great magnitude. They alleged that it violated constitutional principles and values amongst them

sustainable development, transparency, public participation, accountability and specifically violated their constitutional right to earn a livelihood, a clean and healthy environment, cultural rights and the right to information. A sum of Kshs. 1,760,424,000/= was awarded as total compensation.

357. Further, in *Terra Fleur Limited v Kenya Cuttings Limited*[2021] KEELC 2775 (KLR), the Plaintiff averred that the defendant negligently carried out fumigation on its farm using a chemical known as Metham Sodium ,then drained it into a common dam on Kabuku river thereby contaminating the same. The Plaintiff without knowing that the defendant had released the said contaminant chemical pumped the water from the said dam and used the same to water the flowers on its farm and as a result, three (3) hectares of flowers that had been grown on its farm were destroyed. It was awarded Kshs. 6,300,000/= being the loss incurred for one harvest.

358. Regionally and internationally courts have made awards of general damages in instances of oil spills depending on the magnitude and impact on both environment and humans.

359. In *Re: Oil Spill by the Oil Rig "Deepwater Horizon" in the Gulf of Mexico*, on April 20, 2010, MDL No. 2179 (E.D. La.2012), BP was fined $20 billion in compensatory and restorative damages by an American court following the massive disaster in 2010.

360. In *Bodo Community v Shell Petroleum Development Company of Nigeria Ltd* [2015] EWHC 2199 (TCC) Shell settled the matter out of Court by accepting to pay Bodo Community around $55 million dollars in compensation from two massive oil spills in 2008 and 2009.

361. In *Exxon Shipping Co. v Baker*, 554 U.S. 471 (2008), the Court awarded damages against Exxon in the sum of $507 million in punitive damages and $3.8 billion for clean-up and compensation.

362. In the instant Petition, the petitioners sought general damages of kshs 200,000/= per petitioner for violation of various Articles of the *Constitution*; loss of domestic water of kshs 28,059,375/=; damages for loss of land use; crops and fruits of kshs 23,576,948/=; loss of livestock of kshs 280,701,324/=; future medical treatment at kshs 339,240,000/=; and general damages for pain and suffering of Kshs 989,100,000/=. They also sought for an award special damages for human medical examination of kshs 22,100,000/=; and special damages for laboratory tests of kshs 7,830,100/=. They further sought a sum of kshs. 307, 500,000/= in respect to exemplary damages and kshs. 6,000,000 for a borehole.

363. The petitioners sought for general damages of Kshs 200,000/= per petitioner for violation of various Articles of the *Constitution*, making a total of kshs. 615, 000,000/=. We have considered the severity of the impact of the oil spill on the petitioners' health, livelihoods and environment and it is our view that a sum of kshs. 553, 500,000/= shall be reasonable compensation for damages for violation of rights, having awarded each petitioner, a sum of Kshs. 180,000/=.

364. Regarding loss of domestic water, the petitioners' argument was that ESEIA calculated loss of water by applying daily loss calculated at ten (10) litres per person per a day at Kshs. 10 per litre, making it kshs. 1,825/= per person per annum. In applying this amount to 3075 petitioners for five years, they arrived at kshs. 28,059, 378/=. From the evidence tendered, it is clear that while the spillage occurred in 2015 as at 2021, there were still the presence of hydrocarbons in the water and soil. Therefore, the petitioners' multiplicand of five (5) years is reasonable in our view and we hereby award the sum of kshs. 28,059, 378/= as prayed.

365. On damages for loss of land use; crops and fruits the petitioners sought for Kshs 23,576,948/= claiming that while the ESEIA report assumed that farmers will resume the use of their land one and half years after the oil spill, there was no growing of crops for three years. They sought for kshs. 39,386,912/= less what the Insurance paid being the sum of kshs. 15,611,892/= leaving a balance of Kshs. 23,576, 948/

=. We have considered the evidence including the exhibits produced and find this amount reasonable in view of the fact that three years after the oil spill, there were still traces of hydrocarbons in the soil.

366. On loss of livestock, the petitioners sought for kshs. 293,408,200/= less what was paid to them by the Insurance in the sum of kshs. 13, 706,876/= leaving a balance of kshs 280,701,324/=. Their claim is based on Dr. Nthanga's report and includes treatment costs, loss of fish production and loss of bee honey production. Having considered the report of Dr. Nthanga as well as the oral testimonies of the witnesses, we opine that the presumption of 100% livestock loss is exaggerated as not all the livestock died. It is our view that a loss of 80% would suffice in this instance and we proceed to award them the sum of kshs. 225,000,000/=.

