Kinyua (Suing on his behalf and as the legal representative of the Estate of his Late Brother Edward P Gitonga Nkari - Deceased) v Intex Construction Company Ltd (Environment & Land Case 43 of 2018) [2023] KEELC 20398 (KLR) (27 September 2023) (Judgment)

Neutral citation: [2023] KEELC 20398 (KLR)

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MERU

ENVIRONMENT & LAND CASE 43 OF 2018

CK NZILI, J

SEPTEMBER 27, 2023

BETWEEN

JOHN MW NJERU KINYUA (SUING ON HIS BEHALF AND AS THE LEGAL REPRESENTATIVE OF THE ESTATE OF HIS LATE BROTHER EDWARD P GITONGA NKARI - DECEASED) ..... PLAINTIFF

AND

INTEX CONSTRUCTION COMPANY LTD ..... DEFENDANT

JUDGMENT

1. Through a plaint dated 24.10.2018, the plaintiff, as the legal representative of the estate of his late brother Edward P. Gitonga and the registered owner of L.R. No. Igoji/Kianjogu/1574 sued the defendant, claiming that it negligently and recklessly erected a culvert identified as 0+820km near Kagumone Primary School, Igoji area, but failed to do a proper channel with a discharge point.

2. Consequently, the plaintiff averred that rainwater, and surface runoff was directed to the suit premises, where he had heavily invested in horticulture and a modern irrigation system, which was destroyed by the stormwater and its debris.

3. Due to the acts described above by the defendant, its agents, servants, or employees, the plaintiff averred that his greenhouses, structures, crops, farm manure, grading, leveling works, building and construction materials were all destroyed, making him incur huge costs on the land restoration. He prayed for compensation for the loss, and damage caused totaling Kshs.56,574,380/= assessment fees of Kshs.55,000/=, and mandatory injunction compelling the defendant to abate further damage on his land by constructing proper water channels and redirecting the stormwater away from his land. The plaint was accompanied by a case summary, issues for determination, list of witness statements and a list of documents dated 29.10.2018.

4. By a defense dated 8.10.2019, the defendant denied the contents of the plaintiff's claim. In particular, the defendant denied knowledge of the plaintiff's ownership and capacity to sue or his alleged heavy investments in the suit land. The defendant averred that a replacement culvert identified as K.M. 0+820 Igoji T.T.C. Loop Road was constructed in November 2015 in a professional manner and to the highest standards, which did not direct rainwater and or surface runoff out of any alleged negligence or at all. Further, the defendant averred that there was a pre-existing cross-culvert at the same position before the construction of the replacement culvert, and the latter one was constructed in such a way that the channel was aligned with the previously existing outfall of the replaced cross-culvert.

5. Additionally, the defendant denied that any rainwater and or surface runoff from the culvert destroyed the plaintiff's land and investments thereon or at all, or that the plaintiff suffered any loss and or damage, and even if so, it averred that the culvert did not occasion the alleged damage, and or none of it could be attributable to the said works. Moreover, the defendant, over and above denying any alleged loss, damage, or liability, stated that it was not a party to or aware of the matters pleaded in paragraph 8 of the plaint, including the receipt of any notice of intention to sue or perhaps there being any cause of action based on negligence lying against it. Lastly, the defendant denied that the plaintiff suffered any loss or damage or was entitled to any reliefs sought in the plaint. The defense was accompanied by witness statements dated 2.10.2019 and 2.12.2019, a list of documents dated 8.10.2019, a further list of documents dated 4.3.2020, a pretrial questionnaire, and issues for determination dated 13.3.2023.

6. Following an application dated 14.7.2021, the court directed that the Deputy Registrar visit the locus in quo and prepare a report in the presence of the parties.

7. At the trial, John Kinyua testified as PW 1. He adopted the witness statement dated 29.10.2018 as his evidence in chief. He told the court that in November 2015, a culvert was negligently erected by the defendant, its agents, servants, or employees directing water or surface runoff to L.R. No. Igoji/Kianjogu/1574, where he had made extensive horticultural and irrigation projects, causing him loss or damage to the said investments. P.W 1 said that he promptly made a report to senior chief Eugenio Guantai, who accompanied him to the site and later on to the defendant's offices in Igoji market, where Mr. Mathenge, an officer of the defendant, promised to take action but failed to do so. The plaintiff said that he opted to make a report at Kieni Kia Ndege police station, after which an assessment report before the court was done for the loss and damage. He blamed the defendant for not exercising due care and diligence in constructing culvert No. K.M. 0 + 820, which was done without a proper discharge point. He held the defendant liable for the loss of Kshs.56,574,380/= and Kshs.55,000/= for assessment fees.

8. He produced the limited grant for his brother's estate as P. Exh No. (1), copy of the official search as P. Exh No. (2), photos showing the damage as P. Exh 5 No. 3 (a) – (h), farm/crop damage assessment as P. Exh No. (4), assessment receipt as P. Exh No. (5), receipts for the greenhouses as P. Exh No. 6 (a) – (k), demand letter as P. Exh No. 7 (a) and postage, certificate as P. Exh No. 7 (b), and lastly, the scene visit report as P. Exh No. (8).

9. In cross-examination, PW 1 told the court he was a retired teacher without technical knowledge of engineering works. However, through common sense, he knew where his property was situated, and given that there was a naturally occurring stream at the very end of his farm, water would ordinarily flow downwards. His testimony was that the culvert accumulated and caused water to flood his land, causing the loss and damage. PW 1 told the court that had a proper culvert been erected with appropriate planning, directing the water to his land would have been avoided.

10. On his financial capacity to undertake such a massive project, PW 1 told the court that before retiring in 2019, he was in gainful employment at Igoji Teacher's College and that the receipts he had produced

as P. Exh No. (6) would suffice even though not backed by a bank statement. Regarding the culvert, P.W 1 told the court that before it was erected, a natural flow or waterway existed on the upper side of the road to a nearby stream, which was not interfering with his land. PW 1 said that the defendant failed to follow the natural causeway in erecting the culvert, causing water to accumulate on his land, which caused damage to his irrigation system and the four greenhouses contained in P. Exh No. 3.

11. In re-examination, P.W 1 emphasized that it was not ordinary natural water that destroyed his farm but the water that accumulated and passed through the culvert carrying all manner of debris, stone boulders, tree branches, and waste materials. He blamed the defendant for failing to make a proper water channel or follow the furrow directing the water away from his land.

12. PW 1 told the court the damage was so immense that the materials deposited on his land were almost two meters deep, causing the four greenhouses to collapse and be buried. His evidence was that he was an investor in a retail shop in Makutano - Meru, horticultural farming, and running an academy known as Mukaraku. He said that he had enough financial resources to undertake a project worthy of the amount pleaded in this suit and as per the receipts from the suppliers of the materials used in the project.

13. PW 2 was Eujenio Guantai, a farm worker who adopted his witness statement dated 29.10.2019 as his evidence in chief. His evidence was that the defendant failed to exercise due diligence, care, and protection in the manner that the culvert was designed, planned, and erected such that all the runoff water was directed at the farm. He told the court that the negligence and damage were visible to him; otherwise, it could have been avoided had the defendant exercised little care or diligence, since the damage or loss was foreseeable.

14. Timothy Muturi Kithuchi testified as PW 3 and adopted his witness statement dated 29.10.2018 as his evidence in chief. He confirmed that he used to work as a casual worker on the plaintiff's farm, cutting nappier grass. His evidence was that much water got into the plaintiff's farm and spread or flooded everywhere, causing massive loss and damage due to the debris dumped therein. He said that he was the one who witnessed the damage or loss and notified the plaintiff. He blamed the defendant for erecting a culvert without following the natural furrow in the area.

15. Dominic Kipkorir Murey testified as D.W. 1. He adopted his witness statement dated 7.10.2019 as his evidence in chief. His evidence was that in October 2016, the defendant received a demand letter from the plaintiff alleging that his greenhouses had collapsed as a result of stormwater running into his farm and causing loss and damage, allegedly out of its negligence in putting up the culvert, without any remedial measures to mitigate or avert the loss.

