REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI LAW COURTS

CIVIL CASE NO. 2577 OF 1990

DUNCAN NDERITU NDEGWA…………..……..………..... PLAINTIFF

VERSUS

KENYA PIPELINE COMPANY LIMITED…..……....…..1ST DEFENDANT

L. Z. ENGINEERING CONSTRUCTION LIMITED......2ND DEFENDANT

JUDGMENT OF THE COURT

The Plaintiff brought a suit against the Defendants by way of a Plaint dated 25th May 1990. He stated that he has at all times been the registered owner of the parcel of land known as Land Reference Number 12422/22 (hereinafter referred to as the suit property), and that the 1st Defendant is the registered proprietor of the land known as Land Reference Number 12422/23, with a common road separating the two parcels. The Plaintiff alleged that in 1989, the 1st Defendant instructed the 2nd Defendant to develop its premises by erecting several houses, roads and other related works, and that in the process of carrying out the works, the Defendants trespassed on the suit property committing acts of torts. The particulars of the torts alleged to have been committed by the Defendants on the suit property are as follows:

a. Excavating large portions leaving large pits bunkers and deep gaping holes;
b. Making a network of roadways, paths, highways and erecting roadworks;
c. Removing therefrom and converting to their own use large quantities of red/top soils, murrams and rocks forming part of the natural terrain and features;
d. Dumping debris rubbish foreign rocks unwanted materials cleaned and/or derived from the works;
e. Littering spoil, heap debris and other surplus and unwanted mud, glass, cement and other unwanted materials derived from the works;
f. Indiscriminately felling numerous indigenous trees;
g. Using and/or employing heavy construction machinery crushers and the said machinery/equipments thereon;

The Plaintiff has contended that as a result of the tortious acts committed, portions of the suit property measuring approximately 6.47 acres were rendered total waste and unusable, with the remainder of the parcel measuring approximately 13.19 acres being rendered landlocked, inaccessible and unusable. The Plaintiff is seeking the following substantive orders in the said Plaint:

a. Value of the suit premises at Kshs.16,700,000/=
b. In the alternative, Kshs.7,284,760/= comprising the value of wasteland, costs of removing debris litter and other foreign materials as well as the costs of filling excavations, pits, and bunkers.

c. General damages.
d. An injunction to restrain the Defendants jointly and severally by themselves their servants, agents, or employees from continuing/repeating to commit the wrongful acts.
e. Interest at court rates.

The 1st Defendant in its defence dated 18th July, 1990 admitted to being the registered proprietor of Land Reference Number 12422/23 and having engaged the 2nd Defendant to develop the said property by constructing houses. The 1st Defendant alleges that the 2nd Defendant was an independent contractor who was directly responsible and liable to third parties for any loss, damage, claim or injury connected or arising in the course of the works. Further, the 1st Defendant denied that it committed the trespass and tortious acts on the Plaintiff's land as alleged in the Plaint and denied the loss and damage alleged to have been suffered by the Plaintiff.

The 2nd Defendant filed a defence dated 29th June 1990 where it denied the Plaintiff's claim in its entirety. In the mean time, the Plaintiff filed a notice of motion dated 25th July 1990 under Order XII Rule 6 of the repealed Civil Procedure Rules requesting for judgment on admission against the 2nd Defendant. In a ruling delivered on 13th May 1991, Mbito J. (as he then was) entered interlocutory judgment for the Plaintiff against the 2nd Defendant, and directed that the suit proceed for assessment of damages.

The suit was fixed for hearing on 20th March, 2012 and the Plaintiff and 1st Defendant each called one witness who gave oral evidence in addition to the filed witness statement. The Plaintiff's witness was Robin Muriuki Ndegwa (PW1) who testified that he is an administrator in Duncan Ndegwa's company and one of his children. PW1 produced as Plaintiff Exhibit 1 a general power of attorney dated 25th July, 2009 where the Plaintiff had granted him authority to act on his behalf. He stated that the suit property belonged to the Plaintiff and produced a copy of the title as Plaintiff Exhibit 2.

It was the testimony of PW1 that on diverse dates between 1989 and 1990, the Defendants trespassed on the suit property, and when the Plaintiff visited the suit property, he found that while putting up a residential estate on LR 12422/23, the 1st Defendant had destroyed the suit property by excavating and putting material on the same. PW1 informed the court that the Plaintiff had not given any authority to the 1st Defendant to use the suit property for any purpose and therefore, that they were trespassers on the said land. PW1 further testified that judgment was entered against the 2nd Defendant in a ruling delivered by Mbito J. on 13th May, 1991 and produced a copy of the ruling as the Plaintiff's Exhibit 3.