367. The petitioners have claimed future medical treatment at Kshs 339,240,000/=. We have considered the report by Dr. Kowino whose sampling fourty six (46) residents returned 100% of hydrocarbon negative impacts. We have equally considered the report by Dr. Mubisi Swaro who sampled one thousand three hundred and five (1305) residents, and returned 100% renal toxicity, liver and bone marrow dysfunction. The said report also indicated that there was chronic poisoning as there was an accumulated effect, as a result of the exposure to hydrocarbons. For those reasons, it is our view that the accumulated effect of the exposure to hydrocarbons would require future medical treatment. Considering that there are three thousand and seventy-five (3075) petitioners from whom a sample of one thousand three hundred and five (1305) was obtained, showing that all of them were affected, it is our view that all the petitioners are entitled to an award of future medical treatment. We have considered the petitioners' argument that two hundred and twenty-two (222) petitioners suffered severe injuries while two thousand eight hundred and fifty-three (2853) suffered moderate and mild injuries. The petitioners had proposed a sum of kshs. 500, 000/= for each petitioner who suffered severe injuries and kshs. 80, 000/= for each petitioner who suffered mild and moderate injuries, making a total of Kshs. 339, 240, 000/=. It is our view that the petitioners who suffered severe injuries deserve to be awarded kshs. 250,000/= per person while the ones who suffered mild and moderate injuries can be awarded Kshs. 50,000/= per person. Under this head, we find that the sum of Kshs. 198,150,000/= would suffice.

368. The petitioners have claimed general damages for pain and suffering of Kshs 989,100,000/=. From the reports by Dr. Kowino whose sampling of fourty six (46) residents returned 100% hydrocarbon negative impacts while Dr. Mubisi Swaro sampled one thousand three hundred and five (1305) residents, and found 100% renal toxicity, liver and bone marrow dysfunction. Considering that there are three thousand and seventy-five (3075) petitioners from whom a sample of one thousand three hundred and five (1305) was obtained, showing that all of them were affected, it is our view that all the petitioners are entitled to general damages for pain, suffering and loss of amenities for injuries suffered. Having considered the petitioners' argument that two hundred and twenty-two (222) petitioners who suffered severe injuries should be awarded a sum of Kshs. 600,000/= each while two thousand eight hundred and fifty-three (2853) petitioners who suffered moderate and mild injuries should be awarded kshs. 300, 000/= for each petitioner, making a total of kshs. 339, 240, 000/=. It is our view that the petitioners who suffered severe injuries deserve to be awarded kshs. 450,000/= per person while the ones who suffered mild and moderate injuries can be awarded kshs. 250,000/= per person. We hence award them a sum of kshs. 815,150,000/= under this head.

369. The petitioners claimed a sum of kshs. 6,000,000/= for drilling a borehole with large water distribution in the entire Thange River basin. Considering that the oil spillage affected a vast area, we opine that even though the borehole is a necessity, a sum of kshs. 5,000,000/= would suffice.

370. The petitioners sought Kshs. 307, 500,000/= in respect of exemplary damages. In *Rookes v Barnard and others* (1964) AC 1129 quoted by the Court of Appeal in *Godfrey Julius Ndumba Mbogori & another v Nairobi City County* [2018] eKLR, where Spry VP held:

> " The decision in *Rookes v Barnard* [1964] AC 1129 so far as it related to exemplary damages, is of outstanding importance in English Law both because it defines the circumstances in which such damages may be awarded, inter alia in cases of oppressive, arbitrary/ unconstitutional actions by the servants of the government. In the circumstances of this case, we are satisfied that the 1st Respondent's actions were oppressive and unconstitutional. We are persuaded that an award under this head is merited."

371. In *Exxon Shipping Co. v Baker*, 554 U.S. 471 (2008), the court awarded punitive damages of about seven (7) times the compensation awarded in general damages.

372. In the instant case, it was evident from the testimony of the witnesses that the 1st respondent was made aware in 2010 that its pipeline at the Thange River area was corroded, but did demonstrate to court if it took any measures to repair it. This means that the oil spill was inevitable and it is our view that the 1st respondent having not demonstrated to have undertaken measures to prevent the oil spill in time, is liable to pay exemplary/punitive damages. The 2nd respondent having failed to monitor and audit the operations of the 1st respondent violated both the *Constitution* and provisions of *EMCA* and therefore is liable to pay punitive damages.

373. In associating ourselves with *Exxon Shipping Co. v Baker*, decision and applying it to the circumstances herein, we find that Kshs. 250,000,000/= is sufficient compensation on punitive damages.

Loss of expectation of life.

374. On loss of expectation of life, the Supreme Court of India in *Charna Lal Sahu and others v Union of India and Others* [1990] LRC stated that:

> " Death has an inexorable finality about it. Human lives that have been lost were precious and in that sense invaluable. But the law can compensate the estate of a person whose life is lost by the wrongful act of another only in the way the law is equipped to compensate. i.e by monetary compensation calculated on certain well recognized principles "loss of estate" which is the entitlement of the estate and the "loss of dependency 'estimated on the basis of capitalized value awarded to the heirs and the dependents are the main components in the computation of compensation in fatal accident actions."

