



Center For Justice Governance And Environmental Action

THE OWINO UHURU CLASS ACTION SUIT PROGRESS REPORT FROM 2016 TO 2019

Executive Summary

In February 2016, Centre for Justice Governance and Environmental Action, through its legal team, helped the people of Owino Uhuru to file a class action suit against the Lead smelter proponents and state agencies involved in approving its licensing to operate within Owino Uhuru. [The class action litigation](#), which is supported by the partnership of the Office of the High Commissioner for Human Rights (OHCHR) seeks to challenge the responsibility of the state and non-state actors towards the protection of the right to a clean, healthy and sustainable environment as stated in Article 42, 69 and 70 of the Kenyan constitution 2010. The Petitioners want a declaration made stating that their right to life was violated by the actions of the respondents and also want the respondents to cater for the environmental remediation of the area so as to get rid of the lead as well as finance their treatment which is very costly. The case is still ongoing and this report gives an account of the proceedings in the Class action suit.

2017 Court Session Updates

From January 2017 CJGEA embarked on ensuring that all court procedures were adhered to. Non response from some of the respondents since 2016 February, had forced CJGEA to serve them again. **11th May 2017**, was the first mention date of the case at the court. The only respondents represented were the 1st, 2nd and 3rd respondents; the cabinet secretary ministry of environment, water and natural resources and the cabinet secretary ministry of health. The preparations for the mention date were made by the legal team and CJGEA team by filing all documents and the evidence that was needed in court on that day; which included the service notice for the [attorney general](#) received dated 20th February, 2016, service notice for the [county government](#) of Mombasa dated 20th February, 2017 service notice for [Metal refinery EPZ Ltd and Penguin paper and book company, NEMA, EPZ, Ministry of health](#). After this, we served the county government for an appearance at the court for the next mention date dated 20th July, 2017.

On 16th June 2017, in a bid to ensure we stayed compliant with the court order, our legal team had to prepare witness statements to be filed in court on **Monday 19th June**. Witness statements were filed in court on Monday **19th June**. The county government lawyers were served on **29th June, 2017** with a [mention notice](#) to appear in court on **20th July, 2017**, whereby we presented our list of [supplementary document](#) and [witness statement](#).

The judge was presented with the case and when she mentioned it, the county government lawyer Mr. Muturi of Muturi Gakuo and Kibara Advocates and the other lawyers representing the first, second and third respondents asked the judge for a grace period of one month. The two claimed that they needed more time to familiarize themselves with the case. The lawyer for the 1st, 2nd and 3rd respondents told the judge

that he will also take the time to seek for further direction on the matter. Our lawyer told the judge that he was willing to give his colleagues time on condition that it would be the last mention date for the case. This was because the case has been dragging in court since February, 2016 and all the respondents had been served in March, 2016, and it's for this reason that they should have been ready for the case as they had been given ample time. He then asked the judge for an affidavit to ascertain that the next mention should be the last before the hearing. The lawyers agreed to this request and the judge granted the next mention to be on the **11th October, 2017**.

On **11th October 2017**, the respondents' legal teams requested for more time to file their papers because their main witness had not managed to come to Mombasa. Mr. Ndun'gu, who was the public health officer in charge of Changamwe during the operations of MREL, had since been transferred and was among the state witnesses. The next hearing date was agreed to be on **15th and 16th of January 2018**.

On Monday 15th our team was so ready for the hearing, the 4th, 5th and 6th respondents' lawyers applied for adjournment, and they requested to be given time to respond to us. They were granted 45 days to file their responses and within 15 days we will respond to their responses. Justice Amollo said it's the last time that the case is going to be adjourned and if they fail to respond the case will proceed without them. She even added that the respondents are going to refund the costs e.g. accommodation for the legal team, transport for legal team, CJGEA team and community members, meals and any other costs incurred.

2018 Court Session Updates

From **January, 2018**, CJGEA, the Owino Uhuru community and the legal team began the court proceeding. The first hearing was schedule for **15th January, 2018**. Our legal team arrived from Kisumu and we were ready to begin the hearing the morning of 15th. However, the 4th, 5th and 6th respondents' lawyers applied for adjournment, and they requested to be given time to respond to us. They were granted 45 days to file their responses and within 15 days we were to respond to their responses. Justice Amollo said it's the last time that the case is going to be adjourned and if they fail to respond the case will proceed without them. Community members from Owino Uhuru came to the court house as [participants](#) to follow the proceeding.

The next hearing was scheduled for **19th March**. On this day, a lawyer representing alleged 219 Community members from Owino Uhuru told the court that his clients were seeking to be admitted in the case as interested parties. Our Attorney Charles Onyango objected to Mr. Okanga's application on the grounds that; the timing for the application was late and already the court has set for hearing of the petition. Mr Onyango asserted that the application be thrown out on the basis that; a) it was untimely as the courts had already set a date (19th march, 2018) which was for hearing of the case b) the list was not genuine as it has already been used in a land suit that was settled.

Mr. Onyango further pointed out before the court that some names alleged to have signed to seek admission in the list presented by Mr. Okanga are serving as witnesses in the petition scheduled for hearing on 19th march, 2018; therefore, it was illogical to think that they have given consent to Mr.

Okanga to seek their enjoinder as interested parties.

Unfortunately, the judge Lady Justice Anne Amollo directed that the hearing of petition could not proceed. She gave a 14-day window for the petitioners to file a response to Mr. Okanga's application of enjoinder and the matter be determined on 27th April, 2018. Here is a list of the [Participants](#)

On 27th April, 2018, the legal team, CJGEA and Owino community members attended the ruling for 'application to join the petition as proposed respondents and be allowed to defend the suit'. This was an application by lawyer Okanga. Unfortunately, we did not get a judge to give the ruling and we had to go back the next week for the same. The judge was not around the following week so our lawyers told us that we will have to wait until 16th May, during the given date for hearing to get a ruling from the judge. [Participants](#)

During the third hearing session, Justice Omollo gave her ruling on Mr Okanga's application to join the petition as proposed respondents and be allowed to defend the suit. He stated that the applicants in ground 4 had voiced concerns that if the prayers in the Petition were granted, they are likely to be deprived of their homes. I have looked at the reliefs sought in the Petition which are aptly summarized in the Petitioners submissions to include a declaration for the rights over a clean and healthy environment; Right of life; Compensations for the damages caused to the Petitioners' Health, Environment and Lost life and orders of mandamus directed at the specified regulations/conventions. The Petition as framed does not place any claim to land ownership or seek eviction orders. The Applicants fears are thus unfounded. Further the applicants did not annex a draft response to the petition to state why they are opposed to the grant of the prayers in the Petition if at all." Judge A. Omollo.