PW1 stated that the Plaintiff then engaged Mureithi Consultants who ascertained the damage to the suit property. According to PW1, the consultant quantified the costs of removing the debris at Kshs.1,887,360/=; the costs of filling the property at kshs.1,397,400/=; while the diminished value of the land was indicated as Kshs.4,000,000/=. The report on dumped debris and excavated borrow pits prepared by Mureithi Consultants was produced as Plaintiff Exhibit 4. Further, PW1 informed the court that the report valued the land before and after the trespass at Kshs 16,700,000/= and Kshs 12,700,600/= respectively. In addition, PW1 stated that the extent of the trespass was between 1 – 5 acres and that after the trespass, accessibility to the suit property was very difficult since the debris, rocks and a lot of damage was on its front side.

PW1 further stated that the Defendants have never approached the Plaintiff to make good the trespass, and that their prayer that the property be purchased had been overtaken by events. Further, that they were now seeking damages for trespass and damage caused to the property. PW1 testified that they were also seeking a refund for restoration of the land which was at the time Kshs. 7,284,760/=.

During cross examination by Mr. Gaita, Counsel for the 1st Defendant, PW1 informed the court that he was at the time of the trespass a student in Canada, and was out of the country at some times. PW1 however, stated that he toured the suit property in the company of his father at different times, but could not remember the specific dates when they visited, or remember any person they met during the said

visits. It was the testimony of PW1 that he connected the 1st Defendant to the trespass from the documentation he has seen, as well as from the fact that they were constructing on the opposite parcel of land, and it was his view that the persons undertaking the construction were servants of the 1st Defendant. PW1 admitted that he did not find any employee of the 1st Defendant on the suit property, and reiterated that the Plaintiff knew that the 1st Defendant owned the property, and that the 2nd Defendant being servants of the 1st Defendant trespassed on the property.

In re-examination, PW1 maintained that the 2nd Defendant were servants of the 1st Defendant and not the Plaintiff's servants. Finally, this witness reiterated that the 1st Defendant had caused the damage which he got to know of from the letters sent by the Plaintiff to the said Defendant dated 26th January 1990, a reply dated 29th January 1990 as well as correspondence that went on until 7th February 1990, filed in the 1st Defendant's Bundle of Documents.

The 1st Defendant's witness was Charles Njogu Lofty (DW1), who testified that although he retired in 1995, his last employment was with the 1st Defendant as the Chief Administration Manager having joined the company in December 1976. DW1 informed the court that in 1990 the 1st Defendant was putting up staff houses on a plot of land in Karura, and that the 2nd Defendant was awarded the tender for construction after a tendering process,. DW1 stated that a contract dated 26th August, 1988 was entered into between the Defendants, and that clause 18 of the said contract contained an indemnity clause for any damage caused by the 2nd Defendant who executed a bond to this effect. The contract was produced as the 1st Defendant's Exhibit 1. It was the testimony of DW1 that the 2nd Defendant was an independent contractor who was competitively sourced and was not the 1st Defendant's servant.

DW1 admitted to the 1st Defendant having received letters from the Plaintiff complaining that their contractors had gone into his land. DW1 produced as the 1st Defendant's Exhibit 2 a letter dated 26th January, 1990 written by the Plaintiff to the Defendants complaining of the damage occasioned to the suit property. This witness also produced his reply to the said letter dated 28th January, 1990 which stated that they had taken up the issue with their independent contractor, the 2nd Defendant. The said letter was produced as the 1st Defendant's Exhibit 3.

Further, DW1 stated that the clerk of works who was a supervisor on site informed them that the 2nd Defendant was still using the Plaintiff's land. This witness stated that in a letter dated 31st January 1990 which he produced as the 1st Defendant's Exhibit 4, they notified the 2nd Defendant to stop the trespass. It was the testimony of DW1 that the 2nd Defendant agreed to stop the trespass through a letter dated 3rd February, 1990 which he produced as the 1st Defendant's Exhibit 5. DW1 also produced as Exhibit 6, the 1st Defendant's letter dated 7th February 1990 written to the Plaintiff indicating that the 2nd Defendant had agreed to restore the land.