16. D.W. 1 said that the defendant's representatives, including himself, visited the site referred to as K.M. 0+820 Igoji T.T.C. Loop Road on 12.10.2016 to assess the alleged loss and damage.

17. D.W. 1 told the court that a pre-existing cross culvert existed before the replacement culvert was constructed to make it compatible with the new road. He told the court that the supervising engineers had issued a site instruction number 41 for constructing the replacement culvert on 24.9.2015, after which the channel was completed on 11.11.2015. He testified that the culvert was built in such a way that it was aligned with the previously existing outfall of the replaced cross culvert and the stormwater flow channel, which was flowing downhill towards the valley, set to the nearest existing stream approximately 100 meters off Igoji Loop Road.

18. D.W. 1 described the culvert's ground as sloppy and well-drained at the culvert discharge point, with no possibility of water logging or flooding. His evidence was that the stormwater flow was confined to the pre-existing stormwater flow channel from the discharge point. During the visit, D.W. 1 told the court

that he observed that the stormwater flow channel traversed two different parcels of land before flowing through the plaintiff's land and subsequently discharged into a permanent stream passing through the subject property. He relied on photographs taken at the site with notes explaining each of the pictures he produced as D. Exh No. 1 (a) – (w) D.W. 1 further told the court that at the suit land, he found four temporary greenhouses constructed with the nearest greenhouse being approximately 25 meters from the current river flow level, built of gum pole framework and covered with transparent polythene sheets.

19. D.W. 1 said he observed overgrown weeds inside the greenhouses with no signs of planted crops. D.W. 1 told the court that there was a banana plantation on the suit property situated across the stream water channel where the stormwater would flow through before it went past the greenhouse, toward the river as well as other banana trees on the river bank obstructing the river flow, hence compromising the river's ability to contain the flood waters. Similarly, D.W. 1 told the court that the greenhouses had been erected at the lower part of the suit land near the river stream as the ground was reasonably flat. His observation was that the distance between the river and the nearest greenhouse had significantly reduced during the rainy season when high river flow/overflow was experienced and that the river overflow or flooding could worsen and cover a wider area along the river bank due to the banana plants at the river bank, obstructing the natural flow channel. His evidence was that the river had a wider catchment upstream besides the stormwater from the road under construction.

20. D.W. 1 went on to say that during the visit, he observed that one greenhouse had collapsed due to the stormwater, but the rest of the greenhouses were not in line with the stormwater flow channel. Further, D.W. 1 told the court that some roofing poles on the greenhouses had fallen while others were still upstanding, whereas the covering polythene sheets were torn, typical of neglected structures with no requisite maintenance, presumably due to gradual wear and tear and the effect of wind.

21. D.W. 1 also stated that the rainfall data for the area between January 2015 and December 2016, when the alleged damage had occurred, showed exceptionally high rainfall, especially between 20.11.2015 and 25.11.2015 which were 140.5 mm and 104.4 mm, for more than four consecutive rainy days as per reports confirmed by the Kenya meteorological department.

22. Additionally, D.W. 1 testified that contractors were not allowed to trespass upon or enter into private property in such works, for they were only permitted to work on areas within road reserves. For this case, D.W. 1 testified that the defendant's works relating to the culvert's construction were undertaken to the highest professional standards and in compliance with the site engineers' instructions. D.W. 1 denied that the defendant had committed any acts of omission, commission, or negligence while executing the works related to the culvert.

23. Further, D.W. 1 told the court that any damage that may have happened on the plaintiff's property was not as a result of the culvert; therefore, it was not attributable to the defendant. Additionally, D.W. 1 testified that the defendant engaged a loss adjuster who sent an assessor to the suit property for inspection and requested the plaintiff to provide supporting documents for the claim, but the plaintiff declined to offer them to date. His view was that the green houses;- were made of temporary materials whose lifespan was short, had been neglected, could not sustain them, no crop had been planted, installed irrigation water pipes were still intact as well as some subsurface water pipes, the claim was malicious, and that the soil erosion or degradation on the suit land were some of the pre-existing conditions, which would not be associated with the culvert constructed in November 2015.

24. D.W. 1 produced the bundle of photographs as D. Exh No. (1) (a) – (w) letter dated 17.9.2019 to the Kenya Meteorological Department as D. Exh No. (2), letters dated 26.9.2019 as D. Exh No. (3),

meteorological data dated 26.9.2019, as D. Exh No. (4), an expert report dated 2.12.2019 by Vitalis Omollo Owuor, a hydrologist as D. Exh No. (5).

25. In cross-examination, D.W. 1 told the court that he was a quantity surveyor, though he had no paperwork on his credentials from the Technical University of Kenya, where he had studied. Similarly, D.W. 1 denied that he was the architect who had designed the plan for the culvert nor the engineer who foresaw its construction. From the photographs on page 8 of D. Exh no. (1), D.W. 1, told the court that it did not show if there was a discharge channel. As per P. Exh No. 8, D.W. 1 acknowledged that the report indicated that a newly constructed culvert or drainage was erected to control stormwater from draining into the plaintiff's land to run beside the land. D.W. 1 acknowledged the lack of evidence that the pre-existing culvert was incompatible with the new road. Similarly, D.W. 1 admitted before the court that he had no completion or satisfaction certificate to the effect that the channel had been professionally done. Moreover, D.W. 1 concurred with the P. Exh No. (8) that Uriri River was at the edge of the plaintiff's farm. Regarding the plaintiff's investment, D.W. 1 told the court that there was evidence of horticultural activities on the suit land. He acknowledged that the rainfall data was for Chogoria High School and Mariene Coffee Research was in Tharaka Nithi County, whereas the suit land fell under the Imenti Central Sub-County, approximately 50 kilometers away from the said data stations.

26. D.W. 1 told the court that due to the heavy rainfall at the time, rainwater was a likely cause of the damage on the suit land. He admitted the fact that D. Exh No. (5) was prepared long after the damage had occurred in 2014. D.W. 1 confirmed that he was an employee of the defendant since 2008, whose primary duty was to prepare claims certificates, take physical measurements, and develop computable materials for construction structures for the defendant.

27. On P. Exh No. 8, D.W. 1 told the court that a new drainage channel was constructed in 2020, besides the plaintiff's land to improve the drainage after the existing one developed big gullies caused by much water out of the culvert. He said gabions were erected to reduce the water's speed and protect the outlet. D.W. 1 also clarified that the suitland fell within the range of the quoted rainfall station in the report from the Kenya Meteorological Department.

28. Further, D.W. 1 told the court that he took photographs he had produced in the plaintiff's presence to assess the damage, following the defendant's receipt of the demand letter. He admitted failure to deliver any completion or satisfactory certificate before the court to the effect that the culvert had been professionally done in the first instance. D.W. 1, however, reported that he saw some damaged materials on the suit land when he visited the land but could not confirm if the water from the culvert had carried some debris into the suit land.

29. In re-examination, DW1 told the court that he was not among the engineers, architects, and supervisors who had participated in the design, supervision, and construction of the offensive culvert since his primary duty as a quantity surveyor was to prepare claims, certificates, take physical measurements, develop and compute materials required for structures construction.

30. D.W. 1 regarded himself as competent to testify over the claim. Regarding the earlier culvert, D.W. 1 told the court that the same was complete save for the outfall, which was catered for as per P. Exh No. (8). D.W. 1 told the court that the purpose of the new culvert in 2020, was to improve the drainage after the existing drainage had developed big gullies.

    D.W. 1 testified that a twin culvert was constructed since they expected much water from the channel, which would instead land on the gabions to reduce its speed and protect the outlet. D.W. 1 clarified that when he visited the suit land, four greenhouses were on the land, two or three of which had collapsed.

31. At the close of the defense, parties were directed to file written submissions by 9.6.2023. By written submissions dated 16.5.2023, the plaintiff submitted that he had sued on his behalf and that of his late brother based on the heavy horticultural investments on the suit land. Further, he submitted that the defendant was sued as an independent contractor who had negligently constructed an offending culvert without a drainage system, which caused rainwater collected through the channel to drain into his land and caused massive damage to his investments.