The judge dismissed the application and said in her ruling that she finds the application (application to join the petition as proposed respondents and be allowed to defend the suit) lacking in merit.

After the ruling, before the hearing could start, the 1st respondent's (Attorney General) lawyer, asked the judge to give him some time to read the file and familiarize himself with the case because the lawyer who was handling the case has been transferred to Nairobi. The judge told him since they had the file since 2016; she will give him a day to prepare. She said that the hearing will start the next day at 10.30AM.

After this, CJGEA, Owino Uhuru community members and the legal team had a press conference in front of the court house. Our lawyers had a meeting with the witness. This was to equip the witnesses to give evidence in court during hearing. They told the witness to always remember to give all the details when testifying and answering the questions as asked. The witnesses were given the opportunity to ask questions and get clarification on the hearing process. [Participants](#)

The following day, **17th May**, the hearing begun and 3 witnesses from Owino Uhuru got the opportunity to testify. They were; Scholastica Shikanga, grandmother to Kelvin Musyoka who is the first Petitioner in the case. The next witness was Mr Alfred Ogola; he is the village elder of Owino Uhuru. The third witness was Kavumbi Munga, a mother of Philemon, a kid who has been severely affected by lead poisoning since

he was a baby. After this, the judge ordered that; the petition be and is hereby fixed for further hearing on **24th and 25th July 2018**, the Attorney acting for 1st – 3rd Respondents to file and serve their replying affidavits within 14 days from today, witness summons to be issued to expert witnesses on the case to attend court during the next hearing.

The legal team had a meeting with the community members after this. The legal team were asked to request the other lawyers to ensure that they are available full days on 24th and 25th July, 2018. This was a request made to ensure that the rest of the witnesses from the community can testify and the expert witnesses can also get the chance to do the same. The [Participants](#) list showed the attendance from the Community. CJGEA litigation officer worked with the court clerks to ensure summons were sent out to expert witnesses to appear in court.

The 4th hearing session was held on the **24th and 25th of July 2018**. After the previous hearing, the witnesses on the class action litigation from Owino Uhuru were threatened, harassed and attacked. We called upon the Witness Protection Agency, who assessed the security situation of each of the 10 witnesses. Three of the witnesses were moved to a safe location after the assessment. It is important to note that the Government Witness Protection Agency brought all the 3 witness under their protection all in good health. They were; Mr. Wilfred Kamencu, Mr. Jackson Wanyama and Mr. Steven Okello

The witness protection agency also gave in-court protection for all the other witnesses under their protection. Four witnesses had an opportunity to take to the stand and give their testimonies on the issue of lead poisoning in Owino Uhuru and how it affected their lives and who they faulted for their misfortunes. The 3 main Government agencies that the witness held accountable were; NEMA, PUBLIC HEALTH AND MOMBASA COUNTY GOVERNMENT. The witnesses were; Wilfred Kamencu, Eric Odera, Hamisi Diyo and Stephen Okello.

CJGEA facilitated arrangements for an expert witness, Dr Wandera Crispus Bidera, to come to Mombasa to testify. The next day, the 25th of July, Dr Wandera took the stand. He introduced himself a former Government chemist employee. In his testimony he testified that the normal lead in the batteries is not harmful but the smelting activity of the factory to get the lead, made it poisonous. The by products of the smelting is what poisoned the Owino Uhuru community as they were released through a chimney which faced the community and the only thing separating the community from the factory is a wall. Mr Wandera guided the court on remediation and the need for clean-up of the environment in Owino Uhuru. Mr. Wandera's testimony was the only one on this particular day.

The court session ended at 14:47 with the judge giving the dates for the next hearing; **28th and 29th of November 2018**. On **28th November**, Dr Ajoni Adede an expert witness called by CJGEA took the stand. He appeared to give his expert opinion on the medical reports he made on Owino Uhuru community members' lead poisoning. Dr Adede read and clearly explained the 9 medical reports in the petitioners list of documents. He was cross examined on this and he answered each of the lawyers' questions explaining

his qualifications as a doctor and the reason behind the reports and how they were linked to lead poisoning from the smelter.

After Dr Adede testified, Ms Phyllis Omido took the stand. She testified telling the court of the events since she started working at Metal Refinery EPZ Limited in 2009. Ms Omido testified and gave evidence to several of the documents and correspondence in the petitioners list of documents. The respondents' lawyers cross examined Ms Omido as well.

On 29th November, Mr John Ndung'u took the stand. Mr Ndung'u was the 1st, 2nd and 3rd respondents' witness. He was also the District Public Health Officer at the time of the smelters operations. Mr Ndung'u throughout his testimony repeatedly shifts the blame from the Ministry of Health. At one point he clearly pointed out that the people responsible for the pollution and poisoning of the community are; NEMA, EPZA and the county government of Mombasa. He points out that the first step was for NEMA to carry out an EIA. Mr Ndung'u tells the court that to-date the ministry of health has not received an EIA from NEMA to give comment on the factory or its operations. Mr Ndung'u was cross examined and our lawyers brought out the fact that Mr Ndung'u was very aware of the situation in Owino Uhuru even though he had told the court under oath that he only found out through the media.

The next hearing was set for **4th and 5th of March, 2019**. This time the respondents' witnesses will be given the opportunity to testify. Here is the full [Report](#) on the hearing that took place between the 28th and 29th November, 2018.