DW1 informed the court that they received a demand letter from the Plaintiff's advocates dated 16th March, 1990 and in reply, the managing director of the 1st Defendant denied liability through a letter dated 18th March 1990. The demand letter and the reply thereto were produced as the 1st Defendant's Exhibit 7 and 8 respectively. DW1 stated that they had no control over the 2nd Defendant and that their relationship was governed by the contract document produced in court. DW1 maintained that the 2nd Defendant were responsible for any wrongs they committed. This witness urged the court to dismiss the Plaintiff's claim against the 1st Defendant stating that none of the 1st Defendant's employees was involved in the trespass.

During cross examination by Ms. Nderitu, the Plaintiff's counsel, DW1 stated that there was a road in between the Plaintiff's and the 1st Defendant's parcels of land. DW1 testified that the contract produced as the 1st Defendant's Exhibit 1 was a standard document used by parastatals, and that the 2nd Defendant

was employed as an independent contractor. He referred the court to clause 10 of the contract which made reference to the clerk of works, who he stated was employed by the 1st Defendant. Further, DW1 stated that the duties of the clerk of works were given in clause 10(2)(b), and taking the materials from the site was not one of them.

DWI confirmed that the dumped materials on the suit property were clearly visible from the 1st Defendant's parcel of land, and that the clerk of works would have seen it. He stated that the clerk of works could not have known what arrangement the 2nd Defendant had with the Plaintiff. He further stated that the 1st Defendant took immediate action when they were informed of the trespass by the Plaintiff. According to DW1, clause 18 of the contract on indemnity limited the injury to whatever happened within the 1st Defendant's parcel of land and where the works were carried out as explained in the contract. Further, that under sub clause 2, the activities were also limited to the said works.

DW1 referred the court to the 1st Defendant's Exhibits 2, 4 and 5 and stated that they did not command the 2nd Defendant to stop the trespass, but that the 2nd Defendant agreed to stop the said trespass and to restore the plot. Lastly, this witness admitted that the 1st Defendant brought the 2nd Defendant to their land, and stated that he could not confirm if the 2nd Defendant put the debris on the Plaintiff's land as he did not see it being done.

Upon re-examination, DW1 stated that it was not his responsibility to know under what circumstances the debris was put on the Plaintiff's land, or how the 1st Defendant disposed of its materials or dumped his debris. DW1 maintained that the indemnity in the agreement did not impose any liability on the 1st Defendant for any damage caused by the 2nd Defendant who was brought on their site as an independent contractor.

After the close of evidence the counsel for the Plaintiff and 1st Defendant Parties were directed to file written submissions. The Plaintiff's counsel in submissions dated 16th April 2012 argued that liability against the 2nd Defendant was determined by the ruling of Mbito J. delivered on 13th May 1991 where the 2nd Defendant was found liable for trespass on admission. Counsel submitted that the 1st Defendant having admitted to bringing the 2nd Defendant on its land, who in turn trespassed on the suit property, is equally liable for the damage caused to the Plaintiff's land. The Plaintiff referred the court to the case of **Kenya Shell Limited -vs- Milka Kerubo Onkoba,(2010) eKLR** where the Court of Appeal held that the Rule in **Rylands -vs- Fletcher,(1868) LR 3H.L.330** of absolute and strict liability is recognised by our law.

Counsel for the Plaintiff contended that the rule imposing strict liability is founded on the maxim *sic utere tuo ut alienum non ladeas* (use your own property in such a manner as not to injure that of another). It was submitted for the Plaintiff that the main elements of the Rule in **Rylands -vs- Fletcher (supra)** are that the 1st Defendant brought something onto his land; that the 1st Defendant made a "non-natural use" of his land; that the thing was likely to do mischief if it escaped, that the thing escaped and caused damage and lastly, a 5th element added in the case of **Cambridge Water Company -vs- Eastern Counties Leather PLC (1993) UKHL 12**, that the harm was foreseeable.

The Plaintiff's counsel submitted that the damage to the suit property was foreseeable, and relied on **Blacks' Law Dictionary, 5th Edition at Page 584** definition of foreseability to mean *"The ability to see or know in advance, hence, the reasonable anticipation that harm or injury is a likely result of the acts or omissions."* The Plaintiff stated that a reasonable man would foresee that the 1st Defendant's actions of dumping debris and other forms of refuse in his land, the excavation of large portions of land creating pit bunkers as well as deep gaping holes, the use and abandonment of the heavy machinery on his land as well as a creation of network of roads would occasion damage to his land.