32. The plaintiff submitted his pleadings, exhibits, and the scene visit report by the Deputy Registrar, and the cause of action against the defendant was proved. He isolated four issues for determination. On capacity to sue, he relied on P. Exh No. (1), the limited grant ad litem, while on the other hand, the plaintiff submitted that the defendant in paragraph 2 of the defense had admitted the capacity it was sued, and therefore, it was liable for any negligent acts as held in B.O.G. St Mary's School vs Boli Festus Andrew Sio (2020) eKLR.

33. On the defendant's negligent acts, the plaintiff submitted that the actions were pleaded in paragraphs 5 and 6 (ii) – (iv) of the plaint. He relied on Winfield & Jolowiz on Tort 20th Edition, Black's Law Dictionary 9th Edition and Kenya Wildlife Service vs. Rift Valley Agricultural Contractors Ltd (2018) eKLR on the critical elements of negligence, namely; the duty of care, a breach of that duty, causation and damage, which had been pleaded and proved through PW 1, PW 2 & PW 3 over and above an admission of the construction of the culvert by the defendant in paragraph 4 of the defense together with the admission of liability made by D.W. 1, that the earlier culvert had no discharge or drainage channel, and P. Exh No. (8) showing that a remedial mitigation action was taken by the defendant in 2020.

34. Further, the plaintiff submitted that his evidence had established a relationship of the duty of care owed to him by the defendant in erecting the culvert, which required it to exercise due and reasonable care for his sake and avoid acts or omissions that were reasonably foreseeable in injuring him as held in Kenya Wildlife Service (supra).

35. On the breach of that duty of care, the plaintiff submitted that the totality of the evidence by PW's 1, 2, and 3 alongside P. Exh No. 8 confirmed the contents of paragraphs 5 and 6 of the plaint, which were only remedied by the defendant, five years later, and which was a clear breach of the duty of care as per Kenya Wildlife Service (supra), which was foreseeable at the time the offending culvert was erected.

36. Regarding the damage and loss, the plaintiff submitted that he had pleaded the specific damages of Kshs.56,574,380/= in paragraphs 3, 4, 5, 6, 7, 8, and 9 of the plaint, which evidence was established by PW 1, 2 & 3 as well as admitted by D.W. 1, in line with the holding in K.W.S. case (supra).

37. In the defense case, the plaintiff submitted that the insinuation by D.W. 1 that the damage or loss was caused by natural and or unforeseeable factors or eventualities, such as an act of God, could not be available to the defendant since they were not pleaded in the defense and a party is bound by its pleadings going by Order 2 Rule 6 (1) & (2) of the Civil Procedure Rules. Reliance was placed on Samson Emuru vs. Ol Suswa Farm Ltd (2006) eKLR. Further, going by the findings in P. Exh No. 8, the plaintiff submitted that water draining into the suit land after passing through the offending culvert did not amount to an act of God as defined in the Kenya Wildlife Service case (supra).

38. On whether he was entitled to the reliefs sought, the plaintiff submitted that P. Exh No's. (4), (5), and (6) (a) & (b) were sufficient to prove special damages together with costs and interests.

39. The defendant, on the other hand, by submissions dated 26.5.2023, submitted that the evidence presented by the plaintiff to establish loss and damage did not satisfy the certainty and particularity

requirements of the law as set in Richard Okuku Oloo vs. South Nyanza Sugar Co. Ltd (2013) eKLR, and Richard Nyagaka Tongi vs IEBC & 2 others (2013) eKLR, Sections 35 and 106B of the *Evidence Act*.

40. The defendant submitted that the culvert was constructed professionally and to the highest standard, it did not owe the plaintiff any duty of care in the circumstances, there was no breach of its duty or standard of care, it did not commit or omit to do anything that presented a proximate course of any damage, and that it was not legally expected to have reasonably foreseen or contemplated any damage as pleaded or at all. Reliance was placed on Caparo Industries P.L.C. vs. Dickman (1990) 1 ALL ER 568, Pope John Paul's Hospital & another vs Baby Kasozi (1974) E.A 211 and Cork vs. Kirby Maclean Ltd C.A 1952. The defendant relied on the doctrines of or defense of the Act of God, contributory negligence, volenti non-fit injuria, and the duty to mitigate damages. The defendant isolated four issues for the court's determination.

41. On whether the plaintiff had suffered any loss or damage, the defendant submitted that where there was no damage, there was no liability. The defendant submitted that there could be damage without liability if the defendant did not cause it out of its actions or omissions. In this suit, the defendant submitted that the plaintiff relied mainly on photographs produced as P. Exh No. (3), the farm and crop damage assessment produced as P. Exh No. 4, and the receipts.

42. On P. Exh No. 3, the defendant submitted that the photographs demonstrated no damage or destruction of the alleged development as pleaded, apart from the tomatoes which in the defendant's view, created a dissonance between what was asserted in the plaint and what was contained in the photographic evidence. Therefore, the defendant urged the court to find the damage not specifically and with certainty and particularity proved as held in Richard Okuku Oloo (supra).

43. Additionally, the defendant submitted that the alleged photographs were admittedly taken by P.W. 1, who did not disclose the electronic device he had used to take them contrary to the requirements under Section 106B (4) of the *Evidence Act*, rendering the evidence unauthentic and inadmissible for lack of a certificate. Thus, the defendant submitted that the possibility of doctoring could not be ruled out, as held in Richard Tongi (supra). Moreover, the defendant submitted that the photographic evidence looked at from the prism of D.W. 1's testimony was shaky since the greenhouses and the irrigation system were still intact at the time he visited the land, typical of neglected structures, use of substandard materials, poor maintenance, neglect, effects of wind, gradual wear and tear, which could not be wholly or solely attributable to any doing or undoing on the part of the defendant.

44. The defendant submitted that no photographs were taken or produced of the culvert or the stormwater drainage for consideration by the court, further buttressing the point that there was no degree of certainty and particularity in establishing the alleged loss and damage.

45. On P. Exh No. 4 and 6, the defendant submitted that the makers of the documents were not called as required under Section 35 of the *Evidence Act*, for the loss transposing almost Kshs.57,000,000 to rule out a possibility of being cooked and overly inflamed. The defendant submitted that in cross-examination, PW 1 admitted that he had no bank statements or statements of account to establish making any payments for the items pleaded. On that score, the defendant urged the court to disregard the receipts.

46. On whether there was liability out of any alleged negligence, the defendant submitted that it could not and cannot be held negligent because there was no damage that the plaintiff suffered due to its action or omission. The defendant submitted that for the tort of negligence, requirements were fourfold: the existence of a duty of care; breach of the duty; a causal connection between the breach and the damage; and foreseeability of the particular type of damage caused.

47. On the duty of care, the defendant submitted that the basic premise upon which tortious liability is founded was that individuals and corporations living in a civilized society should not intentionally cause injury to one another or the property of others and that the principle could not apply to the world in general but only to one's neighbor. To this end, the defendant submitted that a neighbor in law would mean only those people who were reasonably foreseeable as likely to be impacted in some way by one's behavior or actions, as held in Donoghue vs Stevenson (1932) A.C 562, Caparo Industries P.L.C. (supra) Therefore, the defendant submitted that a duty to care was not an all-encompassing concept applying unconditionally to every defendant, but was a question of proximity between the plaintiff and the defendant.

48. The defendant submitted that in cross-examination, the plaintiff confirmed that the culvert was constructed on a road reserve, which was two properties away from the suit property; hence, there was no proximity between the defendant's construction works on the culvert that directly bordered the suit property allegedly containing the pleaded investments.

49. The defendant submitted that D.W. 1 testified that the stormwater flow channel traversed two different parcels of land before flowing through the plaintiff's land and that in such works, contractors such as the defendant were not allowed to trespass upon or enter onto the private property, but could only carry out works within the road reserve. The defendant submitted that it was only duty-bound to perform the construction or contractual works within the road reserve; therefore, the water drainage system pleaded by the plaintiff in his submissions was constructed out of good faith as opposed to a duty of care.