Conclusion

The hearings this year gave the witnesses from the community an opportunity to give their testimonies. The court heard all the misfortunes and suffering the community members had to go through as a result of a government licensed smelter. The state actors being sued neglected to uphold their duties and respect the rights of the Owino Uhuru community. Access to information and public participation is a right assured in the Kenya Constitution. CJGEA has been trying to bring up the issue of procedural environmental rights and our experience has concretized the fact that access to information, public participation and access to effective remedy is the only way to ensure the right to a clean and healthy environment as assured in Article 42 of the Kenyan Constitution (2010). The Owino Uhuru community members challenging the responsibility of the state and non-state actors towards protection of their rights in this case is a milestone for the other communities suffering as a result of the same. A complete report of the court proceedings can be found [here](#)

2019 Court session Updates

4th March 2019 - The hearing was attended by a section of the Owino Uhuru Community members, CJGEA staff, the CJGEA legal team representing the Owino Uhuru community and the Government agencies' lawyers. [Participants list](#)

The Government was meant to produce some witnesses to represent them in court but the witnesses did not show up initially forcing the judge to adjourn the next hearing dates to July 3rd and 4th. The respondents' lawyers were ordered to compensate the plaintiffs' lawyers as they had inconvenienced their stay in Mombasa by initially failing to produce the witnesses in time yet during the last court hearing in September, they were the ones who settled for March 4th and 5th as the convenient date for the witnesses to testify. The reasons they gave were also illogical as one of the respondent's lawyers claimed that a second witness that he could produce in court could not testify before the first witness who was absent and another was in the case of another respondents' lawyer that was on honeymoon and could not be reached. The judge however, agreed to grant them the additional time they had requested for. We then had a brief meeting with the Owino Uhuru members outside the court who expressed their disappointment as they felt the Government agencies in the case had no witnesses but were rather just buying into time to drag the case further. We then embarked on our journey back to the office.

However, along the way we received a call that we should go back to court as the parties involved did not come to an agreement on the compensation of the travel expenses for the lawyers representing Owino Uhuru. They had initially claimed that the witness from the Ministry of Health was not available to testify but this time round they had decided to reluctantly produce the witness citing the compensation expenses were too hefty for them.

The witness, Dr Nancy Etyang, took to the stand at around 12 noon. She stated that she was representing the Ministry of Health (M.O.H) in the hearing. Dr Nancy currently works at the office of the Director of Medical Services. She went on to testify that in 2014, The Owino Uhuru issue was brought to the attention of the Ministry of Health and she was ordered to lead an investigation to ascertain the complaints raised by the community members and activists. The team consisted of members from The Government Chemist, Kenya Medical Research Institute (KEMRI), Jommo Kenyatta University of Agriculture and Technology (JKUAT), Centre for Disease Control (CDC). The investigative team met with the County Government of Mombasa and the District Commissioner who took them to Owino Uhuru. The team had to involve NEMA in the investigation and shared the findings with NEMA for them to take action with regards to the recommendations of the environmental aspect of the investigation as M.O.H was only tasked in looking into the public health issues.

Upon arrival at Owino Uhuru, they found the factory closed but on peeping, they could still see battery shells scattered on the ground. She stated that it was closed down by public health officers following complaints from a report submitted to them. Her team then went into the settlement and talked to the people who claimed that the factory had harmed them; with some actually stating that they worked in the Company for a long time and the lead dusts and raw effluents released into the community had brought about adverse effects on them. According to her, the medical team then took blood samples from the Owino Uhuru community members, majority being those of the children and also went a step further to visit the neighboring informal settlement known as "Bangladesh" where they also took blood samples from children to compare with those at Owino Uhuru community in order to establish what was the source of the pollution. Up until this point, she still hadn't admitted to the smelter being the source of the lead

poisoning but instead said that there are many other factors that can contribute to elevated lead levels in an area.

Dr Nancy then said that there was a report that discussed the findings of the working group. The lawyers produced the report and handed it over to her while still at the chambers to confirm if it was the same report she was talking about. She however made a remark that there were several versions of the report that had been published and some were misleading the public which appeared as a way of her not wanting to take full responsibility of the findings of the report. She also stated that the M.O.H had not signed the report that was presented in court yet she appeared as the lead investigator in it. She at some point stated that her colleague, Mr Wandera Bideru, absent during the case, was in a better position to answer the questions the lawyers were asking her.

The plaintiffs' lawyer, Mr Charles Onyango then asked Dr Nancy Etyang where the lead tests were conducted and she stated that there were two sets of samples taken; blood and environmental samples (including water and soil). They mapped out areas in the communities i.e. those nearest to the smelter, those far out, the water sources as well as the children's playgrounds to compare the lead levels. The blood samples taken were then shipped to the National Medical Laboratory and the environmental samples were shipped to the County Government of Mombasa. Dr Nancy stated that from the blood samples taken at Owino Uhuru, there were elevated lead levels in the blood and in some of the samples from Bangladesh slum the lead levels were elevated but not as high as those from Owino Uhuru. Asked for a second time if the contributing factor in the high levels of lead in Owino Uhuru was the smelter, she adamantly refused to admit so.

Dr Nancy then said that together with her team, they came up with recommendations as a way of applying public health action to the lead poisoning situation. The M.O.H was to intervene in the situation but only after the lead levels of Owino Uhuru had been investigated and compared to the neighboring settlements. The team recommended that the factory needs to remain closed and the community has to be relocated to another place to prevent further lead exposure, a follow up on the lead levels of the children was to be carried out and monitoring of their progress by the devolved system of Health Department and lastly the environment was to be remediated. She however said that the remediation of the Environment was not the work of the Ministry of Health and that is why they tagged NEMA along and even disseminated the results of the tests and the report to them for further action as the next step was a scientific investigation to be carried out and a scientific report to be published and that was not part of the mandate of M.O.H.

Dr Nancy also stated that there is a drug prescribed for treating lead poisoning but the lead levels in the children of Owino Uhuru did not need the said drug to manage the lead poisoning but instead prescribed Iron and Calcium supplements to prevent the further absorption of the lead into their bloodstream. Her team then had a meeting with the County Government and a medical camp was setup in the area and it was to not only look at lead but also other health problems facing the community. She also said that after they gave out the results to the tested community members, they offered them counseling on dietary actions, nutrition and ways to manage the lead poison levels. They also gave public education, created awareness and suggested clinical interventions.