While relying on the case of **Rylands -vs- Fletcher (supra)** and **Transco Plc -vs- Stockport Metropolitan Borough Council, (2004) 1 ALL ER 589**, counsel for the Plaintiff stated that the 1st

Defendant failed to contain the debris and soil on his land which escaped, aided and abetted by the 2nd Defendant, causing damage to the suit property and rendering the same almost inaccessible. Further, counsel submitted that the rule in **Rylands -vs- Fletcher** as stated in the case of **Read -vs- J Lyons & Co. Ltd, (1947) AC 156** focuses on what thing an occupier has brought onto his land. The Plaintiff submitted that the 1st Defendant's construction works cannot be termed as a natural use of the land and relied on the case of **Sanghani & Another -vs- Chemilabs, CA No. 5 of 1978** where the court stated that the appellant could only be absolutely liable under the rule in **Rylands -vs- Fletcher** if they brought and accumulated, or stored on their land water and sewerage in circumstance involving knowledge and volition on their part, and which constituted an unnatural or extra ordinary user of their land.

The Plaintiff's counsel contended that the 1st Defendant who was present at the building site through its Clerk of Works knew or ought to have known that the large amounts of soil emanating from its land to pave way for construction was likely to cause mischief if it found its way onto the suit property . The counsel stated that escape of rubbish and other foreign materials was directly facilitated by the Defendants who transported the same to the suit property and relied on the case of **Read -vs- J Lyons & Co. Ltd, (1947) AC 156** for the proposition that "escape" means escape from a place where the Defendant has occupation of, or control over, to a place which is outside his occupation or control.

The Plaintiff's counsel further submitted that the 1st Defendant had total control over the 2nd Defendant's actions, and referred the court to the cases of **Rylands -vs- Fletcher(supra), Biffa Waste Services Ltd & Another -vs- Maschinenfabrik Ernst Hese & Another (2008) EWHC 6 (TCC), Green vs. Fibreglass Ltd (1958) 2 QB 245** and **Cassidy -vs- Ministry of Health (951) 2 KB 343**. The gist of these decisions was that an owner of a property who procures another, whether agent, servant or otherwise, to do work for him which involves danger to another's property, is liable to the owners of the property for damages resulting from failure to take proper care.

The Plaintiff's counsel argued that the 1st Defendant ought to duly compensate him and thereafter seek to be indemnified from the 2nd Defendant as per their contract. She relied on the case of **Dalton -vs- Henry Angus & Co.,(1881) UKHL 1** for the proposition that a person causing something to be done cannot relieve himself from liability to those injured where the duty is performed by a contractor through delegation, but may bargain with the contractor for an indemnity from him where the duty is not performed.

It was submitted for the Plaintiff the 1st Defendant is bound by the terms of the contract produced as the 1st Defendant's Exhibit 1, and reliance was placed on the treatise **Charlesworth & Percy on Negligence, 9th Edition** at page 897 for the submission that a person is vicariously liable for the actions of his servants, agents or independent contractors. Further reliance was placed on the case of **Kenya Shell Limited -vs- Njenga, CA No. 22 of 2003** for the submission that parties are bound by their terms of contract.

With regard to the alleged trespass, counsel for the Plaintiff submitted that the same is actionable *per se* and no proof of damage is necessary. The Plaintiff relied on the **Black's Law Dictionary** at page 1347 where a continuing trespass is defined as one which constitutes a permanent invasion of the rights of another, and that there is a continuing wrong so long as the offending object remains. The Plaintiff urged the court to find the trespass in issue to be one of a continuous nature as no remedy or measure has been taken to ensure the same is ceased and that since the offending material has not been removed, the trespass continues to be actively perpetrated in real time.

Counsel placed reliance on the findings of the High Court of Malaysia in **Jiwa Perkas Sdn Bhd -vs- Wong Kwok Holdings Sdn Bhd, K-22-138 of 2006** where the court cited a court of appeal decision in **Sin Heap Lee. Marubeni Sdn Bhd -vs- Yip Shou Shan,(2005) I MLJ 515** where it was held that the excavation and removal of earth on the Plaintiff's land resulting in a loss of soil support was continuing trespass as long as the condition of the Plaintiff's land remained the same and no remedial works were carried out. The court also made a finding that any dumping of debris, rubbish or unwanted earth on an adjacent parcel of land amounted to a continuing trespass as long as the debris, rubbish and unwanted

earth remained on the adjacent land and was not removed.