50. Further, the defendant submitted that out of this evidence, it owed no duty of care because there was no foreseeability of damage given that the culvert was constructed on a road reserve adjoining a different property located a considerable distance away from the suit property, with the stormwater traversing two separate parcels of land before flowing along the border of the suit property to the river downstream. The defendant submitted that it could not reasonably have had the plaintiff in contemplation as being so affected when it directed its mind to the construction of the culvert.

51. On breach of duty of care, the defendant submitted that it did not breach its duty of care to the two property owners close to the culvert, and as such, it could not possibly be in breach of duty of care towards the plaintiff, who was further away in terms of proximity.

52. The defendant also submitted that the duty of care expected of it was that of a reasonable man and that expected of a professional as held in Pope Paul's Hospital (supra) the defendant was not expected to be perfect but instead to be of the level of a person of average intelligence who prudently exercises reasonable care, skill, and diligence considering all the circumstances.

53. In this case, the defendant submitted that its evidence and the defense indicated that notwithstanding a pre-existing stormwater flow channel and a cross culvert at the same position before construction of the replacement culvert, in observing the standard of care, skill, and diligence expected of a professional contractor, it erected a double hole round culvert and laid gabions at the mouth of the culverts, which efforts were meant to reduce scoring. Reliance was placed on the Caparo Industries P.L.C case (supra), on the proposition that the onus of proof and the balance of probabilities that the defendant was careless fell on the claimant throughout the case.

54. The defendant submitted that PW 1, PW 2, and PW 3 had admitted in cross-examination that they were not engineers and could not assess the standard of care required of an engineer to execute the construction works. Since the plaintiff never called any engineer as an expert witness to establish whether or not the defendant discharged its duty in conformity to the standard of a reasonably

competent member of the engineering profession, the defendant submitted that the plaintiff had failed to show any carelessness on its part to be liable.

55. On causation, the defendant submitted that the same does not arise since no damage was caused to the plaintiff due to its acts of commission or omission. On the proximate cause of the alleged injury suffered, the defendant submitted that the plaintiff had to show that the actions or omissions of the defendant resulted in the damage sustained. In this case, the defendant submitted that it did not mean that it was expected to answer every careless act, no matter how remotely connected or traceable to the injury. The defendant submitted that its actions vis a vis the omissions must be related to the injury without intervening events as held in Cork vs Kirby (supra), Lord Denning held that if the damage would not have happened but for a particular fault, then that fault would be the cause of the damage and if it would have happened just the same fault or no-fault, the fault would not be the cause.

56. In this case, the defendant submitted that several events so significantly broke the chain of causation, and therefore, the construction of the culvert could not directly be linked to any damage to the plaintiff's investments. The defendant submitted that the heavy rainfall, as per D. Exh No. (4), during the period, as affirmed by PW 3, was an act of God which could have caused the damage, so was the sloppy land, and cloggy soil as per D.W. 3, engaging in horticulture on cloggy soil and low infiltration raising a defense of volenti non-fit injuria; leveling and banana plantation which obstructed the river bank flow hence compromising its ability to constrain flow water, increasing the chances of flooding and contributing to the harm suffered (contributory negligence). Similarly, the defendant submitted that since it was the first time to invest in greenhouses on the suit land, it meant that the plaintiff was a novice with zero expertise, now heaping the blame on the defendant. The defendant submitted that the plaintiff had no evidence of engaging in a level of horticultural technology well suited for the area and given that the disposition of the land was not suitable for horticulture or greenhouse farming, coupled with a pre-existing natural water flow channel and use of substandard material as per D.W.1 the plaintiff exposed himself to the risk of damage.

57. On foreseeability, the defense submitted that the plaintiff did not suffer any damage as a result of the defendant's action/omissions or at all; hence, the question of whether the damage was too remote or a foreseeable loss, did not apply since it simply constructed the culvert under the site engineer's instructions in alignment with the outfall of the previously existing cross culvert and according to the already naturally existing stormwater flow channel. The defendant submitted that it did not cause rainfall, direct the rainwater, or determine how the water should flow.

58. The defendant submitted that it was not reasonably foreseeable for a contractor to contemplate installing a replacement culvert where there was a pre-existing one in the same outfall alignment and on the course of a naturally occurring stormwater flow channel that could cause harm to anyone. On the contrary, the defendant submitted that it was the plaintiff who ought to have reasonably foreseen that he failed to act as a reasonable man, who would have worked or appreciated the natural characteristics of the suit land and put appropriate measures in place to avert the damage as a result of the heavy rainfall and flooding.

59. On the reliefs sought, the defendant submitted that the plaintiff was not entitled to prayer (a) and (b) the restitution in integrum for he suffered no damage as a result of the defendant's activities at all and in any event, he failed to substantiate the claim, used substandard material, took no steps to mitigate his loss, and never cared to effect the repairs as soon as possible to return the property to its previous condition.

60. On prayer (c) the defendant submitted that the same was untenable since it sought to compel it to engage in construction works after completion thereof outside what would ordinarily constitute a

contractor's obligations. Further, the defendant submitted that it was only required to work on road reserves, and to be ordered to redirect water surface runoff, away would equally require it to abandon the natural stormwater flow courses.

61. On costs, the defendant submitted that it should follow the event, and in this case, it incurred more significant costs, including expert witnesses, legal representatives, and travel expenses. Therefore, since, according to them, the plaintiff has failed on a balance of probabilities to prove negligence, the defendant submitted that the suit should be dismissed with costs.

62. The court has carefully reviewed the pleadings, evidence tendered, written submissions, and the law. The issues calling for the court's determination are:-

    i. If the plaintiff has proved the cause of action before the court.

    ii. What is the defendant's defence

    iii. If the defendant was liable to the plaintiff's claim

    iv. Whether the plaintiff is entitled to the reliefs sought.

    v. What is the order as to costs?

63. The primary pleadings in this suit are the plaint dated 24.10.2018, the defense dated 8.10.2019, and a reply to the defense dated 28.10.2019. The plaintiff pleaded that in November 2015, the defendant constructed a culvert No. 0+820km in the Igoji area near Kagumone Primary School, but failed to do a proper channel with an appropriate discharge point. The plaintiff averred that in erecting the culvert, the defense was negligent in directing rainwater/surface runoff to his nearby L.R. No. Igoji/Kianjogu/1574 with heavy horticultural investments and modern irrigation system.

64. The plaintiff averred that the rainwater/ surface runoff destroyed the land and all his investments. The plaintiff particularized the acts of the defendant's negligence as directing water to his land, failing to construct a proper channel with an appropriate point of discharge, failing to exercise due care, skill, and diligence, and wholly causing damage to his greenhouse structures, crops, farm yard manure, causing him to incur land restoration costs on the irrigation systems and building materials, all totaling to Kshs.56,629,380/=. The plaintiff, therefore, prayed for the aforesaid monetary compensation and a permanent injunction compelling the defendant to abate further damage by constructing a proper channel and redirecting rain/surface runoff water away from that land.

65. In a defense dated 8.10.2019, the defendant admitted constructing a replacement culvert No. 0 + 826 Igoji T.T.C. Loop Road in November 2015 but denied it was negligent as alleged or at all in paragraphs 5 and 6 of the plaint. On the contrary, the defendant averred that the construction was professionally done to the highest standard and that there was a pre-existing cross culvert at the same position before construction so that the outfall was aligned with the previous outfall of the replacement cross culvert. The defendant denied the alleged investments on the land by the plaintiff or the destruction of the same by any water runoff, rainwater, or surface runoff. Similarly, the defendant denied that the plaintiff suffered any loss or damages as alleged or at all and that if any loss or damage occurred, the defendant averred that the same was not attributable to it. It denied any liability as pleaded in the plaint.

66. In reply to the defense dated 28.10.2019, the plaintiff reiterated the contents of the plaint and, in particular, denied that there was a pre-existing cross culvert at the position or the place where the defense diligently constructed the offending channel as alleged in paragraph 4 (c) and (d) of the defence. Further, the plaintiff averred that the defendant had raised no defense known in law; otherwise, its contents were vexatious, scandalous, frivolous, and should be dismissed.