Dr Nancy then said that in her results, nobody tested had lead levels exceeding 45mcg/dl which was contrary to the Government Chemist results that had results with relatively higher levels. There were lead levels detected as high as 420mcg/dl in the case of Irene Akinyi who was present in court. Her team had tested 50 people mostly kids as they were at more risk and their playgrounds had been exposed to lead and the adults tested were of a median age of 40. According to her, 70% of the kids tested were found to have lead levels of 5mcg/dcl and the remaining 30% had levels above the World Health Organization (WHO) required levels. Dr Nancy also stated that by the time her team had arrived Owino Uhuru for the first time, there were blood samples that had already been taken so her team went in for systematic sample collection. In the report she had said levels of 5 to 10 mcg/dl were allowable but from above 70mcg/dl, the patients needed to be hospitalized and begin chelation therapy. She then said that there were no safe levels of lead in blood but Kenya was currently using the Centre for Disease Control (CDC) threshold to establish the allowable levels. She also said that the Soil in Owino Uhuru was found to have 387 mg /Kg slightly lower than the cut off provided by CDC which is 400mg/Kg. She then stated that the practical steps to decontaminate Owino Uhuru were not the core role of the Ministry of Health but in terms of health, they were to provide supplements throughout the chelation course and three weeks after the patients cease treatment.

While addressing the issues on results of lead blood levels differing with those of the Government Chemist, she stated that the Government chemist is no longer under the Ministry of health and she can't speak on behalf of them. Asked by lawyer Charles Onyango if the Government Chemist has the capacity to conduct lead blood tests, she admitted it does which was contrary to a letter sent by the Government Chemist officials to CJGEA whereby they had claimed that they had no equipment to carry out the lead blood analysis that CJGEA had requested them to. She however couldn't state any practical actions that had been taken by the Ministry of Health in helping the Owino Uhuru people after they tested them in terms of medical provisions and a follow up on the same. She kept shifting blame to the other Government agencies and the judge had to ask her to only speak for M.O.H which she was representing and what they had done to better the situation at Owino Uhuru. She however couldn't state any solid practical actions that had been taken by the M.O.H from the time her team had led the investigation and even compiled the report in 2014 apart from stating that they went back into the community and gave out the results then counseled the community members and recommended clinical interventions.

The judge then asked her what can be done to help the people at the moment as we cannot dwell on the past and there are people suffering from the effects of the lead poisoning and she said that as a Doctor she would refer the patients to a clinician and put them under medication but speaking for the Ministry of Health, she stated that the community needs to be relocated for the Ministry to act accordingly. She wasn't clear on any programs that might be rolled out to ensure the victims receive free medication.

The judge then said that after weighing the options presented , she has come to a decision to adjourn the case to **July 22nd and 23rd** to give the Government witnesses time to prepare their witness statements after which the lawyers can apply for closure of the case and she can give a ruling date. The Court was then adjourned and we left at around 1 .00 pm.

[View here the 2019 court session pictures.](#)

NB This class action litigation case is still ongoing.

Pictures



SOME MEDIA REPORTS

<https://m.youtube.com/watch?v=Tv-UfH2SQIc>

<https://www.standardmedia.co.ke/article/2001275253/owino-uhuru-residents-rights-violated-court-told>

<https://www.pulselive.co.ke/bi/finance/slum-dwellers-sue-nema-and-demand-sh1-6bn-over-lead-poisoning>

[-id8402411.html](#)

<https://www.standardmedia.co.ke/article/2001289487/lead-killed-my-wife-and-daughter-man-says-in-court>

<https://www.nation.co.ke/counties/mombasa/Lead-poisoning-case-mombasa/1954178-4570908-5s1qc8/index.html>

<https://www.standardmedia.co.ke/article/2001266073/mombasa-slum-dwellers-sue-state-ag-and-nema-over-lead-poisoning>

<https://www.nation.co.ke/video/news/4146788-4350604-fwkynoz/index.html>

<https://www.standardmedia.co.ke/business/article/2001281121/locals-want-sh1-6-billion-for-lead-poisoning>

<https://www.nation.co.ke/news/Owino-Ouru-slum-has-dangerous-level-of-heavy-metal--court-told/1056-4683136-v7qq8cz/index.htm>

<https://www.standardmedia.co.ke/article/2001281953/lobby-members-supporting-court-case-want-director-of-public-prosecutions-to-intervene>

<https://www.business-humanrights.org/en/metal-refinery-epz-lawsuit-re-lead-pollution-in-kenya>

<https://qz.com/africa/1231792/a-battery-recycling-plant-owned-by-indian-businessmen-caused-a-lead-poisoning-crisis-in-kenya/>

A REPORT ON HEARING OF THE OWINO UHURU COMMUNITY LEAD POISONING CASE ON 22ND JULY, 2019 AT MOMBASA LAW COURTS

On the morning of 22nd July 2019, a team of three CJGEA personnel i.e. two staff members and one board member left the organization's premises at 7:00a.m in the morning to attend a court session at Mombasa law courts. We arrived on time at around 8:45a.m before the beginning of the proceedings which was scheduled to commence at 9:00a.m. We were immediately joined by the Owino Uhuru community members who were a total of twenty people and one more CJGEA staff member. We were alerted to settle in the courtroom by our lawyers who had also arrived and within a short time everyone was settled in the courtroom as we waited for the proceedings on the hearing to begin.

As we waited for the judge's arrival, CJGEA staff members moved around with the attendance list for Owino Uhuru community members to sign in order to get the exact number of people who attended the court session and to file for future use and reference. Here is the signed [attendance list](#) for this particular court session. At exactly 9:15, fifteen minutes later than the time the proceeding was supposed to commence, the court was informed that the judge could not make it to the court for the hearing of the case. The main reason for her missing the court session according to the court clerk was because she missed her flight from Kisumu to Mombasa which made her fail to appear in court for the hearing. This news came as a shock and surprise to everyone in the courtroom, our lawyers could not fathom how the judge could fail to attend court just because she missed her flight while they themselves made it to the court after catching their flights and from the same place.

By the judge missing the court session, it did not only delay justice delivery for the Owino Uhuru

community members, it also meant wastage of resources and was an indictment to the same court for failing to honor its own directives. CJGEA felt the pinch of this situation as the organization spent a lot of funds paying for the lawyers' accommodation, flights and meals during this day of attending court and failing to continue with court sessions meant money was spent for no work done and hence wastage of money especially now that donor funding is hard to come by. Also the transport for the community members and staff which is catered for by the organization went into waste as people came to court just to be turned away with nothing concrete. Everyone was disappointed but they were not deterred in their quest for justice and they swore to continue turning up in court for the hearing of the case until such a time when it will be concluded.