The Plaintiff through his advocate submitted that in a continuing trespass, the cause of action arises from day to day and relied on the Malaysian Court of Appeal decision in **Sin Heap Lee. Marubeni Sdn Bhd -vs- Yip Shou Shan (2005) I MLJ 515,** in a case where excavations by the appellant had seriously affected the land, the court held that as long as the condition of the said land remained the same, the trespass was continuing. The Plaintiff also referred the court to the decision in **Field Common Ltd -vs- Elmbridge Borough Council,(2008) EWHC 2079 (Ch)** where the court found the continued presence of the tarmac on land constituted a trespass which continued from day to day giving rise to a new cause of action from moment to moment.

On the issue of quantum of damages, the Plaintiff's counsel submitted that the prayer in the Plaint on special damages of Kshs 16,700,00/- being the value of the suit property was no longer tenable owing to the escalated property prices since the filing of the suit. The counsel submitted that the Plaintiff was only seeking the prayer for the cost of restoration and rehabilitation together with the value of diminution of the land. Counsel relied on the case of **Dodd Properties (Kent) Ltd -vs- Canterbury City Council, (1980)1 All ER 928** where the court held that in the case of a tort causing damage to real property, the object of placing the Plaintiff in the position he would have occupied if he had not suffered the wrong complained is achieved by either taking the capital value of the property in an undamaged state and comparing it with its value in a damaged state; or by taking the cost of repair or reinstatement or a combination of the two depending on the Plaintiffs future intentions as to the use of the property and the reasonability of those intentions.

Counsel submitted in this regard that the Plaintiff is still in occupation and is currently farming in the suit property. It was further submitted that since according to the Plaintiff's Exhibit 4 the value before and after damage was KShs.16.7 Million and KShs.12.7 million respectively, the lost value was Shs.4 million and the Plaintiff urged the court to grant the same with interest till date of full payment. The Plaintiff also prayed for the cost of rehabilitation and restoration at Kshs 3,284,760/= with interest as set out the Plaint.

The Plaintiff also referred the court to decisions in **Hotel Properties Limited -vs- Willesden Investments Limited, (2009) eKLR, Field Common Ltd -vs- Elmbridge Borough Council(2008) EWHC 2079 (Ch), Inverugie Investments Ltd- vs- Hackett(1995)1WLR 713** and **Attorney General -vs- Blake and anor (2000)4 All ER 385** to support his arguments for payment of damages and mesne profits to the Plaintiff.

The 1st Defendant's counsel in submissions dated 24th May, 2012 argued that form the evidence of DW1 it was clear that the 1st Defendant had engaged the 2nd Defendant as an independent contractor to carry out construction works specified in the building contract produced as the 1st Defendant's Exhibit 1. Counsel submitted that the 1st Defendant did not have any control as to how and from where the 2nd Defendant sourced his material to perform the contract works. The counsel stated that the 1st Defendant was not responsible for any damage/trespass to the Plaintiff's land as none of her employees or servants trespassed the said land.

The 1st Defendant's counsel relied on the treatise **Clerk & Lindsell on Torts** paragraphs 236 at page 149, to submit that the law is that a person who procures an independent contractor is in general, not liable for the negligence and other torts committed by the contractor in the course of the execution of the work. Counsel stated that the test to be applied in determining whether one is an employee or an independent contractor is the extent of control over the work being done. Reliance was placed on the case of **Ochieng' -vs- Amalgamated Sawmills Limited (2005) 1 KLR 152** for the submission that where somebody works independently and with minimal control, such a person is an independent contractor.

It was argued by the 1st Defendant's counsel that there is clear and incontrovertible evidence that the 2nd Defendant was as an independent contractor whom the 1st Defendant had no control over and therefore, that the 1st Defendant is not liable in any way for any torts that may have been committed by its independent contractor, the 2nd Defendant.

Counsel for the 1st Defendant further submitted that the rule in **Rylands -vs-Fletcher(supra)** has no application in this matter, since from the Plaintiff's evidence, this was a case of damage through excavation of top soil and trespass to land. The 1st Defendant argued that the engagement of a contractor to carry out contract works has no relationship with the rule in **Rylands -vs- Fletcher(supra)** since by engaging the 2nd Defendant, the 1st Defendant did not bring "anything" on its land and further, that there was no escape as contemplated by the law. It is the 1st Defendant's submission that since the pleadings disclose trespass, the Plaintiff cannot change his case after hearing.