67. In trite law, parties are bound by their pleadings, and issues flow from them. In IEBC & another vs. Stephen Mutinda Mule and 3 others (2014), the court cited with approval Malawi Railways Ltd vs. Nyasuva (1998) MWSC 3 and that parties formulate their cases subject to the basic rules of pleadings for certainty and finality, and that since their pleadings bind them, they cannot be allowed to raise a different or fresh case without due amendment; they should not take each other by surprise; those pleadings bind the court itself to adjudicate on specific matters and that in an adversarial system, it was the parties who set the agenda for the trial by their pleadings with no room for any other business. In Raila Odinga & others vs. IEBC & others (2017) eKLR, the court reiterated the principles and observed that parties were bound by their pleadings.

68. In this suit, parties filed their respective claims and never sought to amend their pleadings. The plaintiff did not seek any amendments to introduce an admission of liability by the defendant and raise any acts by the defendant in taking remedial or mitigation actions by constructing a proper drainage channel in 2020 or during the pendency of this suit. Similarly, the plaintiff did not plead the doctrine of foreseeability, the nature, particulars, features of the negligence, the proximity of the offending culvert to his land the status of his land before the offending culvert was installed, and lastly, the impact of the remedial or mitigation measures taken by the defendant in 2020 to his land. See K.C.B. vs. Phile Kabita (2002) eKLR.

69. On the other hand, the defendant did not plead any defense based on the doctrines of an act of God, contributory negligence, violent non-fit injuria, and the duty to mitigate damages.

70. It is a trite law that, however forceful, persuasive, or convincing submissions are, they do not amount to pleadings or evidence. In Njeri Murigi vs. Peter Macharia & another (2016) eKLR, the court held that the pleadings, answers in cross-examination, and submissions did not amount to evidence or defense. In the case of IEBC & another vs. Pauline Akai Lokuruka & another (2018) eKLR, the court cited with approval Hassan Abdalla Albeity vs Abu Mohamed Abu Chiaba and another (2013) eKLR, that a court should not entertain or decide on matters not covered by the party's pleadings. In Bernard Bisonga Sungura & another Harisson Ogendo Opiyo (2020) eKLR, the court cited with approval C.M.C. Aviation Ltd vs. Crusair (1978) KLR 103 that pleadings contain averments which until proved or disapproved or admitted by parties do not amount to evidence and no decision could be founded upon them without proof. See Erastus Wade Opande vs K.R.A & another Kisumu HCCA No. 46 of 2007, Nancy Wambui Gatheru vs Peter W. Wanjere Ngugi Nrb H.C.C.C No. 36 of 1993, Nganga & another vs Owiti & another (2008) 1KLR (E.P.)749 and Daniel T. Arap Moi vs. Mwangi Stephen Murithi & another (2014) eKLR.

71. In this suit, both parties have, in their written submissions, relied on some facts and evidence and have tried to raise claims and defenses that were never pleaded in the primary pleadings. The mode of hearing in a civil suit is provided under Order 18 Rule 2 of the Civil Procedure Rules. In Avenue Car Hire & another vs. Slipha Wanjiru Muthegu Civil Appeal No. 302 of 1997, the court of appeal held that no judgment could be based on written submissions, for written submissions were not one of the modes of receiving evidence set out under Order 18 Rule (2) of the Civil Procedure Rules. The court took the same position in Timothy Marete Nchebere another vs. Japhet Bundi (2022) eKLR, that however forceful or detailed submissions are, they cannot replace pleadings or amount to evidence.

72. Order 2 Rule 4 (1) of the Civil Procedure Rules provides that a party shall, in any pleading after a plaint, plead specifically to any matter, for example, performance, release payment, fraud, inevitable accident, an act of God, or any limitation of time or illegality which he alleges makes any claim or defense of the other party and which if not specifically pleaded might take the opposite party by surprise or which raises issues of facts not arising out of the proceeding pleading. In Ryde vs. Bushell and another 1967 E.

A 817, the court observed that a plea of an act of God was available to relieve a defendant from liability but must be pleaded and proved.

73. Regarding contributory negligence, the court in Maina Kaniaru and another vs. Josephat Muriuki Wangondu C. A 14 of 1989, held that it would be wrong for the court to make a finding on contributory negligence when it was not specifically pleaded. In Kenya Wildlife Service (supra) the court cited with approval Winfield & Jolowiz on Torts 18th Edition 2010 paragraph 15-17, that an act of God was a process of nature not due to the act of man and the criteria being whether or not human foresight and prudence could reasonably recognize the possibility of such an event.

74. In this suit, the plaintiff pleaded that the defendant was diligent in the manner that it constructed the culvert by directing the runoff water to his land, which caused the destruction, and for failing to exercise due care, skill and diligence in executing the works. While admitting the construction of the culvert, the defendant averred that the culvert was constructed professionally and to the highest standards, on the exact position as that of the pre-existing cross-culvert before November 2015, and in such a way that the outfall was aligned with the previously existing outfall of the replaced cross-culvert.

75. The defendant did not plead anything relating to the proximity of the alleged loss, damage or loss suffered by the plaintiff in relation to the locality of the culvert. Again, the defendant did not invoke the doctrines of volenti non fit injuria, contributory negligence, or the act of God. No particulars of volenti non fit injuria, contributory negligence, acts of God, assumption of risk, or the failure to mitigate the loss or damage and the remoteness of the plaintiff's property from the culvert. Further, the doctrine of the "restitution in integrum" was also not pleaded by the defendant. See Antique Auctions Ltd vs. Pan African Auctions Ltd (1993) eKLR. Order 2 Rule 10 of the Civil Procedure Rules provides that any pleading shall contain the necessary particulars. In African Highland Produce Ltd vs John Kisorio (2001) eKLR, and Farah Awad Gullet vs C.M.C. Motors Group Ltd (2018) eKLR.

76. In South Nyanza Sugar Co. Ltd vs Rehema Joseph Nkonya (2020) eKLR, the court cited with approval Africa Highlands produce (supra) that a party alleging a breach must take steps to mitigate the loss and that the burden was on the defendants to demonstrate how the plaintiff ought to have mitigated the loss. The court observed that the basis of that approach must start with the pleadings by the defendant, putting the plaintiff on sufficient. The court said to raise the issue at the appeal stage when it had not been pleaded and proved was against the right to fair trial as per Article 50 (1) of *the Constitution*. The court cited with approval South Nyanza Sugar Co. Ltd vs Donald Ochieng (2018) eKLR that the mitigation of loss was a question of fact and not law.

77. Similarly, the plaintiff failed to plead that the defendant repaired the offending culvert in 2020. A court of law has no business in determining matters not before it. Consequently, since parties failed to plead such facts, this court will not dwell on issues which were never pleaded in the first instance.

78. The next issue is whether the plaintiff has proved liability on the defendant's part to be entitled to the reliefs sought. Schedule 4 of *the Constitution* places the function of stormwater management on the County Government. The power to supervise projects likely to have adverse effects on the environment is under the National Environment Management Authority (NEMA). This is a function falling under the National Government. Any party aggrieved by any activities of a developer has the right to invoke Section 117 (3) (g) of Environmental Management and Coordination Act through an improvement order.

79. The plaintiff pleaded that the defendant was negligent in installing a culvert and directing the stormwater to his land. On the other hand, the defendant averred that it followed the natural water course or the pre-existing cross-culvert, and its outfall was in line with the resident engineer's specifications and standards.

80. In reply to the defence the plaintiff denied that any natural water course or culvert was in existence before November 2015. The burden of proof was on the plaintiff to show that the defendant was either reckless, negligent or diverted artificial stormwater to flow to his farm, causing the loss and damage. No expert evidence was produced by the plaintiff that the defendant's activities were either contrary to the specifications set by the government or the instructing project manager or were independently investigated by the relevant government agencies and found as falling below the statutory and professional standards or the specification required in constructing culverts as per the directives of the resident engineer. See Mary Christine Wanja Karanja & another vs. NEMA & 3 others; Runda Evergreen Association Limited & another (2021) eKLR.