Also there was an incident that occurred where the file for the case could not be traced by the court. In the records of the clerk, it was clearly written that the file was taken to the registry while at the registry there was no such record that the file was taken to them. It forced our lawyers to take the issue seriously and intervene to ensure that the file was safely retrieved. Finally, the court managed to trace the file and it had all the documents intact.

Finally, the lawyers of the fourth respondent representing NEMA and fifth respondent representing County government of Mombasa served the petitioner's councils with letters notifying them that they had [two witnesses](#) and [one more new witness](#) respectively who they wanted to be enjoined to testify in the case. This added to the two witnesses of the sixth respondent brings a total of five witnesses who are yet to testify in the case. We as CJGEA, our lawyers and the people of Owino Uhuru community feel that this was a tactic to continue delaying justice for the people of Owino Uhuru as the case is nearing an end and we even anticipated that from these proceedings, the matter would come to rest and the judge would issue a date for the ruling. By bringing in more witnesses at this time will only drag the case further. This was also uncalled for since the accused parties had all the time they needed to produce their witnesses but instead they kept on skipping the court proceeding forcing the judge to adjourn the case from time to time. We all hoped and prayed that the judge would turn down their request on the next date for the hearing when she finally appears to listen to the case.

We all left the court premises at around 11:20a.m for home with the promise of coming back the next day for the hearing and keeping on the spirited fight of quest for justice.

N/B

[Court Pictures](#)

REPORT OF THE OWINO UHURU COMMUNITY COURT CASE ON 23RD JULY, 2019 AT MOMBASA LAW COURTS

We left CJGEA offices at 7:00 am to attend the court session for the hearing of the Owino Uhuru community lead poisoning case. We arrived at 8:48 and found when the lawyers and the community members had arrived earlier. In total, there were fifteen community members, three lawyers, three staff from CJGEA and one CJGEA board member. [See participants list](#).

We all settled in court to wait for the judge and at exactly 9:12am the judge came and the mentioning of the cases scheduled for the day began. At 10:05am the judge mentioned our case and lawyer Onyango representing the petitioner confirmed to the judge that all members from the respondents' team were well represented in the courtroom and he introduced all of them to court. The judge then decided to start listening to our case at 10:45 hence we took a 45 minutes break until then.

At 10:45 we were all back in the courtroom and our session delayed officially starting at 11:20am. The first witness of the day to take stand was Mr Owuor Ouma of the fourth respondent who has worked with National Environment Management Authority for the past 16 years and currently works in the capacity of the acting Director NEMA Mombasa county .He was asked by the lawyer representing the fourth respondent if he swore an affidavit with the court and whether he would like his statement to be used as evidence by the court which positively accepted.

Lawyer Onyango of the petitioner thereafter took to cross-ex-amine the witness. He asked Mr. Ouma if he was familiar with the case before the court and whether he had gone through the documents. Mr. Ouma consented and said he knows about the case. When asked by the lawyer what his involvement in the case was since he was the one who put together all the documents but did not clearly indicate what his role in the whole case was. In his response, Mr Ouma divulged that during that time in 2013, he was the director compliance and enforcement at NEMA and that he took various enforcement and compliance interventions on the facility that was established at Owino Uhuru. He issued environmental improvement court orders, closure order of the company, and denial of transfer or change of user to another company and finally asked the Ministry of Health to inform NEMA on the significant association and causal effects of the health status of the community with reference to the company.

Mr. Ouma thereafter positively confirmed that he knows the company was established way back in 2007 but he was not sure about the exact date. When asked why NEMA gave the EIA license for the company he answered that the license was issued in 2008 but that found when the company had been operating long way before and he noted that it was illegal. The petitioners lawyer went ahead to ask Mr. Ouma why on the 13th March 2007 he wrote to the company that he was in receipt of the EIA report and asked them to continue with operation. Mr Ouma noted that NEMA realised that the company was operating without approval and so they had to stop them.

Still on cross-examination of the 4th respondent witness by the petitioner's lawyer, Mr. Onyango asked Mr. Ouma whether they issued the smelting company with a provisional license to operate before they were formally issued with a valid EIA license. Mr. Ouma declined stating that they did not. Mr. Onyango thereafter referred Mr. Ouma to paragraph six of his affidavit which proved a provisional license was issued but he replied that they issued a stop order at that time and they were not aware the company was operating. The community's lawyer then told Mr. Ouma that P.C.C (Public Compliant Committee) talked to Mr. Shah one of the owners of the company and he confirmed that the company had been in operation since 2007 which Mr. Ouma agreed was true and that is why he issued a stop order as the company was operating illegally.

When Mr. Ouma was told that in a letter dated 6th Dec 2006 with the serial no FK2 D.M Langué writing for Director General NEMA said that the company can go ahead and operate as the license would be issued in due course and whether he was aware of the same, he responded saying that he was aware of the same and that it was not the right procedure to follow hence they broke the law. He also noted that the letter was written on the above date and that was way before they received the letter on EIA report on 13th May 2007.

Mr. Onyango then inquired if any environmental audits were done before the EIA license was issued to determine if there were any damages done to the environment by the company during the time it was operating on provisional license before officially issuing the EIA license to the company. In his response, Mr. Ouma said that no environmental audit was done and this showed laxity on the part of NEMA. Mr. Onyango then asked Mr. Ouma a question regarding the taskforce report that NEMA authorised. The question was that in page 165 of the report, there was a community sharing common border with the smelting company and it led to the poisoning of the environment of this community. When asked what they did about the findings, Mr. Ouma replied that as a matter of urgency they did a policy and they did not know whether it has been acted upon. Still on the taskforce at page 34, they gave a set of recommendations and one stated that the Owino Uhuru area should be gazetted as a contaminated site. This according to the 4th respondent witness Mr. Ouma had not happened and that it was the role of the Cabinet secretary to do so with recommendations from NEMA. Again Mr. Ouma when asked if any of the recommendations had been acted upon, he said that none had been acted upon. This was in sharp contradiction to what the respondents from the ministry of health had stated earlier in the hearing noting that they gave medicine to the people of Owino Uhuru.