On the issue of vicarious liability, the 1st Defendant's counsel argued that a principal cannot be liable for the torts of an independent contractor as in this case, and further, that the entry of judgment against the 2nd Defendant cannot be a basis for liability against the 1st Defendant. Lastly, counsel for the 1st Defendant submitted that the cases cited by the Plaintiff have no application in this suit as they relate to different situations where the rule in **Rylands-vs-Fletcher(supra)** and the principle of vicarious liability were applicable which is not the case herein.

I have carefully considered the pleadings, evidence and submissions made by and on behalf of the Plaintiff and 1st Defendant. I must at this stage express my gratitude for the various legal and judicial authorities that were cited by the counsel for the Plaintiff and 1st Defendant, which have greatly assisted the court in reaching its determination. I find that there are two uncontested facts in this suit. The first is the fact that there was trespass on the suit property, and the only issues that are to be determined in this regard is who committed and is liable for the said trespass. Secondly, it is also not contested that judgment was entered on the liability of the 2nd Defendant for trespass on the suit property. The outstanding issues therefore to be determined by this court are as follows:

1. Whether the 2nd Defendant was a servant of the 1st Defendant or an independent contractor.
2. Whether the 1st Defendant is liable for the acts of trespass committed on the Plaintiff's suit property.
3. Whether the Plaintiff is entitled to be paid the diminution in value and the value of restoration of the suit property, and if so the quantum.
4. Whether the Plaintiff is entitled to mesne profits, and if so the quantum.
5. Whether the Plaintiff is entitled to general damages for trespass, and if so the quantum.
6. Who shall meet the costs of this suit.

1. **Whether the 2nd Defendant was a servant of the 1st Defendant or an independent contractor.**

The Plaintiff has alleged the 1st Defendant should be liable for the acts of the 2nd Defendant who was its servant. The 1st Defendant has on the other hand argued that the 2nd Defendant was an independent contractor and not its servant, and that it is therefore not liable for any wrongs committed by the 2nd Defendant. The general rule as to when one is a servant or independent contractor for purposes of apportioning liability in tort is stated as follows in **Bowstead and Reynolds on Agency, Ninteenth Edition**, edited by Peter Watts and F.M.B. Reynolds at paragraph 1-030

> **"The dichotomy of servant (or employee) and independent contractor stems from the law of tort: a person is more readily liable for the torts of his servants than for those of his independent contractors. The difference turns on the degree of control exercised. A servant has been defined as a**
>
> ***'person employed by another to do work to him on terms that he, the servant, is to be under the control and directions of his employer in respect of the manner in which his work is to be done.'***
>
> **An independent contractor has been defined as**
>
> ***'one who undertakes to produce a given result, but so that in the actual execution of the work he is not under the orders or control of the person for whom he does it, and may use his discretion in***

things not specified beforehand'."

This was also the holding in **Ochieng' -vs- Amalgamated Sawmills Limited (2005) 1 KLR 152** that the extent of control over the work while it is being done will determine whether one is an employee or independent contractor. The question therefore to be asked and answered is what control or directions if any were exercised by the 1st Defendant over the 2nd Defendant. The contract between the 1st and 2nd Defendant was produced in evidence as the 1st Defendant's Exhibit 1. Clause 1 of the said contract stated that for the consideration agreed, the Contractor, who was the 2nd Defendant, would upon and subject to the conditions in the said contract carry out and complete the works agreed upon. The provisions of clauses 8 to 10 of the said contract are also relevant in this regard and stated as follows:

8. "**The Contractor shall constantly keep upon the works a competent foreman-in-charge and any instructions given to him by the Architect shall be deemed to have been issued to the Contractor. The foreman-in-charge shall be literate in English.**
9. **The Architect and his representatives shall at all reasonable times have access to the works and to the workshops or other places of the Contractor where work is being prepared for the Contract, and when work is to be so prepared in workshops or other places of a sub-contractor (whether or not a nominated sub-contractor as defined in the sub-contract so far as possible a secure a similar right of access to those workshops or places for the Architect and his representatives and shall do all things reasonably necessary to make such right effective.**
10. **(1) The Employer shall be entitled to appoint a clerk of works, whose primary duty shall be to act as inspector on behalf of the Employer under the direction of the Architect, and the Contractor shall afford every reasonable facility for the performance of that duty.**