81. The designs of the initial culvert, the computation of the sizing, and the erected culvert, including the catchment delineation, the measurements, catchment characteristics, the stood runoff computation, methodology, calculations, the computed results and all the different flood recurrent intervals, which ought to have applied and the calculated design hydraulic discharge capacity of the offending culvert, the data on the culvert inlet and the outfall hydraulic characteristics and whether the structures were designed on an inlet control basis or an outlet control basis, were not availed by any expert on the part of the plaintiff. See Mary Wanja Karanja (supra). It is trite that the construction of culverts and access roads are governed by the Building Code 1986 Edition pursuant to the *Kenya Roads Act* 2007. In this instance, the culvert fell under the Kenya Rural Roads Authority which organ has the mandate to manage, develop, rehabilitate and maintain rural roads falling under county governments.

82. The plaintiff did not plead the non-compliance with the law and or the breach of the construction contract entered between the defendant and the Kenya Rural Roads Authority. No officers from the Water Resources Management Authority (WARMA) & Kenya Rural Roads Authority (KERRA) was called to testify on behalf of the plaintiff and buttress his claim that the culvert fell short of the specifications, alluded in paragraph 81 above. See Paradise Safari Park Ltd vs A.G. & another (2015) eKLR.

83. In Francis Gachoki Matu vs Kenya Rural Ministry of Road Authority Kirinyaga Region (2019) eKLR, the defendant had pleaded that the erected culvert had followed the original alignment on the existing land and not the plaintiff's land and that the construction of the additional culvert did not divert the flow of the stream in anyway or cause any flooding to the plaintiff's land and that the culvert was on a permanent stream with a riparian reserve. The court observed that guided by Ratcliffe vs Evans (1892) 2 QB 524 the character of the acts themselves which had caused the damage and the circumstances under which the acts were undertaken, had to regulate the degree of certainty and particularity with which the damage done ought to have been stated and proved and to insist upon less was tantamount to relaxing the old and intelligible principles and that to insist upon more would have been the vainest pedantry.

84. The law is that he who alleges must prove the existence of the facts which he asserts that they indeed exist. In this suit, the plaintiff alleged that the defendant had committed acts of negligence and recklessness leading to loss and damage to his land.

85. The county roads engineer was not called to testify and produce any designs or specifications for the offending culvert. Neither the land surveyor nor the land registrar was called to establish the proximity of the plaintiff's land from the culvert. A water engineer was not called to establish the water flow. Such officers or experts would have shed light on the quality, quantity, impact, capacity, loss and whether the only cause of the loss or damage to the plaintiff's land and the investment was solely or largely attributable to the stormwater and the debris flowing or discharged through the said culvert evidence. The layman's evidence alone was not enough to prove liability, loss and damage.

86. There was no specific pleading that as in the time the culvert was constructed, the plaintiff's developments were in existence and therefore that the danger or loss posed by the culvert and the likelihood or damage was foreseeable and or within the knowledge of the defendant.

87. No land survey maps and/or the access road maps were produced to show the distances of the plaintiff's land from the culvert. The court takes judicial notice that crop damage can only be assessed by an agricultural extension officer. The report, by Miten Agricultural Consultant lacked the qualifications of the author of the report including the parameters he had used to arrive at the calculations. See Francis Gachoki Matu (supra).

88. In the case of M'Mila vs County Government of Meru & another Petition E011 of (2021) (2022) KELC 14956 (K.L.R.) 23rd November (2022) Judgment, at issue was whether flood waters were directed to the petitioner's farm, hence making his farm and the homestead inaccessible or inhabitable. The respondents had admitted and confirmed that the road construction had been undertaken without any attempt to comply with the law. A land economist and a land valuer had prepared and produced a valuation report as evidence of the damage, the confirmation on the expanded road, the destruction and the causation as the water draining into the suit land as a result of the culvert pointing towards petitioner's land. An admission of the designing of the murram road and culvert had been made, allegedly based on a natural water course. An inspection report by the NEMA had been undertaken confirming the subject land, the locality of the two culverts and the damage occasioned by the culvert water discharge into the petitioner's land.

89. This court held that stormwater management systems fell under the County government NEMA and that *the Constitution* was exhaustive on causation such that an offended party would not be required to resort to the common law of tort to prove a violation of a constitutional right to clean and health environment.

90. The court observed that under Section 3 of the EMCA, NEMA had the mandate to coordinate and incorporate any environmental concerns in any development plans, progressive and projects make recommendations, investigate complaints, demand Environment Impact Assessment (EIA), advise and make reports control, supervise, issue notices to lead agencies and take any appropriate action under Section 12 thereof against any breach of the said rights.

91. Further the court observed that under Sections 57A-69 of the Environment Management Coordination Authority, NEMA had the mandate to take action including stopping any project or revoking licences under Section 58 and Schedule 2 of the Act including the generation of reports on the likely impact of the projects on land owners.

92. In this suit, the plaintiff solely based his cause of action on the tort of negligence. He did not plead either a breach of statutory duty or the breach of his constitutional rights by the defendant. As indicated above parties are bound by their pleadings. See Samson Emuru (supra). A cause of action has been defined as a combination of facts which entitles a person to obtain a remedy in court from another person and includes a right of a person violated or threatened or violation of such right by another person. See Black Laws Dictionary 9th Edition and A.G. & another vs Andrew Miano Githinji and another (2016) eKLR. Since the plaintiff has solely based his claim on the tort of negligence which the defendant has refuted to in the defence, such a cause of action as rightly submitted by the defendant is proved if there is an existence of a duty of care, a breach of the duty, a causal connection between the breach, the loss, damage and the foreseeability of the particular type of damage caused. See Caparo Industries P.L.C. vs Dickman (supra) and Chun Pui vs Lee Chunen Tal (1988) RTR 298.

93. The plaintiff pleaded and testified that the defendant was negligent and out of its negligent acts he suffered loss and damage making the defendant liable. On the other hand, the defendant averred and testified that its works were professionally done were of high standards, and adhered to the specifications set by the Road Engineer.

94. In D. Exh No. (3), the defendant referred to the construction of St. Mary's Kinoro Chuka Boys, Igoji Teachers College and Kanyakine Access Road Contract No. E7881769. This document was filed alongside the defence on 9.10.2019.

95. In the witness statement attached to the defence by Dominic Kipkorir Murey, he indicated that the defendant undertook St. Mary's Igoji Teachers – Kinoro roads project, to which a complaint was received in October 2016, relating to the culvert at Igoji T.T.C. Loop Road. DW 1 admitted that on 12.10.2016, the site was visited. He stated that there was a pre-existing cross-culvert on the same position which was not compatible with the new road that was to be built. DW 1 stated further that the site instruction number 41 for the construction of the culvert was issued by the supervising engineers on 24.9.2015 and a cross culvert construction was completed on 11.11.2015, in such a way that the outfall was aligned with the previously existing outfall of the replaced cross culvert. DW 1 further identified the features of the stormwater flow downhill, the sloppiness of the land and how the stormwater flow channel had traversed two different parcels of land before flowing through the suit land, and subsequently discharging into the permanent stream passing through L.R. No. Igoji/Kianjogu/1574.

96. DW1 also indicated the quality, siting, and the possibility of obstruction of the river flow by the banana plantation, the poor quality and maintenance of the greenhouses, and the exceptionally high rainfall experience in the locality between January 2015 and December 2016, and the defendant's restricted works on the road reserve. DW 1 also stated that the defendant adhered to the instructions of the site engineer. He produced D. exh No's 1-4 respectively without any objection from the plaintiff.

97. Prior to the hearing Ismael Bharadia had sworn an affidavit dated 13.4.2023 and attached a copy of a contract and a site instruction from the Kenya Rural Roads Authority for the road project as annexure marked 1B (a) & (b). The deponent had pleaded on oath that he had been contracted by Kenya Rural Roads Authority, who had designed the culvert and were instructed on how and where the culvert should be installed, which they did in accordance with the specifications and instructions given. Annexture marked 1B (a) thereto was contracted No. RWC 059 was signed between KERRA and the defendant on 27.6.2013, vide tender No. KERRA/RWC/059/2012. Annexure marked 1B, 1 (b) was the site instruction No. 41 by Engineer J.O Olawo, the resident engineer issued on 24.9.2015. The specifications of the culvert 0 + 820 km including its drainage, inlet, centre, outlet, size, number of lines, length and remarks was contained in the annexure to the site instructions note number 41.