375. In the case of *Hyder Nthenya Musili & Another v China Wu Yi Limited & Another* [2017] eKLR, it was held as follows:

> " As regards damages awarded under the *Law Reform Act*, the principle is that damages for pain and suffering are recoverable if the deceased suffered pain and suffering as a result of his injuries in the period before his death.... The generally accepted principle therefore is that very nominal damages will be awarded on these two heads of damages if the death followed immediately after the accident. The conventional award for loss of expectation of life is kshs.100,000/=."

376. Under this head, the Petitioner contended that seventeen (17) Petitioners lost their lives as a result of the effects of the oil spillage. The deceased according to the death certificates that were produced were the following:

a. Nashon King'oo Musimba

b. Wambua Muli

c. Philip Kitoko Makumi

d. John Mbebi Thuku

e. Duncan Matheri muchoki

f. John Mutiso King'ele

g. Malika Ndonya

h. Muuo Joseph

i. Ann Mwikali

j. Gregory Waema Kilei

k. Stephen Munyasya Muia

l. Stephen Marthias Mulumba

m. Muthama Wathome

n. William Kyengo Kyule

o. Elizabeth Queen Kithyululu

377. Of the seventeen (17) claims, only fifteen (15) people as listed above were proved. In associating ourselves with the decisions of Hyder Nthenya Musili supra and Charna Lal Sahu supra, we find that the estate of each of the above listed deceased persons is awarded Kshs 150,000/= under this head. We hence award Kshs. 2, 250,000/=.

Special damages.

378. It is trite law that the petitioners ought to have specifically pleaded and proven any claim under this head. This was reiterated by the Court of Appeal in the case of *Hahn v Singh*, Civil Appeal No. 42 of 1983 [1985] KLR 716, at P. 717, and 721 where the Learned Judges of Appeal -Kneller, Nyarangi JJA, and Chesoni Ag JA – held that:

> " Special damages must not only be specifically claimed (pleaded) but also strictly proved.... for they are not the direct natural or probable consequence of the act complained of and may not be inferred from the act. The degree of certainty and particularity of proof required depends on the circumstances and nature of the acts themselves."

379. The special damages pleaded were in respect of laboratory tests and result analysis as well as professional fees for livestock impact assessment.

Laboratory tests and result analysis.

380. Although the Petitioners pleaded a sum of Kshs. 22, 100,0oo/=, for human health professional fees, they only produced one receipt in respect of this claim being a receipt dated the 13th March, 2020 for a sum of Kshs 6,916,500/=. In our view, the burden of proof was upon the petitioners to demonstrate they paid the pleaded amount, which they failed to discharge but only proved payment of the sum of Kshs. 6,916,500/= which we hereby award.

Professional fees for livestock impact assessment.

381. The petitioners produced two receipts in respect of this claim being receipts dated the 8th of June 2016 for a sum of Kshs 3,750,000/= and Kshs 7,478,850/= respectively totalling to Kshs 11,228,850/ = which we award.

382. On the petitioners' claim for provision of specialized clinics for the residents, it is our view that medical health services have been devolved and there being government hospitals within the petitioners' reach, there is no material before us to demonstrate that the petitioners' will not get adequate medical attention. On that basis that claim fails.

383. Regarding restorative measures section 108 (1) and (2) of *EMCA* provides for environmental restoration orders and stipulates thus:

> "(1) Subject to any other provisions of this Act, the Authority may issue and serve on any person in respect of any matter relating to the management of the environment an order in this Part referred to as an environmental restoration order.
>
> (2) An environmental restoration order issued under subsection (1) or section 111 shall be issued to—
>
> (a) require the person on whom it is served to restore the environment as near as it may be to the state in which it was before the taking of the action which is the subject of the order;
>
> (b) prevent the person on whom it is served from taking any action which would or is reasonably likely to cause harm to the environment;
>
> (c) award compensation to be paid by the person on whom it is served to other persons whose environment or livelihood has been harmed by the action which is the subject of the order;
>
> (d) levy a charge on the person on whom it is served which in the opinion of the Authority represents a reasonable estimate of the costs of any action taken by an authorised person or organisation to restore the environment to the state in which it was before the taking of the action which is the subject of the order."

384. Therefore, where the environment has been degraded due to pollution, the polluter must take measures to restore the environment to its former status. In the case of *Owino – Uhuru* (supra) Supreme Court while setting aside the Court of Appeal decision, held that the 1st respondent who was the polluter was obligated to take restorative measures to restore the environment to its previous state and in default

they would be required to pay the costs of the remediation which in this case they awarded kshs. 700,000,000/=, where the land to be restored was 13.5 acres.