    (2) Directions given by the Clerk of works in writing to the contractors to his foreman-in-charge shall be deemed to be Architect's instructions in respect of :

a. **The interpretation of Architect's instructions, drawings, specifications or Bills of Quantities.**
b. **The removal from the site of any work, materials or goods which are not in accordance with the Contract.**
c. **Matters of urgency involving the safety or protection of persons or property, and**
d. **Any other matter in respect of which the Architect is expressly empowered by these conditions to issue".**

A plain reading of these clauses shows that the Employer who was the 1st Defendant could give directions to the 2nd Defendant through the clerk of works or the Architect. The Architect was in addition employed by the 1st Defendant under clause 3 of the said contract. Indeed, this Court notes that Exhibit 4 produced by the 1st Defendant which was a letter dated 31st January 1990 from DW1 to the Project Manager of the 2nd Defendant, is a clear example of such directions being given to the 2nd Defendant to stop its activities on the Plaintiff's suit property. I will reproduce the contents of the said letter for an appreciation of the full measure of its effect:

"Project Manager

L.Z. Engineering Co Ltd

Karura Site

NAIROBI

Attention: Mr. Joshua Trebitch

Dear Sir

RE: L.R. NO 12422/22 AT KARURA

This morning, we have received a strong protest from the owners of the above mentioned property that you are still continuing with unauthorized activities on the property including removal of red soil. These activities must stop immediately, to avoid angrivation (*sic*) of a situation which as it is, is already bad.

Yours faithfully,

C NJOGU LOFTY

For: MANAGING DIRECTOR

c.c. Clerk of Works

Karura Site"

It is therefore the finding of this court that the 2nd Defendant was not an independent contractor but a servant of the 1st Defendant, to the extent that the 1st Defendant still retained a measure of control and authority over the 2nd Defendant's activities as shown in the foregoing.

2. **Whether the 1st Defendant is liable for the acts of trespass committed on the Plaintiff's suit property**.

It was argued by the Plaintiff that the 1st Defendant is both strictly liable and vicariously liable for the acts of the 2nd Defendant. This assertion has been denied by the 1st Defendant. I must state here that I do agree with the 1st Defendant's submissions that this is not a case where the rule in **Rylands vs Fletcher(supra)** would be applicable. The application of this rule and the exceptions that apply has been summarized in **Halsbury's Laws of England, Fifth Edition, Volume 97** at paragraph 594 as follows:

> **"A person who for his own purposes brings onto his land and collects and keeps there anything likely to do mischief if it escapes must keep it in at his peril, and, if he fails to do so, he is prima facie liable for the damage which is the natural consequence of its escape. Liability under this rule is a liability in private nuisance, and therefore arises only in respect of damage to interests in land. It is a strict liability in the sense that it is no defence for the defendant to show that the thing escaped independently of any willful act or default on his part, or despite his exercise of all possible care and precautions to prevent it. Liability, however, will not arise unless damage of the relevant type was foreseeable to the defendant if the things collected on his land were to escape.**
>
> **The rule applies only to non-natural user of the land. It does not apply:**

1. **To things naturally on the land.**
2. **To things not likely to do mischief if they escape.**
3. **Where there is no escape from the land on which things were collected.**
4. **Where the escape is due to an act of God, the act of a stranger or the default of the claimant.**
5. **Where the thing which escapes is present by consent of the person injured.**
6. **In certain cases where there is statutory authority."**

The "the thing that did the damage" in the present case was the machinery and debris that was put on the Plaintiff's land, and the escape of the said thing to the suit property was aided by the acts of the 2nd Defendant. This is one of the exceptions to the application of the rule in **Rylands vs Fletcher,(supra)** namely where a third party aid in the escape of the thing causing the damage, and the rule of strict liability does not therefore apply in the present case.

Notwithstanding this finding, it is the finding of this court that this is a case where the 1st Defendant is vicariously liable for the acts of the 2nd Defendant for the following reasons. Vicarious liability in general arises where a person is found liable for the torts of an employee that he or she has authorized or subsequently ratified. This court has already found that the 2nd Defendant was not an independent contractor, and the key tests for determining whether parties have a relationship of employer and employee for purposes of vicarious liability are stated **in Clerk & Lindsell on Torts, Twentieth Edition** (2010) General Editor: Micheal A. Jones, at paragraphs 6-13 to 6-16. In summary these are as follows:

a. There must exist an essential core of mutual obligations to be ready to work and to pay for that work between the parties
b. The employee must be under the direct control or supervision of the employer
c. The existence of the relationship will not be affected by the fact that the employer is not allowed by the law to do the work for himself, but is compelled to employ an agent of a particular class to do it for him, provided that the employer has the power to control and dismiss the agent.