98. While aware of all these details, information and materials, the plaintiff chose to rely on his pleadings on paragraphs 5 and 6 of the plaint and the evidence of PW 1, 2 and 3 who were laymen and not experts to substantiate the averments concerning negligence on the manner that the culvert was installed without due care, skill and diligence.

99. The defendant had raised a defence that the installed culvert followed the design, instructions and the specifications by the resident engineer. In Caparo Industries PLC (supra) the court observed that the necessary ingredients giving rise to the duty of care must exist between the party owing the duty and the party to whom it was owed, a relationship characterized by the law as one of proximity and that the solutions the court to consider it to be fair, just and reasonable and that the law only imposed a duty of a given scope upon the one party for the benefit of the other, the balance of proof always falling upon the claimant throughout the case.

100. In Berkley Steward vs Waiyaki Vol KAR 1118 (1986-1989), it was held that under Section 119 of the *Evidence Act*, the court may presume the existence of any fact which it thought likely to have happened, regard being had to common course of natural events, human conduct and public, and private business in relation to the facts of the particular case. The court cited with approval Halsbury's Laws of England vol. 78, 5th Edition that:

> " Where the claimant successfully alleges res ipsa loquitor its effect is to furnish evidence of negligence on which a court is free to find for the claimant. If the defendant shows how the accident happened and that is consistent with the absence of negligence on his part, he will displace the effect of the maxim and not be liable. Proof that there was no negligence by him or those of whom he is responsible will also absolve him from liability".

101. In this suit, the defendant averred that high professional standards and skill was used in installing the culvert as per the specifications of the resident engineer. Section 67 of the *Kenya Roads Act* provides that, in any legal proceedings for any action done in pursuance or execution of an order made pursuant to the Act or of any public duty or in respect of any alleged neglect or default in the execution of the duty a notice of not less than one month must be given to the Director General by the claimant or his agent.

102. Exh No. 7 (a) was not directed at the Director General of the Kenya Rural Roads Authority as the designer and or resident engineer of the culvert. The specifications, designs, instructions and the construction work of the culvert was under the supervision of the resident engineer. The resident engineer was not called to testify in this suit. No material was placed before the court to indicate that the defendant had failed to adhere to the specifications, designs, instructions and the directives by the resident engineer or was contrary to the Building Code for 1986 Edition, the *Engineers Act* 2011 and Sections 29 & 30 of the Physical Land Use Planning Act.

103. In David Muya Ndeti vs Kenya Urban Roads Authority & others (2017) eKLR, the issue was whether the road had been constructed without a design resulting to a misalignment of the road, hence interfering with the petitioner's land rights. A remedial action to remove the metal bollards which were too close to the petitioner's land was issued. In Amosam Builders Developers Ltd vs Betty Ngendo Gachie and 2 others (2009) eKLR, the court cited with approval Vander Donckt vs Tuelluson (1849) 8 C.B 12, where Maule J observed that: "All persons I think who practice a business or profession which requires them to possess a certain knowledge of the matter in hand are experts so far as experience is required". The court observed that as a general rule, evidence by experts was not binding on the court, but must be considered alongside other evidence. The court said it was at liberty to accept expert evidence depending on the facts and circumstances of the case before it.

104. In this suit, none of the plaintiff's witnesses was an expert in the field of either civil engineering, hydrology, agriculture and or horticulture. No scientific expert reports were produced attributing any negligence on the part of the defendant, its agents, servants or employees. No independent witness was called such as a resident engineer of the County or the National Government who had designed, supervised and or approved the construction works. No single report was produced regarding any post-construction inspection by any government or private agencies such as NEMA or Engineers Board which perhaps had come up with an indication of any defects or poor workmanship on the part of the defendant. There was no expert report produced by the plaintiff to rule out the possibility of any other causes for the loss or damage or damage to the plaintiff's the plaintiff's investments on the land.

105. The plaintiff made no efforts to acquire or avail the designs, inspection reports and certificates of completion from the Ministry of Roads and Public Works or any other relevant government agency

as a basis that the defendant either went against the designs, specifications and or the contract signed on 27.6.2013 regarding the construction of the culvert, to the extent that it omitted a vital component of the project namely, the discharge channel. The basis upon which the plaintiff held the view that there was poor workmanship and or non-alignment with the natural course of the waterflow, in my considered view remained a layman's guess lacking any backing from an expert report.

106. In Jane Wagathuitu Githinji & 2 others vs Sojanmi Springfields Ltd & 2 others (2019) eKLR, the court based on expert and site visit reports had made a finding that there was a direct cause and effect between the bursting of the 1st defendant's dam, the increased volume of water in the old channel caused by the water from the 1st defendant's farm, the continuous flow of water from the land of the 1st defendant, the new channel identified by the deep gulley and the then flooded land of the plaintiff which was not a natural phenomena, given the identified intervening human activities, which had they not been present, the old channel would still have held its own, and not affected the plaintiff's land. The court made a finding that the new channel was not a creature of nature, but out of unnatural activities of the 1st defendant upstream, more so given the reports by the National Environment Management Authority and the Water Resources Management Authority, whose expertise on the study of the terrain and the flow of water on land, was superior to that of the defendant's experts. Guided by Ryland vs Fletcher (1861-73) ALL ER 1, the court held that the holding of water in the 1st defendant's dam was not natural, and so was the breaking of the dam or the continuous flow of excess water from the dam to be termed as an act of God. The court held that the dam broke out due to a poor design and hence the application of the doctrine of the res ipsa loquitor for dam had it been well designed, built and maintained, would not in the course of ordinary existence have burst.

107. In this suit, the plaintiff relied on the findings by the Deputy Registrar of the court as captured per P. Exh No. 8. The Deputy Registrar of this court was not an expert on the issues herein by dint of Sections 35 of the *Evidence Act*. It may very well be true that the Deputy Registrar visited the locus in quo in the presence of the parties and the lawyers representing them. The report was also produced by consent before this court.

108. In Kaysina vs Kagina & 2 others (2021) KECA 242 KLR 3.12 (2021) Judgment, the Court of Appeal held that an opinion of an expert whatever the field was worthless if not founded upon a substratum of facts, capable of being proved exclusive of the expert's evidence, to the satisfaction of the court, according to the appropriate standard of proof. The court observed that a court could even find an expert's opinion irrelevant if it was based on illogical or irrational reasoning, was speculative, internally contradictory and or unreliable.

109. In this suit, the court had allowed an application dated 14.7.2021 by the plaintiff for the Deputy Registrar or an Executive Officer to visit the locus in quo to ascertain whether or not there were other sources of water which could have caused the damage. The court's order as made on 25.10.2021 was clear that parties were at liberty to engage expert(s) during the scene visit. None of the parties came with an expert during the scene visit. The Deputy Registrar lacks any expertise on terrain and water flow on land, civil engineering, horticulture, water engineering, meteorology, land survey and or agriculture.

110. The plaintiff failed to establish the exact locality of the suit land and his developments from the position of the culvert. The distance was neither pleaded nor stated during the plaintiff's testimony. Other than the general averments that the defendant was negligent, the plaintiff failed to prove the four elements of negligence as set out in Kenya Wildlife Service (supra). In particular, causation had to be proved to the extent that there was no drainage discharge channel and that water was directed to the suit land, after accumulating or collecting in the culvert. The dates in which the damage occurred was generally pleaded as November 2015. Other than PW 1 – 3 who were eyewitnesses, more evidence needed to be

availed and as held in Pope John Paul's Hospital and another vs Baby Kasozi (supra), the burden of proof was correspondingly greater on the plaintiff to prove the alleged professional negligence.

111. Again, in Bulam vs Friern Hospital Management Committee (1957) 2 ALL ER, the court held the test as the standard of the ordinary skilled man exercising and professing to have that special skill. See Ricarda Njoki Wahome Mutahi (deceased) vs A.G. & others (2015) eKLR, John Gachanja Mundia vs Francis Marira & another (2017) eKLR.