385. In the matter at hand, the evidence showed that the oil spillage affected twenty-seven (27) villages spanning fourty two (42) kilometres and affected over three thousand (3000) residents. In addition, the oil spillage permeated over ten (10) metres into the pervious rocks and aquifers. The evidence on record demonstrated that at the time of decommissioning the remediation exercise, the environment in dispute was still polluted as hydrocarbons were still in the water and soil. Taking into account the magnitude of the oil spillage and area covered, it is our view that the 1st respondent must undertake measures that would restore the polluted environment to its former status. In default, it must bear the cost of the remediation which in our view would be the sum of Kshs. 900,000,000/=, in line, with the polluter pay principle.

H. Whether the Petitioners are entitled to the orders sought.

386. This court has power to uphold and enforce the Bill of rights; and where it is established that petitioners rights have been violated, the court has power to grant appropriate relief. Article 23 of the *Constitution* provides as follows;

> Authority of courts to uphold and enforce the Bill of Rights.
>
> 23.
>
> 1. The High Court has jurisdiction, in accordance with Article 165, to hear and determine applications for redress of a denial, violation or infringement of, or threat to, a right or fundamental freedom in the Bill of Rights.
> 2. Parliament shall enact legislation to give original jurisdiction in appropriate cases to subordinate courts to hear and determine applications for redress of a denial, violation or infringement of, or threat to, a right or fundamental freedom in the Bill of Rights.
> 3. In any proceedings brought under Article 22, a court may grant appropriate relief, including—
>
> a. 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 for compensation; and
>
> f. an order of judicial review.

386. In the foregoing, we find and hold that the Petitioners have proved their case on the required standard and we enter judgement for them as against the respondents as follows:

a. Liability against the 1st and 2nd respondents is apportioned in the ratio of 80: 20 % respectively.

b. A declaration be and is hereby issued against the respondents that the petitioners constitutional rights guaranteed and protected under Articles 26, 29(d), 35, 40, 42, 43(1) (a) (c) and (d) and 47 of the *Constitution* have been and continue to be contravened and violated.

c. A declaration be and is hereby issued that the respondents have breached Constitutional obligations imposed upon them by Articles 43 and 69 of the *Constitution*.

d. An environmental restoration order be and is hereby issued requiring the 1st respondent to restore the petitioners' damaged land, soil, surface and underground water, the environment (biota & fauna) and the entire Thange River Riparian habitat, to its original status and/or to the satisfaction of this Honourable court within one hundred and twenty (120) days from the date of this judgement and file a report in Court.

e. In default of order (d) above, the 1st respondent shall pay a sum of kshs. 900,000,000/= to the 2nd Respondent who shall facilitate the restoration of the Thange River Riparian habitat and file a report in court within one hundred and twenty (120) days, after receipt of the funds.

f. A declaration be and is hereby issued that the discharge vouchers signed by the petitioners for crops and livestock are unconstitutional, null and void and the same are hereby set aside.

g. The respondents are hereby ordered to pay the Petitioners general, exemplary/punitive and special damages, having already taken into account prior compensation made thereto as itemized here below:

   i. Loss of domestic water at kshs. 28,059, 378/=

   ii. General damages for violation of the petitioners' constitutional rights at kshs. 553, 500,000/=.

   iii. General damages for loss of income for land use, crops and fruits at kshs. 23,576,948/=.

   iv Loss of livestock at kshs. 225,000,000/=

   v Future medical treatment at kshs. 198,150,000/=

   vi. Damages for pain and suffering and loss of amenities at kshs. 815,150,000/=

   vii. Loss of expectation of life (15 victims) kshs 2,250,000/=.

   viii. Cost of borehole at kshs. 5,000,000/=

   ix. Special damages;

   x. Cost of laboratory tests kshs 6,916,500/=

   xi. Professional fees for livestock assessment Kshs 11,228,85/=

   xii. Punitive damages kshs 250,000,000/=

   Total Award kshs. 2,118,831,676/=

h. The sum of kshs. 2,118,831,676/= only, shall be paid to the Petitioners within one hundred and twenty (120) days of this judgement.

i. For the avoidance of doubt, damages of kshs. 900,000,000/= for environmental restoration shall be paid by the 1st respondent to the 2nd respondent in the event of default of compliance with order (d) above.

j. Having awarded damages in the sum of kshs. 2,118,831,676/= and taking into account the cost for environmental restoration of Kshs. 900,000,000/= the Gross Award herein is kshs. 3,018,831,676/=

k. Each party shall bear their own costs of the Petition

l. It is so ordered

DATED, SIGNED AND DELIVERED AT MAKUENI THIS 11TH DAY OF JULY, 2025

.....

CHRISTINE OCHIENG

JUDGE

.....

THERESA MURIGI

JUDGE

.....

ANNET NYUKURI

JUDGE