Upon perusal of the contract between the 1st and 2nd Defendant, I found all these elements are present. The obligation to work and to pay for the work are in clauses 1 and 2 of the agreement, the elements of the 1st Defendant's control and supervision have already been referred to in clauses 8 to 10 of the said agreement, and clause 25 gave the 1st Defendant the power to determine the 2nd Defendant's employment. The letters produced in evidence by the 1st Defendant as exhibits also show that the trespass occurred during the course of the 2nd Defendant's employment. The 1st Defendant's liability as an employer in this respect is complete and total. It is up to the 1st Defendant to pursue any indemnity from the 2nd Defendant under their terms of engagement.

3. **Whether the Plaintiff is entitled to be paid the diminution in value and value of restoration of the suit property, and if so the quantum**.

The Plaintiff in submissions abandoned the prayer sought in the Plaint for value of the suit property, and sought the prayers for special and general damages, as well as mesne profits. With respect to special damages the Plaintiff sought Kshs 7,284,760/= being the diminution in value of the suit property and the cost of the restoration of the suit property. The Plaintiff produced as Exhibit 4 a Quantity Surveyor's Report and valuation report on the areas of, and damage occasioned by the excavations and dumping on the suit property by the 2nd Defendant. The valuation report which was dated 10th May 1990 showed a diminution of value of the suit property of Kshs 4,000,000/=, while the Quantity Surveyors Report estimated the costs of removing the debris from the land to be Kshs 1,887,360/= and the estimated costs of filling the pits and other excavated areas to be Kshs 1,397, 400/=. The exhibit also included survey plans and photographs of the suit property. The said photographs were not disputed by the 1st Defendant and showed areas of excavations and pits filled with water, as well as mounds of debris on the suit property.

The general principles as regards the measure of damages to be awarded in cases of trespass to land where damage has been occasioned to the land is the amount of diminution in value or the cost of reinstatement of the land, and not both. The overriding principle is to put the claimant in the position he was prior to the infliction of the harm. The test that guides the court in deciding which of the two measures of damages to employ is the reasonableness of the said reinstatement in light of the extra costs that may be incurred by the Defendant in this regard. In the present case the diminution in value and the cost of replacement are approximately the same, and this court hereby awards the Plaintiff special damages for the cost of reinstatement of Kshs 3,284,760/= with interest at court rates from the date of filing of this suit until payment in full.

4. **Whether the Plaintiff is entitled to mesne profits, and if so the quantum.**

As regards the award of mesne profits, these are special damages which not only need to be pleaded but also proved. The Plaintiff did not bring any proof of the basis for the mesne profits of Kshs 50,000/= per

month, but brought evidence to show that the land was in a state that was unusable, and it therefore could not provide any sort of profits. Consequential damages in terms of loss of profits are recoverable as special damages. This court appreciates that the Plaintiff as a result of the trespass by the 1st and 2nd Defendants not been able to utilize the suit property, which has remained a wasteland for over twenty years. The court in addition notes from the title produced in evidence by the Plaintiff as his exhibit 2 that the size of the land was quite vast, being 7.956 hectares, and the amount of Kshs 50,000/= per month as loss of profits is therefore not unreasonable. The Plaintiff is accordingly award loss of profits of Kshs 50,000/= per month with interest at court rates from the date of filing of this suit until payment in full.

5. **Whether the Plaintiff is entitled to general damages for trespass, and if so the quantum.**

On the issue and quantum of general damages, once a trespass to land is established it is actionable *per se*, and indeed no proof of damage is necessary to for the court to award general damages. This court accordingly awards an amount of Kshs 100,000/= as compensation of the infringement of the Plaintiff's right to use and enjoy the suit property occasioned by the 1st and 2nd Defendant's trespass.

6. **Costs**

Lastly, as costs follow the cause, it is ordered that the 1st and 2nd Defendants meet the Plaintiff's cost of this suit.

Orders accordingly.

Dated, signed and delivered in open court at Nairobi this ____1st_____ day of_____August____, 2013.

P. NYAMWEYA

JUDGE