Mr. Onyango went ahead and asked the witness why after 2007 the company seized operations according to his affidavit and in 2008 the company reopened and if there was any environmental audits done after it was reopened and continued with operations. In his response to this question, Mr. Ouma noted that in 2007 and 2008 no audit was done but in 2009 it was carried out as it was the first year of the EIA as according to the law, after 12 months of operations of an industry, an environmental audit should be done.

On another question to Mr. Ouma, Mr. Onyango asked why he vilified Ms Phyllis Omido stating that she led the community into unwarranted demonstrations, he replied stating that he did not mean the demonstrations were bad but the spirit of his statement was that the community would have waited for the due process to take place.

The final question for Mr. Ouma was if they disseminated the report to the community as per their recommendations. The reply was that they did not do the same even after CJGEA wrote a letter to them to do the same because they had to follow the laid down procedures on releasing of sensitive documents of the government and therefore he had to seek permission from the cabinet secretary and not that he refused to release the report as claimed by the petitioners lawyer.

The second lawyer to cross-examine Mr. Ouma was Mr. Kithi of the Ministry of Health who told Mr. Ouma that in his response to Mr. Onyango's question on whether any of the recommendations had been acted upon, he replied none had been but in Owino Uhuru blood samples were taken by the Ministry of

Health. He then asked him if he was aware of the same. Mr. Ouma said yes he was aware of the same and Mr. Nyagah told the court that indeed some of the recommendations had been acted upon.

The lawyer of the 6th respondent then took centre stage to cross-examine the witness where she asked if NEMA involved EPZ on the compliance issue. Mr. Ouma said at earlier stages they did not but later on they did. The last lawyer to cross-examine Mr. Ouma was Ms Sang who represented them in the case. She first noted to the court that initially there were two sites identified for the location of the metal refiner industry and that is why there were contradictions in the letters written on issuance of licenses. She thereafter asked Mr. Ouma how many EIA licenses were issued for the metal refinery industry which he positively confirmed as one.

The second witness to take stand was Mr. Shimba who has worked with NEMA since 2002 as an environmental officer. Her lawyer Madam Sang asked him if he swore the affidavit before court. He confirmed that it was his affidavit and accepted that it should be used as evidence in court. The lawyer then opened the floor for the cross-examination of the witness.

The petitioner's lawyer Mr. Onyango began first and asked Mr. Shimba which year he came to Mombasa, if he knew Owino Uhuru borders EPZ, if public participation was done and if he knew who the landlords of EPZ were. Mr. Shimba replied that he came to Mombasa in 2009 and that he clearly knew that Owino Uhuru bordered the EPZ. On the question of public participation and who the landlords were, Ms Sang the lawyer of Mr. Shimba objected and stated that those questions were supposed to be directed to Mr. Ouma the NEMA director as they fell within his mandate and that Mr. Onyango was just trying to manipulate her client to give information. Still Mr. Shimba replied he was not sure who the landowners were and acknowledged that he came after the company had been opened so on public participation he could not answer. Mr. Onyango told Mr. Shimba that the Mombasa Rolling Mills wrote changing their address from Kilifi district to new Go Down and they stated their landlord clearly as Paper Mills Company. Mr. Shimba noted that he was aware of that contrary to his earlier response when he said he did not know who the landlords of the EPZ were. Thereafter the petitioners' lawyers told Mr. Shimba that on 28/5/2019 residents of Owino Uhuru wrote to provincial officer NEMA notifying him of their situation and asked him if he was aware of the same. He replied that by this time he was not yet in Mombasa as he came in October 2009

Mr. Onyango then asked Mr. Shimba who ordered the closure of the EPZ in 2013. He answered that it was NEMA and when Mr. Onyango challenged him if he had ever seen NEMA closing a factory, he said yes though unsure. The final question from Mr. Onyango was on that cessation order that was lifted on the 14th of August 2007 and what the term lifting a cessation order meant. Mr. Shimba replied that it meant proceeding with operations. The cross-examination of Mr. Shimba ended at this point as he was also not cooperating with the lawyers in giving clear answers.

After the end of this session, the next witness was to take stand but unfortunately he was not around. The 5th respondent lawyer claimed that their witness was in Nairobi on official duty and was travelling back to Mombasa on the 5:00 pm flight meaning the witness could not make it to court. This was contrary to what she stated earlier to the petitioners lawyers that the witness would be in court by 2:00pm of the same day.

It is also the same lawyer who served the petitioners lawyer the previous day that she had a witness who was to testify in court the next day so it came as a surprise that the witness could not be present in court.

The sixth respondent's lawyer on hearing this, she also told the court that she wanted her witness to testify last and claimed that their responses would be influenced by that of the 5th respondent's statement. The petitioner's lawyer objected to both the two applications by 5th and 6th respondents' lawyers stating that they were tactics of delaying the case further.

The petitioner's lawyer objected to both the two applications by 5th and 6th respondents' lawyers stating that they were tactics of delaying the case further. The 8th respondent's lawyer also requested for a date to execute a notice of claim against some of the fellow respondents to prove that he was wrongly accused. The judge asked him if he had made an earlier application to the court with the supporting document she wanted to use to execute the notice of claim which he confirmed he had not.

In her final directions, the judge accepted the request of the 8th respondent saying that he had the right to execute his notice of claim. This was also because of the fact that he had agreed with the other lawyers in the case to settle for a date before the 14th of August as the judge was scheduled to go for a transfer by the end of August. The judge also accepted the requests of both the 5th and 6th respondents claiming that even if she was to continue, the three witnesses could not manage to testify within the short time remaining and that it was prudent to give another date for the hearing.

The judge then said that the next hearing will be heard in front of judge Muniyao as the sitting judge as she would be on transfer already and will be unable to conclude the case. The petitioner's lawyers pleaded with the judge to set a date to complete the case before her transfer as it was 96% done. The judge told the lawyers to agree and they all settled for the 13th of August. The court was then adjourned until the 13th of August 2019, where we expect to finish the case and get a date for the ruling.

We all left court at around 2:11p.m together with the residents of Owino Uhuru for our respective destinations.

[Court Pictures](#)

A REPORT ON HEARING OF THE OWINO UHURU COMMUNITY LEAD POISONING CASE ON 13TH Aug, 2019 AT MOMBASA LAW COURTS .