112. The plaintiff failed to call the resident engineer who had supervised the works. There was no report made by the plaintiff to the Engineers' Board of Kenya, the body regulating professional engineers works, to commission an inquiry committee and investigate the incident, if at all the culvert had been recklessly installed, and which inquiry perhaps could have made a report that there was negligence on the part of the defendant. See Godfrey Ajoung Okumu & another vs Engineers Board of Kenya (2020) eKLR, Loyford Gitari Leonard vs Weru Tea Factory (2017) eKLR and Lincoln Kivuti Karingi & another vs Michael Njuguna Makindu (2021) eKLR.

113. In the premises I find that the plaintiff failed to prove the duty to care, breach of that duty, causation and the foreseeability of the damage to his land.

114. Regarding damage, the plaintiff pleaded that he was a legal representative of the estate of his late brother Edward P. Gitonga Nkari, the registered owner of L.R. No. Igoji/Kianjogu/1574. He did not produce any loss and an adjustment report was made by a qualified agricultural extension officer. See Lesiolo Ltd vs Kenya Seed Company Ltd (2017) eKLR. The maker of the valuation report, P. Exh (4) was not called to testify and produce it. Other than the receipts produced before this court, the plaintiff failed to specify when he started his horticulture project, if he used the services of a horticultural officer in erecting the green houses, whether he was issued with any installation certificates and or reports the day the project commenced if he was a licensed farmer with a farm number, and whether there were any site visits by agricultural extension officer to inspect the project. No field visit reports or permits issued by the relevant government agencies in connection with water, abstraction, irrigation systems, installations, greenhouse installation and farm permits for the agri-business were produced before the court to substantiate the loss and damage.

115. Additionally, other than the farm inputs, the report produced as P. Exh No. (4) which attributed, the loss as caused by the road water runoff, poor design and construction of the culvert, the maker of the report was not called to give the scientific basis of his opinion. The report was made in general terms, without specifying the basis of reaching at the figures in line with the Ministry of Agriculture Crop Yield and Crop Compensation Guidelines for 2015.

116. Exh. No. (4) prepared by an agricultural extension officer. The nexus between the cause and the effect was not clear from the report. The nexus between P. Exh No. 6 (a – e) and P. Exh No. (5) was also lacking.

117. In Muthuri & 4 others vs National Police Service Commission & 4 others (Petition 15 (E022) of 2021) (2022) KESC 52 (K.L.R.) (civ) (23rd June 2023), the court citing with approval Njonjo Mue and another vs Chairperson IEBC & others (2018) eKLR, emphasized that it was unacceptable to use self-help or clandestine means to obtain any public documents as doing so would be detrimental to the administration of justice. The court found discrepancies in the uncertified pay slips to be admissible under Section 3.5 of the *Evidence Act* and be of any evidential significance. The makers of P. Exh No's 3, 4, 5, 6 & 8 were not called to produce and shed light on the said exhibits. PW 1, 2 & 3 were not the makers of the said exhibits and therefore they could not vouch for authenticity, certainty, relevance and the significance of the exhibits to the matters before the court. See Richard Okuku Oloo (supra) P.

Exh No. 3, was contrary to Section 106B of the *Evidence Act* for lack of a certificate, as held in Richard Nyagaka Tongi (supra).

118. In Francis Gachoki Matu (supra), the court cited with approval Ratcliffe vs Evans (1893) 2 QB 524, that there must be certainty and particularity with which the damage done ought to be stated and proved, and that both must be insisted on, by way of pleadings and the proof of damage. The court emphasized that Sections 107, 108 and 109 of the *Evidence Act* had to be met by calling the agricultural extension officer or a land valuer, as witnesses to explain how they had arrived at the claim. In this suit, P. Exh. No. 4 was prepared by N. Gitonga Miten consultant. His credentials were missing in the report and so was the basis of his opinion. In Richard Oloo Okuku (supra) the court observed that special damages must be specifically pleaded and proved with a degree of certainty and particularity, depending on the nature and the circumstances of the act complained of. Similarly, in Hahu vs Singh (1985) KLR 716, the court observed;

> " Special damage 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 depends on the circumstances and nature of the acts themselves".

119. The plaintiff in the demand letter produced as P. Exh No. 7 (a) quoted a global figure of Kshs.55,968,000/= as the loss he had suffered. The particulars were not included as at 13.9.2016. In paragraph 7 of the plaint the figure went down to Kshs.56,574,380/=. P. Exh 6 (a) – (k) indicated that the materials were sourced from Supazel Vision Achievers. The cash sale receipt dated 27.5.2015 showed that the suppliers had charged labour for the construction of the water system, drawings and for the technical work. In the receipt dated 20.5.2015, the same entity had charged labour for constructing the green houses, for making benches and for the technical labour. To my mind, the maker of the exhibits should have been called to testify on when the structural works were undertaken and if it had met the specifications as required by the Ministry of Agriculture, Horticultural Department and the Ministry of Water who ideally are the bonafide quality assurance inspectors or agencies in Kenya.

120. It was not enough for the plaintiff to produce the cash sale receipts without calling the makers of the same. The receipts spoke more about the horticultural farm. As regards the installation and quality of the works done in terms of sustaining natural hazards such as heavy rainfall and runoff water, no evidence was availed by the plaintiff to rule out any possibility of other cause of the loss or damage to his farm. In Anne Wambui Ndiritu vs Joseph Kiprono Ropkoi & another (2005) eKLR, the court observed the legal burden lay upon the party who has invoked the aid of the law. To this end, the plaintiff could not affirmatively have asserted the quality of his greenhouses and its capacity to withstand heavy rain or surface water runoff, without calling the persons who had installed the water and green house system for him. Similarly, the plaintiff lacked capacity to answer to the valuation report and the manner in which P. Exh No. (4) was arrived at by Miten Agricultural Consultants. The registration number and license of the said consultant with the Ministry of Agriculture or any other regulatory agency of the government showing his expertise in the field of agriculture, water and irrigation was also missing. The relevance and the significance of P. Exh No. 6 (a), (b) & (c) was also not explained to this court by its maker or the plaintiff.

121. Whereas under Section 77 of the *Evidence Act*, reliance on expert reports is allowed, a party must be careful in producing a document of a technical or a specialist nature especially where such a party lacks knowledge of the issues contained in the document. The plaintiff and his witnesses were unable to explain the contents of the exhibits before court. See Sette vs Geoffrey Masika Juma (2007) eKLR. As a consequence, the liability, loss and damage was not established on a balance of probability.

122. In view of the foregoing, I have come to the irresistible conclusion that the plaintiff has failed to prove the suit to the required standards.

123. On costs, the general rule is that costs follow the event. The defendant has submitted that it has incurred significant costs to defend this suit. P. Exh. No. 8 indicated that the defendant had revisited the culvert in 2020 and reworked on it. DW 1 confirmed this fact. In his written submissions the defendant stated that any construction it undertook in 2020 was out of good faith and not out of a duty of care.

124. The plaintiff had made a report to the defendant after the alleged liability, loss and damage occurred. The defendant made a visit to the locus in quo. Remedial action if any was only taken in 2020, after the suit had been filed. There was no amendment made to the defence to raise the issue that the plaintiff's claim was no longer tenable after remedial action, if any was taken in 2020.

125. In my considered view, though the plaintiff has failed to prove negligence, loss and damage against the defendant, I do not think that he should be condemned to pay any costs in the circumstances of this suit. See Jasbir Singh Rai & others vs Tarlochan Singh Rai & others (2014) eKLR.

126. Consequently, the suit is hereby dismissed with no order as to costs.

Orders accordingly.

DATED, SIGNED AND DELIVERED VIA MICROSOFT TEAMS/OPEN COURT AT MERU ON THIS 27TH DAY OF SEPTEMBER 2023

In presence of

C.A Kananu

C.P Mbaabu for plaintiff

Rapando for the defendant

HON. CK NZILI

ELC JUDGE