On the morning of 13th Aug, 2019, a team of three CJGEA personnel consisting of two staff members and one board member left the organization's premises at 6:30a.m in the morning to attend a court session at Mombasa law courts. We arrived in time at around 8:30a.m before the beginning of the hearing which was scheduled to commence at 9:00a.m. We were joined by the Owino Uhuru community members and one CJGEA staff member. We all settled in the courtroom as we waited for the judge to arrive. See [participants list](#) for the court session.

At exactly 10:10 a.m. the court began with the arrival of the judge. Mr. Onyango who is the plaintiffs' lawyer took to the floor to inform the court on the lawyers who were present in the court. All the parties were present except for the 7th and 8th respondents hence the court was ready to proceed since there was quorum.

The first witness to take stand was Mr. Waliaula who currently is the acting attorney for the county government of Mombasa and was testifying for the fifth respondent in the case i.e. the Mombasa county government. The lawyer of the fifth respondent asked him if he swore an affidavit in court and if it could be used as evidence in the case, which he positively confirmed as true and could be used in court as evidence. The petitioner's lawyer Mr. Onyango took to cross-examine the witness and he began by asking him what the role of the municipal council was in business issues like the EPZ companies. The witness replied that the municipal council which is now the county governments issued single business permits and before they did, they checked keenly if all the requirements for the issuance of the certificate had been met. The lawyer went ahead and asked if the municipal council had the authority to check whether an entity they licensed to operate was adhering to the provisions of the license issued. The witness replied at first that they did not yield such powers but he later changed his response and noted that the municipal council had the powers to check whether entities they licensed were adhering to the regulations of the license issued to them.

Mr. Onyango then asked the witness concerning what actions the county government takes in case they realize that a company they licensed to operate is violating the provision of the license issued to them and whether the municipal council took any action upon realizing that the industry in Owino Uhuru was polluting the community. Mr. Waliaula replied that at that time it was limited for them to take any action as the powers lied with other government institutions but currently they have the authority to revoke the license in case of any violations. When Mr. Onyango asked Mr. Waliaula if what he meant was that they could not shut down the factory then, he confirmed that it was true. The witness was then referred to the replying affidavit of the 5th respondent in exhibit number 6 which was a letter dated 12/6/2016. The letter read in part to the 7th respondent MRM that they had not complied with the regulations and therefore they had no choice but to shut them down, this clearly meant that the municipal council had the authority to actually shut down the MRM. In his response, Mr. Waliaula said that he had not gotten the chance to view the letter and that he could not speak on something he had not read.

Still on cross-examination of the first witness by the petitioner's lawyer, Mr. Onyango asked the witness if he was aware that the local authorities were in charge of the physical planning regulations on zoning that segregated the residential and industrial areas. Mr. Waliaula said yes. Mr. Onyango then went ahead to tell the witness that in the case of the Owino Uhuru, the community shared a common wall with the community and therefore all the smoke from the factory got directly into people's houses. He then asked him to explain how the county government licensed the factory to operate within the community against the laws of physical planning. In his response the witness said that it was okay for the factory to be located in that area depending on the clearances from the relevant authorities. Mr. Onyango then told the witness that in 2009 the community complained of pollution and the Public Complaints Committee visited the

place and a report from the investigations was produced and was before the court. Mr. Peter Mwagine who was the director environment municipal council of Mombasa was among the people who participated in the process. Despite all these, the municipal council did not shut the factory he then asked the witness to explain why that took place. In his reply, the witness said that he did not know why the factory was not shut then.

Mr. Onyango then asked the witness to explain why the municipal council approved a non-existent drainage within the community to be in excellent state and fit for safely releasing toxic wastes from the factory when actually the waste was being disposed directly into the community with no drainage at all. Mr. Waliaula replied that he would want to depend on the documents that were before court and if they stated that there was a drainage system which was approved in the community then it means it was true. The lawyer then asked the witness if he was aware of the laid down protocols for disposal of lead wastes which was in this case was the contaminant and he answered that he did not know the procedures to follow in disposing lead waste. The lawyer then asked the witness if it was proper for the municipal council to allow the factory to dump their wastes at Mwakirube dumpsite a public dumpsite without following the right procedures to dispose lead waste. Mr. Waliaula said that it was not proper and that the municipal council broke the law in doing so. Mr. Onyango ended the cross examination at this point and the next lawyer took to the floor.

Ms. Sang the 4th respondent's lawyer asked the witness who was dealing with solid wastes and issues of zoning during the municipal council time which he clearly noted was the Mombasa municipal council. She then asked the witness if he knew if the area where the EPZ was located was zoned for and he confirmed that he was not aware of that. She then asked the witness if for the EPZ to be where it was located it had to be licensed and he replied that without being licensed it would have never existed where it was and so it was licensed.

The lawyer of the 1st respondent Mr. Makuto took to cross-examine the witness and he asked when the single business permit was issued and the witness said he cannot be able to tell when it was issued. The witness was then referred to affidavit number 6 where the municipal council of Mombasa issued a single business permit and he replied by saying that he had never seen the document. This was very strange as they had the documents in their offices all along. When asked again by the lawyer if the municipal council issued a single business permit, he replied yes and was basing his response on the documents that were before the court. The lawyer then went ahead and asked him if they had produced any document in court to show that the factory at the time of licensing had received a valid EIA license and whether the company had proper drainage system. He replied that he could not be able to categorically answer that question but he presumed that there was an EIA license before the factory was licensed to operate and that on the drainage system he was not aware if there were any documents before court.

The lawyer representing the county government then took to question the witness and she asked him to briefly explain the procedure before a single business permit is issued. He answered that they first do a physical visit to the site to see if it is fit for setting up a business thereafter they confirm with relevant government institutions like NEMA if the proponent of the business has all the necessary approvals before

finally issuing the license. She then put a question to the witness to confirm whether the 7th respondent had all the requirements and he gave a positive reply noting that the 7th respondent had all the requirements and that is why they were issued with the single business permit.

The cross-examination of the first witness ended and the second witness took to the bar. He was Francis Mutegi Wakihiu who was the liaison officer of the EPZ authority. The affidavit in court was sworn by one Mr. Kidenda but Mr. Francis came in to testify and the reason given for this was that Mr. Kidenda's contract was ending in September. He was asked by the lawyer representing EPZ Ms. Nyagah if he would like the affidavit to be used as evidence in court and he said accepted.

Mr. Onyango then took to cross-examine the witness and the first question he asked him was which terms the EPZ was dealing under and he answered to promote the EPZ program. Mr. Onyango then asked what an EPZ program is and the witness replied that it is a government program that was brought in 1990 to promote locally processed products for exports. He then asked what the responsibility of Export Processing Zones Authority (EPZA) was in ensuring that an EPZ factory like the one in Owino Uhuru was set up in a proper manner. Mr. Francis replied that for an EPZ factory to be operational they had to get a license from EPZA and there were certain procedures to be followed in getting the license in the gazetted way. Mr. Francis noted that one must hand in a written application and provide an approval by the municipal council. Mr. Onyango then asked the witness to confirm whether they usually issue a license of operation if the municipal council approves and issues a permit and consequently if an EIA license is given. Mr. Francis replied that they do issue the license at that point.

Mr. Onyango thereafter referred the witness to his affidavit where he was giving conditions to the EPZ factory and he wanted them to submit certified copy of license from NEMA, he then asked Mr. Francis if at the time of approval for the EPZ factory to operate he had viewed the EIA license and he replied no which was against their own regulations. Mr. Onyango then told the witness that the EIA license came in 2008 2years and 3months later after the factory began operations and asked him to confirm if they allowed the company to operate illegally between 2006 and 2008. Mr. Francis admitted that it was true and that it was contrary to their regulations back then. The lawyer then asked Mr. Francis if there was An EIA license for the project that took place at Owino Uhuru and he replied saying that it should be there though they did not have it in court. When asked if NEMA approved the EIA report for Changamwe, he noted that they did so according to his knowledge. The last question to Mr. Francis by the lawyer was on page 79 of their affidavit where he asked why the EPZ was opening the factory again because of substantial compliance despite other authorities refusing that the factory be shut down completely. In his response, Mr. Francis said that they only did so because they got recommendations to reopen the company and they could not refuse. Mr. Onyango finished by telling the EPZA that the laxity on their part to shut the factory showed their negative attitude towards the issue which Mr. Francis denied.

The first respondent's lawyer Mr. Makuto then took to cross-examine the witness. He asked the witness what the site was initially approved for and whether they received an EIA report before approving the EPZ factory to operate. Mr. Francis replied that the site was for the setting up of an EPZ factory and that they did not have the view of the EIA report before approval respectively. Mr. Makuto then asked the witness if

an EPZ factory must first acquire the single business permit before being licensed by the EPZ authority and the response was no. On the question of whether the EPZ confirmed if there was protective gear and an occupational health safety officer before renewing the license, The witness said that all that must have been done though not certain.

The lawyer to the 4th respondent Ms. Sang asked the witness if it was possible to transfer approval by EPZ for a factory to operate from one place to another which Mr. Francis said was possible. She then asked if the EPZ gave any closure order to the company and the witness said that they did not have any authority to do so. The lawyer representing NEMA then asked the witness which license between the EPZ and the EIA should come first and the witness confirmed that the EIA one comes first and in this case the law was not taken into consideration since approvals were made before the EIA license was given.

The final question for this particular witness came from Ms. Nyagah the lawyer who represented them in the case. She asked Mr. Francis to explain to the court why they did not shut down the EPZ factory. In his response, he explained that they could not do so, since they only work with recommendations and in this case they had not received any recommendations from any relevant authority.

The last witness to take stand was Mathew Oliechi the assistant manager environment at EPZ authority. The first lawyer to question him was Ms. Nyagah who asked him of the role he played in the shutting down of the factory and he replied that he stopped the renewal of the EPZ license.

Mr. Onyango the petitioner's lawyer took to cross-examine the witness and he asked him what he does for the authority as an environmental officer, he confirmed that he regulates environmental issues for the authority. Mr. Onyango then asked him if an EPZ requires compliance certificate of environment and he said yes. The lawyer then asked him to confirm if the EPZ authority acted in contravention of its own laws when it issued the EPZ license before the EIA license. Mr. Oliechi stated that they did not necessarily contravene the law. Mr. Onyango then referred him to exhibit number 8 which was a letter dated 23/9/2008 which stated that a company in the area of Mombasa was polluting the environment and he asked him why they did not shut down the company as early as 2008. In his reply, Mr. Oliechi still maintained that they did not receive any recommendations to shut down the company and hence they could not take any action. Mr. Onyango in his last question put it across to the witness that from his comments in 2008 on not receiving recommendations to shut the company was it proper to deduce that they were not willing to shut the company and could that be a demonstration of the attitude they yield towards the case. Mr. Oliechi said that it was not true and that they did not in any way act outside the law.

The fourth respondent's lawyer Ms. Sang asked the witness if the EPZ has powers to revoke a license and he answered yes. She then asked Mr. Oliechi if he knows when MRM stopped operations and he said it was around 2009 though not sure of the exact date. On the question of whether he knew the EPZA visited the company, he replied saying that he was not sure. The next lawyer representing the fifth respondents asked him to explain to the court what prompted the inspection of the EPZ factory in 2009 and whether the municipal council was invited to take part in the process. Mr. Oliechi replied that the factory was inspected

upon receipt of complaints of pollution from the public and that the municipal council was not part of the inspection team.

The last lawyer to cross-examine the witness was Ms. Nyagah of the 6th respondent and she asked his client to tell the court what role EPZ plays as a government agency. The witness replied that their role is to give license to EPZ factories upon receiving approval from other relevant government authorities.

The hearing of the case came to an end with the cross-examination of the third witness and thereafter the judge directed the lawyers to give dates for their submissions. The petitioners' lawyers requested for 30 days from the date of the court adjournment to hand in their submissions and serve the respondents' lawyers which the judge granted. On the same breadth, the respondents' lawyers requested for thirty days after receiving submissions from the petitioner's lawyers to hand in their submissions to the court. The date for the final submissions in courtroom in the presence of the deputy registrar was slated for 31st Oct, 2019. The judge stated that she is being transferred to Busia next month but would be able to prepare the ruling and read it somewhere in March 2020 though not giving us a definite date. She asked the lawyers to either travel to Busia for the reading of the judgment or to agree amongst themselves if it would be convenient to read the judgment in Mombasa. The court session ended at exactly 2:17p.m and everyone left at pleasure.

[Court Pictures](#)